IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 25-340

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STATE OF WEST VIRGINIA ex rel.
STATE OF WEST VIRGINIA,
Petitioner,

v.

THE HONORABLE DEBRA McLAUGHLIN,
Circuit Court Judge of the Circuit Court of
Berkeley County, West Virginia,
and
AARON CURTIS LEWIS,
Respondents.

RESPONDENT'S SUMMARY RESPONSE

Cameron T. LeFevre, Esq.
WV Bar No. 14463
Arnold & Bailey, PLLC
208 N. George St.
Charles Town, WV 25414
(304) 725-2002
clefevre@arnoldandbailey.com

S. Andrew Arnold, Esq.
WV Bar No. 6131
Arnold & Bailey PLLC
208 N. George St.
Charles Town, WV 25414
(304) 725-2002
saarnold@arnoldandbailey.com

I. INTRODUCTION

Comes now, the Defendant, by and through counsel, and submits this summary response in opposition to the State's Petition for Writ of Prohibition. For the reasons set forth below, the Court should deny the Petition for Writ of Prohibition.

II. ISSUES PRESENTED

1. Does a Circuit Court commit clear legal error, necessary to bring a petition for writ of prohibition, when it rules on an issue for which there is no prior jurisprudence by this Court for the Circuit Court to violate?

2. Is a search warrant valid when the affidavit for the warrant substantially relies on information gained from a prior, unlawful, warrantless search of a citizen's home?

3. Does the mere smell of marijuana emanating from a home, without any additional evidence, establish probable cause for a warrant to search that home under West Virginia law in 2020, given the evolving legal status of marijuana-related substances?

4. Is a search warrant invalid when it authorizes the seizure of "any and all controlled substances defined in section 60A-4-401 of the annotated code of West Virginia including but not limited to heroin and methamphetamine," despite the affidavit for the warrant relying solely on the smell of marijuana, thereby lacking a nexus between the observed evidence and the broad and unrelated scope of items to be seized?

III. STATEMENT OF THE CASE

No statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief. W. Va. R. App. P. 10(d). The Defendant directs this Court's attention to the Circuit Court's findings of fact rather than any restatement by the Petitioner. App. 97-99. Respondent includes the following statement of the case in order to clarify any possible inaccuracy or confusion which may be caused by Petitioner's restatement of the factual record.

"After failing to locate the woman in the backyard, Ptlm. Holloway spoke again to her husband, who advised there was no exit from the backyard. App. 45-46. With no way out except through an

adjacent apartment, Ptlms. Holloway and Miller began canvasing the apartments, going door to door in search of her. App. 42, 46." Petitioner's Brief Page 2. The husband was apparently wrong because no suicidal woman was ever found. App. 46.

"Ptlm. Holloway proceeded to apartment 4, where Respondent Lewis lived. App. 46." Petitioner's Brief Page 2. Neither Holloway's incident report nor the affidavit for the search warrant explains how or why he came to the conclusion that Mr. Lewis lived in one of the apartments behind 315 S. Kentucky Ave. App. 19. When Holloway approached apartment 4, he had ceased searching for the woman and became solely interested in finding evidence of a crime again Mr. Lewis. App 19. Holloway waited over ten minutes demanding Aaron Lewis, Jr. or his 17 year old cousin, give him consent to enter before deciding to enter the house without their consent anyway. The State admits this there was no exigency and that the security sweep by Holloway and Miller was unlawful. App. 99.

"In addition to the parties' oral arguments, the State also presented—without objection— the testimony of Ptlm. Miller. Ptlm. Miller described personally detecting a strong odor of raw marijuana emanating from Respondent Lewis's apartment. Tr. 31." Petitioner's Brief Page 4. This is incorrect. The Defendant argued against the legality of considering Officer Miller's testimony during the suppression hearing because the affidavit for the search warrant was written by Holloway not Miller. Tr. 6. Holloways absence during the Federal case on these same facts, which was dismissed, and now the State case, has never been explained by the State. Moreover, the Defendant's argument and objection was further preserved as set forth in Defendant's Supplemental Brief in Support of Motion to Suppress. App. 90.

