IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-421

STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL KEITH ALLMAN,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the June 2, 2023, Order
Circuit Court of Wood County
Case No. 22-F-271

PATRICK MORRISEY
ATTORNEY GENERAL

ANDREA NEASE PROPER
SENIOR ASSISTANT
ATTORNEY GENERAL
1900 Kanawha Blvd., E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
State Bar No. 9354
Email: ***Andrea.R.Nease-Proper@wvago.gov***

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Respondent State of West Virginia responds to Michael Allman's ("Petitioner") Petition arguing that the contents of a bookbag Petitioner abandoned prior to being arrested should have been suppressed. Because Petitioner abandoned the bag, he surrendered any reasonable expectation of privacy in the bag. Even if this Court finds that the bag was not abandoned, the search was incident to a lawful arrest as the bag was not outside Petitioner's immediate control. Likewise, the search meets the exigent circumstances exception here as the search occurred to protect officer safety, to prevent Petitioner's escape, and to prevent the possible destruction of evidence. As Petitioner cannot show that the lower court's decision was clearly erroneous, this Court should defer to the lower court's denial of his motion to suppress.

ASSIGNMENT OF ERROR

Petitioner argues a single assignment of error: "[u]nder the Fourth Amendment to the United States Constitution and article three, section six of the West Virginia Constitution, could officers search [a] backpack's contents when Petitioner could no longer access it, or did they require a warrant?" Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner was arrested on an outstanding warrant when he was recognized by a police officer patrolling a known high crime area. App. 33-35. As the officer approached, Petitioner attempted to stash a firearm in a nearby car, and tried to conceal a bookbag he had been carrying behind a car. The bag contained numerous drugs and drug paraphernalia. App. 36, 38. Petitioner was indicted on the following six counts: possession with intent to deliver fentanyl, second offense; possession with intent to deliver heroin, second offense; possession with intent to deliver

morphine, second offense; possession of marijuana; person prohibited from possession a firearm; and, person prohibited from possession a concealed firearm. App. 533-36.

A. Suppression Motion

Petitioner moved to suppress the contents of the backpack/shoulder bag and its contents, which included eight morphine pills, marijuana, fentanyl, and digital scales. App. 537. Petitioner argued that the evidence was seized as a result of an illegal warrantless search because Petitioner was "secured in handcuffs and not within reaching distance of the backpack/shoulder bag" at the time. App. 537. Petitioner also alleged that another individual claimed ownership of the bag at the time of Petitioner's arrest. App. 538.

At the suppression hearing, the State called Detective McGary of the Parkersburg Police Department. App. 30. Det. McGary testified that he was alone on patrol around 9:00 p.m. in an area known for drug activity. App. 33-35, 38. During his patrol, Det. McGary came upon a commercial garage with an open bay door where he observed six to eight individuals. App. 33-38. Det. McGary testified he recognized one of those individuals as Petitioner, whom he knew was the subject of an active warrant. App. 33-35.

Det. McGary called Petitioner's name, and Petitioner, who had a bookbag on his shoulder, turned to look at the detective. App. 35-36. Det. McGary exited his patrol vehicle and approached Petitioner, who then walked between two vehicles inside the garage. App. 36. Det. McGary witnessed Petitioner remove something from his waistband and "crouched down to discard[] the item." App. 36. Det. McGary suspected the discarded item was a firearm. App. 36.

Det. McGary called Petitioner's name again, and Petitioner began to approach Det. McGary but stopped to place the bookbag on his shoulder on the ground behind one of the vehicles in the garage. App. 38. Det. McGary told Petitioner he was under arrest based on the warrant and

attempted to handcuff him; Petitioner, however, "kept trying to face" Det. McGary and McGary had to "push him against the vehicle" in order to handcuff him. App. 38-39. While Petitioner was being arrested, one of the other individuals present at the garage tried to claim ownership of the bookbag Petitioner had on his shoulder that he had placed behind the car. App. 39.

After handcuffing Petitioner, Det. McGary ordered the other occupants out of the garage. App. 39. The other people went outside but were still around. App. 40. Det. McGary walked Petitioner to where the bag was located and picked it up, then led Petitioner from the garage. App. 39-40. Det. McGary took Petitioner and stood near the cruiser, placing the bookbag on the front of the car by where Petitioner was standing. App. 41. Det. McGary testified that he was concerned with the other people still being around and continued to be "cautious." App. 40.

After Petitioner was led to the cruiser, Patrolman Abraham appeared as backup. App. 41. Abraham went into the garage and located a firearm in the area Det. McGary observed Petitioner pull something out of his waistband and place the item in one of the cars. App. 41-42. An empty holster was found on Petitioner during a subsequent search of his person. App. 42.

Det. McGary searched Petitioner's bag "to locate any…other type of weapons" after Abraham found the gun Petitioner stashed. App. 43. When Det. McGary went through the bookbag, he located narcotics, digital scales, and ammunition. App. 42. After it was searched, Petitioner put the bag in the front floorboard of the cruiser. App. 43.

