# APPENDIX

**APPENDIX A**

IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

September 2022 Term

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No. 21-0396

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STATE OF WEST VIRGINIA,

Respondent,

v.

TRACY PENNINGTON,

Petitioner.

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Appeal from the Circuit Court of Jackson County
The Honorable Lora A. Dyer Judge
Criminal Action No. 19-F-83

AFFIRMED

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Submitted: September 27, 2022
Filed: November 14, 2022

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| Roger L. Lambert, Esq. | Patrick Morrisey, Esq. |
| Hurricane, West Virginia | Attorney General |
| Counsel for Petitioner | Katherine M. Smith, Esq. |
| | Assistant Attorney General |
| | Charleston, West Virginia |
| | Counsel for Respondent |

CHIEF JUSTICE HUTCHISON delivered the Opinion of the Court.

JUSTICE WOOTON dissents and reserves the right to file a dissenting opinion.

**SYLLABUS BY THE COURT**

1. "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

2. "In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. . . . Thus, 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." Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

3. Law enforcement executing a valid arrest warrant may lawfully enter a residence if they have reason to believe that the subject of the warrant lives there and is presently within. Reason to believe requires less

proof than probable cause and is established by evaluating the totality of the circumstances.

**HUTCHISON, Chief Justice**:

Petitioner Tracy Pennington entered a conditional guilty plea to one count of child concealment following the Circuit Court of Jackson County's denial of her motion to suppress evidence that her minor child, who had been adjudicated as a status offender for truancy and placed in a temporary guardianship with her grandparents in a neighboring county, was discovered by law enforcement in petitioner's home after absconding from her grandparents' supervision five months earlier. At issue in this appeal is whether the officers' entry into the residence for the exclusive purpose of executing a lawful juvenile "pick-up" order violated petitioner's constitutional right against unreasonable search and seizure such that the evidence obtained as a result of the search of the residence should have been suppressed.

Upon review of the parties' briefs, appendix record, oral argument, and applicable legal authority, and for the reasons stated below, we find no error and affirm the circuit court's decision to deny petitioner's motion to suppress.

## I. Factual and Procedural Background

Juvenile S.W. was adjudicated as a status offender for truancy on July 30, 2018. By order entered November 5, 2018, it was agreed that, as a lesser restrictive alternative to out-of-home placement, S.W. would be placed with her paternal grandparents, as temporary guardians, in Kanawha County, West Virginia, where she would attend

school. Petitioner's parental rights to S.W. remained intact. After being placed with her grandparents, on December 7, 2018, S.W. left their residence, without permission, and was no longer attending school.

By order entered January 11, 2019, upon consideration of the State's motion and verified petition that S.W., who was then sixteen years old, was an "active runaway, whose current whereabouts are unknown[,]" the circuit court determined that there was probable cause to believe that S.W.'s health, safety, and welfare demanded that she be taken into custody, in accordance with West Virginia Code § 49-4-705(a)(2)[1], and it ordered that she be taken into custody forthwith and placed in the State's custody for placement in a staff-secured facility pending further hearings. This order is commonly referred to as a "pick-up" order.

Until she was temporarily removed from petitioner's custody in November 2018, S.W. resided

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[1] West Virginia Code § 49-4-705 provides:

> (a) In proceedings formally instituted by the filing of a juvenile petition, the circuit court or a magistrate may issue an order directing that a juvenile be taken into custody before adjudication only upon a showing of probable cause to believe that one of the following conditions exists: . . . (2) the health, safety and welfare of the juvenile demand custody. . . . A detention hearing pursuant to section seven hundred six of this article shall be held by the judge or magistrate authorized to conduct the hearings without unnecessary delay and in no event may any delay exceed the next day.

with petitioner and G.W., S.W.'s father, in petitioner's apartment on Klondyke Street in Ripley, West Virginia. After S.W. absconded from her grandparents' home in December, Department of Health and Human Resources (DHHR) worker Carey Blackhurst spoke with petitioner and G.W. by phone and, on several occasions, attempted to locate S.W. by going to petitioner's apartment. Also on occasion, DHHR workers received tips that S.W. had been seen at petitioner's apartment or at her maternal grandparents' house, which was located nearby. Ms. Blackhurst's efforts to locate S.W. were unsuccessful. Law enforcement's repeated efforts to locate S.W. at petitioner's apartment were equally unavailing.

On May 16, 2019, by which time S.W. had been missing for more than five months, Jackson County Sheriff's Deputy Ben DeWees was advised by his superior, Chief Deputy R. H. Mellinger, that, at approximately 8:30 p.m., he received a tip from a woman who not only saw S.W. at petitioner's apartment, but who was also informed by petitioner that she intended "to keep [S.W.] hidden until she was 18, so all this juvenile stuff would go away." Chief Deputy Mellinger advised Deputy DeWees that his source concerning S.W.'s whereabouts was credible. Upon receiving this information from his superior, and with the knowledge that S.W. was the subject of a "pick-up" order, Deputy DeWees contacted the Jackson County Prosecuting Attorney to determine whether a search warrant was also required to enter petitioner's apartment in order to execute the "pick-up" order. According to Deputy DeWees, Prosecuting Attorney Katie Franklin advised him that a search warrant was not required. Deputy DeWees also contacted two other law enforcement officers, West Virginia State Troopers

M.P. Fannin and J.M. Comer, whom he knew had been to petitioner's apartment earlier in the evening in an unsuccessful attempt to speak with petitioner on an unrelated criminal matter. The officers returned to petitioner's apartment and joined Deputy DeWees as he knocked on the door. Although footsteps could be heard from inside the apartment, no one answered the door. After explaining the purpose of their visit to petitioner's landlord, who lived next door, Deputy DeWees obtained a key to the apartment.

Using the key, the officers entered the apartment and encountered petitioner and G.W. lying on the bed in one of the bedrooms.[2] Petitioner and G.W. denied that S.W. was in the apartment. The officers eventually proceeded to the second bedroom, where they found S.W. hiding inside a hollowed-out chest of drawers that had been placed against the wall. The officers took S.W. into custody pursuant to the pick-up order. Deputy DeWees also arrested both petitioner and G.W. for "child concealment," in violation of West Virginia Code § 61-2-14d[3], because of

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[2] The body camera video footage taken by Deputy DeWees of the search of petitioner's apartment was made a part of the appendix record and viewed by the Court in connection with this appeal.

