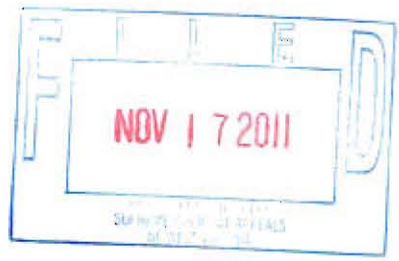
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0643



STATE OF WEST VIRGINIA,

Respondent,

v.

JOSHAWA CLARK,

Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

On January 4, 2010, a Cabell County Grand Jury indicted Joshawa Clark ("Petitioner") and his co-defendant Dustin Shaver on two counts of First Degree Robbery, two counts of Conspiracy, and two counts of Kidnapping.[1] (A.R. 77.) The charges arose from two separate armed robberies occurring at the Marquee Cinema Multiplex in Pullman Square, Huntington, Cabell County, West Virginia: one on July 13, 2009, and one on October 19, 2009. The Petitioner, a theater employee, was present for both robberies. During the preliminary hearing the investigating officer, Corporal Cass McMillian, referred to the Petitioner as the "common connector." (A.R. 54.)

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[1]The trial court dismissed the kidnapping counts prior to trial pursuant to defense counsel's persuasive arguments and this Court's holding in Syl. pt. 3, *State v. Brumfield*, 178 W. Va. 240, 241, 358 S.E.2d 801, 802 (1987). (A.R. 114.)

The Petitioner's trial began on February 8, 2011. (A.R. 157.) Before trial, counsel for the Petitioner filed a motion to suppress Petitioner's cell phone records recovered by use of an administrative subpoena[2] issued by the Drug Enforcement Agency ("DEA"). The records proved that the Petitioner had repeatedly called his co-defendant both immediately before and after the July robbery.[3] (The trial court convened a pretrial suppression hearing on August 2, 2010, during which it considered argument from defense counsel, and counsel for the State.) (A.R. 85.) By order entered September 30, 2010, the court denied the Petitioner's motion.[4] (A.R. 102.) Petitioner appeals the trial court's order.

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[2]The United States Attorney General has the statutory authority to subpoena, *inter alia,* any papers, documents, or other tangible things which constitute evidence in any investigation relating to its functions under the Comprehensive Drug Abuse Prevention and Control Act. (Pub. L. N. 91-513, 84 Stat. 1236 (1970). *See also* 21 U.S.C. §§ 841, 876(a). Title 21 U.S.C. § 878(a)(2) authorized the Attorney General to delegate to other enforcement personnel within the Justice Department such as DEA Special Agents-in-Charge. 28 C.F.R. Part 0.100(b), Subpart R § 4. This authority encompasses all investigations conducted under the Act: both regulatory and criminal. *See United States v. Hossbach*, 518 F. Supp. 759, 766-67 (D.C. Pa. 1980), citing *United States v. Minker*, 350 U.S. 179, 185 (1956). If the target refuses to comply, the Attorney General must invoke the aid of a federal court to enforce the subpoena. 21 U.S.C. § 876(c).

[3]These records were limited to numbers the Petitioner's outgoing calls and texts from his cell phone. These calls were not made from the Petitioner's home, but from the scene of the robbery. The records did not contain recordings of the substance of the phone conversations between the Petitioner and his co-defendant. Nor were these records used to track the Petitioner's geographic position. The information did not include subsequent numbers dialed by the Petitioner, such as digits dialed once one calls a pharmacy to fill a prescription.

[4]The court later amended the order when defense counsel pointed out that counsel for the State had included facts in the original order not set forth in the record. Although counsel for the Petitioner claims that the State provided this information *ex parte,* there is no evidence of this. Counsel for the State told the trial court that she had provided this information to its law clerk. She does not specify whether she also provided it to opposing counsel. (A.R. at 143.) The amendments did not change the overall substance of the order. Any error in its drafting was harmless. (A.R. at 1094.)

II.

SUMMARY OF ARGUMENT

The Petitioner's brief does not offer this Court cogent legal arguments. Instead, he relies upon issues of public policy better suited for the Legislature than this Court. His is not a legal brief. It is a policy paper peppered with self-serving appeals to this Court's passions. This Court should take no notice of it. "Both '[t]he Fourth Amendment of the United States Constitution[5] and Article III, Section 6 of the West Virginia Constitution[6] protect an individuals reasonable expectation of privacy.'" Syl. pt. 7, *State v. Peacher*, 167 W. Va. 540, 541, 280 S.E.2d 559, 560 (1981). "A claim of protection under the Fourth Amendment and the right to challenge the legality of a search depends not upon a person's property right in the invaded place or article of personal property, but upon whether the person has a legitimate expectation of privacy in the invaded place or thing." *Wagner v. Hedrick*, 181 W. Va. 482, 486-87, 383 S.E.2d 286, 290-91 (1989), *citing Katz v. United*

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[5]United States Constitution, amend IV.

> 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.

[6]West Virginia Constitution, art. III, § 6.

Unreasonable Searches and Seizures Prohibited.

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

States, 389 U.S. 347, 353 (1967). This Court has adopted the two-pronged definition of the term "reasonable expectation of privacy" first stated by Justice Harlan as part of his concurrence in *Katz*. "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Wagner v. Hedrick*, 181 W. Va. at 487 n.6, 383 S.E.2d at 291 n.6, *quoting Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Knowing that the United States Supreme Court has already ruled against him on his issue under the Fourth Amendment to the United States Constitution,[7] the Petitioner is forced to limit his claim to his right to privacy under the West Virginia Constitution. *See* W. Va. Const. art. III, § 6. *See also Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (defendant has no legitimate expectation of privacy in phone numbers dialed from his home thus pen register[8] installed on phone company's property at phone company's central office which recorded numbers dialed from defendant's phone did not constitute search under Fourth Amendment); *United States v. Miller*, 425 U.S. 435, 443-44 (1976) (individuals possess no legitimate expectation of privacy in financial information they voluntarily supply to banks thus subpoenas compelling bank to disclose all records of accounts in defendant's name for two specific time periods did not constitute search under Fourth Amendment). His claim hinges on this Court's ruling in *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007),

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[7]Despite this the United States has not slipped down the slope into a totalitarian state.

[8]"A 'pen register' is a device that records the numbers dialed for outgoing calls made from the target phone. A trap and trace device captures the numbers of calls made to the target phone." *In re Application for Pen Register and Trap/Trace Device with Cell Site Local Auth.*, 396 F. Supp. 2d 747, 752 (S.D. Tex. 2005).

in which it held that the provisions of article III, § 6, in some instances, provides greater protection to the citizens of West Virginia than the Fourth Amendment. *Mullens*, 221 W. Va. at 89, 650 S.E.2d at 188.