Det. McGary testified that, in his experience, individuals have moved their handcuffed arms from the back to the front. App. 45. Further, even though an arrestee is handcuffed, Det. McGary testified they can still pose a threat. App. 46, 55. Det. McGary also testified that he has had an individual escape custody while handcuffed. App. 54.

Petitioner argued that the contents of the bag should be suppressed because Petitioner was secured at the time it was searched and the bag was not within his immediate control. App. 58. Additionally, Petitioner argued that a warrantless search of a backpack is only permissible as a search incident to arrest if, at the time of the search, the arrestee was unsecured and within reaching distance of the object. App. 59. Petitioner also argued that another individual claimed the bag on scene, and lack of consent to enter the commercial garage. App. 59.

In response, the State argued that Det. McGary could enter the garage because he knew there was a pending arrest warrant for Petitioner. App. 59-60. Second, the State argued that if Petitioner is claiming someone else owned the bag then he has no standing to challenge the search. App. 60. Finally, the State argued that the search incident to arrest exception to the warrant requirement governs this case and allows admission of the evidence found in the bag. App. 61-64.

The motion was denied by order dated April 5, 2023. App. 540-44. The court found that officers had reason to enter the garage by virtue of the warrant for Petitioner's arrest. App. 542. Further, the court found that if Petitioner maintains his stance that someone else possessed the bag then he has no standing to object to the search. App. 542. Finally, the court opined that the search was allowed based on the totality of the circumstances, including that there were numerous others in the garage with Petitioner posing a threat to the officer, and that Petitioner had stashed a gun in the garage. App. 542-43. The court further found that the search was "reasonable and lawful" incident to Petitioner's arrest to both prevent the destruction of evidence of a crime, prevent a possible escape, and to look for weapons. App. 543-44.

B. Trial[1]

A three-day jury trial was held on May 31, June 1, and June 2, 2023. App. 96. Det. McGary testified that he was patrolling an area known to be "a high area for drug users and sales of narcotics" when he came upon Petitioner in an open commercial garage and knew Petitioner to have a warrant against him. App. 327-29. McGary then detailed Petitioner's arrest and the location of the gun and contents of the bookbag. App. 331-38. Patrolman Abraham testified to finding the gun Petitioner stashed. App. 377. Blake Kinder, who works as a forensic scientist in the West Virginia State Police Laboratory as the leader of the seized drug section, testified that while he did not test the marijuana, he did test and confirm the other substances found in the bag were morphine, heroin, and fentanyl. App. 396, 405-10. Petitioner maintained that the bag was not his throughout trial. App. 318, 475-76, 478. Petitioner was found guilty of possession of a controlled substance with intent to deliver fentanyl; possession of a controlled substance with intent to deliver heroin; possession of a controlled substance with intent to deliver morphine; possession of marijuana; person prohibited from possession a firearm; and person prohibited from possessing a concealed firearm. App. 492-93.

C. Sentencing

Following a sentencing hearing, Petitioner was sentenced to four to twenty years of incarceration for possession of a controlled substance with intent to deliver fentanyl; two to thirty years of incarceration for possession of a controlled substance with intent to deliver heroin; two to thirty years of incarceration for possession of a controlled substance with intent to deliver morphine; six months in jail for possession of marijuana; five years of incarceration for person

[1] As the trial evidence is not at issue in this appeal, Respondent will only offer a brief overview for the Court's consideration.

prohibited from possessing a firearm; and five years of incarceration for person prohibited from possessing a concealed firearm. App. 546-47. Counts one, two, four, and six were ordered to run concurrently, and counts three and five were to run consecutively to the other counts. App. 547. Petitioner's motion for an alternative sentence was denied. App. 547. Petitioner appeals from this order.

SUMMARY OF THE ARGUMENT

Petitioner's abandonment of the bookbag means that this case can be decided without even examining the exceptions to a warrantless search. Petitioner voluntarily relinquished and left behind the bookbag when he dumped it behind a car in a commercial garage after realizing he was about to be arrested; that action also abandoned Petitioner's privacy rights in the bag. Petitioner cannot now embrace the Fourth Amendment rights he discarded.

Even if Petitioner maintained a privacy right in the bag, the search here meets at least two of the exceptions for a warrantless search. The search was incident to a lawful arrest, as Petitioner was being lawfully arrested based on an outstanding warrant. While the arrest was ongoing, Petitioner had access to the bag and the circumstances of the other individuals milling around, combined with Petitioner's proximity to the bag, allowed for the search to occur. Additionally, the search meets the exigent circumstances exception to a warrantless search because officer safety remained in question up until the search occurred.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the West Virginia Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

ARGUMENT

A. Standard of Review

The sole issue on appeal is the denial of Petitioner's motion to suppress the search of his bookbag. The following standard of review applies: "[o]n appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference." *State v. Farley*, 238 W. Va. 596, 606, 797 S.E.2d 573, 583 (2017) (citation omitted).

B. Petitioner had no reasonable expectation of privacy in the bookbag because he disclaimed ownership, and he abandoned the bag.

Petitioner's claim fails at the outset because he lacks Fourth Amendment standing. He had no reasonable expectation of privacy in the bookbag for either of two reasons: the bag was not Petitioner's bag at all, or he abandoned it. Either way, Petitioner lacked a valid privacy interest in the bag and, thus, cannot claim the Fourth Amendment's privacy protection.