[3] West Virginia Code § 61-2-14d provides, in relevant part, as follows:

> (a) Any person who conceals, takes or removes a minor child in violation of any court order and with the intent to deprive another person of lawful custody or visitation rights shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than

"[t]he way [S.W.] was hidden in the room." Petitioner and G.W. were subsequently indicted on felony charges of "child concealment" and conspiracy to commit that offense, in violation of West Virginia Code § 61-10-31.[4]

On August 20, 2019, petitioner filed a motion to suppress "any and all evidence obtained as a result of the illegal, warrantless search of [petitioner's] home" – i.e., evidence that S.W. was concealed in the home. A suppression hearing was conducted on May 18, 2020, at which Ms. Blackhurst, the DHHR caseworker, and Deputy DeWees testified consistently with the facts as set forth above. Deputy DeWees clarified that the sole purpose for entering petitioner's apartment was to execute the "pick-up" order for S.W. out of concern for her because "[w]e didn't know where she was"; that he did not intend to charge petitioner with a crime in the event S.W. was found in the home; but that petitioner and G.W. were ultimately arrested because of "[t]he way [S.W.] was hidden in the room." By order entered

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> five years, or in the discretion of the court, shall be imprisoned in the county jail not more than one year or fined not more than one thousand dollars, or both fined and imprisoned.

[4] West Virginia Code § 61-10-31 provides, in relevant part, as follows:

> It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State or (2) to defraud the State, the state or any county board of education, or any county or municipality of the State, if, in either case, one or more of such persons does any act to effect the object of the conspiracy.

on August 6, 2020, the circuit court denied petitioner's motion.

Petitioner thereafter entered into a plea agreement pursuant to which she pled guilty to the offense of "child concealment"; the State agreed to dismiss the count of conspiracy.[5] Under the terms of the plea agreement, petitioner retained the right to appeal any prior pretrial evidentiary rulings of the circuit court. She was sentenced to a period of incarceration of one to five years, with such sentence being suspended, and was placed on probation for a period of four years. This appeal followed.

## II. Standard of Review

The issue on appeal is whether the circuit court erred in denying petitioner's motion to suppress the evidence obtained as a result of the search of her home.

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's

[5] Additionally, the plea agreement provided that the State would dismiss one count of "obtaining money by false pretenses," one count of "forgery," and one count of "uttering," for which petitioner was indicted in connection with an unrelated criminal matter.

> factual findings are reviewed for clear error.
>
> In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. . . . Thus, 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.

Syl. Pts. 1 and 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). With these standards in mind, we now consider the parties' arguments.

## III. Discussion

The Fourth Amendment to the United States Constitution provides that citizens have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" [6] It

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[6] This federal right to be free from unreasonable search and seizure applies to the states through the Fourteenth Amendment. *See Payton v. New York*, 445 U.S. 573, 576 (1980) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). *See also State v. Duvernoy*, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973) ("Article III, Section 6 of the West Virginia Constitution is very similar to the Fourth Amendment" and

protects against certain kinds of government intrusions, most particularly, "the physical entry of the home by law enforcement."[7] However, in *Payton v. New York*, 445 U.S. 573, 603 (1980), the Supreme Court held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the [subject of the warrant] lives when there is reason to believe the [subject] is within." Indeed, where authorities have a valid arrest warrant, "it is constitutionally reasonable to require [the subject] to open his doors to the officers of the law." *Id.* at 602-03.[8] The parties agree that the "pick-up" order directing that S.W. be taken into custody and placed with the DHHR, which was founded upon probable cause to

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has been traditionally construed in harmony with the Fourth Amendment).

[7] *State v. Snyder*, 245 W. Va. 42, 47, 857 S.E.2d 180, 185 (2021) (citing *Payton v. New York*, 445 U.S. 573, 585-86 (1980)).

[8] To be clear, the subject of the pick-up order was S.W., but the Fourth Amendment claim in this case was raised by petitioner, who was not named in the pick-up order but whose indictment and guilty plea were based on evidence uncovered during the officers' search of her residence for S.W. In *Steagald v. U.S.*, 451 U.S. 204 (1981), the Supreme Court held that, absent exigent circumstances or consent, "under the Fourth Amendment, a law enforcement officer may not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant." *Id.* at 205-06. Because we conclude that there was a reasonable belief that S.W. resided with petitioner, *see infra.*, petitioner's apartment was not "the home of a third party" and, therefore, *Steagald* does not apply.

believe that her "health, safety and welfare" demanded it, *see* W.Va. Code § 49-4-705(a)(2), was the functional equivalent of an arrest warrant[9] and was lawfully issued.

At issue here is whether petitioner's Fourth Amendment protection against unreasonable search and seizure was violated when the officers entered her apartment to execute the pick-up order for S.W. The *Payton* standard for executing a valid arrest warrant (or, in this case, a valid "pick-up" order) has been interpreted as requiring a two-part inquiry: "first, there must be a reasonable belief that the location to be searched is the [subject's] dwelling, and second, the police must have 'reason to believe' that the [subject] is within the dwelling."[10] Petitioner contends that *Payton's* "reasonable belief" standard requires that law enforcement have "probable cause" that S.W. was both living at the apartment and would be there when they entered because that interpretation "is most consistent with the special protections that the Constitution affords to the home." *United States v.*

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[9] *See State v. Ellsworth*, 175 W. Va. 64, 70, 331 S.E.2d 503, 509 (1985) (stating that "the term 'custody' as used in [formerly] W. Va. Code, 49-5-8 [now 49-4-705] . . . is equivalent to an arrest, that is, it must be based upon probable cause . . . .").

[10] *United States v. Magluta*, 44 F.3d 1530, 1533 (11th Cir. 1995); *accord Valdez v. McPheters*, 172 F.3d 1220, 1224 (10th Cir. 1999); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996); *United States v. Lauter*, 57 F.3d 212, 215 (2nd Cir. 1995).

*Brinkley*, 980 F.3d 377, 385 (4th Cir. 2020).[11] *See id.* (observing that "*Payton* itself reiterated that 'the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'" (quoting *Payton*, 445 U.S. at 585)). [12] According to petitioner, the facts and circumstances surrounding the officers' entry and search of her home did not meet that heightened standard, emphasizing that the officers were not entitled to rely on the uncorroborated tip of an unidentified informant concerning S.W.'s whereabouts.

The State counters that the appropriate quantum of proof for executing an arrest warrant is the less stringent standard of whether, under the totality of the circumstances available to the officers, the officers had a reasonable belief that S.W. was residing with petitioner in her home and was at the home at the time they entered. The State contends that the plain text of *Payton*, along with the holdings of a number of jurisdictions, support its argument, and that using common sense and viewing the situation in the totality, the officers had reason to believe that S.W.

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[11] *Accord United States v. Gorman*, 314 F.3d 1105 (9th Cir. 2002); *United States v. Vasquez-Algarin*, 821 F.3d 467 (3rd Cir. 2016).

[12] Several state courts have held that, under their respective state constitutional search and seizure provisions, the reason to believe standard means there must be probable cause to believe the subject of the arrest warrant lives in the dwelling and is within. *See e.g.*, *State v. Hatchie*, 166 P.3d 698 (Wash. 2007); *Anderson v. State*, 145 P.3d 617 (Alaska Ct. App. 2006); *State v. Jones*, 27 P.3d 119 (Oregon 2001).

both lived at, and would be present in, petitioner's apartment at the time they entered. We agree.

