No. 16-1141

In the Supreme Court of the United States

ENNIS C. PAYNE, II,

Petitioner,

v.

THE STATE OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under long-standing precedent of this Court consistently applied by lower state and federal courts, a person can lose all Fourth Amendment protection over a piece of property he or she leaves at another person's house. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." But this Court has held that a person has no Fourth Amendment interest in abandonded property. See, *e.g.*, *Abel v. United States*, 362 U.S. 217, 241 (1960). Moreover, the "touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy,'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)), and this Court has noted that an overnight guest can reasonably expect that his property may be disturbed by his host or his host's invitees, *Minnesota v. Olson*, 495 U.S. 91, 99 (1990).

The question presented is whether the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") erred when it determined that Petitioner Ennis C. Payne II ("Petitioner") lacked a reasonable expectation of privacy in a jacket that he abandoned in the first floor living area of his friend's home after a brief early-morning visit with no indication whether or if he would return to retrieve it.

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OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia, affirming the judgment of the Circuit Court of Harrison County, will be formally published, --- S.E.2d ---, and has been informally reported at 2016 WL 6135396. The opinion is reproduced in Petitioner's Appendix at 1a.

The Circuit Court of Harrison County's sentencing and commitment order memoralizing Petitioner's jury trial and conviction is informally reported at 2015 WL 10960967. It has not been reproduced in Petitioner's Appendix.

The Circuit Court of Harrison County's opinion and order addressing the parties' pretrial motions, including Petitioner's motion to suppress evidence obtained from the searches implicated in this petition, is not informally reported. It has been reproduced in Petitioner's Appendix at 43a.

INTRODUCTION

The Petition turns primarily on the existence of an alleged split in authority, but the decision below does not implicate that split. Petitioner claims that there are splits in authority concerning whether the police have apparent authority to conduct a warrantless search of a third party's property when a homeowner consents to a search of the premises. But the Supreme Court of Appeals never reached this issue. It resolved the case solely on the threshold ground that Petitioner had abandoned his property and thus lacked any cognizable privacy interest in the property that was searched.

The property at interest in this case is a jacket that Petitioner left in the foyer of a friend's home after a brief, early morning visit, without any indication whether or when he would return to retrieve it. Two days later, the police arrived at the home and, with the consent of the homeowner, searched the premises, including the contents of the abandoned jacket. The police recovered ammunition from the jacket that the State of West Virginia later used, in conjunction with other dispositive testimonial, video, and circumstantial evidence, to convict Petitioner of first-degree murder. On appeal, the Supreme Court of Appeals of West Virginia rejected Petitioner's argument that the evidence obtained from the jacket should have been suppressed under the Fourth Amendment.

Contrary to Petitioner's assertion, the decision of the Supreme Court of Appeals turned not on whether the homeowner's consent gave the police apparent authority to conduct a warrantless search, but rather whether Petitioner had any privacy interest in the jacket at all. In its decision, the Supreme Court of Appeals correctly applied the fact-sensitive inquiry mandated by this Court's well-settled Fourth Amendment jurisprudence and held, in a decision binding only in West Virginia, that Petitioner had no reasonable expectation of privacy in the contents of a jacket that he abandoned in plain sight in the "common area" of a friend's home without any indication he would ever return. Pet. App. 29a. For that reason alone, the court concluded, Petitioner could not challenge the search of his jacket.

Because the Supreme Court of Appeals did not pass upon the issue of the police' apparent authority to conduct a warrantless search, this Court should deny certiorari. As this Court has often said, it is a "court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam).

To the extent Petitioner argues that he did in fact have a reasonable expectation of privacy in his abandoned jacket, certiorari is not warranted. On that question, Petitioner is seeking splitless, fact-bound, error correction, which is not an appropriate basis for certiorari. Moreover, the Supreme Court of Appeals' reasoning as to Petitioner's expectation of privacy was indisputably correct. This Court's case law, as well as the most closely analogous cases decided by the federal courts of appeals and state courts of last resort, confirm the Supreme Court of Appeals conclusion.

Even if this case implicated Petitioner's asserted splits, this Court should still deny certiorari. Petitioner's asserted splits do not present an issue of great importance. They concern a scenario that lower courts have been successfully addressing, based on the facts of the particular case, for decades. Indeed, this Court denied certiorari to resolve them only last Term in a case from the Supreme Court of Iowa that exhaustively catalogued the relevant authorities.