This Court has stated that "Fourth Amendment rights are personal rights [that] . . . may not be vicariously asserted." *State v. Payne*, 239 W. Va. 247, 257, 800 S.E.2d 833, 843 (2016) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). If the bag was not Petitioner's, he simply cannot claim a Fourth Amendment violation. Here, Petitioner claimed consistently and at every stage below that the bag, in fact, wasn't his--even at the suppression hearing when he raised this very issue. App. 59. Furthermore, Petitioner disclaimed ownership of the bag throughout his trial. App. 318, 475-76, 478. Even on appeal, Petitioner notes repeatedly that someone else claimed the bag was his. Pet'r's Br. 2, 4. The Court should take Petitioner at his word and hold him to the consequences of it. At a minimum, Petitioner cannot tell the lower court one thing and then do a

complete about-face on appeal. *See State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) (noting that a defendant cannot invite error).

Even if the Court allows Petitioner to change his position on who owned the bag, his claim would still fail on Fourth Amendment standing grounds because by abandoning the bag at the scene, he gave up any reasonable expectation of privacy in it that the Fourth Amendment would protect. Petitioner extinguished his reasonable expectation of privacy in the contents of the bag by abandoning it. Thus, Petitioner need not show that he meets an exception to the Fourth Amendment protection against warrantless searches. As this Court has aptly opined, "[t]he State and Federal Constitutions prohibit only unreasonable searches and seizures and there are numerous situations in which a search and seizure warrant is not needed, such as . . . property that has been abandoned." Syl. Pt. 4, *Payne*, 239 W. Va. 247, 800 S.E.2d 833. Based on Petitioner's abandonment of the bag,[2] a warrant was unnecessary, and the search of the bag was not violative of the Fourth Amendment.

While the court below focused on the exceptions to a warrantless search, the facts of this case show that Petitioner never had a legitimate expectation of privacy in the bookbag he abandoned. This Court's decision in *Payne* is illustrative of these principles. Following a shooting, the defendant in *Payne* left behind his cell phone and a jacket in a home he stayed in from time to time. 239 W. Va. at 252-53, 800 S.E.2d at 838-39. When police went to the home to question the homeowner, the homeowner indicated that the petitioner had left behind the phone and jacket; police subsequently searched the jacket and found an ammunition magazine matching the

[2] The State recognizes that this argument was not raised below nor was it addressed by the circuit court. This Court has noted, however, that it "may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 2, *Milmoe v. Paramount Senior Living at Ona, LLC*, 247 W. Va. 68, 875 S.E.2d 206 (2022) (quoting Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)).

ammunition used to shoot the victim. *Id.* at 253, 800 S.E.2d at 839. Payne argued a violation of the prohibition against warrantless search and seizure, but the State argued that because Payne abandoned the jacket "with no indication that he ever planned to return or to retrieve it," he also abandoned any privacy interest in the jacket's contents. *Id.* at 257, 800 S.E.2d at 843.

In response to Payne's argument specific to the abandoned jacket and its contents, this Court stated that "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Id.* at 258, 800 S.E.2d at 844 (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) then citing *California v. Ciraolo*, 476 U.S. 207, 211 (1986)). *Payne* then adopted a two-part test: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable." *Id.* (quoting *Ciraolo*, 476 U.S. at 211). This Court explained that "[u]nder this two-part inquiry, our analysis does not turn on whether the petitioner retained an ownership interest in the jacket, but whether he retained a reasonable expectation of privacy in the jacket and its contents." *Id.* More importantly, a petitioner bears the burden of proving not only that the search was illegal, but also that the petitioner had a "legitimate expectation of privacy" in the property. *Id.* (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (additional citation omitted)).

In examining the facts under the requisite "highly fact-specific lens," this Court found that "the petitioner failed in his burden of proving that he had a reasonable expectation of privacy in his jacket and, thus, lacks standing to challenge the search." *Id.* at 259, 800 S.E.2d at 845. The Court noted that leaving the jacket in "a common area" of the home, which he did not own, "le[aving] no instructions with regard to his jacket," and failing to indicate when or if he would return to pick up the jacket extinguished the petitioner's reasonable expectation of privacy. *Id.* In

sum, "the petitioner could not reasonably have expected that no one would ever touch or handle his jacket that he had abandoned on a chair in the foyer of [someone else's] home." *Id.*

Like the jacket in *Payne*, the record reflects that Petitioner abandoned the bookbag and his privacy interest in the bookbag. Petitioner, upon seeing Det. McGary, took his bag off and placed it behind one of the vehicles in the commercial garage. App. 38. Petitioner also notes on appeal that the bag was "hidden" by him prior to his arrest. Pet'r's Br. 2.