The issue of what quantum of proof is necessary to satisfy the reason to believe standard in the context of executing a lawful arrest warrant has been frequently debated, with multiple courts construing it as being "satisfied by something less than would be required for a finding of 'probable cause.'" *United States v. Thomas,* 429 F.3d 282, 286 (D.C. Cir. 2005).[13] In view of the plain text of *Payton* – that an officer with "an arrest warrant founded on probable cause" has "the limited authority to enter a dwelling in which the [subject of the warrant] lives when there is reason to believe the [subject] is within"[14] – it is clear that the Supreme Court "used a phrase other than 'probable cause' because it meant something other than 'probable cause.'" *Thomas*, 429 F.3d at 286; *accord United States v. Magluta*, 44 F.3d 1530, 1534 (11th Cir. 1995) (stating that "[t]he strongest support for a lesser burden than probable cause remains the text of *Payton*, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'"). Indeed, the Court's use of "probable cause" in *Payton* to "describe[e] the foundation for an

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[13] *Accord United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006); *Valdez*, 172 F.3d at 1225; *United States v. Route*, 104 F.3d 59, 62 (5th Cir. 1997); *Risse*, 83 F.3d at 216; *Lauter*, 57 F.3d at 215; *Magluta*, 44 F.3d at 1535; *Barrett v. Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015); *Duran v. State*, 930 N.E.2d 10, 15-16 (Ind. 2010); *State v. Chavez*, No. 27840, 2018 WL 5310268 (Ohio Ct. App. 2018); *Brown v. U.S.*, 932 A.2d 521 (D.C. Ct. App. 2007).

[14] 445 U.S. at 603.

arrest warrant[,] and its use of 'reason to believe' [to] describ[e] the basis for the authority to enter a dwelling[,] shows that the Court intended different standards for the two." *United States v. Pruitt*, 458 F.3d 477, 484 (6th Cir. 2006); *see also Barrett v. Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015) ("[i]n setting forth the rule in *Payton*, the Supreme Court required the arrest warrant to be 'founded on probable cause,' yet set [']reason to believe[']as the standard to justify entry. Therefore, the Court was clearly aware of the differences and chose to require separate standards."). [15] As one court also explained, "a reasonable ground for belief of guilt" (that is, probable cause for the issuance of an arrest warrant) is not the "grammatical analogue to a reasonable belief that an individual is located within a premises subject to

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[15] The Supreme Court's awareness and use of the different standards was specifically noted in *Maryland v. Buie*, 494 U.S. 325 (1990), in the context of the justification of a protective sweep. The Court stated that the Court of Appeals of Maryland "applied an unnecessarily strict Fourth Amendment standard" when it "require[ed] a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed." *Id.* at 337. Rather, the Court explained, "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* Thus, as *Buie* demonstrates, the "Court does not use the terms probable cause and reasonable belief interchangeably, but rather that it considers reasonable belief to be a less stringent standard than probable cause." *Pruitt*, 458 F.3d at 484.

search. These are two entirely different inquiries." *Pruitt*, 458 F.3d at 484.[16]

The less stringent "reason to believe" standard is "established by looking at common sense factors and evaluating the totality of the circumstances and requires less proof than does the probable cause standard." *Barrett*, 470 S.W.3d at 342. Stated another way, an in-home search for the subject named in an arrest warrant is lawful where "the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, . . . warrant a reasonable belief that the location to be searched is the [arrestee's] dwelling, and that the [arrestee] is within the residence of the time of entry." *Magluta*, 44 F.3d at 1535. "[T]he appropriate test is whether the facts known to the officers, taken as a whole, gave them objectively reasonable grounds to believe that the [subject of the arrest warrant] lived at the apartment." *People v. Downey*, 130 Cal. Rptr.3d

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[16] Additionally, by obtaining an arrest warrant, officers have already demonstrated probable cause to a neutral magistrate. *See Magluta*, 44 F.3d at 1534-35("Reasonable belief embodies the same standards of reasonableness [as probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate" (internal quotations omitted).); *Barrett*, 470 S.W.3d at 343 ("[T]he rights of suspects will be adequately protected by using th[e] [reasonable belief] standard. When police execute a valid arrest warrant, a neutral and detached magistrate has already made a probable cause evaluation that the suspect has committed a crime. It would be overly burdensome for police to make a second probable cause determination when executing a valid arrest warrant.").

402, 409 (Cal. Ct. App. 2011). For example, although the subject of an arrest warrant "'may live somewhere else from time to time does not categorically prevent a dwelling from being the [subject's] residence[,]'[b]ut the officers' belief that the searched home is the [subject's] residence must be reasonable at the time of entry into the home." *Payton v. City of Florence, Ala.*, 413 Fed. Appx. 126, 131 (11th Cir. 2011) (quoting *United States v. Bennett*, 555 F.3d 962, 965 (11th Cir.), *cert denied*, 558 U.S. 831 (2009)). As for law enforcement's "on the spot determination" as to whether the subject is inside the residence at the time, "'courts must be sensitive to common sense factors indicating a resident's presence[,]'" *United States v. Bervaldi*, 226 F.3d 1256, 1263 (11th Cir. 2000) (quoting *Magluta*, 44 F.3d at 1535), such as the presence of an automobile parked outside the residence. *See State v. Slaman*, 189 W. Va. 297, 299, 431 S.E.3d 91, 93 (1993) ("the two officers reasonably believed that one of the suspects, [Maria] Luciano, . . . could be inside the mobile home. . . . [because] they noticed an automobile with a vanity license plate with 'Maria 2' on it").[17] The

[17] The State contends that we have previously determined the appropriate standard to be "reason to believe" and that our decision in *State v. Slaman*, 189 W. Va. 297, 431 S.E.2d 91 (1993), is controlling. In *Slaman*, officers visited the defendant's home in order to execute arrest warrants for the defendant and his girlfriend. *See id.* at 298, 431 S.E.2d at 92. The officers were advised by a neighbor that the girlfriend, Maria Luciano, should be home at that time of day; a vehicle parked outside the residence with the license plate "Maria 2" also suggested that she was at home. *See id.* The officers entered the home through an unlocked door and observed a purse and a blanket tossed on the couch, which suggested that someone was inside the home. *See id.*

time of day has also been held to be sufficient. *See Thomas*, 429 F.3d at 286 ("[T]he early morning hour was reason enough" for officers to have reason to

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Although Ms. Luciano was not found there, an inspection of the home revealed marijuana plants growing in a fish aquarium that was found on the floor. *See id.* The plants were later seized pursuant to a subsequently obtained search warrant. *See id.* After he was indicted on the charge of manufacturing a controlled substance, the defendant moved to suppress the evidence obtained as a result of the initial search of the home. *See id.* at 299, 431 S.E.2d at 93. The motion was denied, and the defendant was subsequently convicted of the crime charged. *See id.* On appeal, the defendant argued that the initial search of his home was an unreasonable violation of his constitutional rights, and that the evidence ultimately seized as a result of that search was inadmissible, because "the officers lacked the requisite probable cause and exigent circumstances to justify the illegal entry and search." *Id.*

In affirming the circuit court's ruling and defendant's conviction, we emphasized that the officers were at the home to execute arrest warrants and, "[g]iven their authority, [they] acted reasonably in entering the unlocked . . . home. . . . [T]he two officers reasonably believed that one of the suspects, . . . whom they were looking for, could be inside. . . .and they had the legal authority to look and see if she was within the . . . home." *Id.* at 299-300, 431 S.E.2d at 93-4.

