IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 18-0498

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Appeal from a Final Order of the
Circuit Court of Grant County
(Case No.: 17-MAP-1)

MICHAEL SHANE REXRODE,

Defendant Below, Petitioner.

PETITIONER'S REPLY BRIEF

Submitted by:

Jerry D. Moore (WV State Bar No. 2609)
Jared T. Moore (WV State Bar No. 11988)
The Moore Law Firm, PLLC
P.O. Box 8
74 Walnut Street
Franklin, WV 26807
(304) 358-2208
jared.moore35@gmail.com
Counsel for Petitioner

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I. STATEMENT OF THE CASE[1]

No one condones of domestic violence. However, merely because a citizen stands *accused* of a domestic offense does not permit their constitutional rights to be trampled during their arrest and criminal prosecution. That is exactly what happened to Petitioner and Defendant below, Michael Shane Rexrode (hereinafter "Mr. Rexrode").

A. The Events of April 19, 2017.

When Mr. Rexrode came home from an exhausting day of work on the evening of April 19, 2017 his wife was drunk, and she was mad. (App. 170, 176). She accused him of having an affair. (App. 175-76). Mr. Rexrode did not fight with her but, instead, went to bed.[2] (App. 176). According to [redacted] Rexrode (hereinafter "Mrs. Rexrode"), after Mr. Rexrode went to bed, she tripped on a step and fell onto an Indian figurine in the living room, injuring her eye. (App. 170). Mrs. Rexrode readily admitted that she was "drunk" and "pissed off." *Id.*

Corporal S.A. Nazelrod arrived at the Rexrode home later that evening. Mrs. Rexrode greeted him on the front porch. She exhibited no signs of being in danger or fearing for her safety. (App. 160, 226-27). When Cpl. Nazelrod asked about the injury to Mrs. Rexrode's eye, she answered that she had injured it on farm equipment earlier in the day. (App. 227-28). Mrs. Rexrode gave no indication, direct or subtle, that there was an emergency. (App. 160, 226-28) Without Mrs. Rexrode's consent, and over her objection, Cpl. Nazelrod "instantly" forced his way into the Rexrode home. (App. 160, 219, 228). Cpl. Nazelrod went directly to the marital bedroom and immediately shouted "show me your hands!" to Mr. Rexrode who was in bed, under the covers, wearing only his underwear, and asleep. (App. 160-61, 220, 229-30). Cpl.

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[1] The Petitioner only submits what he deems necessary to correct inaccuracies or omissions in the Respondent's *Statement of the Case*.

[2] Similar to its trial tactics, Respondent attempts to pinpoint Mr. Rexrode going to bed at exactly 8:30 p.m. As the record reflects, Mr. Rexrode testified that he was uncertain of the exact time he went to bed. (App. 179). Mr. Rexrode was certain, however, that his wife was not injured when he went to bed. *Id.*

Nazelrod had no information that a weapon was involved in the alleged altercation. (App. 231). The record shows that there was no emergency when Cpl. Nazelrod entered the home. In fact, Cpl. Nazelrod readily admitted that he entered the home to "detain" Mr. Rexrode because he treats "all" domestic calls as emergencies. (App. 219, 222, 235-36).

Cpl. Nazelrod testified that he saw blood on Mr. Rexrode's hand. Mr. Rexrode had indeed injured his hand on the edges of the pan on the feedline at his poultry house, which he had repaired earlier in the day. (App. 175, 177). Cpl. Nazelrod described the injury as "tearing of the skin," which is consistent with Mr. Rexrode reaching into a feedline and ripping the skin off the side of his hand and ring finger. (App. 106, 164). Tearing of the skin, like that suffered by Mr. Rexrode's hand, simply does not occur by "jabbing" a person in the face as the Respondent attempts to suggest.

Mrs. Rexrode later signed a written statement. Respondent conveniently omits that the written statement was "dictated" by Cpl. Nazelrod. (App. 173). After she sobered up, Mrs. Rexrode adamantly testified that the written statement was "a lie" because she was "drunk" and "pissed off" at Mr. Rexrode. (App. 169-70).