Petitioner knew he was about to be arrested on an outstanding warrant, as Det. McGary told him as much. App. 35-38. Hiding the bag he was carrying behind a vehicle in a commercial garage is clearly akin to abandoning it like the defendant in *Payne* leaving behind his jacket. As this Court noted, the operative inquiry is whether Petitioner maintained a reasonable expectation of privacy in the bag. Petitioner did not. By leaving the bag unsecured in the commercial garage, he could no longer control what happened to the bag. Det. McGary testified that there were six or eight other people in the garage, then outside the garage, any of whom could have immediately walked over and grabbed the bag and searched the contents. App. 38, 40. Moreover, one individual even laid claim to the bag. App. 39. Those individuals did not have the chance to take or search the bag only because Det. McGary later secured the bag. Petitioner did not give the bag to any of the others in the garage, nor did he instruct them to take his bag and keep it for him. The idea that he maintained a legitimate expectation of privacy in a bag he attempted to hide while being arrested, with numerous others around, in a commercial facility, is baseless.

Even following the arrest, Petitioner continued to disclaim ownership, only strengthening the idea that he abandoned the bag. 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. This Court should take Petitioner at his word when he claims the bag was not his and find that he

has no privacy interest in the bag he claims he does not own. But, even if the bag was his, by hiding the bag and leaving it behind, Petitioner gave up his legitimate expectation of privacy, making the lower court's decision correct.

1. Other jurisdictions support the idea that because Petitioner abandoned the bookbag he gave up his expectation of privacy therein.

Other state courts and at least two federal circuits confirm this result. This Court cited to several out-of-jurisdiction cases with approval in *Payne*. 239 W. Va. at 259, 800 S.E.2d at 845. These include the District of Columbia's opinion in *Brown v. United States* wherein the defendant "wiggled out of" his jacket and left it behind after officers grabbed him by the jacket while in pursuit. 97 A.3d 92, 96 (D.C. 2014). The court found that because Petitioner "voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question," he no longer had an expectation of privacy in the jacket. *Id.* (quotations omitted). Accordingly, a petitioner who "abandons property" then "'lack[s] standing' to 'raise the Fourth Amendment issue.'" *Id.* at 97 (quoting *United States v. Boswell*, 347 A.2d 270, 273 (D.C.1975)).

Likewise, Ohio has found that "[a]bandoned property is not afforded protection under the Fourth Amendment." *State v. Corbin*, 957 N.E.2d 849, 857 (Oh. App. 2011) (citing *Abel v. United States*, 362 U.S. 217, 241 (1960)). The relevant inquiry, as determined by the *Corbin* court, is "whether the owner of the abandoned property voluntarily relinquished his interest in the property such that a reasonable expectation of privacy does not exist at the time of the search." *Id.* Both cases support the notion that by abandoning the bag in the garage, Petitioner also abandoned his privacy interest in the bag, making the search of the bag proper.

The Fourth Circuit has also discussed abandonment of a bag after the petitioner therein disclaimed ownership of the bag. *United States v. Ferebee*, 957 F.3d 406, 412 (4th Cir. 2020). In

Ferebee, the court discussed the petitioner's lack of standing, noting that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Id.* (quoting *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)). The court opined that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* (quoting *Rakas*, 439 U.S. at 143). Moreover, the court noted that "one who abandons property would have no subjective expectation that the property would remain private, nor would society recognize any such expectation as reasonable." *Id.* at 412-13. Perhaps most significant to the case at bar, *Ferebee* concluded that the denial of ownership of the bag constituted abandonment. *Id.* at 413 (collecting cases). The court then moved on to the "test for abandonment," which is "whether the defendant 'retains a reasonable expectation of privacy' in the property at issue," focusing on the intent of the defendant who abandoned the object. *Id.* (quoting *United States v. Thomas*, 864 F.2d 843, 846 (D.C. Cir. 1989)).

So Ferebee squarely held that—as explained above—disclaiming ownership equals abandonment. Aside from Petitioner's actions showing he abandoned the bag on scene, the record in this case shows Petitioner consistently disclaimed ownership of the bag. App. 59, 318, 475-76, 478. Petitioner maintains this stance on appeal. Pet'r's Br. 2. Thus, Petitioner's disavowal of this bag equates abandonment, meaning Petitioner had no expectation of privacy in the bookbag. There cannot be a Fourth Amendment warrantless search violation without an expectation of privacy; hence, the lower court's refusal to suppress the contents of the bag should be affirmed.

The Fifth Circuit, in *United States v. Colbert*, similarly found that "[t]he issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in

question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." 474 F.2d 174, 176 (5th Cir. 1973). As such, abandonment in terms of search and seizure law has nothing to do with a possessory interest, but whether a defendant, through his "words spoken, acts done, and other objective facts" has relinquished his privacy interest in the item searched or seized. *Id.* Petitioner's acts show that he discarded and left behind the bag in question, also leaving behind his legitimate privacy interest in the bag. He cannot now claim a Fourth Amendment right to privacy in that bag. As refusal of the motion to suppress was proper under West Virginia law, the law of other states, and federal law, the lower court's order should be affirmed.

2. Petitioner has no standing to challenge the search of the bookbag and so he cannot meet the threshold inquiry for a Fourth Amendment challenge.