Mullens is not dispositive for two reasons. First, this Court's holding in *Mullens* was based on a tradition of affording West Virginia citizens a greater degree of freedom from government intrusion while in their *homes*. *Mullens*, 221 W. Va. at 90, 650 S.E.2d at 189, *and cases cited therein.* The Petitioner has failed to offer this Court any reason why it should extend the long-recognized protections afforded homeowners recognized in *Mullens* to cellular telephone records gathered outside the defendant's home and compiled and held by a third party. Indeed, the records reflect telephone calls and texts made while the Petitioner was at his place of work. Additionally, there was no question of standing in *Mullens*. *See Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (Fourth Amendment rights are personal and "may be enforced . . . only at the instance of one whose own protection was infringed by [a] search."). *See also State v. Lopez*, 197 W. Va. 556, 569, 476 S.E.2d 227, 240 (1996) ("Whether a defendant has standing to challenge a search under our Constitution depends on two factors: (1) whether one demonstrated by his conduct a subjective expectation of privacy, and (2) whether society is prepared to recognize that expectation as reasonable."), *citing Smith*, 442 U.S. at 740.

The Petitioner also objects to the means used by the State to obtain his telephone information. Because the Petitioner had no legitimate expectation of privacy, the means used by the State is irrelevant to his claim. Any conflict would be between the State and the third-party subject of the subpoena. *See* 21 U.S.C. § 876(c) (target of administrative subpoena may refuse to comply thus forcing the federal agency to bring an enforcement action in federal court).

In *Doe v. United States,* 253 F. 3d 256, 263-64 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit distinguished between information gathered by warrant upon a finding of probable cause and compelled disclosures of records pursuant to administrative subpoenas. "Whereas the Fourth Amendment mandates a showing of probable cause for the issuance of search warrants, subpoenas are analyzed only under the Fourth Amendment's general reasonableness standard." The Court went on to explain, "[o]ne primary reason for this distinction is that, unlike 'the immediacy and intrusiveness of a search and seizure conducted pursuant to a warrant[,]' the reasonableness of an administrative subpoena's command can be contested in federal court before being enforced." *Id.* at 264 *quoting In re Subpoena Duces Tecum*, 228 F.3d 341, 347-49 (4th Cir. 2000). *See also United States v. Bailey*, 228 F.3d 341 (4th Cir. 2000). This principle extends to third parties--that is entities other than the subject of the investigation. *See United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993).

Phipps makes explicit, however, a necessary Fourth Amendment caveat to the rule regarding third-party subpoenas: The party challenging the subpoena has "standing to dispute [its] issuance on Fourth Amendment grounds" if he can "demonstrate that he had a legitimate expectation of privacy attaching to the records obtained." *Id*; *see also United States v. Miller*, 425 U.S. at 444 ("Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant."). This language reflects the rule that where the party challenging the disclosure has voluntarily disclosed his records to a third party, he maintains no expectation of privacy in the disclosure vis-a-vis that individual, and assumes the risk of that person disclosing (or being compelled to disclose) the shared information to the authorities. *See, e.g.,*

United States v. Jacobson, 466 U.S. 109, 117 (1984) ("[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.").

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for the Respondent takes no position on the issue of oral argument.

IV.

STATEMENT OF FACTS

On July 13, 2009, the Marquee Cinema in Huntington was robbed at approximately 12:40 p.m. (A.R. 298.) The Petitioner and another theater employee, Zachary Lewis, had finished their shift and were just walking out the door when the perpetrator suddenly appeared.[9] (A.R. 539.) The theater was robbed again on October 19, 2009, at 11:19 p.m.[10] (A.R. 315.) The Petitioner was working during both robberies. (*Id.*)

The lead investigating officer was Corporal Michael McMillian of the Huntington Police Department. (A.R. 297.) On July 13 Corporal McMillian watched a video of the robbery in which the perpetrator ("Mr. Shaver" or "co-defendant") entered the movie theater and confronted the two employees working outside of the theater's main office. He is seen holding a gun against the back of one of the employees. He then instructs the Petitioner to call the manager and open the door to

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[9]The theater doors were locked. The only way to enter the theater was if someone from the inside opened the doors. (A.R. 542.)

[10]The theater had been robbed in November 2008. There is no evidence linking the Petitioner to that robbery. (A.R. 359.)

the count room.[11] (A.R. 300.) Once inside he points his gun at the manager and instructs him to fill a bag with money from the safe. (A.R. 306.) After he has stolen the money, Mr. Shaver is seen exiting down a hallway to the Tenth Street exit. (A.R. 302.)

Upon viewing the video Corporal McMillian subpoenaed the Petitioner's telephone records. (A.R. 308.) The phone records revealed that the Petitioner repeatedly called the co-defendant, Mr. Shaver, both before and after the robbery. (A.R. 311.) According to these records the Petitioner called Mr. Shaver seven times between 11:54 p.m. and 12:38 on the evening of the robbery. (A.R. 311-12.) Mr. Shaver called Petitioner five times between 9:14 and 9:28 p.m., the evening of the robbery. (A.R. 313.) The Petitioner called Mr. Clark three times between 1:56 a.m. and 3:28 a.m. the morning after the robbery. (A.R. 314.)

According to Corporal McMillian, the telephone records were subpoenaed by DEA Special Agent Tom Bevins. (A.R. 471.) At trial, he testified that he contacted Mr. Bevins because he believed that the armed robbery of an interstate business might carry a stiffer penalty in federal court.[12] (A.R. 472.) Although defense counsel thoroughly cross-examined Corporal McMillian on the propriety of the subpoena, the only person who could tell the trial court about the circumstances surrounding the decision to issue it was DEA Agent Bevins. There is no evidence that it was issued

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[11]Corporal McMillian found it suspicious that Mr. Shaver allowed the Petitioner access to a telephone during the course of the robbery. He also found it suspicious that Mr. Shaver was physically abusive to the other employee, but not to the Petitioner. (A.R. 302.)

According to theater manager Matthew Mundy, an armored car picked up the deposits every Monday morning before the theater opened. The July robbery occurred on Sunday night. (A.R. 592.) The robber made off with the receipts from Friday, Saturday and Sunday. (A.R. 593.)

[12]The victim had theaters in other states.

ultra vires.[13] (*Id.*) Neither the State nor the defense called Agent Bevins at the suppression hearing or at trial.

Each witness described the robber as having the same build, but that the second robber had darker skin. (A.R. 315-16.) None got a good look at his face.

Prior to the October robbery, the robber pretended to watch a movie. Once the picture had ended he walked towards the employee cleaning the theater and pointed a gun in his ribs. (A.R. 316.) According to a video recovered from the theater, the robber forced the employee to the concession stand, where the Petitioner was working. He then instructed the employee to call the manager in the locked room and let him. Although he hesitated, the manager finally opened the door and allowed all three individuals inside. Once inside, the robber instructed the three individuals to bind themselves with zip ties he had brought with him. Upon recovering the money from the safe, the robber exited the theater using the same exit. (A.R. 318-19.)

The next day Corporal McMillian showed Jay Maynard, the employee who had been cleaning the theater the night before, and Felicia Gross, who had been working the ticket counter, photo line-ups containing Mr. Shaver. Although Mr. Maynard was not able to identify any of the photos, Ms. Gross identified Mr. Shaver. According to her preliminary hearing testimony it took her five minutes. (A.R. 319-20, 481.) Based upon the information gathered, Corporal McMillian sought an arrest warrant charging Mr. Shaver with robbery.[14] Two days after the October robbery

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[13]The appropriate venue to determine whether Agent Bevins overstepped his authority would have been a federal court in southern West Virginia. *See* 21 U.S.C. § 876(c).