B. <u>The Criminal Prosecution.</u>

Contrary to the Respondent's contention, *voir dire* took place in the magistrate courtroom. The prospective jurors were seated in the chairs in the back of the courtroom. Both the prosecuting attorney and the undersigned counsel, rather than face towards the magistrate and have their backs toward the jury pool, turned around to face the jury pool seated in the back of the courtroom. (App. 252-253). Undeniably, counsel was unaware that the magistrate's assistant was not recording *voir dire*. (App. 253).

Respondent skims over the magistrate's actions in forcing Mrs. Rexrode to testify after she justifiably asserted her Fifth Amendment privilege based upon the advice of her independent

counsel. There can be no mistake that Mrs. Rexrode testified "under fear of being held in contempt by the Court." (App. 167). Respondent's contention that Mr. Rexrode "orchestrated a plan for Mrs. Rexrode to plead the Fifth" (Respondent's Brief at p. 8) is wholly unsupported by the record. Mrs. Rexrode retained counsel and relied upon her counsel's advice when she invoked her Fifth Amendment privilege. Moreover, a condition of Mr. Rexrode's bond was that he could have no direct or indirect contact with Mrs. Rexrode. (App. 010). Thus, Respondent's conspiracy theory is easily debunked by the record evidence.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner renews his request for this Court to set this case for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure to provide the Court with an opportunity to inquire into the specific facts surrounding the application of law to the evidence of this case. If the Court is inclined to consider application of the community caretaker doctrine to the warrantless entry into Petitioner's home, then Petitioner requests oral argument pursuant to Rule 20 of the Rules of Appellate Procedure because it would involve an issue of first impression.

III. ARGUMENT

A. The Respondent Has Failed to Establish that the Warrantless Arrest of Mr. Rexrode in the Marital Bedroom of His Home Fell Within Any Exception to the Warrant Requirement.

Respondent bears the burden to prove that Cpl. Nazelrod's warrantless entry into Mr. Rexrode's home and his arrest in the marital bedroom fell within one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Jones v. United States*, 357 U.S. 493 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. McNeal*, 162 W. Va. 550, 251 S.E.2d 484 (1978). The Respondent has not and cannot meet that burden.

i. The Emergency Doctrine Exception Simply Does Not Apply Because Cpl. Nazelrod Entered the Home to Detain Mr. Rexrode Under the Mistaken Impression that All Domestic Calls are Classified as Emergency Situations that Permit Warrantless Entry Into the Home.

The circuit court[3] committed clear error in finding that Cpl. Nazelrod's entry into the Rexrode home, under the circumstances, fell within the emergency doctrine exception to the warrant requirement. The emergency doctrine permits a "*limited*, warrantless search or entry of an area by police officers where (1) there is an *immediate need* for their assistance in the protection of human life, (2) the search or entry by the officers is *motivated by an emergency, rather than by an intent to arrest* or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question." *State v. Cecil,* 173 W.Va. 27, 32, 311 S.E.2d 144, 149 (internal citations omitted) (emphasis added).

Upon approaching the Rexrode home, Cpl. Nazelrod did not hear any arguing or shouting, and he did not see any altercation. (App. 160, 226). He was greeted by Mrs. Rexrode on the front porch. *Id.* She was not fleeing and gave no indication whatsoever that she was fearful for her safety, in danger, or needed assistance. (App. 160, 226-27). When questioned about her eye, she calmly stated that she had injured it on farm equipment earlier in the day. (App. 228). When asked at the suppression hearing what he did next, Cpl. Nazelrod testified "***Instantly*** had went inside to locate and ***detain*** Mr. Rexrode who she said was inside." (App. 219) (emphasis added). He did not ask any other questions, make any further inquiry, or evaluate the situation or circumstances further. (App. 228). Cpl. Nazelrod admittedly[4] went inside to "detain" Mr. Rexrode. (App. 219, 230).

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[3] The magistrate court made no findings of fact or conclusion of law in upholding the warrantless entry, except that, he believed, Cpl. Nazelrod acted lawfully and appropriately. (App. 242).