This case is also a poor vehicle to resolve the purported conflicts Petitioner identifies, because any error asserted by Petitioner is harmless. Apart from

the ammunition recovered from Petitioner's jacket, the State relied on a bevy of other evidence at trial, including inculpatory statements made to a relative, security camera footage that showed Petitioner was near the victim's apartment shortly before and shortly after the murder, and other circumstantial evidence that placed Petitioner at the scene at the time of the murder.

STATEMENT

This case involves the application of this Court's well-established reasonable expectation of privacy test under the Fourth Amendment to evidence obtained from a jacket that Petitioner abandoned in a common living area of a friend's home after a short-term visit, which the State later used in conjunction with other dispositive evidence to convict Petitioner of first-degree murder.

1. In the early morning hours of January 13, 2010, someone entered the Clarksburg, West Virginia apartment of Jayar Poindexter ("Poindexter"), a physical altercation ensued, and Poindexter was shot and killed. Evidence collected during the investigation of the murder showed that Petitioner was responsible for Poindexter's death. The following facts were developed during pretrial proceedings or at Petitioner's jury trial.

Late in the evening of January 12, 2010, Petitioner met up with four individuals at a bar in Clarksburg. Pet. App. 9a. Security camera footage from near the bar shows that Petitioner was wearing dark Timberland-type boots and a baseball hat

emblazoned with the Pittsburgh Pirates "P" logo. *Ibid*. Several hours after arriving at the bar—around 3:00 A.M. on the morning of January 13—Petitioner and his associates left the bar in two vehicles and traveled to the nearby apartment complex, Quarry Apartments, where Poindexter lived. *Ibid*. Security camera video indicates that Petitioner was wearing the Pittsburgh Pirates "P" hat when the group arrived at the complex. *Id.* at 11a.

Shortly after arrival, Petitioner and one of his companions, Darnell Bouie ("Bouie"), exited their vehicles, while the others stayed behind in the parking lot. *Id.* at 9a. Payne and Bouie returned after "some time," walking quickly. *Id.* at 9a–10a. Upon their return, the group immediately left Quarry Apartments. See *id.* at 11a. Security camera footage from a nearby Go Mart, which the quintet visited immediately thereafter, indicates that Petitioner was still wearing the Timberland-style boots, along with a "jacket with white stripes," but that he was no longer wearing the Pittsburgh Pirates "P" hat. *Ibid.*

Poindexter's girlfriend, Jennifer Hall ("Hall"), was asleep in Poindexter's apartment at the time of the attack. *Id.* at 10a. She testified at trial that she awoke to see Poindexter already engaged in a struggle with a figure near the apartment's bedroom window. *Ibid*. She proceeded to hide and then made a call to 911, which was recorded as beginning at 3:30 A.M. *Ibid.* Security camera footage places Petitioner at the nearby Go Mart, without the Pittsburgh Pirates "P" hat, at 3:35 A.M.—mere minutes after

Hall called 911. *Id.* at 11a. During the ensuing investigation, a Pittsburgh Pirates "P" hat was discovered on the grounds of the Quarry Apartments. *Ibid.* Petitioner later admitted that the hat which had been recovered belonged to him. *Id.* at 14a. Police also discovered—and made impressions of—bootprints in the snow outside the window to Poindexter's apartment. *Id.* at 10a. At trial, an expert witness for the State opined that the bootprint impressions were consistent with a pair of size 10.5 Timberland boots recovered during a search of Petitioner's residence. *Id.* at 13a.

At trial, this evidence suggesting that Petitioner shot Poindexter was bolstered by testimony from one of Petitioner's relatives, who said under oath that Petitioner admitted, a few days after Poindexter's death, that he had "shot [a] victim in a 'robbery gone bad' . . . and that someone [had] 'ended up dead.'" *Id.* at 10a n.9.

2. After the stop at Go Mart, Petitioner was dropped off at the home of Timothy Starks ("Starks"). *Id.* at 11a. Starks lives at the residence with his wife and their children. *Ibid.* Petitioner had been "crashing" in the first floor living room area of Starks' home "off and on" for a "short period of time." *Ibid.* When Petitioner arrived—at approximately 4:00 A.M.—he was carrying two firearms. *Id.* at 11a–12a. When Starks awoke later that morning, Petitioner had already departed, leaving no indication when or if he would return. *Id.* at 12a. He had, however, left behind a "Carhartt-type" jacket

"slung over a chair in the foyer" of Starks' first floor living area. *Ibid.*

On January 15, two days after Poindexter was killed, a Clarksburg police officer visited Starks looking for information about Petitioner. *Ibid.* During a brief conversation with the police, Starks explained that he did not have any information about Petitioner's whereabouts, and asked if he should keep or dispose of the jacket that Petitioner had left at his home. *Ibid.* Starks was told to "hang onto" the jacket. *Ibid.* Later that day, a detective came to Starks' residence and Starks consented to a search of several portions of his home, including the first floor living area. *Ibid.* While police were performing the search, Starks reiterated that the jacket in the foyer belonged to Petitioner. *Ibid.* Inside the jacket's pocket, police discovered ammunition for a .25 caliber firearm and court documents bearing Petitioner's name. *Id.* at 12a–13a.