[14]Corporal McMillian did not believe he had sufficient evidence to charge the Petitioner at the time. (A.R. 321.)

the Petitioner voluntarily came to the Huntington Police Station at Corporal McMillian's request. (A.R. 320-21.)

The Petitioner told the officers that he was working the concession stand from 6:00 p.m. to approximately 10:30 p.m the day of the October robbery. (A.R. 325.) While he was cleaning his working space, Mr. Shaver appeared in the lobby pointing a gun at Jay Maynard. He instructed the Appellant to come out from behind the concession counter. He then instructed Mr. Maynard to call the manager, Matt Mundy, and ask him to come out. When the manager balked, Mr. Shaver stated, "You have got five seconds to get out here before I start shooting people." (A.R. 328.) Mr. Shaver made all three of them empty their pockets, and then instructed the manager to tie up the Petitioner. Because the manager could not open one of the safes, he told Mr. Shaver that there was nothing in it. The Petitioner said, "Dude, just listen to him. It is all right there." At which point, according to the Petitioner, Mr. Shaver "kicked the shit out of me.[15]" (A.R. 329.) After Mr. Shaver had left, Jay Maynard called 911, and the Petitioner called Pullman Security. (A.R. 331-32.) He also cut the manager's zip ties off.

After the robbery they went to a friend's home[16] for 15 or 20 minutes and then went home. He did not wake up his wife, but could not sleep. He watched television and then took a shower. (A.R. 338.) The investigating officers then showed him a photo-array containing Mr. Shaver's photo. Although he could not pick out the person who robbed the theater, he identified Mr. Shaver's photo, calling him "one of his friends." (A.R. 341.) At another point in the interrogation the

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[15]A video shown by the State of the manager's office showed Mr. Shaver kick the Petitioner.

[16]His friend's name was Stephanie. The Petitioner did not know her last name or exactly where she lived. He did know that she lived in an apartment on Fourth Street in Huntington. (A.R. 257-58.)

Petitioner called Mr. Shaver his best friend. (A.R. 343, 380.) He told the officers that he intended to join the Marines on the buddy system with Mr. Shaver. (A.R. 342.)

The investigating officers then showed the Petitioner a video[17] taken the day of the robbery at 2:43 a.m., which showed the Petitioner parking his car and walking to Mr. Shaver's home: Mr. Shaver is with him. (A.R. 351.) The Petitioner told the officers that he earned $400 every two weeks, but had recently purchased a motorcycle and a car.[18] (A.R. 363, 368.) Later, the Petitioner stated that the robberies could have been perpetrated by Mr. Shaver, and that he had picked him up that evening. (A.R. 402.)

The Petitioner admitted that he called Mr. Shaver almost every night. Sometime, he would text him while at work.[19] The evening of the October 2009 robbery, fellow employee Jay Maynard observed the Petitioner using his cell phone to text, and then placing it back in his pocket. (A.R. 252, 572.) Throughout the course of the interrogation, the Petitioner maintained his innocence. When the investigating officers spoke to Mr. Shaver, he initially stated that the Petitioner had nothing to do with the robbery. (A.R. 487.)

State witness Lieutenant John Williams of the Huntington Police Department testified that he executed a search warrant at the Petitioner's home on 2104 Marcum Terrace on October 21,

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[17]The State did not introduce the video at trial.

[18]While executing the search warrant for Petitioner's house, they found the title to a 2001 Hyunda, which was registered on September 2, 2009, and a certificate of title for a 2002 Buell motorcycle, which was sold to the Petitioner on July 21, 2009. (A.R. 465-67.) The State called the dealer who produced a bill of sale dated July 20, 2009. He testified that the Petitioner paid $2,750.00 in cash. (A.R. 501-02.)

[19]That would explain the short duration of the telephone calls as reflected in the Petitioner's phone records. On re-cross, defense counsel asked Corporal McMillian why he had not obtained copies of the Petitioner's text messages. (A.R. 494.) Thus, the Petitioner argues he has a legitimate interest in the privacy of the numbers he dials, but not the content of his text messages.

2009. (A.R. 285, 335.) One of the items recovered was a safe. The safe was transported to the Huntington Police Department by Lieutenant Joseph Combs and turned over to Corporal McMillian. (A.R. 291, 452.) Upon opening the safe, Corporal McMillian found the pink Nike bag used by Mr. Shaver in the October robbery. Mr. Shaver later testified that he had gotten the bag from the Petitioner. (A.R. 456, 464, 578, 662.) He also found a white bag containing money.[20] (A.R. 457.) Corporal McMillian found another bag of money when he tilted the top shelf of the safe back. (A.R. 460.) The investigating officers recovered $4,600.00 all total. (A.R. 467.) According to the theater manager the robber made off with something greater than $30,000.00 in the July robbery. (A.R. at 612.)

The State also introduced the contents of a telephone conversation between the Petitioner and his mother, while the Petitioner was incarcerated at the Western Regional Jail. (A.R. 514-15.) During the conversation the Petitioner asked his mother to move his car--which he states is in his name; to get rid of his computers; that the safe contains "the money"; and that she should tell the police that the money orders in the safe are hers. (A.R. 516-17.)

The State's last witness was the Petitioner's co-defendant, Justin Shaver. (A.R. 625.) Previously, Mr. Shaver had pled guilty to two counts of First Degree Robbery. Although the State removed the gun specification, there was no agreement on sentencing. (A.R. 669, 671.) He testified that he had known the Petitioner for years, and considered him his best friend. (A.R. 626.) Both of them lived at Marcum Terrace, and associated on a daily basis. (A.R. 627.) According to Mr. Shaver, he and the Petitioner came up with the idea of robbing the theater. The Petitioner would

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[20]The theater manager identified the manner in which the money was bundled together as consistent with the theater's practice. (A.R. 611.)

serve as the inside man; coming up with the best days and times to commit the robberies. (A.R. 629.) When asked why they had decided to rob the theater, all Mr. Shaver could say was that they needed the money. (*Id.*)

On July 13, Mr. Shaver rode his bicycle to the theater. He and the Petitioner had decided on that date, and the Petitioner knew Mr. Shaver was coming. (A.R. 638.) Just before the Petitioner and his co-worker left the theater, the Petitioner alerted his co-defendant by text message that he was on his way out. (A.R. 635.) Pursuant to the Petitioner's prior directions, Mr. Shaver then ordered them into the manager's office. (A.R. 636.) Once in the manager's office, Mr. Shaver ordered him to fill a bag with money. He knew the money would be there because the Petitioner had told him where to look before the robbery. (A.R. 638.) After stealing the money, Mr. Shaver left the theater by using a route that the Petitioner had told him to take. (A.R. 640.) Mr. Shaver telephoned and texted the Petitioner both before and after the robbery. (A.R. 642.) Later that evening, the Petitioner picked him up from his girlfriend's apartment and drove to the Petitioner's apartment at Marcum Terrace. They split the money 50/50. (A.R. 643.) Mr. Shaver's half came to close to $15,000.00. (A.R. 644.)

