No. _____

In the Supreme Court of the United States

BROOKLYN ZAVION JOHNSON,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of West Virginia

PETITION FOR WRIT OF CERTIORARI

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March 6, 2023

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QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner's 4th amendment right against unreasonable search was violated where police made warrantless entry into his hotel on the basis that a third party who had purchased the room but who was not staying in the room gave consent to search.

Whether Petitioner's 4th amendment right against unreasonable seizure was violated where police lacked authority to arrest under state law because probable cause existed only as to a misdemeanor offense which required a warrant before arrest.

Whether Petitioner's 5th Amendment right against self-incrimination where Petitioner, a juvenile, was interviewed outside the presence of his parents and where he was under the influence of drugs at the time of the interview.

Whether Petitioner's 14th Amendment due process rights were violated by the Court's conduct during trial and pretrial proceedings where his transfer to criminal jurisdiction was done in violation of statute, where jury questions were answered in a manner to optimize the state's advantage, and where unrelated prior acts evidence was improperly admitted as intrinsic to the charged crime.

LIST OF PARTIES

Petitioner:

Brooklyn Zavion Johnson

Respondent:

State of West Virginia

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a nongovernmental corporation or other corporate entity, and so is exempted from this requirement per U.S. Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

The Circuit Court of Berkeley County, West Virginia

State of West Virginia v. Brooklyn Zavion Johnson, (August 3, 2021).

The West Virginia Supreme Court of Appeals

State of West Virginia v. Brooklyn Zavion Johnson, (December 6, 2022).

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The matter was originally tried before the Circuit Court of Berkeley County, West Virginia in April of 2021, with a final sentencing order entered on August 3, 2021. Petitioner then timely appealed the decision to the West Virginia Supreme Court on August 25, 2021. On December 6, 2022, the West Virginia Supreme Court entered its decision affirming the judgment of the Circuit Court. Petitioner now files his Petition for Certiorari before the United States Supreme Court within the ninety-day timeframe provided under United States Supreme Court Rule 13(1).

BASIS FOR JURISDICTION

The date of the Judgment sought to be reviewed is December 6, 2022.

Jurisdiction over this matter is proper under 28 U.S.C. § 1257 because it asserts violation of rights and privileges established under the United States Constitution.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. *United States Constitution, 4th Amendment*:

> 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.

2. *United States Constitution, 5th Amendment*:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. *United States Constitution, 14th Amendment*:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case relates to the arrest and prosecution of Petitioner for the murder of Thomas Dove, who was found dead on August 23, 2019. *Testimony of Deputy Merson*, *Trial Transcript Day 1*(Appendix Record ("AR") pg. 157), p. 99-100. Police, after speaking with the victim's mother, were made aware that two individuals whose names were not known but who go by the moniker "D.C. Boys," and who were driving a silver car, had threatened the victim the day prior over a debt. *Id*. at 104.

Separately, Deputy Chris Merson was informed by suspects in an unrelated matter that a firearm was brandished against them. *See Testimony of Deputy Chris Merson*, *Pretrial Hearing Transcript* (AR 155), p. 25-26; 47. A facebook photo was shown to police of the perpetrators, who identified him from prior interactions as Nashaun Howard. *Id*. at 26. Petitioner was also in that photo, though his identity was unknown to police or witnesses. Police identified the vehicle used by Howard from another incident as a Silver Nissan Altima.

It was suspected that the suspects might be staying at a local hotel. *Id*. at 27. Officer Merson went to local hotels looking for a car matching the description, and found a Silver Nissan Altima at the Knights Inn in Martinsburg, West Virginia. *Ibid*. While looking at the vehicle, Merson observed blinds moving in Room 127, causing Deputy Merson to make contact with the occupants. *Id*. at 128. After making contact, Deputy Merson observed some occupants of Room 127 make their way to Room 130.

When they opened the door to 130 Deputy Merson shined his flashlight into the room and saw who he recognized to be Nashaun Howard, who was promptly arrested. *Id*. at 31. Officers then cleared room 130, and found out that Derrick Dyke, the individual who rented room 130, had also paid for another room, room 129. *Id*. at 32. Merson obtained consent from Dyke to search Room 129. *Id*. at 32-33. Deputy Merson then stated that, upon entering room 129, he located Petitioner and detained him. Deputy Merson acknowledged that it was only Mr. Dyke's consent and "the fact that he did acknowledge that there were other people in that room that he based his right to make warrantless entry into the room." *March 12, 2021 Hearing Transcript* at 75 (AR pg. 155). Thereafter, the state conceded that there were no exigent circumstances which would have justified a warrantless entry of the room absent Mr. Dyke's consent. *Id*. at 77.

After Petitioner's arrest, he was brought to the police station and interrogated without either parent being present. Petitioner's grandmother, Danella Johnson, was present. *Id*. at 38-39. However, she was neither his legal guardian, nor did he live with her. Captain Hall testified that Danella Johnson had claimed to be Petitioner's legal guardian away from the camera *(Id*. at 58), however, the video itself shows that the investigating officers failed to ensure that Petitioner's grandmother could give legal consent for the interview. The only question asked by officers relating to Petitioner's guardian or custodial status was when Deputy Steerman asked Ms. Johnson whether Petitioner "stays with you," to

which she gave no audible response, putting her hands over her face and crying. Petitioner testified that he did not live with either Danella Johnson nor his mother, but that he actually lived with his paternal grandmother, Dorothy Lynn. *Id*. at 96. He further testified that his father and mother are his legal guardians. *Id*. at 97. Although Petitioner was read his Miranda rights, he did not clearly articulate a desire to answer questions, saying instead, "it depend on what type of questions." *Id*. at 88. *See Custodial Interrogation Video*, (AR 165). There was no consent form signed.