IV. ARGUMENT

A writ of prohibition is an extraordinary remedy that requires a clear legal error or an action in excess of jurisdiction. As this Court has held, "[t]he State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial." *Syl. Pt.* 1, in part, *State v. Gwaltney*, 901 S.E.2d 70, 75 (2024).

Here, the Circuit Court's ruling—grounded in constitutional analysis—falls squarely within its discretionary authority. The State's continued use of petitions for writs of prohibition as de facto interlocutory appeals deprives this Court of the benefit of a fully developed factual record and comprehensive legal arguments. This practice not only undermines judicial efficiency but also ensures protracted litigation and the likelihood of future appeals once the case is resolved on the merits.

West Virginia law has long disfavored interlocutory appeals, recognizing that piecemeal litigation is inefficient and burdensome. As the Court explained in *State ex rel. U.S. Fidelity & Guaranty Co. v. Canady*, interlocutory review is generally disallowed unless the order in question is final or falls within a narrow exception. *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 460 S.E.2d 677, 194 W.Va. 431 (1995). The Court has emphasized that "we must apply the aforementioned standards and ascertain whether there is a clear-cut error that needs resolution where alternate remedies are inadequate and judicial economy demands resolution." *Id.* at 437, 460 S.E.2d at 683.

Moreover, the procedural concerns that accompany interlocutory appeals—such as incomplete records, evolving legal theories, and the potential for inconsistent rulings—are equally present when the writ of prohibition is misused for the same purpose. The Court has cautioned against such misuse, noting that "it does not lie for errors or grievances which may be redressed in the ordinary course of judicial proceedings, by appeal or writ of error." *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977) (citing *County Court v. Boreman*, 34 W.Va. 362, 366, 12 S.E. 490, 492 (1890)).

The State's inability to appeal in criminal cases does not justify circumventing that limitation through a writ of prohibition at this juncture in the underlying proceeding. As the Court held in *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998), "[o]ur law is in accord with the general rule that the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or a statute." This principle reflects a deliberate policy choice to protect defendants from repeated prosecutions and to preserve the finality of trial court rulings. "In *State v. Bailey*, 154 W.Va. 25, 173 S.E.2d 173 (1970), the State sought to appeal an order of the circuit court granting the defendant's motion to suppress evidence that was allegedly essential to obtain a conviction. This Court dismissed the appeal as improvidently awarded on the basis that neither Art. VIII, § 3 of the Constitution of West Virginia, 4 nor any statutory provision authorized the State to appeal an order granting a criminal defendant's motion to suppress evidence." *State v. Jones*, 363 S.E.2d 513, 514 178 W.Va. 627, 628 (1987)

The risk of incomplete records, evolving legal theories, and the potential for inconsistent rulings are all present here. In this case, even if the Court were to grant a writ against the Circuit Court, the Defendant would not be foreclosed from raising additional, novel legal arguments regarding the validity of the search warrant before the Circuit Court. For example, Officer Miller's

testimony at the suppression hearing may violate Rule 43(a) of the West Virginia Rules of Criminal Procedure and the holding by this Court in *State v. Adkins*, 209 W. Va. 212, 544 S.E.2d 914 (2001). The body cam footage shown at the suppression hearing and included in the appendix record to this case likewise suffers from the same legal issue. Additionally, unresolved issues under *Giglio v. United States*, 405 U.S. 150 (1972), the results of which are closely intertwined with facts and legal issues in this proceeding, remain pending before the Circuit Court.

Since the last hearing, new information has surfaced concerning Officer Holloway that may lead the Circuit Court to compel production of his personnel records. These are just two of many potential legal issues that underscore the importance of allowing the case to proceed to final judgment, thereby affording this Court a complete record upon which to base its review.

A. The Circuit Court did not commit clear legal error because there is no case on point and it did not violate any Supreme Court precedent or Constitutional provision. Thus, the petition for writ of prohibition should be denied.