Because Petitioner did not have a legitimate expectation of privacy after he abandoned the bookbag, Petitioner lacks standing to challenge the search. This Court recently discussed standing as it applies to Fourth Amendment challenges in *State v. Ward*, No. 22-0211, 2023 WL 7401695 (W. Va. Nov. 9, 2023) (to be published). *Ward* notes that Petitioner has "the initial burden of demonstrating that he had a reasonable expectation of privacy in the place searched." *Id.* at *6 n.14 (citing *Payne*, 239 W.Va. at 259, 800 S.E.2d at 845). Absent this showing, Petitioner "lacks standing to challenge the search." *Payne*, 239 W.Va. at 259, 800 S.E.2d at 845.

Fourth Amendment standing was an issue from the time of the suppression hearing. App. 60. Although the lower court ultimately ruled on other grounds, this Court can affirm on lack of standing. Syl. Pt. 2, *Milmoe*, 247 W. Va. 68, 875 S.E.2d 206. As recently as this fall, this Court found that standing is a component of a Fourth Amendment claim that may be forfeited or waived. *Ward,* 2023 WL 7401695 at *6. By failing to raise the issue of the petitioner's standing, and, in

fact, affirmatively admitting that the petitioner had an expectation of privacy, this Court found the State waived the argument. *Id.* at *6 n.13. Such is not the case here.

Unlike in *Ward*, the State below did not openly waive the standing argument. 2023 WL 7401695, at *6 n.13. While the State argued an exception to the warrant requirement of the Fourth Amendment, the State also challenged Petitioner's standing. App. 60-66. Most significantly, this Court cited with approval the proposition that the State may raise the issue for the first time on appeal. *Ward*, 2023 WL 7401695, at *6 n.15 (citing *United States v. Russell*, 26 F.4th 371, 374 (6th Cir.), cert. denied, 143 S. Ct. 385, 214 L. Ed. 2d 188 (2022)). In *Russell*, the Sixth Circuit found that the failure to challenge a defendant's Fourth Amendment standing before a lower court "isn't fatal" as "[t]he government may object to Fourth Amendment standing for the first time on appeal if it hasn't waived the argument." 26 F.4th at 374. *Russell* also notes that to waive an argument, the government has to "(1) take some step to 'expressly abandon' it or (2) fail to raise it in its first brief on appeal." *Id.* at 375. The State has done neither in this case.The State did not concede below that Petitioner has a reasonable expectation of privacy in this bag. And, the State is raising this issue on appeal.

Keeping this standard in mind, Petitioner has not shown the required reasonable expectation of privacy in the bookbag sufficient to allow him to challenge the subsequent search. As the *Ferebee* court noted, while Fourth Amendment standing is "not jurisdictional," it is "a threshold inquiry that is preliminary to and distinct from the question of whether a warrant was required." 957 F.3d at 412. Furthermore, for Petitioner to have standing, he "must have a cognizable Fourth Amendment interest in the place searched *before seeking relief for an unconstitutional search*." *Id.* (emphasis in original) (quoting *Byrd v. United States*, 584 U.S. __, 138 S. Ct. 1518, 1530 (2018)). "[A] person who voluntarily abandons property loses any

reasonable expectation of privacy in the property and is consequently precluded from seeking to suppress evidence seized from the property." *Id.* (quotation omitted). Since, as discussed above, Petitioner has no "cognizable Fourth Amendment interest" in the bag, so he cannot meet the threshold to maintain a Fourth Amendment challenge. Accordingly, the denial of the motion to suppress was proper based on Petitioner's lack of standing due to the abandonment of his bookbag.

C. Even if this Court finds Petitioner meets the threshold of showing a legitimate privacy interest in the bookbag, the search of Petitioner's bag was proper under exceptions to the warrant requirement.

Petitioner challenges the finding that the search of his bookbag fell under the "search incident to arrest" exception for a warrantless search. Pet'r's Br. 6. The Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution protect the public from unreasonable searches and seizures by government officials. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); Syl. Pt. 4, *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973).[3] These constitutional provisions generally require a government actor to obtain a warrant issued upon probable cause before conducting a search. U.S. Const. Amend. IV; W. Va. Const. art. III, § 6; *see also* Syl. Pt. 5, *Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631.

This Court has routinely found that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution—subject only to a few specifically established and well-delineated exceptions." Syl. Pt. 3, in part, *State v. Deem*, 243 W. Va. 671, 849 S.E.2d 918 (2020) (quotations and citation omitted). These exceptions include "searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified

[3] In fact, with limited exception, "[t]his Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment." *Duvernoy*, 156 W. Va. at 582, 195 S.E.2d at 634.

by exigent circumstances, consensual searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable." *State v. Kimble*, 233 W. Va. 428, 433, 759 S.E.2d 171, 176 (2014) (quoting *Farley*, 230 W. Va. at 197, 737 S.E.2d at 94).

"When the State seeks to introduce evidence that was seized during a warrantless search, it bears the burden of showing the need for an exemption from the warrant requirement and that its conduct fell within the bounds of the exception." *State v. Lacy*, 196 W. Va. 104, 111, 468 S.E.2d 719, 726 (1996). On the other hand, when examining the ruling on a motion to suppress, this Court "should construe all facts in the light most favorable to the State, as it was the prevailing party below" and give "particular deference" 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, in part, *State v. Snyder*, 245 W. Va. 42, 857 S.E.2d 180 (2021) (quotation omitted). Moreover, "a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made." *Id.* at Syl. Pt. 2 (quotation omitted).