Additionally, Petitioner ingested multiple drugs prior to his interview, and police failed to ascertain whether he was under the influence. *Id*. at 59. Although Captain Hall denies that Petitioner was slurring his words (*Id*. at 59), the video shows his speech is slurred and often incoherent throughout. AR 165. Captain Hall admitted that he could not understand what was said at key portions of the video. *Id*. at 88. Petitioner testified that, during his interview, he had been under the influence of marijuana and "boot," which contains MDMA and other drugs. *Id*. at 98. The interview video shows Petitioner lying across his grandmother's lap, covered in a blanket. AR 165.

Thereafter, the state charged Petitioner as a juvenile, and then transferred him to the court's criminal jurisdiction following a transfer hearing. However, notice of said transfer hearing was not provided to both parents as required under W.Va. Code § 49-5-710(a). As such, Petitioner moved to set aside the transfer on September 18, 2020. Said

Motion was denied because Petitioner's mother, but not his father, had received notice. AR 164.

Prior to the trial, Petitioner filed pretrial motions to suppress evidence, including all evidence obtained (a) through the illegal search of Petitioner's motel room, (b) through the illegal seizure of Petitioner, and (c) through Petitioner's unlawful custodial interrogation. All such motions were denied. *See March 12, 2021 Order* (AR pg. 37) and *March 22, 2021 Transcript* (AR pg. 156). Petitioner's statement to police was then used against him at trial, wherein Captain Hall testified that Petitioner had changed his story during his interview. *March 23, 2021 Transcript* (AR pg. 157), pp. 129-130.

During trial, the State called Maddie Walters, who testified that she heard Petitioner tell Dove that he wanted money owed. (*Trial Day 1 Transcript* (AR pg. 157), p. 165). She also testified that, on a separate and unrelated occasion, she'd seen Petitioner holding a gun in his hand and saying that he "wanted to pop off." *Id.* at 167, 173. Undersigned counsel objected on relevance and 'prior acts' grounds. *Ibid.* In response, the State argued that it was not prior acts testimony because "she's testified that this happened in very close proximity to the shooting of Tommy Dove and this is intrinsic to the offense and thus not subject to 404(b) analysis." *Ibid.* The judge responded, "Well, I do believe that it's relevant. The weight of the relevance is for the jury's determination. Objection's overruled" *Id.* at 172. Thus, the Court overruled Petitioner's prior bad acts objection on relevant grounds only, and without making any finding that the testimony comported with Rule 404(b). *Id.* at 172.

Jury deliberation went on for three days, during which time the Court reconvened the parties to discuss two jury questions, one of which concerned the concerted action jury instruction. Said the Court:

> *The question reads as follows: On page 9 the instructions read, quote, and by acting with another contributed to the criminal act is criminally liable for such offense as if he were the sole perpetrator, period, end quote. On the second page then – this is a one of two-page question – on page 2 of 2 it reads is it a correct understanding of our instructions that if he was in the car he is guilty of first degree murder.*

Transcript from March 26, 2021, p. 4. (AR pg. 160).

The parties then each read copies of the handwritten question, and the State then responded that it didn't believe the question should be answered, asking instead for an instruction reminding the jury to rely upon their recollection and apply it to the instructions. *Id.* at 5. Defense counsel argued: "I very much disagree with the state's position on this. The Court can answer the question because it is a matter of law and the answer is no…mere presence is not guilt of underlying crime [n]or…conspiracy…if you read the language of the instruction itself it says [']contributes['] and I think it has some other language that indicates action." *Id.* at 6. The court then noted that the instruction reads, "Under the concerted action principle a Petitioner who is present at the scene of the crime and by acting

with another contributed to the criminal act is criminally liable for such offense as if he were the sole perpetrator," Causing undersigned to again note that the language necessitated an overt act, and the question pertained only to whether Petitioner being in the car was enough to meet that requirement. "Remember the [jury's] question is not if he was driving the car. The question is not if he made a phone call. The question is he's just in the car. Just being in the car does not merit… guilt by concerted action so the answer to that as a matter of law is no." *Id*. at 7. Nevertheless, the Court sided with the State, saying that it "would not give a law school answer that could be debated between students of the law…" *Id*. at 7. Petitioner then requested an opportunity to submit additional briefing on the propriety of his request to submit an additional instruction of law regarding mere presence at the scene. *Id*. at 8-9. The State made further objection, objecting even to the Court's proposal of instructing the jury to re-read the concerted action instruction, prompting the Court to then Order the parties to adjourn for the day and brief the issue. *Id*. at 9-10.