The State makes the bold and erroneous claim that this Court has already addressed the underlying legal issue in this issue. It misquotes *State v. Chapman* as holding "the odor of marijuana, without more, may provide the requisite probable cause" and that this "leaves no room for doubt" on the issue. Petitioner's Brief Page 11. The State astonishingly fails to include the rest of the quote, creating a tremendous mischaracterization of this Court's jurisprudence. "The odor of marijuana, without more, may provide requisite probable cause **to support the warrantless search of a vehicle and baggage contained in that vehicle.**" *State v. Chapman*, No. 13-0111, 2013 WL 5676630, at *4 (2013) (memorandum decision) (citing *United States v. Scheetz*, 293 F.3d 175 (4th Cir. 2002)) (emphasis added). This opinion says nothing about a house, a subject of some note in Fourth Amendment law.

Accordingly, the Circuit Court was correct to distinguish this case from vehicle search precedents such as *State v. Chapman*, which rely on the automobile exception to the warrant requirement. Unlike vehicles, homes are not inherently mobile, and the exigencies that justify warrantless vehicle searches are absent. Similarly, *State v. Ott*, involved a warrantless entry based on exigent circumstances—not a judicially reviewed warrant application. *State v. Ott*, No. 16-0892 (2017). Further distinguishing *Ott* from the facts of the present case is that the initial entry in *Ott* was lawful on an exigent basis. *Ott* also derived part of its exigency on the risk of destruction of evidence. *Id*.

In contrast, the present case involved no exigency, an initial unlawful entry, and a subsequent warrant application based upon the fruits of that unlawful entry. Holloway knew that Mr. Lewis was not home because he saw him leaving as he approached and he also detained both of the other individuals in the house on the front steps so there was no risk of destruction of evidence here. Obviously, the instant case demands a more robust showing of probable cause than a mere sensory observation as was necessary for the exigency in *Ott*.

This was not the search of a vehicle, nor was this a search based upon exigent circumstances. This was an unlawful search of Mr. Lewis' home. The State admitted below that there was no exigency. The State admitted below that Holloway engaged in an unlawful entry which formed the basis for the subsequent search warrant application.

The legal issue before the Circuit Court, whether the smell of marijuana alone was sufficient probable cause for a search warrant of a house, has never been decided by this Court. Therefore, Judge McLaughlin could not have made a clear error because there was no previous jurisprudence of this Court to violate. A writ of prohibition is an extraordinary remedy that requires a clear legal

error or an action in excess of jurisdiction. This is not *de novo* review. This Court must determine whether the Circuit Court made clear legal error by violating an existing precedent of this Court or provision of the Constitution. The Circuit Court did not violate any existing precedent of this Court.

Therefore, even if this Court believes the Circuit Court did not decide the suppression issue in this case as it would have, there is still no clear legal error present which is necessary to grant the writ. Accordingly, the petition for writ of prohibition should be denied on this basis alone. This is not the appropriate procedural forum to make new law on this issue. The Court should decide this issue on a Defendant's appeal, not the State's quasi-interlocutory appeal in the form of a writ of prohibition.

B. The home is subject to the highest degree of Fourth Amendment scrutiny and is entitled to even greater protection by the West Virginia Constitution than the Federal Constitution.

The home occupies a uniquely protected status under both the Fourth Amendment to the U.S. Constitution and Article III, § 6 of the West Virginia Constitution. The latter provides that "The rights of the citizens to be secure in their houses . . . against unreasonable searches and seizures, shall not be violated." That provision has been interpreted by this Court to afford greater protections than its federal counterpart, particularly in the context of residential privacy. This Court emphasized in *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007).

"This Court has also held that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." *Id* at 88. (citing *Syl. pt.* 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979)). Therefore, the mere fact that the Fourth Amendment has been interpreted as allowing probable

cause to obtain a search warrant based upon the smell of marijuana alone does not mean that this Court is required to interpret article III, § 6 in the same manner. "This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart." *Id* at 88. (citing *State ex rel. Carper v. West Virginia Parole Bd.*, 203 W.Va. 583, 590 n. 6, 509 S.E.2d 864, 871 n. 6 (1998)).