[4] Revealingly, Respondent all but concedes that Cpl. Nazelrod entered the Rexrode home to effectuate an arrest of Mr. Rexrode. *See Respondent's Brief* at p. 13 ("Officers immediately entered the home to secure

Upon locating Mr. Rexrode asleep in his bed while wearing only his underwear, Cpl. Nazelrod did not ask if Mr. Rexrode was hurt or in need of assistance, as would be indicative of an intent to assist in the protection of human life or render aid under emergency circumstances. (App. 161, 220). Instead, Cpl. Nazelrod yelled "show me your hands!" – the prototypical comment made by a police officer arresting a suspect. *Id.* And, that is exactly what Cpl. Nazelrod did – immediately place handcuffs on Mr. Rexrode. *Id.* Simply stated, Cpl. Nazelrod's actions are consistent with the intent to effectuate an arrest rather than render aid or assistance.

The facts here do not demonstrate the sense of immediacy or urgency characteristic of cases justified under exigent circumstances. For example, in *Cecil, supra,* this Court upheld application of the emergency doctrine "where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry." *Cecil* at Syl. Pt. 1, *in part.* In *State v. Farley*, 230 W. Va. 193, 737 S.E. 2d 90 (2012), this Court found the emergency doctrine applicable where officers, after locating an *armed robbery – i.e.*, armed and dangerous – suspect, knocked on the door and thereafter heard rapid movement inside as if someone were running through the house, all while knowing that the suspect was armed and believing that he was upset as a result of the failed robbery.

In *State v. Kimble*, 233 W. Va. 428, 759 S.E.2d 171 (2014), deputies received a report that a suspect had shot at a person's vehicle at an intersection. The deputies responded to the house of the suspect living at the intersection where the shots had occurred. *Id.*, 233 W. Va. at 431, 759 S.E.2d at 174. Importantly, deputies had previously responded to reports of the suspect

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the other individual involved in the dispute."); p. 14 ("Rather his sole mission was to find and secure the other person involved in the dispute.").

shooting guns near his house. *Id.* Deputies approached the house with their guns drawn and ordered the suspect on the ground. Deputies asked where the shotgun was located and the suspect told them. *Id.* This Court found that the facts satisfied the emergency doctrine but, largely, validated the warrantless search as a protective sweep. *Id.,* 233 W. Va. at 434, 759 S.E.2d at 177.

The record evidence does not support the Respondent's argument that Mr. Rexrode was armed and dangerous so as to endanger the life of Mrs. Rexrode that the emergency doctrine was appropriately called into play. Mrs. Rexrode was not in an emergency situation. She was on the front porch and gave no indication that she was in danger or feared for her safety. While she had an injury to her eye, she plainly stated that she had injured it on farm equipment. Moreover, she did not exhibit any signs or symptoms of needing immediate medical attention. Certainly, Cpl. Nazelrod did not render any medical assistance to Mrs. Rexrode when he burst through the door, over her objection, so that he could detain Mr. Rexrode. Thus, the record demonstrates that Cpl. Nazelrod was not presented with the type of emergency situation required for immediate warrantless entry into the home.

In a desperate effort to validate a clearly unlawful entry into the home, Respondent attempts to sweep Cpl. Nazelrod's actions under the nebulously catch-all label of "officer safety." The parameters of a protective sweep for officer safety was discussed in Syllabus Points 5 through 8 of *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). Under *Lacy*, a *minimal* intrusion is permitted when police feel a search *for weapons* is necessary to keep the premises safe during a search. *Id.* Once an officer shows there are "specific articulable facts indicating a danger" he is entitled to conduct a protective sweep, defined as "a quick and limited search of premises *for weapons* once an officer has individualized suspicion that a dangerous weapon is

present and poses a threat to the well-being of himself and others." *Id.* (emphasis added). First, Cpl. Nazelrod was not engaged in lawful conduct when he entered the home without a warrant. Second, there is no indication that a weapon was involved. (App. 231). The facts do not support application of a protective sweep for officer safety.