Thereafter, Petitioner submitted its Memorandum of Law Regarding the Proposed Supplemental Jury Instructions, (AR pg. 78). Said Memo made two primary points: (1) that the Court has a duty to clarify its jury instructions when the jury notifies the Court of its confusion; and (2) that the Court, having been notified of the jury's confusion regarding the limits of the concerted action instruction, must clarify to the jury that mere presence at the scene of a crime does not make a

person a party to the crimes commission, nor does witnessing the crime, an undisclosed intention to render aid, or a refusal to intervene. Petitioner then submitted to the Court the following proposed jury instruction:

> *Under concerted action principle, a Petitioner who was present at the scene of a crime and who by acting with one or more other persons contributed in any way to the commission of such criminal act is criminally liable for the crime the same as if he or she were the sole perpetrator.*
>
> *However, merely witnessing a crime, without intervention, does not make a person a party to its commission. Neither mere presence at the scene of a crime, nor mental approval of the actors conduct, nor a failure to intervene are enough to find a Petitioner guilty of a felony under the concerted action principle.*

Jury Instruction Memo, (AR 138), p. 3.

On March 29, 2021, the Court reconvened, heard argument on the issue, and then held as follows:

> *So the Court because it does not like to parse out what is a law under a syllabus point would simply suggest that we read what is the equivalent of the Syllabus Pt. 5 in the Foster [Fortner] case along with Syllabus Pt. 6 which then would read as*

> *follows adding that after the original instruction the Court the Court would propose, merely witnessing a crime without intervention does not make a person a party to its commission unless his interference was a duty and his non-interference was one of the conditions of the commission of the crime or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator. Proof that a Petitioner was present at the time and place of the crime was committed is a factor to be considered by the jury in determining guilt along with other circumstances such as the Petitioner's association with or relation to the perpetrator and his conduct before and after the commission of the crime.*

March 29, 2021 Transcript, p. 7-8. (AR pg. 161)

Petitioner objected to this on multiple grounds, noting that the language regarding "unless his interference was a duty," was intentionally omitted from his proposed instruction to avoid jury confusion because it relates to security guards and other similar roles and was not at all relevant to the case or asked about by the jury. *Id*. at 8-9. Petitioner's further raised a second objection to the Court's proposed action on the basis that the modified instruction fails to include some of the pertinent case language explaining the limits of the concerted action principal – in particular, that silent approval does not constitute concerted action. *Id*. at 10-12.

The Court then pressed undersigned as to why it shouldn't also note that presence at the scene of the crime is factor to be considered in determining guilt, and undersigned responded that the key requirement, based on the juries question, was to "correct the jury's misapprehension of law with concrete accuracy," and that "[to say] you can use this and this and this to find him guilty [when] they didn't even ask that, that wasn't the question they asked. It kind of begins to seem like we are rephrasing this in a way that is intentionally favorable to the state." *Id*. at 13-14.

The Court then held that it was not required to reinstruct the jury, but that it would, "out of an abundance of caution" provide instructions to the jury such that "merely witnessing a crime without intervention does not make a person a party to its commission unless this interference was a duty and his non-interference was one of the conditions of the commission of the crime or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." *Id*. at 17-20. She further held that she would also include language that "proof that the Petitioner was present at the time and place of the crime committed is a factor to be considered by the jury in determining guilt along with other circumstances such as the Petitioner's association with or relation to the perpetrator and his conduct before and after the commission of the crime." *Id*. at 20.

Petitioner objected to leaving out the language requested in his proposed instruction and to the inclusion of the unrelated "unless his interference

was a duty" language, and further objected to the placement of the supplemental language within the concerted action instruction for being more germane to the burden of proof or sufficiency of the evidence instructions. *Id*. at 20-22. The Court overruled Petitioner's objections, denied his request, and proceeded with the revised instruction. *Id*. at 24.

After additional deliberation, the jury returned a verdict of guilty against Petitioner on all charges. Petitioner's Motion for New Trial (AR 123) was denied.

Thereafter, Petitioner made timely appeal to the West Virginia Supreme Court of Appeals, asserting five assignments of error: (1) that the Circuit Court erroneously admitted evidence from an unlawful search and seizure in violation of the 4th Amendment to the U.S. Constitution (*See Petitioner's Appeal Brief*, pp. 1, 17-24); (2) that the Circuit Court erroneously admitted evidence from an unlawful custodial interrogation in violation of the U.S. Constitution's 5th Amendment (*Id*. at 1, 25-27); (3) That the Circuit Court violated Petitioner's (Petitioner below's) Constitutional due process rights by erroneously transferring Petitioner to adult status in violation of the state statutory requirements (*Id*. at 1, 27-29); (4) that the Circuit Court erroneously admitted prior bad acts evidence in violation of Rule of Evidence 403 and 404(b) (*Id*. at 1, 29-30); and (5) that the Circuit Court violated Petitioner's due process rights under the 14th Amendment by permitting, over his objection, the amendment of the "concerted action" jury instruction in a manner which indicated towards conviction while denying

Petitioner's request for the inclusion of legal precedents relevant to the jury's question and accurately stated West Virginia law (*Id*. at 1, 30-33). The matter was then fully briefed by the parties. *See* Respondent's *Response Brief*, and Petitioner's *Reply Brief*.

On December 6, 2022, the West Virginia Supreme Court issued an unpublished, "Memorandum Decision," rejecting Petitioner's assignments of error and affirming the decision of the trial court. This Petition for Certiorari follows.