While our conclusion in *Slaman* is wholly consistent with our holding in this case, we acknowledge that the decision did not include an analysis of *Payton* or a clear explanation as to why a reasonable belief that Ms. Luciano was present in the home was sufficient for entry. Thus, although *Slaman* clearly lends support to our holding in the present case, we do not exclusively rely on it as the final word on the issue presented herein.

believe the arrestee would be home when they executed the warrant); *United States v. May*, 68 F.3d 515, 516 (D.C. Cir. 1995) ("[T]he logical place one would expect to find [the arrestee] on that . . . morning was at his home"); *United States v. Terry*, 702 F.2d 299, 319 (2d Cir. 1983) (holding that "agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that [the subject] would be home"); *Magluta*, 44 F.3d at 1535 ("[O]fficers may presume that a person is at home at certain times of the day – a presumption which can be rebutted by contrary evidence regarding the [arrestee's] known schedule"). Officers may also "take into consideration the possibility that the resident may be aware that police are attempting to ascertain whether or not the resident is at home[.]" *Id.* The circumstances of the subject's employment may also be relevant. *See Lauter*, 57 F.3d at 215 (information given to police that the subject "was unemployed and typically slept late" supported "a reasonable belief that [he] was present in the apartment when the warrant was executed"). "And the officers may consider an absence of evidence the suspect is elsewhere." *Valdez v. McPheters*, 172 F.3d 1220, 1226 (10th Cir. 1999). "No single factor is, of course, dispositive." *Id.*

Based upon all of the foregoing, we now hold that law enforcement executing a valid arrest warrant may lawfully enter a residence if they have reason to believe that the subject of the warrant lives there and is presently within. Reason to believe requires less

proof than probable cause and is established by evaluating the totality of the circumstances. [18]

In applying our holding to this case, we find that in evaluating the unique facts and circumstances in the totality, law enforcement had a reasonable belief that S.W. resided with petitioner in her home and that S.W. was within the home at the time they entered for purposes of executing the pick-up order. S.W. was a child who, up until she was removed from petitioner's custody, lived with petitioner at her apartment. Indeed, S.W.'s placement with her grandparents was temporary, with petitioner's parental rights remaining intact. There was no evidence presented that S.W. had previously lived anywhere other than with her parents; therefore, it was certainly logical to believe that, after running away from her grandparents' supervision, S.W. would return to her mother's home. Given that S.W. had previously been seen at

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[18] Petitioner contends that, because West Virginia is within the jurisdiction of the Fourth Circuit, this Court should adopt the probable cause standard consistent with that court's holding in *United States v. Brinkley*, 980 F.3d 377 (4th Cir. 2020); however, we decline to do so for the reasons stated herein. Although "[t]his Court pays due deference and respect to opinions and analysis of the Fourth Circuit . . . . we are not bound to adopt [its] approach" on this issue. *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 595, 788 S.E.2d 319, 341 (2016). *See also State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 477 n.18, 647 S.E.2d 899, 913 n.18 (2007) ("While federal court opinions applying West Virginia law are often viewed persuasively, we are not bound by those opinions"), *superseded by statute as stated in J.C. by and through Michelle C. v. Pfizer, Inc.*, 240 W. Va. 571, 814 S.E.2d 234 (2018)).

petitioner's apartment on several occasions during the course of the five-month period after she ran away, the sighting of S.W. on May 16, 2019, was reasonably believed by law enforcement to be credible. Further adding to the reliability of the information that S.W. was living with petitioner and was presently within the home was the informant's specific (and correct) knowledge that S.W. was the subject of juvenile proceedings and that petitioner, according to the informant, planned to conceal S.W. in the apartment until she reached the age of majority, when the juvenile proceedings would resolve. It was also proper for the officers to consider that S.W. was aware that they were looking for her and that she was attempting to conceal herself within the home so as not to be found.[19] *See Magluta*, 44 F.3d at 1535. Moreover, the officers arrived at the home sometime after 8:30 p.m., a time of night that a child would ordinarily be at home. *See e.g.*, *id.* ("[O]fficers may presume that a person is at home at certain times of the day"). Because the officers had a reasonable belief, according to the totality of the circumstances, that S.W. lived with petitioner at her apartment and was within the apartment at the time they entered, we discern no error in the circuit court's denial of petitioner's motion to suppress.

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[19] Critically, Deputy DeWees testified that the exclusive purpose for entering petitioner's apartment was to execute the pick-up order for S.W. and that the decision to arrest petitioner was because of "[t]he way [S.W.] was hidden in the room."

## IV. Conclusion

Based upon all of the foregoing, the circuit court's order is hereby affirmed.

Affirmed.

WOOTON, Justice, dissenting:

In this case, the petitioner Tracy Renee Pennington challenged the legality of a search of her private home by a law enforcement officer executing a juvenile pick-up order (arrest warrant) for the petitioner's daughter. Law enforcement had neither consent to enter the home nor a search warrant, and the petitioner argued that the officer lacked the requisite "reason to believe" that the juvenile was in the home. *See Payton v. New York*, 445 U.S. 573 (1980). The determinative issue in this case is what legal standard controls law enforcement's right to enter a private residence without a search warrant in order to execute a juvenile pick up order. The petitioner argued that probable cause was the standard; conversely, the respondent, State of West Virginia ("the State"), argued [1] for the adoption of either a "reasonable suspicion"[2] standard or simply a standard that was

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[1] The State also argued that this Court's prior decision in *State v. Slaman*, 189 W. Va. 297, 431 S.E.2d 91 (1993) (per curiam), is controlling. However, in *Slaman* this Court did not even mention *Payton* or the United States Supreme Court's subsequent holding in *Steagald v. U. S.*, 451 U.S. 204 (1981), both decisions discussed *infra* in greater detail, and the case was devoid of any analysis in regard to the quantum of proof needed to support a warrantless entry into a home. Thus, the case has very little, if any, precedential value.

[2] *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (finding "authority to permit a reasonable search for weapons for the protection of the police officer, where he has *reason to believe* that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely

something less than probable cause.[3] The majority establishes a new standard – one with the vaguest of factors, holding in syllabus point three that "[l]aw enforcement executing a valid arrest warrant may lawfully enter a residence if they have reason to believe that the subject of the warrant lives there and is presently within. *Reason to believe requires less proof than probable cause and is established by evaluating the totality of the circumstances*." (Emphasis added). Insofar as this new standard allows law enforcement officers to make a warrantless entry into a private home to execute a juvenile pick-up order

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certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.") (emphasis added); *see also Maryland v. Buie*, 494 U.S. 325, 336-37 (1990) (A limited protective sweep is permitted when an officer has "reasonable belief" that a dangerous individual is in the area.).