The Fourth Amendment places a high bar on the State to justify a warrantless search. Unlike Fourth Amendment standing—which is Petitioner's burden to prove—the State must prove an exception. But that burden is not impossible. Courts routinely uphold warrantless searches that fall within the well-established exceptions. Here, the lower court found that two of them apply. App. 543-44. It was right.

1. The search in this case meets the exception of a search incident to valid arrest.

Petitioner argues that the search of the bag was "too attenuated from the arrest" to meet the search incident to a valid arrest exception. Pet'r's Br. 6. Petitioner's contention that the arresting officer waited too long is not the relevant standard, though. A review of the applicable law relating to a search incident to a valid arrest reveals that the lower court properly denied Petitioner's motion.

This Court has found 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, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991) (quotation omitted). The search incident to arrest exception allows arresting officers to search specifically "the arrestee's person and the area 'within his immediate control.'" *Davis v. United States*, 564 U.S. 229, 232 (2011) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). The "rationale for this exception" has been explained by this Court, noting that "a search of the limited area immediately under the physical control of an arrested person is necessary to uncover weapons that might be used against the arresting officer and to prevent destruction of evidence by the arrested party." *State v. Cook*, 175 W. Va. 185, 192, 332 S.E.2d 147, 154 (1985) (quotation omitted). This Court has found "ample justification. . . for a search of 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." *Julius*, 185 W. Va. at 426, 408 S.E.2d at 5 (quoting *Chimel*, 395 U.S. 752).

While Petitioner balks at the idea that the search was incident to his arrest, the facts show differently. Petitioner contends that "[w]hen evidence and officer safety are no longer endangered, police must obtain a warrant." Pet'r's Br. 6. The State agrees. Where the disagreement lies is

whether Petitioner continued to "pose[] a realistic threat." Pet'r's Br. 7. Although handcuffed, the record reflects Petitioner continued to pose a threat and continued to be within arm's reach of the bag. App. 41, 45-46, 54-55. Det. McGary testified that even a handcuffed individual continues to pose a threat. App. 45-46, 54-55. Further, Petitioner had already attempted to resist arrest in this case. App. 38-39. At any moment, Petitioner or one of his cohorts could have grabbed the bag.

Petitioner also contends that the officer "waited until long after he had seized the bag itself and divested Petitioner of any control over it." Pet'r's Br. 9. As argued above, the State maintains that Petitioner at any time could have regained control of the bag. But, more significant to this point is the qualification of how long Det. McGary waited to search the bag. This is not a matter of Det. McGary waiting hours to search the bag, after all of Petitioner's cohorts had disappeared, and merely at the officer's leisure. Rather, Det. McGary waited for his fellow officer to find the firearm stashed by Petitioner in the garage, which was a strategic choice given the circumstances. Det. McGary strongly (and correctly) suspected a gun was hidden in the garage, but knew that six or eight others were in the garage then milling about outside the garage. App. 38, 40. It was obviously unsafe for Det. McGary to turn his back on the situation and search the bag while a firearm was at large. The timeframe was mere minutes, and the search occurred while the bag remained within Petitioner's potential control.

Petitioner relies upon the Fourth Circuit's opinion in *United States v. Davis* in support of his argument that he no longer posed a realistic threat to officers. 997 F.3d 191 (4th Cir. 2021). *Davis* fully supports the validity of this search. While *Davis* discusses the search incident to arrest exception, the facts are materially different from this case and support the decision of the lower court. As Petitioner noted, *Davis* deals with a Fourth Amendment challenge to the search of a backpack which the government alleged was a search incident to arrest. *Id.* at 195-96. The *Davis*

court discussed the "limits" of the search incident to arrest exception, noting that officers may search "the person being arrested and the area within his reach (1) 'in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape' and (2) 'in order to prevent [the] concealment or destruction' of evidence." *Id.* at 195 (quoting *Chimel,* 395 U.S. at 763). Thus, an officer may search the area within an arrestee's immediate control. *Id. Davis* discussed the parameters of such searches and how they have evolved over time, then concluded that the Supreme Court's holding in *Arizona v. Gant* that a search incident to arrest may only occur "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" should be expanded to "non-vehicular containers" such as a bag. *Id.* at 196-97 (quoting *Gant*, 556 U.S. 332, 343 (2009)).

In applying this holding, the *Davis* court found that the warrantless search of the backpack was not permissible as a search incident to arrest because Davis was on the ground face down, with his hands handcuffed behind his back when the search occurred. *Id.* at 198. Moreover, he was being held at gunpoint by the arresting officer at the time, and "[t]he only other individuals within eyesight were officers, who outnumbered him three to one." *Id.* The Fourth Circuit opined that while "there is a level of precarity when police officers arrest a suspect who has fled arrest," Davis was undoubtedly secured in this case because he was at gunpoint, handcuffed on his stomach, outnumbered by police officers, and "[w]ithout the fluid situation created by nearby observers, the officers were able to focus solely on Davis." *Id.*

This is in direct contrast to Petitioner's situation. Petitioner also resisted arrest, though not as seriously as Davis. But, the remaining differences are stark. The arresting officer in this case was alone initially, and, even when backup arrived, officers were outnumbered at least three to one. App. 38, 40. Petitioner was handcuffed, but was not on his stomach on the ground at gunpoint.