REASONS FOR GRANTING PETITION

I. PETITIONER'S 4TH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WERE VIOLATED

Police actions in the case at bar violated the 4th Amendment through their illegal search of Petitioner's hotel and room and through their unlawful seizure of Petitioner.

A. Unlawful Search

The undisputed circumstances of the case clearly indicate that Dyke lacked authority to consent to a search or admit third parties because he had no control over the room. He did not have a key, and he clearly identified the room as being for other individuals, not himself. And, indeed, when police entered, both beds were occupied by sleeping individuals who clearly had every expectation to believe that they were in their own private room which only they would be accessing.

In *Stoner v. California*, 376 U.S. 483 (1964), the U.S. Supreme Court established that, "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protections against unreasonable search and seizures." *Id.* at 490. In *Minnesota v. Carter*, 525 U.S. 83, 142 L.Ed.2d 395 (1998), the U.S. Supreme Court held that Fourth Amendment protections are conferred upon any individual who had a reasonable expectation of privacy in the place searched. Such expectation of privacy is established where a Petitioner maintains a subjective expectation of privacy in the location searched and based on society's willingness to accept the reasonableness of this expectation. *Id.* at 88. The U.S. Supreme Court has further held that a reasonable expectation of privacy exists even for an overnight guest in another person's home. *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990). ("Olson's status as an overnight guest is alone sufficient to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.").

In making its ruling on Appeal, the West Virginia Supreme Court almost completely ignores the issue of whether Mr. Dyke had the right to consent to entry into Petitioner's hotel room. Rather, the Court combined its finding regarding whether Mr. Dyke had the authority to consent with its findings with their ruling on the issue of whether Mr. Dyke actually consented to entry[1], and focused its

[1] Because the issue of whether Dyke voluntarily consented to the search (as opposed to consent under duress) is a factual issue within the trial court's discretion, the Circuit Court and

reasoning almost exclusively on the issue of whether Dyke actual consent, excepting the following:

> *Moreover, the circuit court found that petitioner, a minor, did not have a reasonable expectation to privacy in the motel room. Reviewing this ruling in the light most favorable to the State, and giving particular deference to the findings of the circuit court, we find that the individual who rented the room did voluntarily consent to allow law enforcement officers to search the room. Thus, we decline to disturb this ruling on appeal.*

See 12/6/22 Memorandum Decision (App. 4-5).

This first sentence quoted above represents the only analysis that the Court gives to Petitioner's argument on this point, and the West Virginia Supreme Court was in error in reviewing the Circuit Court's finding under a deferential standard of review because the Circuit Court's ruling was not based on a factual dispute, but was instead based on erroneous interpretations of law regarding (a) whether a suspect having a reasonable expectation of privacy is "informed" by property rights, and (b) that Petitioner's youthful age militates against finding a reasonable expectation of privacy.

West Virginia Supreme Court's ruling on this point does not fall within this Court's jurisdiction, and so is not presented herein as a basis for granting *Certiorari*.

The Trial Court's pretrial order reads, in relevant part, as follows:

> *Specifically, the Court found that, based upon objective societal expectations,* ***the fifteen-year-old Petitioner did not have a legitimate expectation of privacy in the motel room****. The Court recognized that, as set forth in Georgia v. Randolph, Fourth Amendment analysis is not governed by property law,* ***but is informed by it****, and that great significance must be given to widely shared social expectations and customary social understanding… Petitioner,* ***as a minor, could not reasonably be the only person who could give consent or deny consent to search a motel room he was staying in. The Court found that the male who rented the room, solely in his name, under customary social understanding would have a common right to obtain an additional room key and enter the room, over which he had common authority, so he had the right to consent to entry of the room. Further, the Court found that the Petitioner, who is a minor whose name was not on the room rental agreement, who could not have practically been expected to obtain a key to the room, did not have an***

> ***objective expectation of privacy in the motel room.***

See March 12, 2021 Pretrial Order (AR 41-42) (emphasis added).

While this language shows that the Circuit Court did attempt to pay some level of lip service to the fact that 4th amendment jurisprudence is not governed by property rights, she nevertheless linked Petitioner's inability to purchase the room himself, and conversely, Mr. Dyke's actual purchase of the hotel room, as the key factors which militated against Petitioner's right to privacy and in favor or Mr. Dyke's right to consent. However, this U.S. Supreme Court has made it explicitly clear that property rights have nothing whatsoever to do with whether a suspect has a reasonable expectation of privacy in a place to be searched. As stated in *Georgia v. Randolph*, 126 S.Ct. 1515, 547 US 103, 104 (2006), "*the right to admit the police is not a right as understood under property law*. It is, instead, the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances." (emphasis added). As such, as a matter of pure law, the Circuit Court's ruling, and any appellate Court's affirmation of the same, is constitutionally defective. The case at bar is perfectly analogous in all relevant respects, to *Minnesota v. Olson*, *supra*, in that the relationship between Petitioner and Mr. Dyke in terms of the room 129 is equivalent to the *Olson* homeowner permitting an overnight guest to sleep in a room of his home. *See Id.* 495 U.S. at 98-99. That overnight

guest maintains an expectation of privacy, just as Petitioner did.