Both the Petitioner and Mr. Shaver came up with the idea of the October robbery. (A.R. 646.) They had planned to rob the theater four days before that, but Mr. Shaver did not show up. (A.R. 647.) Both he and the Petitioner needed the money to hold them over before they entered the Marines. (A.R. 649.) They discussed how they would accomplish this second robbery. Instead of showing up at the front door when the employees left, Mr. Shaver bought a ticket for a movie. By the time the movie was over the theater would be closed. (A.R. 650.) He applied Halloween makeup to make his face look darker. Because Mr. Shaver had not touched the Petitioner during the

July robbery, both of them decided that he should be rougher with him during the October robbery. (A.R. 652.) He kicked the Petitioner during the robbery once to "make it look more real." (A.R. 653.) The Petitioner told Mr. Shaver that, the last time, the employees had used their cell phones to call 911. This time he should take their phones away. (A.R. 657.)

After the robbery, Mr. Shaver drove to his apartment in Marcum Terrace. After Mr. Shaver put up the money he drove to his girlfriend's house on 4th Street in the west end of Huntington. (A.R. 664.) Later, the Petitioner picked him up, and they drove to Mr. Shaver's apartment, picked up the bag with the money, and drove to the Petitioner's house. After splitting the money, Mr. Shaver asked the Petitioner to hold onto his half. Both of them then burned the clothing Mr. Shaver was wearing during the robbery. (A.R. 666.)

Defense counsel spent over 40 pages of transcript cross-examining Mr. Shaver. (A.R. 524-64, 602-08.) After the State had rested its case, the Petitioner testified in his own defense. Upon instruction and after closing arguments, the jury retired to deliberate. It took them shortly over an hour to return guilty verdicts on all of the charges. (A.R. 1010-19.)

V.

ARGUMENT

A. THE PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE TELEPHONE RECORDS RECOVERED BY ADMINISTRATIVE SUBPOENA.

1. The Standard of Review.

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference. Syl. pt. 3, *State v. Stuart*, 192 W. Va. 428, 429, 452 S.E.2d 886, 887 (1994). Insofar as the circuit court's ruling on the suppression motion involved purely legal determinations, we review the circuit court's order *de novo*. *State v. Mullens*, 221 W. Va. at 73, 650 S.E.2d at 172.

2. The Third-Person Doctrine Is the Appropriate Test to Apply in This Case.

Although the Petitioner contends that, after *Katz, supra*, the Supreme Court "used an assumption of risk analysis to *defeat citizens' expectation of privacy claims*" in their phone and bank records: the Petitioner's claim is wholly unsupported by the law. (Petitioner's brief, 8; emphasis added.) The Third-Person Doctrine articulated in *Smith* and *Miller* was first set forth in *Katz* when the United States Supreme Court found, "What a person *knowingly exposes to the public*, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351 (citations omitted; emphasis added). *See also* Syl. pt. 3, *State v. Aldridge*, 172 W. Va. 218, 219, 304 S.E.2d 671, 672 (1983) ("A person has no reasonable expectation of privacy in what he knowingly exposes to the public). Thus, a defendant who had exposed his lacerated hand to the public before

donning gloves to hide the laceration had no legitimate expectation of privacy in the lacerated hand and could be ordered to remove the gloves by a police officer. *Aldridge*, 172 W. Va. at 221, 304 S.E.2d at 674.

In *Smith v. Maryland, supra*, the Court held that the installation of a pen register which revealed the phone numbers called by the defendant did not constitute a search under the Fourth Amendment. The Court viewed the facts of *Smith* through the prism of *Katz*. "In determining whether a particular form of government initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment, *our lodestar is Katz v. United States*. *Smith*, 442 U.S. at 739 (emphasis added).

In *Smith* a female robbery victim began to receive obscene and threatening phone calls from the perpetrator. On one occasion the defendant asked the victim to step outside of her home. When she did, she noticed the same car that had been used by the defendant in the previous robbery. Later the police noticed a man fitting the defendant's description driving the same car in the victim's neighborhood. After running a trace on the car's tag the police identified the defendant by name. The following day the defendant's telephone company, at law enforcement's request, installed a pen register at its central office to record numbers dialed from the defendant's home. Prior to asking the phone company to install the register, law enforcement did not seek a warrant or any other form of court order.

The records generated by the register revealed a telephone call made from the defendant's home telephone to the victim's home telephone 12 days after the robbery. This information, along with other evidence, was used to obtain a search warrant for the defendant's home where the officer's found a telephone book with the page containing the victim's number folded down. At

trial, the defendant sought to suppress all fruits derived from information obtained by the pen register. The trial court denied the motion, and the defendant was convicted. The state supreme court affirmed the conviction. *Smith,* 442 U.S. at 737-39.

The Supreme Court upheld the state supreme court's ruling finding the installation of the pen register did not constitute a search; therefore, it was not subject to the Fourth Amendment's limitations. *Smith*, 442 U.S. at 743-44. In *Katz*, the Court held that it was not the place of the conversation that the defendant sought to protect by entering the telephone booth: It was its contents. *Katz*, 389 U.S. at 352 ("But what he sought to exclude when he entered the booth was not the intruding eye-it was the uninvited ear."). Because law enforcement used a technological device specifically designed to expose the exact thing the defendant sought to keep private when he entered the telephone booth, and because the defendant's privacy expectations were objectively reasonable, the Court found that an illegal search had taken place. *Katz*, 389 U.S. at 351 (subjective expectation of privacy turns on whether the individual has shown that, "he seeks to preserve [something] as private.").

The same could not be said for the defendant in *Smith*. Subjectively, he had not sought to keep anything private. The Court recognized that he knew by calling the victim from his home he was sharing this information with the telephone company.[21] *Smith*, 442 U.S. at 743 (fact that call originated from defendant's house immaterial). As the Court held, "But the site of the call is immaterial for purposes of analysis of the case. Although defendant's conduct may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have

[21]Indeed, the defendant further demonstrated his utter lack of regard by repeatedly driving his car, a car the victim had seen during the course of the robbery, past the victim's house.

been calculated to preserve the privacy of the number he dialed.[22]" *Id.* He received a monthly bill with a list of his long-distance calls. *Smith*, 442 U.S. at 742. The fact that he used his home telephone with the foreknowledge that a third party would be connecting his call further demonstrated to the Court that the defendant had no legitimate subjective expectation of privacy. Objectively, the Court found that every person who uses a telephone knows that there is no direct connection between the caller and the recipient. Indeed, if this were true there would be no need for the telephone exchange. *Smith,* 442 U.S. at 742. Additionally, the telephone book the defendant possessed had a section instructing all of the telephone company's customers that the telephone company could trace calls received by the customer by request. *Id.* at 742-43.

In his dissent Justice Marshall initially refused to accept that a telephone user would have any reason to know that the phone company was using pen registers to record the phone numbers of each of its customers' outgoing calls. The Justice's argument is wide of the mark. It is not the pen register which the customer should reasonably anticipate, but the simple fact that the outgoing numbers he dials are not lost in the ether once they are dialed.