There were other observers around through the entirety of the interaction, creating the "fluid situation" discussed by *Davis*. App. 38-40. Officers in this case were not able to solely focus on Petitioner but also had to focus on the other individuals who were in the garage then outside the garage.

Davis went on to discuss key differences in the situation therein and other similar fact patterns. Importantly, *Davis* found that the situation it faced was different from the prior *Ferebee* decision in that Ferebee, while "handcuffed and physically near an officer, 'he still could walk around somewhat freely and could easily have made a break for the backpack inside the house.'" *Davis*, 997 F.3d at 199 (quoting *Ferebee*, 957 U.S. at 419). *Davis* noted that "[t]he contrast here is key" in that it was "reasonable for the officers in *Ferebee* to believe that the defendant could access his bag because, although handcuffed and out of reaching distance, [he] was not secured and presumably could have reentered the home and retrieved his bag. In contrast, Davis was *both* secured *and* not within reaching distance." *Id.* at 199 (emphasis in original) (citing *Ferebee*, 957 U.S. at 419).

The Fourth Circuit noted that the contrast was key—such is the case here. Petitioner, like the *Ferebee* defendant, was handcuffed but was not secured in the same manner as the *Davis* defendant. More importantly, Petitioner was within reaching distance of the bookbag, whereas *Ferebee* was not, lending further to the notion that the search in this case was in fact lawfully made incident to arrest. Petitioner could walk freely, like the *Ferebee* defendant, as exhibited by Det. McGary's testimony that he walked with Petitioner to obtain the bag. App. 39-40.

The *Davis* court also contrasted its findings with those of the Third Circuit in *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010). *Davis*, 997 F.3d at 199-200. In *Shakir*, the defendant was arrested and dropped a duffle bag at his feet, and the bag was searched after the petitioner was

handcuffed. *Id.* at 199 (citing *Shakir*, 616 F.3d at 316-17). The *Shakir* court noted that the petitioner could have "dropped to the floor" to access the bag even though he was "handcuffed and guarded by two police officers." *Id.* (citing *Shakir*, 616 F.3d at 321). The *Davis* court found great significance in the fact that others were around when Shakir was arrested:

> Surely underlying the Court's reference to the number of bystanders and a possible confederate is a realization that an arrest scene may be more fluid—and an arrestee less secure—when officers must not only maintain custody of the arrestee, but also stay vigilant of the crowd and any efforts by confederates to interfere with the arrest.

Id. at 199-200. Given the circumstances, "there was more than a remote possibility that the defendant could have accessed his bag and retrieved a weapon." *Id.* at 200 (citing *Shakir*, 616 F.3d at 321). Finally, the *Davis* court noted that the differences between the two arrests led to the different result relating to the search of the bags, noting how the *Shakir* arrest was "low key" while Davis had a gun pointed at him, and Davis was alone at the time of arrest. *Id.*

The facts in this case are more akin to *Shakir* (and *Ferebee*) than those of *Davis*. Like *Shakir*, there were numerous others around when Petitioner was arrested, and officers had no idea if those others were possible criminal accomplices. Like both *Shakir* and *Ferebee*, Petitioner was handcuffed, but the bag in question was within reaching distance. The circuit court in this case aptly noted, as did the *Davis*, *Ferebee*, and *Shakir* courts, that even being handcuffed does not equate to fully securing a defendant. App. 542-44.

Further, the presence of numerous other individuals with unknown intent was found significant by the lower court as well as the *Ferebee* and *Shakir* courts. The presence of these other individuals diminishes the ability of officers to control the situation and clearly means that a defendant is not as secure as the *Davis* defendant. As *Davis* noted, a situation becomes "more fluid" and an "arrestee less secure" when a crowd is present. 997 F.3d at 199-200. If a defendant

is not secure and can gain access to the bag, a search of that bag is proper. Thus, the holdings in these three cases supports a finding that the search in this case was lawful as a search incident to arrest. The lower court's findings should be affirmed.

2. The search in this case was also proper under the exigent circumstances exception.

The search of the bookbag was also proper under the exigent circumstances exception. Although the lower court did not specifically note this exception in its final order, the findings indicate that this exception was a consideration of the court; regardless, as noted above, this Court may affirm on any legal ground disclosed in the record. *See* Syl. Pt. 2, *Milmoe*, 247 W. Va. 68, 875 S.E.2d 206. This Court should affirm the lower court's finding that the search was necessary for officer safety and to prevent destruction of evidence, and was proper in light of the exigent circumstances exception. App. 7.

In West Virginia, the presence of exigent circumstances may justify a search and seizure without a warrant.

> Exigent circumstances exist where there is a compelling need for the official action and there is insufficient time to secure a warrant, police may then enter and search private premises ... without obtaining a warrant.
> ***
> Exigent circumstances may exist in many situations: three well recognized situations are when police reasonably believe (1) their safety or the safety of others may be threatened, (2) quick action is necessary to prevent the destruction of potential evidence, or (3) immediate action is necessary to prevent the suspect from fleeing.