In *Mullens*, this Court held that law enforcement's use of a wired informant to record inside a home without a court order violated Article III, § 6, even though it may have passed muster under federal precedent. This underscores the West Virginia Constitution's distinct and elevated concern for the sanctity of the home.

C. The smell of marijuana alone, within the four corners of the affidavit, did not establish probable cause to search the defendant's home.

Probable cause must be assessed solely within the "four corners" of the affidavit supporting the warrant. *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762, 766 (1985). The affidavit in this case relied on evidence unlawfully obtained from a prior unlawful search of the Defendant's home. The State admits that the previous entry was unlawful and accordingly all of the references to the unlawfully obtained evidence contained in the search warrant are being ignored for this analysis. Here, the only thing left in the affidavit for consideration is the alleged odor of marijuana. This alone cannot be used to bootstrap probable cause when it was discovered as part of an unconstitutional intrusion. The State's attempt to salvage the warrant by reframing the issue as solely about probable cause and the odor of marijuana—when that odor was only perceived before and during an admitted constitutional violation—must be rejected, just like this Court did in *State v. Snyder*. *See State v. Snyder*, 857 S.E.2d 180 (2021). The exclusionary rule exists precisely to deter such conduct and to preserve judicial integrity.

As the Court held then, law enforcement may not rely on observations made during an illegal entry to justify a subsequent search warrant obtain after the fact. Just like Sherriff Cole in *Snyder*, Holloway and Miller had no authority to enter Mr. Lewis' home, and "it follows that the evidence collected once inside is inadmissible as a fruit of the illegal intrusion." *Id*. To hold otherwise would incentivize unlawful conduct and erode the very protections the Fourth Amendment was designed to uphold.

On the issue of the Circuit Court's probable cause analysis, the lower Court relied upon this Court's clearly articulated requirements in *State v. Lilly*. App. 100. The Court included the following excerpt from *Lilly* in its analysis.

> "Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit 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. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There 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."

State v. Lilly, 194 W. Va. 595, 598, 461 S.E.2d 101, 104 (1995).

D. The warrant is also invalid because it lacks specificity and a nexus to the items sought.

Alternatively, even if this Court holds that the smell of marijuana alone is sufficient probable cause to authorize a warrant to search a citizen's home, the specific warrant in this case still violates the Fourth Amendment and West Virginia Constitution's Article III, Section 6 particularity requirements. A warrant must "particularly describe[] the place to be searched, and the person or things to be seized." Here, the warrant at issue authorized the seizure of "any and all controlled substances defined in section 60A-4-401 of the annotated code of West Virginia

including but not limited to heroin and methamphetamine." This exceeds the scope supported by Holloway's affidavit because the smell of marijuana has nothing inherently to do with heroin or methamphetamine. The State seeks to handwave this deficiency away as a "copy and paste error" and mere surplusage. App 81-82. However, it only further highlights the affidavit's lack of tailoring to the facts and as the Circuit Court describes in its order, "[t]he State explains this as a cut and paste error, however, the entirety of the search warrant appears to be a cut and paste error." App 101.

The State relies on *State v. Knotts* and *State v. Bates* to argue that broad language in the warrant is permissible. However, in *Knotts*, the warrant tied the broad request ("any other items stolen") to specific evidence of a robbery, establishing a nexus. *State v. Knotts* (2023) WL 7983840, at *1. In *Bates*, the "all further evidence" clause related to a homicide, where blood, a gun, and signs of struggle provided a clear connection to the crime. *State v. Bates* 380 S.E.2d 203, 208 (1989). Here, no such nexus exists. Holloway allegedly detected only the odor of marijuana from the front door—no evidence of drug trafficking, other substances, or paraphernalia suggesting heroin or methamphetamine. The State's claim that this was a "copy and paste error" does not cure the defect; it highlights the affidavit's lack of tailoring to the facts.