Justice Marshall's second point is far more meritorious. "Privacy is not a discreet commodity, possessed absolutely or not at all." *Smith*, 442 U.S. at 749. The mere fact that the defendant used the telephone company's resources to connect his call does not evince an intent to reveal the numbers he dialed to law enforcement. Although the content, or the very existence, of these communications has not been divulged, the numbers themselves may contain information he wished to keep private. "In my view, whether privacy expectations are legitimate within the

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[22]Of course, the defendant could have evinced a subjective expectation of privacy by calling the victim from a pay phone located some distance from his house.

meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society." *Smith*, 442 U.S. at 750. Justice Marshall's dissent skirts the issue.

The question is not whether a person using the telephone should accept the risk that the numbers he calls will be shared with law enforcement. The question is whether the Fourth Amendment to the Constitution forbids it.[23] Justice Marshall's dissent engenders a philosophical disagreement with the majority; not a legal one. The same can be said of the Petitioner's brief. The majority's decision falls well within the boundaries of *Katz*. It is those boundaries that the dissent objects to, not their application. Such objections are better left to state and federal lawmakers.[24]

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[23]Justice Marshall's argument that a citizen does not assume the risk that the phone company may divulge the records of the numbers he has dialed to law enforcement because he has no other choice but to use the phone in his or her day to day life lacks substance. When a citizen avails themselves of certain day- to-day conveniences or advanced technologies, both his or her subjective and objective expectation of privacy may be reduced as the price for the use of these conveniences. For instance, West Virginia implies that a driver using its roads consents to a secondary test of his or her blood if he or she is suspected of driving under the influence. *See* W. Va. Code § 17C-5A-1(a). That driver may refuse the test, but that is an issue of remedies not consent. Certain businesses, such as liquor distributors or restaurants, are deemed to have consented to warrantless searches by the government because they are so heavily regulated on a day-to-day basis. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978) (businessman in highly regulated industry consents to administrative searches by federal agencies); *New York v. Burger*, 482 U.S. 691 (1987) (closely regulated industries have no reasonable expectation of privacy). To satisfy *Katz* a citizen may not merely state that the information sought by the State may reveal intimate details of his or her life. He must also prove that he has both a subjective and reasonably objective expectation of privacy in these intimate details. The location or content of this information does not, standing alone, satisfy the *Katz* test. An unfaithful spouse may sign their name to a hotel register. He cannot later argue that he had a reasonable expectation of privacy in that information, although it is intimate. Justice Stewart seems to ignore this fact in his dissent in *Smith*. *Smith*, 442 U.S. at 748. (Stewart, J., dissent).

[24]In fact, the United States Congress has demonstrated a great degree of flexibility on this issue. Under 18 U.S.C. § 3121(a) no person may use or install a pen register or a trap device without first obtaining a court order. 18 U.S.C. § 3122(b)(2). The bar is far below that necessary to obtain

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The Petitioner cites this Court to the Electronic Communications Privacy Act of 1986 ("ECPA")(P.L. 99-508, 100 Stat. 1848). The ECPA did add new provisions concerning the use of pen registers. *See* 18 U.S.C. § 3122. It amended Title III of the Omnibus Crime Control and Safe Street Act of 1986 ("Title III"). Under the ECPA an order for a pen register may be issued only after a showing that, "the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." *See* 18 U.S.C. § 3122(b)(2). Notwithstanding the Petitioner's claim that this statute was enacted "to contain the effect" of the Supreme Court's decision in *Smith*, the Congress intentionally authorized the installation of pen registers on a showing far less demanding than probable cause.

3. This Court Has Never Held, Nor Should It, That *Smith v. Maryland*, 442 U.S. 735 (1979), Has Been Superceded By the Search and Seizure Provisions of Article III, Section 6 of the West Virginia Constitution.

The United States Supreme Court has emphasized, "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*,

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[24](...continued)
a search warrant. To obtain such an order the court must find, upon certification by a government attorney, "that the information likely to be obtained by [installing and using the device] is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1). Violation of this statute calls for possible imprisonment or fine. The statute does not call for the exclusion of evidence recovered as per the exclusionary rule. 18 U.S.C. § 3121(c). *See also United States v. Thompson*, 936 F.2d 1249 (11th Cir. 1991).

After the September 11, terrorist attacks on the World Trade Center and the Pentagon, Congress enacted legislation granting the Attorney General the power to install pen registers without prior court approval in emergency situations relating to international terrorism and foreign intelligence. *See* 50 U.S.C. § 1842(a)(1). The orders are valid for 60 days. 50 U.S.C. § 3123(c)(1).

Neither statute recognizes a constitutionally mandated minimum standard. The standards are set by the legislation.

309 U.S. 551, 557 (1940). In most cases, this Court has ruled that the protections afforded West Virginia citizens under the search and seizure provisions of our State Constitution are co-extensive with those provided for in the Fourth and Fourteenth Amendments to the United States Constitution. *See Rogers v. Albert,* 208 W. Va. 473, 479, 541 S.E.2d 563, 569 (2000) (*per curiam*) ("This Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law construing the Fourth Amendment."); *State v. Andrews*, 91 W. Va. 720, 723, 114 S.E. 257, 260 (1922) (Article III, § 6 of the West Virginia Constitution is "substantially the same" as the Fourth Amendment to the Federal Constitution); *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973) ("This court has traditionally construed Article III, § 6 in harmony with the fourth amendment."); *State v. Bruner*, 143 W. Va. 755, 766, 105 S.E.2d 140, 146 (1958) ("The provisions of [Article III, § 6] of the West Virginia Constitution being substantially the same as the pertinent provisions of the United States Constitution, 'should be given a construction in harmony with the construction of the federal provisions by the Supreme Court of the United States.'") quoting *Andrews*, 91 W. Va. at 723, 114 S.E. at 260.

In Michael J. Gorman's law review article *Survey: State Search and Seizure Analogs*, 77 Miss. L. J. 417, 462 (2007), he conducted a thorough review of the search and seizure provisions of every state constitution, and their scope as compared to the Fourth Amendment. Regarding West Virginia he found, "Interpretation: 'This Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law.' Indeed, the West Virginia Supreme Court

does not seem to have broken that custom, as I was unable to locate reported cases where West Virginia diverged[,]"[25] *quoting Rogers v.* Albert, 208 W. Va. at 479, 541 S.E.2d at 569.

It is true that this Court has never held that it walks in lockstep with the federal courts on search and seizure issues. *See* Syl. pt. 4, *State v. Mullens*, 221 W. Va. at 72, 650 S.E.2d at 171 (affording greater protection under article III, § 6 of the West Virginia Constitution to homeowners than the Fourth Amendment by prohibiting State use of wired informants inside a defendant's home unless the State has first obtained a warrant); *State v. Perry*, 174 W. Va. 212, 324 S.E.2d. 354 (1984) (because the requirements of valid inventory search were not clearly set forth by the Supreme Court in *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court settled matter under State Constitution).