[3] *See U.S. v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) ("As explicated by five other circuits, the 'reason to believe' standard is satisfied by something less than would be required for a finding of 'probable cause.' *See Valdez v. McPheters*, 172 F.3d 1220, 122526 (10th Cir.1999); *United States v. Route*, 104 F.3d 59, 62 (5th Cir.1997); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir.1996); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir.1995); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995). That is consistent with our decision in *United States v. May*, 68 F.3d 515 (1995) (Fourth Amendment permits search of suspect's dwelling if officers have 'reason to believe the suspect is there'), where we upheld entry into a dwelling based upon an address found in police records and upon testimony that the suspect had slept there on the night of the murder, some two days before the search. *Id*. at 516.").

without probable cause, it diminishes the protections afforded by the Fourth Amendment. Even assuming, arguendo, that this new standard is constitutionally sound, the petitioner's motion to suppress should have been granted under the facts and circumstances of this case. Accordingly, I respectfully dissent.

The Fourth Amendment of the United States Constitution protects citizens from unreasonable intrusions into their homes:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.; *accord* W. Va. Const., art. III, § 6 (providing nearly identical protections as afforded in the federal constitution). The United States Supreme Court has recognized that

> the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.

*Payton*, 445 U.S. at 585-86. In no uncertain terms, the Supreme Court explained in *Payton* that "[i]t is a 'basic

principle of Fourth Amendment law' that searches and seizures inside a home without a warrant *are presumptively unreasonable*." *Id*. at 586 (emphasis added).

The Supreme Court has adhered to its keen focus on protecting the sanctity of the home first enunciated decades ago:

> "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). At the Amendment's "very core," we have said, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Collins v. Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (internal quotation marks omitted). Or again: "Freedom" in one's own "dwelling is the archetype of the privacy protection secured by the Fourth Amendment"; conversely, "physical entry of the home is the chief evil against which [it] is directed." *Payton v. New York*, 445 U.S. 573, 585, 587, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (internal quotation marks omitted). The Amendment thus "draw[s] a firm line at the entrance to the house." *Id*., at 590, 100 S.Ct. 1371. What lies behind that line is of course not inviolable. An officer may always enter a home with a proper warrant. And as just described, exigent circumstances allow even warrantless intrusions. *See ibid*.;

> *supra*, at 2017-2018. But the contours of that or any other warrant exception permitting home entry are "jealously and carefully drawn," in keeping with the "centuries-old principle" that the "home is entitled to special protection." *Georgia v. Randolph*, 547 U.S. 103, 109, 115, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (internal quotation marks omitted); *see Caniglia v. Strom*, 593 U. S. — —, ——, 141 S.Ct. 1596, 1600, —— L.Ed.2d —— (2021) ("[T]his Court has repeatedly declined to expand the scope" of "exceptions to the warrant requirement to permit warrantless entry into the home"). So *we are not eager—more the reverse—to print a new permission slip for entering the home without a warrant*.

*Lange v. California*, 141 S.Ct. 2011, 2018-19 (2021) (emphasis added). Yet, "a new permission slip for entering the home without a warrant" is exactly what the State sought and received from the majority in the instant case. *See id*.

To fully explain my misgivings with the standard adopted by the majority, I begin with an examination of *Payton*, where the Supreme Court considered "the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." *Id*. at 574. The Supreme Court found that

> [i]f there is sufficient evidence of a citizen's participation in a felony [4] to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within*.

*Id*. at 602-03 (footnote and emphasis added). Notably, the *Payton* court was discussing felonies, not juvenile status offenses. Further, the Supreme Court failed to define or otherwise give any guidance to what is meant by "reason to believe" – whether that concept is tantamount to probable cause, reasonable suspicion, or something else. Finally, in *Payton*, while the police had probable cause to arrest each of the suspects for

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[4] Federal courts have determined that the *Payton* "reason to believe" standard applies equally to the execution of a misdemeanor arrest warrant. *See U. S. v. Gooch*, 506 F.3d 1156, 1159 (9th Cir. 2007) ("We hold that a valid arrest warrant issued by a neutral magistrate judge, including a properly issued bench warrant for failure to appear, carries with it the limited authority to enter a residence in order to effectuate the arrest as provided for under Payton."); *U.S. v. Spencer*, 684 F.2d 220, 223 (2d Cir. 1982) (rejecting the defendant's request that *Payton* should be confined to a felony and finding that the issuance of a warrant for a felony, misdemeanor, or a bench warrant by a neutral magistrate or court controls a warrantless entry into the suspect's residence to effect the arrest warrant).

their respective crimes (murder and armed robbery), they had not obtained either arrest warrants or search warrants at the time they entered the suspect's respective apartments. *Id*. at 57778. Based on the officers' failure to obtain an arrest warrant, the Supreme Court reversed the cases and remanded for further proceedings. *Id*. at 603.

Following *Payton*, the Supreme Court addressed the issue of whether officers who had obtained a felony arrest warrant for an individual could enter the home of a third party to execute that warrant. *See Steagald,* 451 U.S. 204. In *Steagald*, the officers had an arrest warrant for Ricky Lyons. An informant called a Drug Enforcement Administration ("DEA") agent and gave the agent a telephone number where Mr. Lyons could be reached. The agent traced the number to an address in Atlanta, Georgia. Law enforcement officers went to that address and approached two men standing outside the house, one of whom was Gary Steagald. *Id*. at 206. The officers proceeded to enter the house without a search warrant and discovered what they believed to be cocaine. At that point they sent another officer to obtain a search warrant, but before it was secured they conducted a second search of the home, yielding additional incriminating evidence. During a third search of the home – this time with a search warrant – the officers found forty-three pounds of cocaine. *Id*. at 206-07. The petitioner, Mr. Steagald, was arrested and indicted on federal drug charges. *Id*. at 207.

Mr. Steagald moved to suppress all the evidence found in the house due to the officers' failure to secure a search warrant before entering the residence. The government argued that the arrest warrant for Mr.

Lyons authorized the officers' entry into Mr. Steagald's home. The Supreme Court framed the issue before it as "whether an arrest warrant – as opposed to a search warrant – is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances."[5] *Id*. at 212.

The *Steagald* court found the warrantless entry into the petitioner's home to be unreasonable. *Id*. at 222. It emphasized the need for a warrant absent consent or exigent circumstances as follows:

> The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, *supra*, 333 U.S. at 14, 68 S.Ct., at 369, may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the

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[5] The Supreme Court mentioned a split in the federal circuits in regard to whether both an arrest warrant and a search warrant are required before law enforcement may enter a third party's residence, or whether an arrest warrant is sufficient if the officers have "reason to believe" the person to be arrested is within the home to be searched. *Steagald*, 451 U.S. at 207 n.3.