Over a week later, on January 24, a different police detective obtained a search warrant for Petitioner's residence. *Id.* at 13a. When asked, during a suppression hearing, about the justification for the the search of Petitioner's residence, the detective explained that the evidence recovered from Quarry Apartments, along with the various surveillance camera footage from the night of the attack, provided probable cause. See *id.* at 14a–15a. As noted above, a pair of size 10.5 black Timberland boots were recovered during that search.

3. Prior to trial, Petitioner moved to suppress various pieces of evidence, including the jacket recovered during the consent search of Starks' home. *Id.* at 69a. Petitioner principally argued that he had a reasonable expectation of privacy in the jacket left at Petitioner's home and that Starks' consent to search the premises could not lawfully extend to Petitioner's jacket. *Ibid.*

In resolving this claim, the circuit court engaged in a two-part analysis. First, the circuit court noted that, under the Fourth Amendment to the U.S. Constitution and its counterpart in the West Virginia Constitution, "[a] casual visitor who is merely present in another person's home does not have a legitimate expectation of privacy to contest an illegal entry by police in that home." Pet. App. 73a. That said, the court reasoned that someone who is "more than a casual visitor to an apartment or dwelling . . . has the right under the Fourth Amendment . . . to challenge the search and seizure" of an item belonging to that person. *Ibid.* Based on Petitioner's occasional visits to the Starks home, the circuit court concluded that Petitioner "enjoyed a legitimate expectation of privacy in the Starks' residence." *Id.* at 74a.

The court noted, however, that this finding "does not end the inquiry." *Ibid.* Rather, the court explained that it needed to decide next whether, despite Petitioner's putative expectation of privacy, the homeowner could nevertheless consent to a warrantless search of Petitioner's jacket based on his common control over the entire residence. See *ibid.*

The court noted that, under this Court's case law, while the Fourth Amendment ordinarily requires a warrant supported by probable cause to conduct a search, "[t]he State may justify a warrantless search by proof that consent was obtained from another party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Ibid.* (quoting *United States v. Matlock*, 415 U.S. 164, 171 (1974)). The circuit court concluded that Starks' authority over the first floor living area of his home was sufficient to enable him to validly consent to a police search of Petitioner's jacket. *Id.* at 74a–75a.

4. On appeal, the Supreme Court of Appeals engaged in "plenary" review of the circuit court's denial of Petitioner's motion to suppress. *Id.* at 23a. While the Supreme Court of Appeals affirmed the denial of Petitioner's motion, it reached that result by a different route than the circuit court. Unlike the circuit court, the Supreme Court of Appeals concluded that Petitioner did not possess a reasonable expectation of privacy in the jacket he abandoned in the first floor of the Starks home. *Id.* at 29a. Having resolved that threshold question against Petitioner, the Supreme Court of Appeals did not reach the question of whether the police had apparent authority to search Petitioner's jacket based on Starks' consent.

The Supreme Court of Appeals began its discussion of Petitioner's Fourth Amendment claim by noting his reliance on *Matlock*. Pet. App. 26a. But the court did not apply *Matlock* (or any similar cases)

to the facts underlying Petitioner's claim. Instead, the court explained that, "[b]ecause Fourth Amendment rights . . . may not be vicariously asserted," it was obligated to "begin [its] analysis" by determining "whether the petitioner has standing" to invoke the protections provided by the Fourth Amendment at all. Pet. App. 25a.

That question of standing, the court explained, turned on "whether the person [making a claim] has a legitimate expectation of privacy in the invaded place or thing." *Ibid.* The Supreme Court of Appeals further explained that if a person "cannot reasonably expect privacy" on the facts of the case, the appropriate conclusion is that "an unreasonable Fourth Amendment search has not taken place." *Id.* at 25a–26a. Thus, the Supreme Court of Appeals ultimately dismissed Petitioner's reliance on *Matlock* as inapposite, holding that the "relevant inquiry is . . . whether the [P]etitioner had a reasonable expectation of privacy in the jacket at the time of the search and seizure." *Id.* at 27a. This inquiry, the court explained, is "highly fact-specific." *Id.* at 28a.