In *Mullens* this Court diverged from Federal Fourth Amendment precedent to protect the sanctity of conduct occurring inside a defendant's home. The Court went on to find that it had a long history of protecting its citizens from unfettered State intrusion into the privacy of a citizen's home, and that the Supreme Court's prior decisions on this issue did not reflect the same approach to the issue. *See Mullens*, 221 W. Va. at 90, 650 S.E.2d at 189. This Court went to great lengths to limit its holding to conduct occurring inside a West Virginia citizen's home. In fact, the Court explicitly said as much. *Id.*, 221 W. Va. at 89 n.45, 650 S.E.2d at 188 n.45 ("Our decision has no impact on the authority of the police to place a body wire on an informant to record communications with a suspect *outside a suspect's home.*") (emphasis added). This Court has never held that article III, § 6 applies to telephone records held by a third party outside of the defendant's home. Nor has this Court

[25]The article was written before this Court's decision in *Mullens*.

ever held that article III, § 6 abandoned the third-party analysis used by the Supreme Court in *Smith*, *supra*. Certainly, that is not what this Court held in *Mullens*.

In *Mullens* law enforcement surreptitiously recorded the content of the defendant's conversations inside his home. This Court was unwilling to approve the State's unrestricted use of technology to intrude into what once was not only private, but sacroscant, conversations occurring inside one's home. *Mullens*, 221 W. Va. at 90, 650 S.E.2d at 189. In this case the opposite occurred. By the use of technology, the Petitioner was able to conceal what would have been, without this technology, conducted in the open.[26] If the Fourth Amendment is designed to protect citizens from unreasonable intrusions made more possible by technological advances, there must be a counterbalance. Potential criminals should not be able to use these same technological advances to conceal criminal activity which, previously would have been conducted in the open. *See* Orrin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 580-81 (2009) (discussing the importance of Third-Party Doctrine in protecting "technological neutrality."); Orrin S. Kerr, *Defending the Third-Party Doctrine: A Response to Epstein and Murphy,* 24 Berkeley Tech. L. J. 1229, 1233-34 (2009) ("What matters is how much protection the Fourth Amendment provides given third-parties that criminals actually use, not whether criminals happen to use third-parties because they have calculated that it will help them avoid detection, or because it is convenient, or for some other reason.").

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[26]Even if this Court were to find that the telephone calls were made from inside the Petitioner's house, the analysis is no different. In *Mullens,* the defendant deliberately chose his home to communicate with the wired confidential informant as to keep the fact and content of the occurrence confined to the defendant's home. In this case, the Petitioner's actions were designed to travel outside of his home. Thus, if he had communicated with his co-defendant by opening a window and yelling to his co-defendant who was standing on a public sidewalk, no court could say that he enjoyed a reasonable expectation of privacy in that communication.

Presently California,[27] Colorado,[28] Florida,[29] Hawaii,[30] Idaho,[31] Illinois,[32] New Jersey,[33] Pennsylvania,[34] and Washington[35] do not follow the Federal Third-Party Doctrine.

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[27]Cal. Const. art I, § 13. A 1982 constitutional amendment eliminated suppression of evidence as a remedy of state constitutional violations. *See* Cal. Const. art I, § 28(d). California also recognizes a right to privacy in garbage left for collection. *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971) (*en banc*).

[28]Colo. Const. art II, § 7. *See People v. Sporleder*, 666 P.2d 135 (Sup. Ct. Colo. 1983) (*en banc*) (defendant has reasonable expectation of privacy in telephone numbers dialed from her house).

[29]Florida's State Constitution contains two provisions on its citizen's right to privacy. Fla. Const. art I, § 12; Fla. Const. art. I, § 23 ("Every person has the right to be left alone and free from governmental intrusion into the person's private life except as otherwise provided herein."). Fla. Const. art I, § 12, amended in 1982 to correlate it exactly with the Fourth Amendment. The right to privacy in telephone records is based on Fla. Const. art. I, § 23. West Virginia's Constitution does not have a similar provision. *See Shaktman v. State*, 553 So. 2d 148 (Fla. 1989) (although state supreme court recognized right to privacy in phone records under art. I, § 12, state demonstrated a compelling state interest in use of pen register).

[30]Haw. Const. art I, § 7. *See also* Haw. Const. art. I, § 6 (right to privacy provision). *See State v. Rothman*, 779 P.2d 1 (Haw. 1989) (reasonable expectation of privacy in telephone numbers). This same court, without explanation, found that a defendant enjoys no reasonable expectation in his bank records. *State v. Klattenhoff*, 801 P.2d 548, 552 (Haw. 1985).

[31]Idaho Const. art I, § 17. *See State v. Thompson*, 760 P.2d 1162, 1167 (Idaho 1988) (defendant has reasonable expectation of privacy in numbers dialed from home telephone under state constitution).

[32]Ill. Const. 1970, art. 1, § 6. *People v. DeLaire*, 610 N.E.2d 1277 (Ill. App. Ct. 1993) (defendant has legitimate expectation of privacy in telephone records).

[33]N.J. Const. art. I, P 7. *See Sate v. Hunt*, 450 A.2d 952 (N.J. 1982) (New Jersey's long-established policy of protecting telephonic records dating back to 1930 meant citizen has reasonable expectation of privacy in phone numbers dialed under State constitution).

[34]Pa. Const. art I, § 8. *See Commonwealth v. Beauford*, 475 A.2d 783, 789-90 (Pa. 1984) (*Smith* rejected based upon tradition of preserving right to privacy in numbers dialed).

[35]Wash. Const. art I, § 7. *State v. Gunwall*, 720 P.2d 808, 816 (Wash. 1986). This precedent is of limited value. The State of Washington interprets its search and seizure provisions differently (continued...)

Alabama,[36] Georgia,[37] Kansas,[38] Maryland,[39] North Carolina,[40] North Dakota,[41] Oklahoma,[42] and South Carolina[43] follow the Supreme Court's holdings in *Smith* and *Miller*. Other state courts

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[35](...continued)
than other state and federal courts. Unlike the Fourth Amendment, which Washington courts have interpreted as a grant of power; the state search and seizure provisions operate as a limitation on the government's power to interfere on a citizen's privacy. *Gunwall*, 720 P.2d at 815. The Washington Supreme Court has established a series of neutral criterion it uses to decide whether the state constitution provides greater protection than the federal constitution: (1) the textual language; (2) differences in the text; (3) constitutional history; (4) preexisting state law; (5) structural differences; and, matters of particular state or local concern. Washington Constitution has not adopted the *Katz* test; instead, the court determines whether the state has unreasonably intruded into a citizen's private affairs. *Gunwall*, 720 P.2d at 814. Applying these criterion to a citizen's right to privacy in the numbers he dials, the Washington Supreme Court found that when police obtained defendant's long-distance telephone records and placed a pen register on defendant's telephone they unreasonably intruded into her private affairs. *Gunwall,* 720 P.2d at 816.

[36]Ala. Const. art. I, § 5. *See Henderson v. State*, 583 So. 2d 276 (Ala. Crim. App. 1990) (telephone records gathered by subpoena were not defendant's property, and he has no legitimate expectation of privacy in their content).