> individual's interests in protecting his own liberty and the privacy of his home. *Coolidge v. New Hampshire*, *supra*, 403 U.S., at 449-451, 91 S.Ct., at 2029-2030; *McDonald v. United States*, 335 U.S. 451, 455-456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948). However, while an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

*Steagald*, 451 U.S. at 212-13. The Court acknowledged that while the arrest warrant protected Mr. Lyons from an unreasonable seizure, it did nothing to protect the petitioner's privacy and his Fourth Amendment right to be free from an unreasonable search of his home. *Id*. at 213.

Moreover, the *Steagald* court warned against the dangers of foregoing the warrant requirement

where a third-party's home was to be searched in order to execute an arrest warrant, noting that

> the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant—would create a significant potential for abuse. Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances. *See*, e. g., *Lankford v. Gelston*, 364 F.2d 197 (CA4 1966) (enjoining police practice under which 300 homes were searched pursuant to arrest warrants for two fugitives). Moreover, an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place. *Cf. Chimel v. California*, 395 U.S. 752, 767, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685 (1969).

*Steagald*, 461 U.S. at 215.

The Supreme Court has determined that the *Payton* "reason to believe" standard governs the execution of an arrest warrant at a *suspect's* residence and eliminates the need for law enforcement officials to obtain a search warrant to enter that residence so long as the officer has "reason to believe" the suspect is inside. *See Payton*, 445 U.S. at 602-03. However, where law enforcement officials seek to enter a third-

party's home to execute a warrant on a suspect who is not a resident, then absent consent or exigent circumstances they must obtain a search warrant based on probable cause to enter the third-party's home to execute the arrest warrant. *Steagald*, 451 U.S. at 222.

Recently, the United States Court of Appeals for the Fourth Circuit addressed the very issue now before us: the quantum of proof that the "reasonable belief" standard requires. *U.S. v. Brinkley*, 980 F.3d 377, 385 (2020). The Fourth Circuit first recognized that

> [t]he courts of appeals have unanimously interpreted *Payton's* standard — "reason to believe the suspect is within," 445 U.S. at 603, 100 S.Ct. 1371 — to require a two-prong test: the officers must have reason to believe both (1) "that the location is the defendant's residence" and (2) "that he [will] be home" when they enter. *United States v. Hill*, 649 F.3d 258, 262 (4th Cir. 2011). But the quantum of proof necessary to satisfy *Payton* has divided the circuits, with some construing "reason to believe" to demand less than probable cause and others equating the two standards.[6] *See United*

[6] The dissenter in *Brinkley* noted the continuing split in federal circuits as to what standard controls:

> [s]ome circuits have equated "reason to believe" and "probable cause." *See United States v. Vasquez-Algarin*, 821 F.3d 467, 480 (3d Cir. 2016); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002). Others have

> *States v. Vasquez-Algarin*, 821 F.3d 467, 474–77 (3d Cir. 2016) (collecting cases).

*Brinkley*, 980 F.3d at 384 (footnoted added). The court also observed that

> *Steagald* sheds particular light on how *Payton* must be interpreted to respect the home's privileged status under the Fourth Amendment. As noted above, when officers armed with an arrest warrant seek to apprehend the suspect in a third party's home, *Steagald*, not *Payton*, controls, and requires police to obtain a search warrant founded on probable cause in order to enter the home. But *Payton* controls when officers

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> suggested the same in dicta. *See United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009); *United States v. Hardin*, 539 F.3d 404, 416 n.6 (6th Cir. 2008). On the other hand, some circuits have found that the "reason to believe" standard is less stringent than the "probable cause" standard. *See United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005); *Valdez v. McPheters*, 172 F.3d 1220, 1225 n.5 (10th Cir. 1999); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995); *United States v. Werra*, 638 F.3d 326, 337 (1st Cir. 2011). And still others have side-stepped the problem. *See United States v. Barrera*, 464 F.3d 496, 501 n.5 (5th Cir. 2006); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995).

*Brinkley*, 980 F.3d at 395 n.2 (dissenting opinion).

> believe that the suspect resides in a certain home, even if they are mistaken. *See Vasquez-Algarin*, 821 F.3d at 472. Under these circumstances, the home's actual residents are no longer entitled to the judicial authorization founded on probable cause that *Steagald* guarantees; *Payton's* "reason to believe" standard is all that protects their weighty Fourth Amendment privacy interests. Thus, when police seek to enter a home and are uncertain whether the suspect resides there, interpreting reasonable belief to require less than probable cause "would effect an end-run around . . . *Steagald* and render all private homes . . . susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination." *Id.* at 480.
>
> It seems to us that interpreting reasonable belief to require probable cause hews most closely to Supreme Court precedent and most faithfully implements the special protections that the Fourth Amendment affords the home. For these reasons, we join those courts "that have held that reasonable belief in the *Payton* context 'embodies the same standard of reasonableness inherent in probable cause.'" *Id.* (quoting *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002)).

*Brinkley*, 980 F.3d at 385-86.

I believe that the quantum of proof standard adopted by the Fourth Circuit – reason to believe is tantamount to probable cause – should have controlled the resolution of this case. The probable cause standard is the surest way to protect the Fourth Amendment rights of private homeowners to be secure in their homes, free from unreasonable searches and seizures, as required by both the State and federal constitutions. The lesser standard adopted by the majority weakens citizens' Fourth Amendment rights by allowing as a matter of routine the type a search that occurred herein – one in which police can enter a private home and search without a warrant based solely on a "'dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination.'" *Brinkley*, 980 F.3d at 386 (quoting *Vasquez-Algarin*, 821 F.3d at 480).

Significantly, the State conceded that probable cause did not exist in this case, and that it could not prevail under that standard because the only basis for searching the petitioner's home was an anonymous tip, which is insufficient to support a probable cause determination. *See Florida v. J.L.*, 529 U.S. 266, 270 (2000) ("'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,' *Alabama v. White*, 496 U.S., at 329, 110 S.Ct. 2412. As we have recognized, there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' *Id.*, at 327, 110 S.Ct. 2412."). However, in this case the deputy did not even try to verify or corroborate the anonymous tip before acting upon it. Thus, the petitioner's motion to

suppress should have been granted as the search was unreasonable under the Fourth Amendment.

Even with the majority's adoption of a weaker "reason to believe" quantum of proof, I would find that the State failed to carry its burden. The facts of this case established that by order entered on November 5, 2018,[7] the Circuit Court of Jackson County placed the juvenile in a temporary guardianship with her grandparents in Kanawha County because of continuing issues with unexcused absences from school.[8] It is clear that from and after November, 2018, the juvenile's legal residence was at her grandparents' home in Kanawha County until such time as the temporary guardianship ceased.