If this Court were to find that the seizure of Mr. Rexrode could be justified under the emergency doctrine – when no facts suggest the type of dire emergency required under *Ceicil* – it would turn almost every routine domestic call into an exigent circumstance. *Cecil* unequivocally requires that the "emergency doctrine must ... be considered upon a case by case basis . . ." *Cecil,* 173 W.Va. at 32, 311 S.E.2d at 149 (internal citations omitted). It is undisputed that ***Cpl. Nazelrod treats <u>every</u> domestic call as an emergency***. (App. 222,[5] 235-36). That is wholly inconsistent with long-standing Fourth Amendment precedent.[6] Simply because a law enforcement officer is out on a domestic call does not afford him or her *carte blanche* authority to conduct a warrantless search. If that were the case, the exception would swallow the rule.

Because the record reflects that no emergency situation existed, which required urgent entry into the home, and Cpl. Nazelrod entered the home to detain Mr. Rexrode under the mistaken belief that *all* domestic calls are emergencies, the arrest violated the Fourth Amendment. Both the magistrate court and circuit court committed clear error in validating the warrantless entry and arrest of Mr. Rexrode in his home.

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[5] Interestingly, the prosecuting attorney directly elicited this testimony at the suppression hearing, solidifying the erroneous application of the emergency doctrine.

[6] The Supreme Court of the United States allows warrantless searches on a case-by-case basis where the "exigencies" of the particular case "make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" in that instance. *Missouri v. McNeely,* 569 U.S. 141, 149 (2013) (quoting *Kentucky v. King,* 563 U.S. 452, 460 (2011)). "The defining feature of the exigent circumstances exception is that the need for the search becomes clear only after 'all of the facts and circumstances of the particular case' have been considered." *Birchfield v. North Dakota,* 136 S. Ct. 2160, 2188–89 (2016) (citing McNeely, 569 U.S., at 150).

ii. The Community Caretaker Doctrine Does Not Apply Because Cpl. Nazelrod Entered the Home to Detain Mr. Rexrode, Not Render Help.

Alternatively, the Respondent contends that the community caretaker doctrine validates Cpl. Nazelrod's warrantless entry into the Rexrode home. It does not. For this Court to justify the warrantless search of the home under the community caretaker doctrine, it would be doing so as a matter of first impression. The Courts have applied the community caretaker exception minimally, only to vehicles, and have never held that the community caretaker exception applied to homes. *See Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010); *Cady v. Dombrowski,* 413 U.S. 433 (1973); *South Dakota v. Opperman,* 428 U.S. 364 (1976); *United States v. Johnson*, 410 F.3d 137 (4th Cir. 2005).

The community caretaker doctrine applies when officers are "acting in a health, safety and welfare role." *Ullom v. Miller*, 227 W. Va. 1, 12 n.10, 705 S.E.2d 111, 122 n.10 (2010). It focuses on whether, "based upon the totality of circumstances, an experienced officer would suspect that a citizen is in need of help or is in peril such that immediate action by the officer is needed." *Id.*

That was not the situation on the evening of April 19, 2017. There was no indication that anyone inside the Rexrode home was in need of help or was in peril. Cpl. Nazelrod unmistakably testified that he entered the Rexrode home to detain Mr. Rexrode because he was suspected of committing an act of domestic violence. (App. 219, 230). The facts do not justify the warrantless seizure of Mr. Rexrode under the community caretaker doctrine either.

B. Mr. Rexrode was Denied a Fair Trial Because the Critical Ruling in the Case – *i.e.*, to Compel Mrs. Rexrode to Testify – Was Made by the Chief Judge Who was Not Present at Trial.[7]

[7] Respondent's response to Petitioner's second assignment of error is actually contained in Section VII, C of Respondent's Brief, rather than Section VII, B. For the sake of consistency, Petitioner's reply to the Respondent's response to the second assignment of error is set forth in Section III, B herein.

Noteworthy, Respondent does not dispute that the magistrate consulted with the chief judge of the 21st judicial circuit to ask for advice in the midst of an evidentiary dispute during trial and then ruled based entirely upon the chief judge's instruction. Indeed, this cannot be disputed as it is clearly set the record. (App. 166).