[37]Ga. Const. art 1, sec. 1, par. XIII. *Kesler v. State*, 291 S.E.2d 497, 504 (Ga. 1982) (no reasonable expectation of privacy in telephone records).

[38]Kan. Const. Bill of Rights § 15. *State v. Schultz*, 850 P.2d 818, 823-24 (Kan. 1993) (no reasonable expectation of privacy in bank or telephone records obtained by law enforcement by subpoena pursuant to *Miller* and *Smith*).

[39]Md. Const. Declaration of Rights art. 26. *Smith v. State*, 389 A.2d 858 (Md. 1978), *aff'd* 442 U.S. 735. Holding affirmed in *Smith*.

[40]N.C. Const. art. I, § 20. *State v. Melvin*, 357 S.E.2d 379 (N.C. Ct. App. 1987) (no reasonable expectation of privacy in defendant's bank records pursuant to *Miller*).

[41]N.D. Const. art. I, § 8. *State v. Lind*, 322 N.W.2d 826, 836-37 (N.D. 1982) (defendant has no reasonable expectation of privacy in his telephone records).

[42]Okla. Const. art. II, § 30. *McAlpine v. State*, 634 P.2d 747, 749 (Okla. Crim. App. 1981) (no reasonable expectation of privacy in bank records under *Katz* and *Miller*; state may obtain without search warrant or showing of probable cause).

[43]S.C. Const, art. I, § 10. *Bell Tel. & Tel. v. Hamm,* 409 S.E.2d 775, 779-80 (S.C. 1991) (no (continued...)

have not addressed this issue. But, in other circumstances they have held that their approach to the search and seizure provisions of their constitution mirror the approach adopted by the federal courts. *See People v. Cabales*, 851 N.E.2d 26 (Ill. 2006) (Illinois follows "limited lockstep" approach to scope of state constitutional protections compared to federal constitutional protections and will only diverge from Supreme Court Fourth Amendment jurisprudence if a specific state criterion such as unique state history or experience justifies departure from federal precedent); *State v. Cramer*, 851 P.2d 147, 150 (Ariz. Ct. App. 1992) (no reasonable expectation of privacy in heat emitted from home), *citing United States v. Knotts*, 460 U.S. 276 (1983) (beeper placed in vehicle to track movements does not constitute search); *Morgan v. Brown*, 592 A.2d 925, 929 (Conn. 1991) (without referring to state constitution found no reasonable expectation in bank records); *Rickards v. State*, 77 A.2d 199, 204 (Del. 1950) (state constitutional protections against unreasonable search and seizure and Fourth Amendment "substantively identical."). Stephanie Henderson, *Learning From All Fifty States: How to Apply the Fourth Amendment and its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. L. Rev. 373, 395 (2006).

The Washington Supreme Court's approach to this issue is instructive. By setting forth neutral criteria the court required principled reasons for greater privacy under state constitutions thus preventing "constitution shopping." It is not enough for a state court to conclusively hold that its constitution provides greater protection than the federal constitution. As the *Gunwall* Court explained:

> As one commentator observes, "[f]inding instances of state courts' use of state constitutions independently of the Federal Constitution is easier than articulating a

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[43](...continued)
expectation of privacy in telephone numbers dialed pursuant to *Smith*).

> principled theory of when courts should in fact use the power to chart their own course." Many of the courts now resorting to state constitutions rather than to analogous provisions of the United States Constitution simply announce that their decision is based on the state constitution but do not further explain it. The difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.

Gunwall, 720 P.2d at 811-12.

A judicial body that rejects federal precedent under the fig leaf of an identical provision of the state's constitution is merely sitting as a super-legislature. Such an approach does great violence to the Separation of Powers Doctrine. A principled explanation as to why a state constitutional provision provides additional protection, not based solely upon a philosophical disagreement with the Supreme Court's holding, is necessary to ensure predictability, uniformity, and fairness.

In his brief to this Court, the Petitioner does not mention a single reason why article III, § 6 of the State Constitution affords greater protection than the Fourth and Fourteenth Amendments to the Constitution. Counsel simply disagrees with the Supreme Court's holdings in *Smith* and *Miller*. Applying the *Gunwall* criteria to the facts of this case strongly supports the Respondent's position.

The text of both the article III, § 6 and the Fourth Amendment to the United States Constitution are virtually identical. Clearly, the drafters of the West Virginia Constitution were aware of that when they adopted article III, § 6's language. There are no significant differences between the rights guaranteed a criminal suspect in the West Virginia Constitution and those guaranteed by the Fourteenth Amendment to the United States Constitution. Thus, there is no unambiguous evidence that the framers of the West Virginia Constitution intended to provide criminal defendants in West Virginia greater constitutional protection than that provided in federal court. Unlike *Mullens*, this Court cannot cite to a longstanding State tradition affording greater

privacy to the identity of the telephone numbers dialed by a defendant. Nor is there anything in the present law which would evince a legislative intent to afford such privacy. Whether a criminal defendant has a reasonable expectation of privacy in his cell phone records is not a unique matter of local concern. There is no evidence that this issue has any greater impact in West Virginia than in any other state.

Simply put, there is no cogent reason why this Court should reject the Supreme Court's holding in *Smith* on State constitutional grounds. This Court has adopted the two-part *Katz* test. It has also adopted the Supreme Court's holdings in several other seminal Fourth Amendment cases, such as *Terry v. Ohio*, 392 U.S. 1 (1968);[44] *Mincey v. Arizona*, 437 U.S. 385 (1978);[45] *Rakas v. Illinois*, 439 U.S. 128 (1978);[46] and *Horton v. California*, 496 U.S. 128 (1990).[47]

B. AS DEA AGENT BEVINS LAWFULLY OBTAINED THE PETITIONER'S TELEPHONE RECORDS, THEY WERE ADMISSIBLE IN HIS TRIAL.

The Petitioner properly points out the State's shifting explanations offered for the issuance of the subpoena. These differing explanations, without more, do not prove perjury. This could simply be an instance of one hand not knowing what the other was doing. There is no reason to doubt the prosecutor's statement that the city police believed that drugs played a role in the robberies. (A.R. 93-94.) In fact, the Huntington Police Department and the DEA have a joint task force. (A.R. at 93.) Huntington Police Officer J.T. Combs was a member of that task force, and was also investigating the robberies. (*Id.*) Ordinarily, the task force shares office space. DEA agent Bevins could have

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[44]*See* Syl. pt. 1, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

[45]*See State v. Flippo*, 212 W. Va. 560, 575 S.E.2d 170 (2002).

[46]*State v. Lopez*, 197 W. Va. 556, 476 S.E.2d 227 (1996).

[47]*State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

obtained these records independently. Later, he could have shown them to either Corporal McMillian or Officer Combs. They were under no constitutional obligation to look the other way.

The subpoena is proper on its face. It is signed by DEA Agent in Charge Dennis M. Bolum on June 28, 2010, and states:

> Pursuant to an investigation of violations of 21 U.S.C. Section 801, *et. seq.*, please provide the following for the dates between 7/12/2009 and 7/13/2009; All customers/subscribers for the date range give, provide name and street and/or mailing address, Local and long distance telephone connection records, including incoming and outgoing calls for:

[the Petitioner's cell-phone number].