State ex rel. Adkins v. Dingus, 232 W. Va. 677, 687, 753 S.E.2d 634, 644 (2013).

Justice Cleckley issued a lengthy list of exigent circumstances in the *Lacy* opinion as well as discussing the proper test. "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 "[r]ecognized situations in which exigent circumstances exist include: danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit of a fleeing suspect." *Id.* Officers must have a reasonable belief that exigent circumstances exist, which "should be analyzed from the perspective of the police officers at the scene; an inquiring court should not ask what the *police* could have done but whether they had, at the time, a reasonable belief that there was a need to act without a warrant." Syl. Pt. 4, *State v. Deem*, 243 W. Va. 671, 849 S.E.2d 918 (2020) (emphasis in original) (quotation omitted). This test is an objective test based upon "the totality of the circumstances." *Id.* at 677, 849 S.E.2d at 924. The test is "based on what a reasonable, well-trained police officer would believe." Syl. Pt. 3, in part, *Farley*, 230 W. Va. 193, 737 S.E.2d 90.

The totality of the circumstances here shows exigent circumstances. Several of the recognized situations for exigent circumstances exist here, including the danger of flight or escape, the danger of harm to police officers or the general public, and the risk of the loss of evidence. Petitioner also resisted while being arrested, giving Det. McGary a reasonable belief that he may not remain compliant. App. 38-39. As discussed above, there was a risk of Petitioner escaping or fleeing, as Petitioner and his cohorts outnumbered police at least three to one. There was also the risk of losing evidence, as someone in the general vicinity, or Petitioner himself, could have at any time grabbed the bag and taken off.

Perhaps more importantly, prior to transporting this bag in his police vehicle, Det. McGary had to determine if there was anything inside that was dangerous to him or Petitioner while in transit. Det. McGary knew by then that Petitioner had stashed a firearm and had no idea if a second firearm was present in the bag. Det. McGary specifically testified that he went through the bag to

"locate any—possibly any other type of weapons." App. 43. Furthermore, there was Fentanyl located inside the bag. App. 537. As this Court well knows, the presence of Fentanyl presents significant risk to anyone who may touch it. Det. McGary held a reasonable belief that he needed to search the bag to maintain his own, and Petitioner's, safety.

In addition, a finding of exigent circumstances requires that officers have probable cause. This requirement was met here. This Court has found that, while related, exigent circumstances and the emergency doctrine differ in this aspect: "The doctrine of exigent circumstances requires the officers have traditional probable cause, while the emergency doctrine requires that the officers have an objectively reasonable basis for believing immediate assistance is required inside." *State v. Rexrode*, 243 W. Va. 302, 310 n.10, 844 S.E.2d 73, 81 n.10 (2020) (citing *United States v. Snipe*, 515 F.3d 947, 951-53 (9th Cir. 2008)). "The exception for 'exigent circumstances' applies when police are engaged in crime-solving activities, such as searching for evidence or suspects. Probable cause is necessary." *Ullom v. Miller*, 227 W. Va. 1, 12 n.10, 705 S.E.2d 111, 122 n.10 (2010) (internal quotation marks provided). The *Payne* Court discussed probable cause for a search, noting that it "exists if the facts and circumstances . . . are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location." Syl. Pt. 7, *Payne*, 239 W.Va. 247. Furthermore, "[t]here must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances." *Id.*

First, there is no question that there was probable cause to arrest Petitioner, and he does not dispute as much. The arrest was made pursuant to a warrant, not in relation to this search.

Second, based on Patrolman Abraham finding the gun Det. McGary saw Petitioner stash, there was probable cause that Petitioner was engaged in further criminal activity at the time. The gun, which he could not possess based on his prior felony convictions, linked him to criminal activity even outside of the valid warrant for his arrest. These facts are sufficient to warrant a belief that a crime has been committed and that evidence of that crime may be found in the bag seen on Petitioner's shoulder by officers.

CONCLUSION

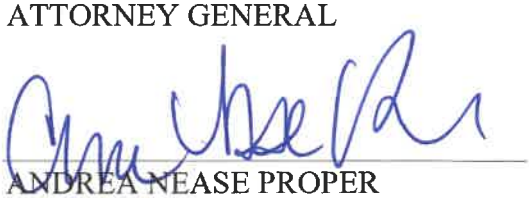
For the foregoing reasons, Respondent respectfully asks this Court to affirm the circuit court's order denying the motion to suppress the contents of the bookbag.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



ANDREA NEASE PROPER
SENIOR ASSISTANT
ATTORNEY GENERAL
W. Va. State Bar #9354
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
(304) 558-5830
Fax: (304) 558-5833
Andrea.R.Nease-Proper@wvago.gov
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-421

STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL KEITH ALLMAN,

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, do hereby certify that on the 22nd day of December, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure,:

Matthew Brummond, Esquire
Public Defender Services
One Players Club Dr., Suite 301
Charleston, WV 25311

Andrea Nease Proper (State Bar No. 9354)
Senior Assistant Attorney General