Engaging in that analysis, the Supreme Court of Appeals concluded that Petitioner did not have a reasonable expectation of privacy in the contents of the jacket. *Id.* at 28a–29a. The court noted that Petitioner "[c]ould not reasonably have expected that no one would ever touch or handle [the] jacket that he had abandoned on a chair in the foyer of Starks' home, whether it be Starks, or his wife and children, or people Starks invites into his home, such as Detective Wygal and Officer Fazzini." *Id.* at 29a. The

Supreme Court of Appeals reinforced its conclusion by noting that courts from around the country have held that individuals "by their acts and deeds can lose any expectation of privacy in personal items." *Ibid.* (collecting authorities). In short, "under the specific facts and circumstances" of this case, the circuit court's denial of Petitioner's motion to suppress was not error, because Petitioner lacked the reasonable expectation of privacy necessary for his Fourth Amendment rights to be implicated by the search of the jacket. See *id.* at 30a. The court proceeded to affirm Petitioner's conviction in its entirety. See *id.* at 42a.

On March 17, 2017, Petitioner filed his petition for certiorari with this Court.

REASONS FOR DENYING THE PETITION

This Court's involvement is unnecessary for four principal reasons. *First*, the Supreme Court of Appeals did not decide the question of the scope of apparent authority to conduct a warrantless search, and therefore, the two purported splits identified by Petitioner on that issue—even assuming they would otherwise merit this Court's attention—are not presented by this case. *Second*, under this Court's Fourth Amendment jurisprudence, the Supreme Court of Appeals' decision that Petitioner lacked any reasonable expectation of privacy in the contents of a jacket that he abandoned in plain sight after a short visit in a friend's home correctly applied this Court's well-settled case law. To the extent it did not, this Court should not grant review to correct fact-bound

errors on which there is no asserted split in authority. *Third*, this issue lacks public importance, as courts have for decades been applying this Court's Fourth Amendment case law to similar fact patterns and rejected a similar petition for certioriari only last Term. *Fourth*, and finally, this case is a poor vehicle to address the issues raised by the Petition because the State introduced at trial overwhelming evidence of Petitioner's guilt apart from the ammunition recovered from his jacket.

I. The Purported Splits In Authority Identified By Petitioner Are Not Implicated By The Decision Below.

As an initial matter, this Court should deny certiorari because the purported splits in authority that Petitioner asks this Court to resolve relate to an issue that the Supreme Court of Appeals did not reach—namely, the scope of a police officer's apparent authority to search an object based on a homeowner's consent to search a dwelling. See Pet. 7–8.

Before the Supreme Court of Appeals, Petitioner argued that the police conducted an illegal search of his jacket because the homeowner's consent to search the entire premises did not extend to an item within the house that the police knew belonged to Petitioner. In support of that argument, Petitioner relied on *United States v. Matlock*, 415 U.S. 164 (1974), in which this Court held that police may conduct a warrantless search of a third person's property only if the person providing consent had

"common authority" over the premises or effects to be inspected. Pet. App. 22a. Now, Petitioner urges this Court to grant certiorari to review two purported splits relating to the application of *Matlock* and similar cases to particular fact patterns—(1) cases where the police affirmatively know that the object searched belongs to a third party, and (2) cases where the police do not know, but may have reason to know, that the object searched belongs to a third party. Pet. 13–27.

The Supreme Court of Appeals' decision, however, does not implicate either of these splits. As explained above (*supra* pp. 9-10), the Supreme Court of Appeals did not reach the question whether the police had apparent authority to conduct a warrantless search of Petitioner's jacket. Rather, the court resolved the case based on the analytically prior, and "highly fact-specific," question of "whether the [P]etitioner had a reasonable expectation of privacy in the jacket at the time of the search and seizure." *Id.* at 27a–28a. Based on the fact that Petitioner had left the jacket in plain view in his friend's living area after a short visit without any indication he would ever return, the court concluded that Petitioner "could not reasonably have expected that no one would ever touch or handle his jacket," which had been "abandoned." *Id.* at 29a.

To be sure, the Supreme Court of Appeals noted as one relevant fact in this analysis that the police officers were invitees of the Starks family when they searched Petitioners' jacket. Pet. App. 24a. But the court did not address that fact to show that the

officers had apparent authority to search the jacket. Rather, the Supreme Court of Appeals deemed this relevant because, as this Court observed in *Minnesota v. Olson*, the reasonable expectation of privacy a household guest has in his or her belongings does not generally extend to the "host and those [the] host allows inside." 495 U.S. at 99. The Supreme Court of Appeals applied this principle to note that Petitioner could not reasonably expect that his abandoned jacket would remain undisturbed by Starks, his wife and family, or anyone else Starks invited into the home—such as the police officers in this case. Pet. App. 29a.