The text of the subpoena also asks Sprint not to disclose the existence of the subpoena for an indefinite time period. *See, e.g., SEC v. Jerry T. O'Brian, Inc.*, 467 U.S. 735, 742-47 (1984) (SEC need not inform target of investigation when issues third-party subpoena). (A.R. 81.)

The subpoena is entitled, "U.S. Department of Justice/Drug Enforcement Administration Subpoena." It is signed by Dennis M. Bollum, Resident Agent in Charge. (*Id.*) The caption contains a formal case number and subpoena number. It was issued to the Sprint/Nextel Corporation, Legal Compliance Division. (*Id.*)

The federal statute authorizing the use of administrative subpoenas, 21 U.S.C. § 876(a), provides, in part:

(a) Authorization of use by the Attorney General.

> In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witness, compel the attendance and testimony of witness, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in the State or in any territory or other place subject to the jurisdiction of the United

> States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpoena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

The Attorney General's authority to issue these subpoenas is broad. *See United States v. Mountain States Tel. & Tel. Co., Inc.*, 516 F. Supp. 225 (D.C. Wyo. 1981) (subpoena power under 28 U.S.C. § 876(a) is not restricted to enforcing regulatory provisions of Controlled Substances Act, but may also be used by the DEA during criminal investigations); *United States v. Harrington*, 761 F.2d 1482 (11th Cir. 1985) (DEA may issue administrative subpoena during investigation as long as subpoena not directed as suspect). The target of the investigation does not have automatic standing to challenge an administrative subpoena served on a third party. *United States v. Plunk*, 153 F.3d 1011, 1020 (9th Cir. 1998) *amended by* 161 F.3d 1195 (9th Cir. 1998), *abrogated on other grounds by United States v. Hankey*, 203 F.3d 1160, 1169 n.7 (9th Cir. 2000). When DEA administrative subpoenas are issued to third parties pursuant to 21 U.S.C. § 876(a), a defendant may demonstrate standing when he can show "a legitimate expectation of privacy attaching to the records obtained." *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993). *See also United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010) (defendant had no reasonable expectation of privacy in subscriber information--name, email address, telephone number, and home address--obtained by administrative subpoena). Pursuant to *Smith* the Petitioner has no legitimate expectation of privacy in the telephone company's records. Thus, he lacks standing to attack the subpoena.

Petitioner's claim seems to focus upon his subjective belief that the government "may not obtain by subpoena or informal request that evidence which it is unable to obtain, or inconveniently obtain, by search warrant." Petitioner's allegation that the government was obliged to gather this information by search warrant, or not at all, is unsupported by the law.

Although the Petitioner contends that these records were obtained by DEA Agent Bevins by use of fraudulent means, he has no evidence to support his allegation. The face of the subpoena strongly suggests that the DEA was conducting an investigation. It had been assigned a case number, and was assigned a subpoena number. The DEA's administrative subpoena power is broad. It has the statutory authority to subpoena records which will assist them in any investigation "related to their functions." *See* 21 U.S.C. § 876(a). The statute does not require a finding of probable cause before the subpoena is issued. *See, e.g., Oklahoma Press Club v. Walling*, 327 U.S. 186, 216 (1946) (Administrator's authority to subpoena records under the fair labor standards act is part of investigative function in searching out violations thus that inquiry must not be limited by forecasts of probable result of investigation). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (FTC has power of inquisition derived from judicial function similar to grand jury which may investigate to determine if law has been violated or even if wants to assure it is not). This is because the target of the subpoena may chose not to comply. If this occurs, the government must go to a federal court within the investigation's jurisdiction or where the target is located for an order. *See United States v. Powell*, 379 U.S. 48 (1964), failure to abide by this order may be punished by the court as contempt. *See* 21 U.S.C. § 276(c). *See, e.g.,* 18 U.S.C. § 2703(c) (a provider of electronic communication service or remote computing device shall disclose to a government entity the (A) name; (B) address; (C) local and long distance connection record, or records of session time or duration; (D) length of service and types of service utilized; (E) telephone or instrument number or other subscriber number or identity; and, (F) means and source of payment for such service of a subscriber when the government entity an administrative subpoena authorized by federal or state statute).

There is no evidence to suggest that the administrative subpoena was improperly issued. Had the Petitioner's cell carrier believed otherwise, it could have ignored the subpoena requiring the DEA to institute an enforcement proceeding in the United States District Court for the Southern District of West Virginia. Sprint voluntarily chose to comply.

The Petitioner appears to argue that information gathered by anything less than a search warrant issued by a state judicial body is not admissible in a state criminal proceeding. He also claims that the State's explanations for obtaining the warrant shifted. Had the State been required to obtain a warrant upon a showing of probable cause this information may have been relevant. *See Franks v. Delaware*, 438 U.S. 154 (1978). Of course, the Petitioner would have to prove that the investigating officers committed perjury or demonstrated a "reckless disregard" for the truth. *Franks,* 438 U.S. at 155-56. The Petitioner's evidence does not come anywhere near this threshold.

The Petitioner has not cited a single case which states that the DEA is prohibited from sharing information it receives by lawful means with state law enforcement. Indeed, West Virginia Code § 62-1D-9(f) states:

> Any law enforcement officer of the United States, who has lawfully received any information concerning a wire, oral or electronic communication or evidence lawfully obtained therefrom, may disclose the contents of that communication or the derivative evidence while giving testimony under oath or affirmation in any criminal proceeding held under the authority of this state." Indeed, such a policy should be encouraged. If the DEA chose not to proceed to investigation with the information it had gathered, it was well within its rights to provide that information to the state.

In this case, apart from the Petitioner's speculation, there is no evidence that DEA Agent Bevins lawfully obtained the Petitioner's telephone records pursuant to 21 U.S.C. § 276(a). Thus, they were admissible at the Petitioner's trial.[48]

It is important to note that because the information gathered did not include the content of the conversations, it cannot be argued that the State "intercepted" the Petitioner's communications. *See* W. Va. § 62-1D-2(e) ("'Intercept' means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device."); W. Va. Code § 62-1D-3(a)(1) ("unlawful to intercept, attempt to intercept or procure any other person to intercept or attempt to intercept, any wire, oral or electronic communication[.]").

The Petitioner's claim that this information was obtained illegally lacks and merit or proof, and should be disregarded by this Court.

[48]The Petitioner waived any objections to the State's failure to produce Agent Bevins by not objecting to the introduction of the telephone records by Corporal McMillian.

VI.

CONCLUSION

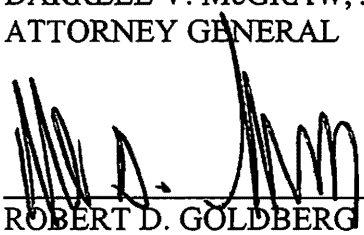
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Brief of Respondent State of West Virginia upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 17th day of November, addressed as follows:

To: Jason Parmer, Esq.
Post Office Box 2827
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ROBERT D. GOLDBERG