Like the circuit court, the Respondent tries to sweep this glaring error under the rug by contending that Chief Judge Courrier was not on the *rotation* to hear criminal appeals in Grant County. This argument is grossly misplaced. Comment 5 to Rule 2.9(A)(3) of the Code of Judicial Conduct specifically provides that "[a] judge may consult with other judges on pending matters, ***but must avoid ex parte discussions of a case*** with judges who have previously been disqualified from hearing the matter, and ***with judges who have appellate jurisdiction over the matter.***" (emphasis added).

Rotation is by no means the same as *jurisdiction.* Clearly, the Circuit Court of Grant County – consisting of two circuit judges – has appellate jurisdiction over criminal cases tried in magistrate court. Here, the magistrate unequivocally consulted with the circuit judge having jurisdiction over the case, and more particularly the chief judge of the circuit. There can be no question that Chief Judge Courrier had appellate jurisdiction over the case. The mere fact that Chief Judge Courrier entered an order in this case proves beyond any doubt that he had appellate jurisdiction. (App. 215). Regardless of whether Chief Judge Courrier was then currently on the criminal rotation in Grant County is to no avail – he still had jurisdiction over the appeal.

Moreover, the rotation of circuit judges in the 21st Judicial Circuit is subject to change at any time. Indeed, the circuit judges routinely alternate hearing cases, depending on a variety of factors, including conflicts of interest, scheduling, and preference. As chief judge, Judge

Courrier had the authority to change the rotation at any time. Additionally, by virtue of his position as chief judge, he has jurisdiction over all cases in the circuit.

Respondent's argument is not persuasive. By analogy, it would be the same as a circuit judge calling a justice of this Court for an opinion on how to rule on an evidentiary dispute during trial and then justifying the action by proclaiming that the particular justice consulted with would not be on the rotation to author the opinion when the case was then appealed. Respondent is asking this Court to condone the practice of magistrates calling circuit judges for advice on evidentiary rulings. If approved, circuit judges will become overburdened. Consequently, there is nothing to prevent circuit judges from calling Justices of this Court for advice on evidentiary rulings. That would lead to a dangerous precedent.

Prejudice is evident. The conviction was affirmed in the circuit court because the circuit judge did not want to reverse a decision in which the chief judge rendered an advisory opinion. Most telling, the magistrate flaunted the fact that he had the approval of a higher ranking judicial officer who could not be challenged. The magistrate exclaimed to the undersigned after consulting with the chief judge "[y]ou're aware this is appealable to the Circuit Court. ***And your opinion is not going to change there.***" (App. 167) (emphasis added). The magistrate was correct – the decision did not change in circuit court. The fact that the magistrate left the courtroom and conferred with a person off the record demonstrates the absence of transparency, invites suspicion, and challenges the fundamental concept of a fair trial. The magistrate's actions were clearly erroneous. Such acts destroy the public's confidence in the court system, particularly the magistrate courts.

C. The Magistrate Forced the Victim to Testify With the Threat of Contempt.

Respondent's response to Mr. Rexrode's second assignment of error completely misses the mark. Rather than address what actually transpired in magistrate court, Respondent argues that Mrs. Rexrode was not entitled to make a blanket assertion of her Fifth Amendment right. That is not what occurred.

As set forth on the record by Mrs. Rexrode's independently retained counsel, if Mrs. Rexrode testified at trial that she lied to Cpl. Nazelrod on the night of April 19, 2017, then she would incriminate herself and subject herself to criminal prosecution for providing false information to a state trooper in violation of W. Va. Code § 15-2-16. (TT.71-76). To avoid incriminating herself, she asserted her Fifth Amendment privilege. Granted, answering the first question to which she asserted her privilege – whether she was married to Mr. Rexrode – would not have necessarily incriminated her. However, the more salient issue to this appeal is the magistrate's ruling and his threat of contempt.

The magistrate's ruling was clear – Mrs. Rexrode was compelled to answer *all* questions. The magistrate directed the prosecutor "to question only to the events of that night, not as to any other events." (App. 167). This would have, undisputedly, included Mrs. Rexrode's false statement to Cpl. Nazelrod. The magistrate in no way limited his ruling to non-incriminating questions, despite being asked on numerous occasions by Mrs. Rexrode's counsel for such a limitation. (App. 167-68). Clearly, the magistrate compelled Mrs. Rexrode to answer *all* questions, including those that would incriminat her. For Respondent to somehow claim that Mrs. Rexrode's answers were not incriminating is simply misguided.