The prosecution suggested that Dyke was a co-occupant of the room who had the right to consent on Petitioner's behalf, but in *United States v. Matlock*, 415 U.S. 164 (1974), this Supreme Court held that only a "co-occupant" in a "jointly occupied" premises could consent to a search. *Id*. at 170. It is plain that Dyke was not a co-occupant of said room - he was staying in room 130, and had purchased room 129 for another. As such, he cannot give consent to a search for the room of another even if he had provided the occupants the gift of paying for their room. Rather, the only two "occupants" were the two individuals actually staying there neither of which was Dyke. Thus, Dyke cannot, under any reasonable interpretation, be said to be an "occupant" of room 129 regardless of whether he paid for the room. As such, Dyke having paid for the room, or, conversely, Petitioner having been legally prohibited from paying for the room, is of absolutely no legal import in determining who could consent to a search thereof. Moreover, per *Georgia v. Randolph*, 126 S.Ct. 1515 (2006), *even where an actual occupant gives consent to search,* "a physically present co-occupant's stated refusal to permit entry prevails." While Petitioner, of course, did not expressly object to the search (because he had no opportunity), its plain that both he and his co-occupant would have refused access.

Additionally, as the *Stoner* Court held, "At least twice this Court has explicitly refused to permit an otherwise unlawful police search of a hotel room to rest upon consent of the hotel proprietor. *Lustig v.*

United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819; *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59." *Stoner*, 376 U.S. at 489." One might again analogize this situation to the case at bar in that just as the hotel proprietor, despite owning the hotel, lacks the authority to consent to a search of a room that he has let out to a guest, so does a hotel room purchaser, despite now owning the right to stay in a hotel room for the night, not have authority to consent to the search a room that he has given away to another for their own private use.

Regarding the age issue of Petitioner age, this Supreme Court has upheld a reasonable expectation of privacy in individuals as young as 8 years old – far younger than Petitioner's age at the time of search. *See Randolph*, 547 U.S. at 113. Similar holdings abound throughout state and federal precedent.[2]As

[2] *See Florida v. J.L.,* 529 U.S. 266, 270, 271 (2000) (finding that a 15 year old's motion to suppress evidence as fruit of an unreasonable stop and frisk should be granted despite Petitioner's status as a minor); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (where a trial court denied a juvenile's motion to suppress but not because of his minor age); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995) (discussing a minor's capacity to give valid, knowing consent to enter his parents' home and finding that "privacy is an intuitive interest, and legal sophistication is not required" for adults or minors to understand the importance of privacy); *In re Rudy F.,* 12 Cal. Rptr. 3d 483, 490 (Ct. App. 2004) (holding that minor had standing to challenge search of room in home that he shared with his sister); *Commonwealth v. Porter*, 923 N.E.2d 36, 45 (Mass. 2010); see also *In re Welfare of B.R.K.*, 658 N.W.2d 565, 574-76 (Minn. 2003) (holding minor who was social guest in host's home had reasonable expectation of privacy in home to invoke Fourth Amendment protections to challenge warrantless search of host's home).

such, to argue that a 15 year old cannot have a reasonable expectation of privacy as to a hotel room that he is residing in is to disregard the entire body of law on this point.

B. Unlawful Seizure

The deputies conducting the search of the Knights Inn lacked the authority to seize Petitioner Johnson because they lacked probable cause to believe that he had committed a felony.

W.Va. Code § 60A-5-501 delineates the powers of law enforcement personnel. Pursuant to this statutory authority, officers may execute and serve any search or arrest warrant and are further empowered to make warrantless arrests "for any offense under this act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of this act *which may constitute a felony*." *Id.* at § 501(a)(3) (emphasis added).

Pursuant to W.Va. Code § 61-7-11, brandishing a deadly weapon is a misdemeanor. The only crime for which probable cause existed to arrest Petitioner at the time of his seizure was a misdemeanor, and law enforcement personnel did not witness its commission. They therefore lacked authority to arrest Petitioner at that time under West Virginia law.

At the time of the arrest, the only evidence they had which linked Petitioner to any crime sufficient for arrest were the statements of Kaitlyn Urey, who identified Petitioner as involved in the brandishing

incident. At the time of arrest, there were no witness statements or other evidence which implicated Petitioner in any other crime other than him being a black male of teenage years. The lead investigator, Captain Hall, admitted that this information was not enough to warrant an arrest of Petitioner for the murder of Dove. *See March 22, 2021 Hearing Transcript*, p. 33 (AR 155). Captain Hall further provided the following as a basis for probable cause to arrest:

1. Connie Butterfield, mother of Dove, informed police that, though not in the room at the time, "some people came to the house had made some threats to Javier and Mr. Dove. She believed it was over drug transactions somebody owed." *March 22, 2021 Hearing Transcript* (AR pg. 155), p. 33, 45.

2. Per Butterfield, one suspect was a "darker skinn[ed]" younger male of 14-15, and the other was "a little older" with "light skin," with both referred to as "the D.C. Boys," who were driving a silver "Toyota or a Nissan or Mazda," *Id.* at 33.

3. Deputy Merson had an unrelated interaction with Kaitlyn Urey, who had a firearm pulled on her by black males from Washington, D.C., triggering Merson to connect the report to the Dove investigation. *Id*. at 47. Urey

showed Deputy Merson a Facebook picture of the two individuals. *Ibid*.

4. There could be hundreds or even thousands of black males who are from D.C. in the Berkeley County area at any given moment. *Id*. at 48-49.