Petitioner improperly relies on this observation, as one fact considered in a totality of circumstances, to attempt to construe the Supreme Court of Appeals' decision as resting on the apparent authority doctrine. To the contrary, the court's decision was based solely on Petitioner's lack of a reasonable expectation of privacy in his jacket, a conclusion that flowed principally from the fact that Petitioner had abandoned the jacket—in plain view—in the commonly shared first-floor living area of the home in which he was a guest, and had not returned to claim, recover, or conceal it for two days. See Pet. App. 11a–12a, 29a; see also *id*. at 75a.

Because the court below did not address the scope of the apparent authority doctrine, and because Petitioner's only purported splits relate to apparent authority, this Court should deny certiorari. "In reviewing the judgments of state courts . . . the Court has, with very rare exceptions,

refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); see also *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

While Petitioner preserved the *Matlock* issue before the Supreme Court of Appeals, that court ultimately did not reach the question. While there is no absolute jurisdictional bar to this Court considering an issue not decided by a lower court, see, *e.g.*, *Illinois v. Gates*, 462 U.S. 213, 219, (1983), it remains the general rule that this Court does "not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

This rule helps ensure that this Court does not decide issues "without the benefit of thorough lower court opinions to guide [its] analysis of the merits." *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 201 (2012); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (the Supreme Court is a "court of final review and not first view"). The rule also advances the salutary purposes of ensuring there is an adequate record for this Court to review, promoting comity with state courts, and ensuring that cases are presented through an optimal vehicle. See *Adams v. Robertson,* 520 U.S. 83, 90–91 (1997); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79–80 (1988); *Gates*, 462 U.S. at 221–24; *Webb v. Webb*, 451 U.S. 493, 499–501 (1981).

In addition, the principle that this Court should only entertain issues decided by lower courts helps ensure that this Court does not "pass on questions of constitutionality . . . unless such adjudication is unavoidable," *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993), or "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (quoting *United States v. Raines*, 362 U.S. 17, 21, (1960)); cf *Rogers v. United States*, 522 U.S. 252, 256, 259 (1998) (determining, in accordance with the Court's "tradition of avoiding the unnecessary or premature adjudication" of "important constitutional question[s]," that certiorari had been improvidently granted because "the record d[id] not fairly present the question"). In analogous contexts, "when [a] lower court[] ha[s] failed to address an argument that deserved [its] attention, [this Court's] usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.28 (2010).

Here, the Supreme Court of Appeals limited its analysis to the question of whether Petitioner had a reasonable expectation of privacy in his jacket. Had the court instead determined that Petitioner had a cognizable privacy interest—as the circuit court improperly concluded (see *supra* pp. 7)—it then would have been compelled to address the question of whether the officers had authority to search the contents of his jacket without first obtaining a

warrant. It is not possible to know whether the Supreme Court of Appeals would have resolved that question in Petitioner's favor or what reasoning it would have adopted in support of its decision. Hence, under this Court's standard practice and general principles of constitutional avoidance, this Court should not grant certiorari to resolve purported splits in authority that are not presented by the decision below. For this reason alone, the Petition should be denied.

II. The Decision Below Faithfully Applies This Court's Precedents

The Petition should also be denied because the Supreme Court of Appeals correctly applied this Court's precedents to resolve the only issue that it actually reached in this case—namely, whether Petitioner had a reasonable expectation of privacy in the contents of the jacket he left at the Starks home. The Supreme Court of Appeals concluded, based on this Court's jurisprudence, that Petitioner had no reasonable expectation of privacy because, based on the facts and circumstances of the case, he abandoned his jacket in a home where he had been only an occasional visitor, and where he could not have expected the jacket to remain untouched for any extended period of time.

A. The Fourth Amendment protects, among other things, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. In order to claim the Fourth

Amendment's protections, a person "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Hence, "the extent to which the Fourth Amendment protects people may depend upon where those people are." *Ibid.*; see also *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

Correctly applying long-standing precedent of this Court, the Supreme Court of Appeals below hinged its decision on the fact that Petitioner had voluntarily abandonded his property in Starks' home. As early as 1924, this Court has held that "there [is] no seizure in the sense of the law when the officers examined the contents of [an object] after it had been abandoned." *Hester v. United States*, 265 U.S. 57, 58 (1924). Similarly, in *Abel*, this Court held that "[t]here can be nothing unlawful in the Government's appropriation of . . . abandoned property." 362 U.S. at 241.