On January 11, 2019, the prosecutor in Jackson County filed an emergency motion for the juvenile to be taken into custody and placed in a staff-secured facility. It was alleged that the juvenile had left her grandparents' residence in Kanawha County on December 7, 2018, without permission, and had not returned to their home. By order entered January 11, 2019, the circuit court directed that the juvenile be taken into custody and placed with the Department of Health and Human Resources ("DHHR") for

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[7] While the order was entered was November 5, 2018, the order states that a hearing was held in the matter on November 29, 2018. It is unclear exactly when the parties agreed that the juvenile would live with her grandparents or when she was actually placed in her grandparents' custody. Suffice it to say that the transfer of custody occurred in November of 2018.

[8] The juvenile previously had been adjudicated as a status offender in July of 2018 due to truancy issues.

placement in a staff-secured facility pending further hearings.

The evidence established that the DHHR and local law enforcement made several trips to the petitioner's home trying, unsuccessfully, to locate the juvenile. There was also evidence that other "sporadic tips regarding her whereabouts" were investigated, but she was not found. On May 16, 2019, some five months after the juvenile pick-up order had been issued, Chief Deputy R. H. Mellinger of the Jackson County Sheriff's Department relayed an anonymous tip he had received to Deputy Ben DeWees, also with the department, which tip indicated that the juvenile was seen at the petitioner's apartment and that the petitioner planned to hide her until she turned eighteen. Deputy DeWees testified that he proceeded to the petitioner's apartment because "we had credible information that she was there, and we had a pickup order." However, he admitted that he knew nothing about the so-called "credible source" of the tip, or whether the information indeed was credible.

Deputy DeWees arrived at the petitioner's home. He knocked on the door and no one answered, although the deputy stated that heard movement inside the apartment. He testified that he entered the apartment without obtaining a search warrant after speaking with the prosecutor, who said it was okay. He initially found both the petitioner and her co-defendant, G.W., inside. The juvenile was located "inside a hollowed-out chest of drawers inside the Apartment" and was taken into custody. Significantly, the deputy stated that he never saw the juvenile around or near the petitioner's residence before he entered; that the petitioner never consented to his

entry; that he had no knowledge of any evidence that was going to be destroyed if he did not enter the home; that he had no knowledge that the juvenile was actually in harm's way; and that the only reason the authorities wanted to find her was *because they didn't know where she was*.

Additionally, a youth service worker ("worker") for the DHHR testified that at the time the pick-up order was issued, the juvenile resided with her grandparents. The worker stated that although she had been to the petitioner's home several times after the juvenile ran away from her grandparents' home, she never entered the residence and had never found the juvenile at the residence. The worker also testified that there had been tips where "people would say they had seen [the juvenile]" at the grandparents' house or at the petitioner's home, but these "tips" never prompted law enforcement or the worker to enter either home.

Given this evidence, it is incomprehensible that the majority has upheld the circuit court's determination that the deputy had reason to believe that the juvenile was at the petitioner's home. The deputy's entrance into the petitioner's home was based exclusively on an anonymous tip, unsupported by any evidence as to credibility of either the tipster or the information. An anonymous, unverified tip is insufficient to support reasonable suspicion, let alone reason to believe that the juvenile was inside the petitioner's home. It is undisputed that the petitioner's home was not the juvenile's legal residence and had not been for more than five months; further, the testimony about the various "tips" received during this period demonstrated that the juvenile was, at

minimum, bouncing around perhaps to avoid being found. With so much uncertainty as to where the juvenile was, a single anonymous, unsubstantiated tip relayed to a deputy is wholly insufficient to justify a law enforcement officer's entry into, and search of, a private residence. Consequently, the motion to suppress should have been granted because the search conducted violated the petitioner's Fourth Amendment rights.

For all the foregoing reasons, I respectfully dissent.

## APPENDIX B

### Order Denying Defendant's Motion to Suppress

**In the Circuit Court of**
**Jackson County, West Virginia**

**State of West Virginia**,

*Plaintiff*, Case No. 19-F-81

v. Hon. Lora A. Dyer

**Gary Ward**,

*Defendant*.

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**State of West Virginia**,

*Plaintiff*, Case No. 19-F-83

v. Hon. Lora A. Dyer

**Tracy Pennington**,

*Defendant*.

**ORDER DENYING MOTIONS TO SUPPRESS**

On May 18, 2020, case numbers 19-F-81 and 19-F-83 came before the Court for pretrial hearing. The State of West Virginia appeared by William E. Longwell, Esq., Assistant Prosecuting Attorney. Gary Ward ("Ward"), the defendant in 19-F-81, appeared in-person and by Counsel, Calvin Honaker. Ward's co-defendant, Tracy Pennington ("Pennington"), the defendant in 19-F-83, appeared in-person and by Counsel, Roger L. Lambert, Esq.

Whereupon, the Court took up Ward's and Pennington's Motions to suppress evidence, filed, respectively, on August 16 and August 20, 2020. All

parties were afforded equal opportunity to present evidence. The State called witnesses Carey Blackhurst of the West Virginia Department of Health and Human Resources ("DHHR") and Jackson County Sheriff's Deputy B.A. DeWeese ("Deputy"). The State further admitted State's Exhibits 1,2, 3, and 4 into evidence, without objection. Ward and Pennington called no witnesses. At the conclusion of the hearing, the Court ordered the parties to submit proposed findings of fact and conclusions of law.

Upon due consideration of the record and the law, the Court **FINDS** as follows:

## FINDINGS OF FACT[1]

1. The June 2019 Jackson County Grand Jury returned a two-count joint indictment charging Ward and Pennington with one felony count of "Child Concealment" and one felony count of "Conspiracy to Commit a Felony."

2. The Motions seek to suppress "any and all" evidence seized by law enforcement officers from the residence shared by Ward and Pennington, located at 503 Klondyke Road, Apartment 2, Ripley, Jackson County, West Virginia ("the Apartment").

3. On or about November 29, 2018, incident to a Jackson County juvenile status offense case, this Court ordered Pennington and Ward's minor

[1] The facts are essentially uncontested for purposes of this Order.

daughter, S.W.[2], be placed in the temporary custody of Ward's parents (S.W.'s paternal grandparents).

4. On or about on December 7, 2018, DHHR was advised S.W. ran away from her grandparents' residence and that her whereabouts were unknown.

5. DHHR and local law enforcement unsuccessfully attempted to locate S.W. by following sporadic tips regarding her whereabouts.

6. On January 11, 2019, the State moved this Court to take S.W. into custody and place her in a staff secured facility pending further hearing in her juvenile case.

7. This Court entered an "Order" on January 11, 2019, directing S.W. be taken into custody forthwith, finding S.W.'s health, safety, and welfare demanded such custody.

8. On May 16, 2019, Chief Deputy R. H. Mellinger of the Jackson County Sheriff's Department relayed a tip to Deputy indicating S.W. was seen at the Apartment shared by Ward and Pennington. The tip further indicated Pennington intended to hide S.W. until she was eighteen years old and would no longer be under the Court's juvenile jurisdiction.