5. The basis for probable cause to arrest Petitioner was allegedly "the totality of everything we'd uncovered at that point. Based on the information that Deputy Merson got and what we got from Ms. Butterfield." *Id*. at 49. Yet he also claimed Petitioner wasn't arrested for the murder, but "was taken into custody as a runaway." *Ibid*. The State then conceded that Petitioner was not known to be a runaway at the time of his apprehension. *Id*. at 75-76, 82.

6. The keys to the Altima were not found with Petitioner, and ownership was attributed to Howard. *Id*. at 53.

The West Virginia Supreme Court, in rejecting Petitioner's argument on this point, found that, regardless of whether police had the authority to arrest, they had the right to detain. The Decision reads, "Inasmuch as the record suggests that the investigating officers had probable cause to suggest that petitioner had committed a murder, they had authority to detain him without a warrant. Accordingly, we find that the circuit court did not err in determining that the petitioner's detention was lawful." This is nonsense. Petitioner was not merely

temporarily detained as part of a broader investigation. He was arrested, fingerprinted, photographed, interviewed, and incarcerated pending trial, through which police were able to procure additional evidence from Petitioner and his various accomplices which would not have been possible absent Petitioner's arrest. Had Petitioner been only detained, he would have been released a short time after such detainment without being taken into custody, as a "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Moreover, an investigative stop "must be reasonably related in scope and duration to the circumstances that justified the stop in the first instance so that it is a minimal intrusion on the individual's Fourth Amendment interests." *U.S. v. Bullock*, 632 F.3d 1004, 1015 (7th Cir. 2011). Thus, it is no justification to an illegal arrest to argue that police would have had legal justification to detain the suspect anyway because an investigative detainer is an extremely limited compulsory interaction which would not have generated the same evidence as Petitioner's arrest.

II. PETITIONERS 5TH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION WERE VIOLATED BY THE ADMISSION OF HIS CUSTODIAL INTERROGATION AT TRIAL.

The statements of Petitioner Johnson were improperly admitted because they were obtained without his parents presences and while he was under the influence.

The 5th Amendment to the U.S. Constitution provides, in part, that "no person," shall "be compelled in any criminal case to be a witness against himself. As such, the government "…may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the Petitioner unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This analysis applies to juveniles as well as adults. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011). Fundamentally, the question "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

It is flatly impossible to argue that Petitioner made a knowing and intelligent waiver of his right to remain silent in this case. Petitioner's parents and legal guardians were not present during the custodial interrogation. *See March 22, 2021 Hearing Transcript* (AR pg. 155), p. 38-39. Rather, only his

grandmother was present, who is not a legal guardian. His Miranda rights were discussed with him only in the most perfunctory fashion, he was not asked to sign a waiver, he was not in any way evaluated to ensure that he was clear of mind and not under the influence such that he could appreciate the significance of what was being said to him and what he was agreeing to. *See Custodial Interrogation Video*, (AR pg. 165). His body language and speech pattern as shown in the interrogation video reveal that he was under the influence. He was laying down across his grandmother's lap and slurring his words such that many of his statements are incomprehensible. Petitioner testified that he had been using psychotropic substances prior to his arrest (both "boot" – a combination of MDMA, heroin, and other substances - as well as marijuana), and that he continued to feel under the influence at the time of the interrogation. *See March 22, 2021 Hearing Transcript* (AR pg. 155), p. 98. Under these circumstances, Petitioner Johnson's statements cannot be said to constitute a knowing and voluntary waiver of his right to remain silent.

The West Virginia Supreme Court, in adjudicating Petitioner's appeal, *did not address this Assignment of Error at all*, despite its having been clearly articulated both in the "Assignments of Error" section of Petitioner's Appeal brief, p. 1) as well as in the body of the brief. *Id.* at p. 25-27. Petitioner would respectfully submit that their silence on this point is deafening.

III. THE CIRCUIT COURT PROCEEDINGS VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT BY BEING CONDUCTED IN PLAIN VIOLATION OF ESTABLISHED RULES AND LAW.

Per the 14th Amendment, "no State shall deprive any person of life, liberty, or property without due process of law." Due process requires that the procedures by which laws are applied be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894). Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved. The U.S. Supreme Court in *Hagar v. Reclamation Dist.,* 111 U.S. 701, 708 (1884), described due process as follows:

> *Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected.* ***It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought****. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves*

> *these principles of liberty and justice, must be held to be due process of law.*

(emphasis added). See also *Hurtado v. California*, 110 U.S. 516, 537 (1884).

On multiple occasions and in multiple ways, the State acted in contravention of "the ordinary mode prescribed by law" to favor of the prosecution.

A. The Circuit Court Violated Petitioner's Due Process Rights by Permitting the Amendment of the 'Concerted Action' Jury Instruction in a Way that Prejudiced Petitioner and Misled the Jury.

Perhaps the single most egregious due process violation, in terms of its effect on the case, was the way it favored the state when presented with a jury question. The question indicated that the jurors were confused about whether mere presence at the scene of the crime was enough to merit a conviction for first degree murder, The Court structured its answer in such a way as to avoid a direct response and obfuscate the relevant law in a way that maximized advantage for the State.