While these cases predate this Court's articulation of the reasonable expectation of privacy test in *Katz*, there is no indication that this Court has retreated from the principle that abandoning a piece of property places that property outside the protection provided by the Fourth Amendment. See, *e.g.*, *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (citing *Abel* for the proposition that "if an item has been abandoned, n[o] Fourth Amendment interest is implicated, and neither probable cause nor a warrant is necessary to

justify seizure"); cf. *Smith v. Ohio*, 494 U.S. 541 (1990) (per curiam) (rejecting, on particular facts of the case, State's assertion, predicated on *Abel* and *Hester*, that defendant had abandoned property, but giving no indication that abandonment doctrine is no longer valid).

Indeed, courts of appeals and state courts of last resort have repeatedly applied the *Katz* standardand concluded that a defendant loses any reasonable expectation of privacy in property that has been voluntarily abandoned. See, *e.g.*, *United States v. Harrison,* 689 F.3d 301 (3d Cir. 2012); *United States v. Richardson*, 537 F.3d 951 (8th Cir. 2008); *United States v. Rem*, 984 F.2d 806 (7th Cir. 1993); *United States v. Ramos*, 960 F.2d 1065 (D.C. Cir. 1992); *United States v. Thomas*, 864 F.2d 843 (D.C. Cir. 1989); *United States v. Oswald*, 783 F.2d 663 (6th Cir. 1986); see also *Teal v. State*, 282 Ga. 319, 647 S.E.2d 15 (2007); *Commonwealth v. Bly*, 448 Mass. 473, 862 N.E.2d 341 (2007); *State v. Rynhart*, 2005 UT 84, 125 P.3d 938; *State v. Britton*, 633 So.2d 1208 (La. 1994); *Spriggs v. United States,* 618 A.2d 701 (D.C. App. 1992); *City of St. Paul v. Vaughn*, 306 Minn. 337, 237 N.W.2d 365 (1975). This weight of authority clearly illustrates that the principles initially articulated by this Court in *Hester* and *Abel* remain good law under the reasonable expectation of privacy test.

Applying these basic principles, the Supreme Court of Appeals concluded that Petitioner "could not reasonably have expected that no one would ever touch or handle his jacket that he had abandoned on

a chair in the foyer of Starks' home. . . ." Pet. App. 29a. In support, the court noted that, after Petitioner's short stay at the Starks home, Petitioner had "relinquished possession of his jacket by leaving it in the foyer of the home, a common area," and that he "gave Starks no indication as to whether he would ever return to Starks' home, and . . . left no instructions with regard to his jacket." *Ibid.* The court then cited numerous authorities for the proposition that "persons by their acts and deeds can lose any expectation of privacy in personal items." *Ibid.* (collecting authorities).

Petitioner cites to three cases that he claims support the conclusion that he retained a reasonable expectation of privacy in his abandoned jacket. Pet. 34–35. But none of these cases are apposite. The only authority he cites from this Court, *Bond v. United States*, 529 U.S. 334 (2000), held that a person retains a reasonable expectation of privacy in a bag placed in an overhead compartment on a bus while that person remains a passenger. *Id.* at 338–39. On such facts, there could be no argument that the passenger had abandoned his property.

The other two cases that Petitioner cites recognize the general principle that a person loses any reasonable expectation in privacy in abandoned property, but hold, on the facts of those specific cases, that the defendant's actions manifested an intent to retain control or possession over the object. See *United States v. Infante-Ruiz*, 13 F.3d 498, 501–02 (1st Cir. 1994) (holding that "nothing in the circumstances indicated that [defendant] had

abandoned the briefcase" that was stored locked inside a locked car trunk); *United States v. Basinski*, 226 F.3d 829, 837–38 (7th Cir. 2000) (reasonable expectation of privacy where defendant entrusts locked briefcase to friend to store in locked barn with explicit instructions to keep it hidden until he returned for it).

Unlike in *Infante-Ruiz* and *Basinski*, there is no indication here that Petitioner took affirmative steps to protect his jacket from discovery, such as by placing it under lock and key or providing instructions for its disposal. To the contrary, Petitioner left his jacket in a public place with no indication he would ever return to retrieve it. This case thus bears more similarity to the facts of *City of St. Paul v. Vaughn*, in which the Supreme Court of Minnesota held that a defendant lost any reasonable expectation of privacy in an eyeglasses case that he left in a laundromat where it could easily be retrieved by others present. See 306 Minn. at 346, 237 N.W.2d at 370.