9. Deputy obtained and reviewed a copy of the Order to take S.W. into custody.

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[2] Consistent with long-standing practice of the West Virginia Supreme Court of Appeals, initials are used to protect the identity of the minor child. *See In re K.H.,* 235 W. Va. 254, 773 S.E.2d 20 (2015); *State v. Edward Charles L.,* 183 W. Va. 641, 398 S.E.2d 123 (1990).

10. Deputy went to the Apartment and knocked on the door. No one answered the door, but Deputy heard movement coming from within the Apartment.

11. Deputy then obtained a key from the landlord and entered the Apartment.

12. After entering the Apartment, Deputy made contact with Ward and Pennington.

13. Deputy, along with other officers, located S.W. inside a hollowed-out chest of drawers inside the Apartment.

14. Officers took S.W. into custody pursuant to this Court's Order.

15. Pennington and Ward were arrested and charged with "Concealment of a Child."

16. Nothing was removed from the Apartment by law enforcement officers. Accordingly, S.W. herself is the only evidence Ward and Pennington seek to suppress.

## CONCLUSIONS OF LAW

17. "[T]he mere fact that a juvenile is a runaway is insufficient to take a child into custody without a warrant or court order." *State v. Todd Andrew H.,* 196 W. Va. 615, 617, 474 S.E.2d 545, 547 (1996); *see* W. Va. Code § 49-4-705.

18. It is well established that both the United States and West Virginia Constitutions protect an individual from any unreasonable search and seizure conducted without a valid warrant. Syl. Pt. 3, *State v. Cook, 175* W. Va. 185, 332 S.E.2d 147 (1985) (citing Syl. Pt. 1, *State v. Moore,* 165 W.Va. 837 (1980),

*overruled on other grounds by State v. Julius,* 185 W. Va. 422, 408 S.E.2d 1 (1991) (searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution, subject to "only a few specifically established and well delineated exceptions"); *see State v. Peacher,* 167 W. Va. 540, 280 S.E.2d 559 (1981) (quoting *Katz v. U.S.,* 389 U.S. 347, 351 (1967) (the Fourth Amendment "protects 'people, not places'")).

19. Here, there *was* a "warrant or court order" relative to S.W. Rule 6 of the *West Virginia Rules of Juvenile Procedure* authorizes the Court to issue such an order for taking a juvenile into custody:

> (3) *Immediate Custody Order for Status Offenses.* A circuit judge . . . may issue an order for immediate custody of a juvenile charged with a status offense if the judge . . . finds that there is probable cause to believe that one of the following conditions exists:
>
> (A) the health, safety, and welfare of the juvenile demand such custody; or
>
> (B) the juvenile is a fugitive from a lawful custody or commitment order of a court.
>
> (6) *Who May Execute.* An order for immediate custody may only be executed by a law-enforcement officer authorized by law to execute an arrest warrant.
>
> (7) *How Executed.* An order for immediate custody shall be executed by taking the juvenile into custody.

> (8) *Where Executed.* An order for immediate custody may be executed at any place in the state except where prohibited by law. . . .
>
> (9) *When Executed.* An order for immediate custody may be executed at any time.
>
> (10) *Possession of Order.* An existing order for immediate custody need not be in the law-enforcement officer's physical possession at the time the juvenile is taken into custody.

W. Va. R. Juv. P. 6(a); *see also* W. Va. Code §§ 62-1-2, 4 (probable cause necessary to issue arrest warrant, which may be executed at any time or place within the State by a law enforcement officer authorized to execute arrest warrants).

20. The authority of the Order is uncontested. Instead, Ward and Pennington argue the Order was insufficient to allow law enforcement to enter the Apartment or insufficient to allow the State to use "what they found" during the search as evidence against Ward and Pennington.

21. "The law on warrantless entries of a dwelling to effectuate an arrest is well settled in West Virginia: In the absence of one of the exemptions to the warrant requirement, the police must obtain an arrest warrant before entering a home to seize a person." *State v. Peacher,* 167 W. Va. 540, 570, 280 S.E.2d 559, 579 (1981) (citing *State v. McNeal,* 162 W. Va. 550, 251 S.E.2d 484 (1978).

22. The West Virginia Supreme Court of Appeals has held the term "custody" of a juvenile, as used here, is "equivalent to an arrest." W. Va. Code § 49-4-705; *Todd Andrew H.,* 196 W. Va. at 622, 474 S.E.2d at 552 (citing *State v. Ellsworth J.R.,* 175 W. Va. 64, 70, 331 S.E.2d 503, 509 (1985)).

23. Deputy testified he was aware S.W.'s permanent address was at the Apartment, notwithstanding the Court's Order placing her in the custody of her grandparents. Testimony presented further indicates Deputy had good cause to believe S.W. was inside the Apartment, and Deputy had knowledge of and possessed this Court's Order finding S.W.'s health, safety, and welfare demanded she be located. For these reasons, Deputy's entry into the Apartment for the limited purpose of taking S.W. into custody was not an unreasonable intrusion into Ward and Pennington's home.

24. Furthermore, this Court cannot conclude that Deputy, knowing what he knew and in possession of a signed Order directing S.W. be retrieved, was required to take additional steps to secure a *second* warrant prior to entering the Apartment. Such a conclusion would be unsupported by the law cited herein and would render juvenile custody orders devoid of any authority for law enforcement officers attempting to execute them.

25. Moreover, the only authority cited by Ward and Pennington addresses evidence or contraband seized *during* execution of an arrest warrant, *not the fruit of the arrest warrant itself* as is the case here. *See, e.g., Steagald v. U.S.,* 451 U.S. 204 (1981); *see also State v. Schofield, 175* W. Va. 99, 105,

331 S.E.2d 829, 836 (1985) (discussing *Steagald,* and noting it would exclude contraband seized from the homeowner's home during execution of an arrest warrant for a third-party on the grounds that use of the arrest warrant "in this manner was reminiscent of general warrants and writs of assistance that gave the police the unfettered discretion to search anywhere and arrest anybody").

26. It is undisputed that law enforcement possessed the Order prior to entering the Apartment, and such an order may be executed "at any time or place within the state" "except where prohibited by law." W. Va. R. Juv. P. 6(a). Because taking a juvenile into custody in this context is "equivalent to an arrest," the Order was sufficient to justify Deputy's entry into the Apartment for the limited purpose of taking S.W. into custody, and execution of the Order was not "prohibited by law." Therefore, no legal basis exists to suppress the fruit of the lawfully executed Order.

**ORDER OF THE COURT**

**WHEREFORE,** based upon the foregoing, the Court **FINDS** and **ORDERS**:

1. Deputy's entry into the Apartment on May 16, 2019, was lawful under the facts of this case, and did not violate the Fourth Amendment or the West Virginia Constitution;

2. Ward's and Pennington's motion to suppress are each **DENIED**; and

3. The Clerk **SHALL** enter this Order and distribute to all Counsel of record. All of which is **ORDERED**.

**ENTERED** this 6th day of August 2020.

/s/ Lora A. Dyer
Hon. Lora A. Dyer, Circuit Judge
Fifth Judicial Circuit of West Virginia