The question posed was:

> *On page 9, the instructions read – "and by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator." Is it a correct understanding of our instructions, that*

> *if he was in the car he is guilty of First Degree Murder?"*

The question suggests that some jurors believed Petitioner merely being in the car at the time of the shooting would make him guilty of First Degree Murder. This is, as a matter of law, incorrect, as West Virginia precedent holds that, "[M]erely witnessing a crime, without intervention, does not make a person a party to its commission..." Syl pt. 1, *State v. Mayo* (quoting Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972); Syllabus Point 9, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)). Moreover, "mere presence at the scene of the crime is not enough, nor is mental approval of the actor's conduct." *State v. Hoselton*, 371 S.E.2d 366, note 4 (1988). Additionally, "An undisclosed intention to render aid if needed will not suffice, for it cannot encourage the principal in his commission of the crime." *Ibid*. Also, "in the absence of unique circumstances giving rise to a duty to do so, one does not become an accomplice by refusing to intervene in the commission of a crime." *Ibid*.

The Circuit Court had an absolute duty to provide an instruction of law needed to clarify the jury's confusion. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13,66 S.Ct. 402,405 (1946). *See also U.S. v. Horton*, 921 F.2d 540 (4th Cir. 1990); *Alcindore v. United States*, 818 A.2d 152, 155 (D.C. 2003) ("When a jury sends a note which demonstrates that it is confused, the trial court must not allow that confusion to persist; it must respond

appropriately.") Additionally, where an instructional scheme creates a danger that a jury will resolve any doubts in favor of conviction, the scheme violates due process. *See Bobby v. Mitts*, 131 S.Ct. 1762, 1764 (2011) (citing *Beck v. Alabama*, 447 U.S. 625, 638, 643, 100 S.Ct. 2382 (1980)).

The jury's question demonstrated that it was confusing the concerted action doctrine with a belief that mere presence or silent acceptance at the scene of the crime amounts to guilt under the concerted action doctrine. The Court could have cleared up the jury's confusion with a single, accurate statement of law: "No, the Petitioner merely being the car does not make him guilty of first-degree murder."

However, not only did the Court choose not to give this simple, clear answer to the jury's question, it rejected Petitioner's own legally accurate proposed supplemental instruction, which reiterated the concerted action doctrine and added the limitations set forth in the case law as cited above.[3] The Court

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[3] Petitioner's proposed instruction was as follows:

> *Under the concerted action principle, a Petitioner who was present at the scene of a crime and who by acting with one or more other persons contributed in any way to the commission of such criminal act is criminally liable for the crime the same as if he or she were the sole perpetrator.*
>
> *However, merely witnessing a crime, without intervention, does not make a person a party to its commission. Neither mere presence at the scene of a crime, nor mental approval of the actors conduct, nor a failure to intervene are*

refused to include any of Petitioner's requested language except for a single line about mere presence not being enough, and then added irrelevant verbiage about inaction being a duty (i.e. for a security guards) which had no relevance to the case, as well as additional language about the ways that the jury might use Petitioner's presence to infer guilt. The Court had no need to include the language about how a Petitioner's presence at the time of the crime is a factor to be considered because this information was duplicative of law included in the Burden of Proof instruction. (*See jury instructions*, AR 138), yet it chose to include the language again at the concerted action instruction anyway, thereby emphasize law favorable to the state. The Court's actions show that it did what it thought to be the absolute minimum to directly answer the jury's question because the answer favored the Petitioner, and then heaped on as much favorable law for the State as possible. After days of deliberation, this choice likely represented just the push the jury needed to find the Petitioner guilty when they otherwise couldn't.

The West Virginia Supreme Court of Appeals affirmed the Circuit Court because "Here, upon receiving the jury question, the court sought guidance from the parties and eventually provided a supplemental instruction that was consistent with

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> *enough to find a Petitioner guilty of a felony under the concerted action principle.*

Jury Instruction Memo (AR 138), p. 3

existing law. Therefore, there is no basis for this Court to find that the circuit court abused its discretion." This is erroneous. The Circuit Court had an obligation to "clear the juries confusion" away "with concrete accuracy," per *Bollenbach* and *Alcindore, supra*, and the Court's reinstruction further violated *Mitts* and *Beck* by creating a situation where the jury would resolve their doubts in favor of conviction.

B. The Circuit Court Violated the West Virginia Juvenile Transfer Statute in Transferring Petitioner's case from Juvenile to Adult Court.

Petitioner avers that the state failed obtain his transfer in the ordinary mode prescribed by law because it failed to comply with the notice requirements of W.Va. Code § 49-5-710(a), which states, in relevant part, that, "Upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing and with reasonable *notice to the juvenile, his or her counsel, and his or her parent**s**, guardian**s** or custodian**s**,* the court shall conduct a hearing to determine if juvenile jurisdiction should or must be waived and the proceeding transferred to the criminal jurisdiction of the court." (emphasis added).

Here, the transfer hearing previously conducted violated Petitioner's due process rights insomuch as, prior to the hearing, notice was not provided to both of Petitioner's parents, as required by the provisions of W.Va. Code § 49-5-710. Testimony on Petitioner previous Motion to Set Aside Transfer revealed that

no notice had been sent to his father, in plain violation of the statute. *See October 14, 2020 Transcript* (AR 165 and Supplemental AR 6), p. 22.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Here, although evidence indicates that Petitioner's mother, Janay Johnson, had notice, she is not married to and does not live with Petitioner's father, who was entitled to notice of his own and was, by any measure, an interested party as the parent of a child being charged with murder.