In short, the Supreme Court of Appeals' conclusion that Petitioner had abandoned the jacket and thus had no reasonable expectation of privacy in it was correct under this Court's case law, which further supports denial of the Petition. But even if Petitioner were right that the Supreme Court of Appeals should not have concluded that Petitioner had abandoned his jacket on these facts, that putative misapplication of settled law is not an appropriate basis for certioriari.

B. The court below also addressed and rejected the notion that Petitioner's brief stay in Stark's home created any reasonable expectation of privacy in his abandoned property. This Court has held that overnight guests enjoy some expectation of privacy in their belongings during the course of an overnight stay. See *Olson*, 495 U.S. at 98–99. But the Court has also made clear that this expectation is not boundless; rather, an overnight guest reasonably expects that "he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Id.* The Court has further explained that not all intermittent guests enjoy the same degree of privacy in the places they visit. While an overnight visitor enjoys protection in part because "[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings," *id*. at 99, the same reasoning and expectations do not apply to all short-term visitors. For instance, a person who is "only in the home a matter of hours" for a business transaction has no reasonable expectation of privacy. *Carter*, 525 U.S. at 90.

In this case, the Supreme Court of Appeals correctly noted that *Olson* does not ensure the privacy of a houseguest's possessions in all cases, but instead contemplates that those possessions may be "disturbed" by the guest's "host and those his host allows inside." Pet. App. at 24a (quoting *Olson*, 495 U.S. at 99). In this regard, the court below noted that the homeowner "voluntarily consented to a police search of the first floor of his home," and therefore,

Petitioner as a guest could not claim to have a reasonable expectation of privacy as to the police officers, who were the homeowner's invitees. *Ibid*.

The court below also emphasized that Petitioner did not frequently visit the Starks home, but "just kind of hung out" with the family "a little bit," either "crashing" at the Starks' home "when he needed to" or else "stay[ing] with somebody else." *Id.* at 28a–29a. Indeed, on the night when Petitioner abandoned his jacket, he arrived at the Starks home "during the early morning hours" and was gone "when Starks awoke later that same morning." *Id.* at 29a.

Accordingly, it is unlikely that Petitioner's relatively brief (apparently only a few hours-long) early-morning visit to the Starks' home even entitled him to the protection accorded the overnight guests in *Olson*, and the Supreme Court of Appeals did not explicitly hold that the protection provided by *Olson* applied. At most, the Supreme Court of Appeals noted that even if *Olson* applied, its application supported the conclusion that Petitioner had no reasonable expectation of privacy in his jacket, because his belongings were not disturbed by anyone other than the police officers who were his host's invitees. *Id.* at 24a. Such a conclusion does not contrevene, but rather flows directly from, *Olson*. And even if that conclusion were itself an incorrect application of *Olson*, as Petitioner suggests (see Pet. 11), Petitioner identifies no split in authority on this question, and this Court should not grant the Petition merely to correct this putative error.

III. This Case Does Not Present A Question Of Public Importance.

In addition to the decision below being undisputably correct, this Court should decline to grant certiorari because the Petition does not present questions of public importance warranting this Court's review. The basic principles that Petitioner culls from this Court's case law have been well established for decades. Indeed, in the Petition's explication of the principles that govern a guest's reasonable expectation of privacy in another's dwelling, and the principles of apparent authority that Petitioner urges this Court to clarify, the most recent decision cited hails from 1990. See Pet. 10–12. The principal decision that set forth the apparent authority doctrine, *Matlock*, was decided in 1974. The lower courts have in the interim applied these general principles to the unique fact patterns of a variety of different cases without further guidance from this Court on the issues that Petitioner claims are central to this case.

This Court has not lacked opportunities to intervene to further clarify the *Matlock* standard. For example, only last Term, in a case highlighted by Petitioner, this Court had an opportunity to review a decision from the Supreme Court of Iowa that squarely presented the question of apparent authority and exhaustively catalogued the decisions of the lower courts in its opinion. See Pet. 9 (citing *State v. Jackson*, 878 N.W.2d 422, 431 (Iowa 2016)). Neverthless, this Court denied certiorari in *Jackson* on October 3, 2016. 137 S. Ct. 235 (2016). That

decision reflects the sound judgment that this Court does not need to intervene to provide further direction, as the lower courts already have sufficient guidelines for resolving the highly fact-specific cases that arise in this context.