The smell of marijuana is the only possibly lawfully obtained information contained within the affidavit in support of the warrant application, yet the warrant expansively targets all controlled substances, including heroin and methamphetamine specifically. There is no factual basis linking heroin or methamphetamine to the Defendant's home or to drug trafficking from the marijuana Holloway allegedly smelled. Paragraph nine of the affidavit for the search warrant contains statements regarding information obtained only because of the prior unlawful search of the Defendant's home by Holloway and Miller. The only information contained in the affidavit which

the Magistrate could have lawfully considered was Holloway's alleged detection of the odor of marijuana in paragraph eight of the affidavit for the search warrant. Moreover, *State v. Adkins* provides,

> Under Rule 41(c) of the West Virginia Rules of Criminal Procedure, it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information had been contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit.

Syl. Pt. 2, *State v. Adkins*, 346 S.E.2d 762, 176 W.Va. 613 (1986). Therefore, Officer Miller's testimony that he also smelled marijuana at the house should not have been permitted at the suppression hearing and should not be considered by this Court. Any testimony by Miller about his training or experience not included in the affidavit for the search warrant is also improper for the Circuit Court to permit at the suppression hearing or to consider. Additionally, any reference to Holloway's or Miller's body camera footage relied on by the State should also be rejected by this Court because the Magistrate did not view it when issuing the search warrant so it cannot be used now to bolster an argument for probable cause.

E. The *Leon* good faith exception does not apply because the affidavit for the issuance of the search warrant is bare bones.

The State invokes the good faith exception under *United States v. Leon*, arguing that officers relied on the warrant in good faith. *United States v. Leon*, 468 U.S. 897 (1984). However, this exception does not apply when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" or when the warrant is facially deficient. *Adkins*, 346 S.E.2d at 774-75.

Here, the affidavit's sole basis—the smell of marijuana—lacks sufficient detail (e.g., quantity, source, or context) to support probable cause for a home search, especially given

marijuana's nuanced legal status in 2020. A "reasonably well-trained officer" should recognize that this single observation, without more, does not justify a warrant for all controlled substances. Additionally, the warrant's overbroad language—authorizing seizure of unrelated drugs like heroin and methamphetamine—makes it facially deficient. No reasonable officer could presume its validity when the affidavit provides no hint of such substances. Thus, at least two *Leon* exceptions apply: the affidavit's inadequacy and the warrant's lack of particularity.

V. CONCLUSION

The Circuit Court did not commit clear legal error because there is no case on point and it did not violate any Supreme Court precedent or Constitutional provision. A writ of prohibition is an extraordinary remedy that requires a clear legal error or an action in excess of jurisdiction. Thus, the petition for writ of prohibition should be denied.

Furthermore, within the four corners of the affidavit, the smell of marijuana alone, without corroborating evidence, did not establish probable cause to search the Defendant's home in 2020. This is especially true given the heightened Fourth Amendment protection for residences and the legal ambiguity surrounding marijuana-related substances at the time of the warrant in West Virginia law. Moreover, even if the smell of marijuana alone could have established probable cause, the officers searched the Defendant's home without a warrant prior to writing the affidavit and Holloway used the information from that unlawful search in his affidavit. Furthermore, the later obtained warrant's authorization to go back and seize "any and all controlled substances" lacks a nexus to the affidavit's limited observation, violating the particularity requirement. Finally, the good faith exception does not salvage the search due to the affidavit's deficiencies and the warrant's facial invalidity. Accordingly, the Defendant respectfully requests that this Court deny the Petition for Writ of Prohibition.

/s/ Cameron T. LeFevre
Cameron LeFevre, Esquire
WV Bar No. 14463
Arnold & Bailey, PLLC
208 N. George St.
Charles Town, WV 25414
(304) 725-2002
clefevre@arnoldandbailey.com

/s/ S. Andrew Arnold
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CERTIFICATE OF SERVICE

I, Cameron T. LeFevre, Esq., do hereby certify that the foregoing Respondent's Summary Response is being served on counsel of record by File & Serve Xpress this 27th day of June 2025.

Holly M. Mestemacher
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220

/s/ Cameron T. LeFevre
Cameron LeFevre, Esquire
WV Bar No. 14463
Arnold & Bailey, PLLC
208 N. George St.
Charles Town, WV 25414
(304) 725-2002
clefevre@arnoldandbailey.com