The West Virginia Supreme Court's 12/6/22 Decision reads, on this point, that:

> *Upon our review of the record, petitioner's legal guardian and his mother were given notice of his transfer. Moreover, murder is an enumerated offense in the transfer statute that required that petitioner be transferred to adult status… Accordingly, we decline to find that the circuit court's order transferring petitioner to adult status was clearly wrong or against the plain preponderance of the evidence.*

12/6/22 Decision, p. 5 (App. 9).

This ruling ignores the issue regarding Petitioner's father's lack of notice, and also confuses the standard of review. Although, immediately prior to making the above finding, they correctly noted that "The circuit court's application of the transfer statute is reviewed de novo…"they also cited to *State v. Bannister*, 162 W.Va. 447, 250 S.E.2d 53 (1978), in order to claim that "An order transferring juvenile to adult jurisdiction may only be set aside where the order is 'clearly wrong or against the plain preponderance of the evidence.'" However, The West Virginia Supreme Court appears to have slightly misinterpretted *Bannister's* Syllabus Point 1, which reads: "Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed." This refers to the *findings of fact*, and so necessarily relates to the trial court's discretion on factual matters. Here, there were no contested facts that related to the transfer or notice issue. It was a pure matter of law, to wit, whether the state's failure to provide notice of Petitioner's transfer from juvenile to criminal court violates the requirements of the transfer statute, which, as the West Virginia Supreme Court itself noted, should have been reviewed de novo.

C. The Circuit Court Erroneously Allowed the State to Introduce Prior Bad Acts Evidence Against Petitioner in Violation of the West Virginia Rules of Evidence.

Finally, the prosecution of Petitioner further violated his due process rights under the 14th Amendment through the admission of plainly inadmissible and highly prejudicial prior acts evidence on the basis that the information was "relevant," (*Trial Day 1 Transcript* (AR 157), p. 172), where there had been no 404(b) notice and where the prior act was not intrinsic to the crime.

West Virginia Rule of Evidence 403 permits the exclusion of relevant evidence if its probative value is outweighed by a danger of unfair prejudice, confusion, or misleading the jury. Rule 404(b) prohibits the use of crimes, wrongs, or other prior acts to show that on a particular occasion the person acted in conformity therewith. Rule 404(b)(1). However, prior acts may be admitted for another purpose - like motive, opportunity, etc. – so long as the prosecution notices its intent to do prior to trial or the court finds good cause for lack of pretrial notice. Rule 404(b)(2).

Additionally, evidence which would otherwise violate Rule 404(b) can be admitted where such evidence is "intrinsic" to the crime charged. *See State v. Larock*, 196 W.Va. 294, n. 29, 470 S.E.2d 613, n. 29 (1996). "Other act" evidence is intrinsic when "the evidence of the other act and the evidence of the crime charged are inextricably intertwined' or both

acts are part of a single criminal episode,' or the other acts were 'necesssary preliminaries' to the crime charged." *Ibid*.

The West Virginia Supreme Court, in its Decision, summarily asserted that "Here, the testimony that petitioner showed the witness a gun that he wanted to 'pop off' was inextricably intertwined to the crime charge[d]. We agree with the State that Rule 404(b) was not implicated, as the testimony was intrinsic, not extrinsic, to the murder." No further explanation is given, and the Court's conclusion that there was no abuse of discretion in finding the act "intextricably intertwined" with the Murder is erroneous, because every fact inveighs against finding the gun incident intrinsic to the murder.

Maddie Walters observing Petitioner waiving a gun around while saying he wanted to "pop off," was admitted for the purpose of suggesting that Petitioner did, in fact, "pop off" with a gun by shooting Dove. This, as Petitioner argued at trial, is textbook propensity evidence which is expressly disallowed by Rule 404(b). *See Trial Day 1 Transcript* (AR 157), p. 170. The ruling also violates Rule 403 because its potential for prejudice vastly outweighs its probative value. It's not related to the state's theory of motive, as it did not argue that Petitioner shot Dove because he had the urge to shoot somebody, but that Petitioner shot Dove over a debt. As such, the only exception to Rule 404(b) which might conceivably apply is ruled out.

The State's only rebuttal was that the temporal proximity of the two events made the gun statements intrinsic, but mere temporal proximity does not make a prior act inextricably intertwined with the crime charged, and there are no other facts in the case at bar which connects Petitioner's statement about wanting to shoot his gun with the murder of Dove.[4] Thus, the decision to allow this testimony was reversible error, and the Court's admission of this evidence on "relevance" grounds, and without the provision of any 404(b) Notice prior to trial, was an obvious abuse of discretion.

Finally, the State failed to provide Notice of Intent to use 404(b) evidence, and the Court made no finding that good cause existed for the oversight. Thus, it was error to allow the introduction of such evidence over Petitioner's objection *even if it had been intrinsic to the case*.

CONCLUSION

For all the reasons stated above, Petitioner requests that the decision of the West Virginia Supreme Court of Appeals be reversed, Petitioner's conviction be set aside, and that a new trial be granted.

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[4] On cross, Ms. Walters admitted she had no information linking the gun incident she observed to the Dove shooting. *Id*. at 173.

Respectfully submitted,

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