There is nothing unique about the facts of the present case that should lead this Court to reverse course and grant certiorari. Petitioner claims that this Court's review is necessary given the increase in usage of ride-sharing services like Uber and Lyft, and short-term leasing apps like AirBnB. Pet. 8, 29. But Petitioner does not explain how these relatively new services differ materially from services that have existed for centuries—such as hotels, inns, taxis, or carriage rides. For example, this Court has long held that the protection provided by the Fourth Amendment extends to individuals staying in a hotel room, see, *e.g.*, *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *United States v. Jeffers*, 342 U.S. 48, 51–52 (1951), and explicitly stated in *Katz* that "an individual in . . . a taxicab . . . may rely upon the protection of the Fourth Amendment," *Katz*, 389 U.S. at 352 (citing *Rios v. United States*, 364 U.S. 253 (1960)). Of course, whether persons may be deemed to have abandoned property in any public or semi-public location would depend on the facts of the particular case.

There is no reason for this Court to grant certiorari in this case to provide further clarity as to expectations of privacy that have already been defined by social custom for many years. Nor should it grant certiorari to resolve questions of apparent

authority in the Uber or Lyft context that this case does not present. If the Court wishes to provide further guidance in an appropriate case as to how its Fourth Amendment jurisprudence applies to, say, an Uber ride, it should wait for a case that presents appropriate facts to do so.

IV. This Case Is A Poor Vehicle For Review Of The Questions Presented By The Petition

Finally, to the extent the Court believes that the splits identified by Petitioner warrant its attention, this case is a poor vehicle to address them. First, as noted above, the decision of the Supreme Court of Appeals does even not address the questions implicated by the Petition. For that reason alone, this Court should await a more appropriate vehicle that squarely addresses Petitioner's purported splits in authority before accepting a case to resolve them.

Second, even if the apparent authority question were squarely presented by the decision below, this case would still be a poor vehicle to resolve it because the decision to admit the contents of Petitioner's jacket into evidence in his trial constitutes harmless error.

Even when a case otherwise would present a question suitable for this Court's review, the existence of an alternative legal basis for sustaining the lower court's judgment can weigh decisively in favor of denying certiorari. "If it appears that . . . the Supreme Court might be able to decide [a] case on another ground and thus not reach the point upon

which there is conflict, the conflict itself may not be sufficient reason for granting review." Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013). Here, there would be an alternative basis for this Court to resolve this case in the event it accepted it, and an alternative basis for the circuit court to uphold Petitioner's conviction on remand—apart from the anterior question of whether Petitioner has a reasonable expectation of privacy. Specifically, any error that the circuit court committed was harmless beyond a reasonable doubt because there was sufficient independent evidence introduced at trial to support the jury's conviction of petitioner. Cf. *Chambers v. Maroney*, 399 U.S. 42, 52–53 (1970) (applying harmless error analysis in Fourth Amendment case); see also *Rose v. Clark,* 478 U.S. 570, 576 (1986) (explaining that the harmless beyond a reasonable doubt standard applies to a "wide variety of constitutional errors" including Fourth Amendment violations) (citing *Chambers*). In its merits brief filed before the Supreme Court of Appeals, the State expressly invoked and argued the doctrine of harmless error, see Resp't Br. 39–40, although the court did not address that argument in its opinion.

Petitioner claims that he would not have been convicted had the ammunition from his jacket not been introduced because the remaining evidence introduced at trial was "thin and circumstantial." Pet. 31. To the contrary, the record in this case contains enough evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that Petitioner murdered Jayar Poindexter. Security

camera footage placed Petitioner at or near the Quarry Apartments, where Poindexter lived, shortly before and shortly after the crime was committed. Pet. App. 11a. That camera footage also showed the distinctive attire Petitioner was wearing on the night in question, including his hat (which was later found at the scene) and boots (which an expert said were consistent with footprints left in the snow outside the window to Poindexter's apartment). *Id.* at 9a, 11a, 13a. When Petitioner arrived at Timothy Starks' house less than half an hour after the murder was committed, Starks observed that he was carrying two firearms, *id.* at 12a—and Poindexter died of a gunshot wound to the chest, *id.* at 10a. Finally, one of Petitioner's relatives testified that a few days after the murder occurred, Petitioner admitted to having shot someone in a "robbery gone bad" and that the person he shot had "ended up dead." *Id.* at 10a n.9. This evidence—none of which is in any way connected to or reliant on the evidence uncovered during the search of the jacket—would clearly be enough to show that Petitioner committed the murder in question beyond a reasonable doubt. Thus, even if the Supreme Court of Appeals incorrectly permitted the ammunition recovered from Petitioner's jacket to be admitted at trial, any such error was harmless. For this reason too, this Court should deny certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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