Mrs. Rexrode's attorney made clear for the record that Mrs. Rexrode "is testifying under fear of being held in contempt by the Court." (App. 167). Thereafter, Mrs. Rexrode's counsel, in

attempting to obtain clarification from the magistrate's vague ruling, asked "[b]ut she's not permitted to preserve her Fifth Amendment right anymore, or else she'll be facing contempt charges?" (App. 168). Mrs. Rexrode's counsel went on to state "[t]hen that's where I need clarification at, is ***if she continues to assert her Fifth Amendment right, is she going to be subject to contempt by this Court? And my indication is that she would be.***" (App. 168) (emphasis added). At no point in time did the magistrate state that he would *not* hold Mrs. Rexrode in contempt, despite being asked repeatedly. (App. 166-69). As such, it is apparent that the magistrate's intentions were to hold Mrs. Rexrode in contempt if she failed to testify. There can be no mistake that the magistrate compelled Mrs. Rexrode to testify with the threat of contempt.

The magistrate was well aware that Respondent could not obtain a conviction without Mrs. Rexrode's written statement. As such, he made abundantly clear that he was going to admit her written statement, regardless of whether she testified or not:

THE COURT:	We're splitting hairs. I mean, the inconsistency in what she told later as opposed to what she told that night is going to come out one way or another. Basically, if she declines to testify, the statement comes in.
MR. MOORE:	Is that the Court's ruling, if she does not testify, her statement to the policy is coming into evidence?
THEO COURT:	If the prosecutor makes that motion, I'm prepared to grant it.

(App. 167).

This Court has previously found reversible error when a trial judge assists the prosecutor in obtaining a conviction. *See State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007). In this case, the magistrate went too far. Unfortunately, the magistrate abandoned his neutral role

and took affirmative action to ensure that Mrs. Rexrode's incriminating written statement came into evidence. Mr. Rexrode was denied a fair trial as a result.

D. The Prosecuting Attorney's Fear Mongering Argument Was Not Supported by the Evidence.

Do any of you doubt that she is afraid about going home? … What do you reckon might happen to her if she goes home now after he's had to go through all this? (App. 187) (emphasis added). The prosecuting attorney's arguments were a classic example of fear mongering – suggesting that Mrs. Rexrode would be harmed if she "went home." Such an argument, quite simply, is a foul blow.

Respondent takes Mrs. Rexrode's apology to Mr. Rexrode completely out of context. As the record reflects, Mrs. Rexrode apologized for *lying*: "I'm sorry I lied." (App. 170). Moreover, it would not make sense for Mrs. Rexrode to apologize if she was fearful. If Mrs. Rexrode was afraid to go home with Mr. Rexrode, then it would have clearly been reflected in her testimony. It was not.

E. Plain Error was Committed in Failing to Record the Voir Dire Portion of the Jury Trial.

Respondent's solitary retort to this assignment of error is that Petitioner "invited" the error. At the outset, it is not counsel's obligation to keep a close eye on the magistrate assistant to make sure the tape recording is rolling at all times. Obviously, counsel has many other things to worry about during the course of a jury trial. As the undersigned stated during the hearing in circuit court, "when the voir dire portion of the trial was being held, both the prosecuting attorney, myself – we were actually turned around looking at the prospective jury pool. So, Judge, I didn't know that it wasn't being recorded. If I had – you know, if I had known that, I certainly would have brought that to the Court's attention." (App. 252-53). The prosecuting

attorney did not respond during the hearing, knowing the undersigned's representation were true and accurate.

To correct an obvious misunderstanding of the record from Respondent's appellate counsel, when the magistrate went "back on the record at counsel's request" (App. 154), it was because the parties were previously outside the courtroom striking jurors. As demonstrated by the very next line on the transcript, the undersigned made an objection based upon the preemptory strikes utilized by the Respondent. *Id.* Obviously, that objection was asserted immediately after the Respondent exercised its preemptory strikes. When attorneys are conferring with their respective clients about which jurors to strike, it is done so in private and off the record. To the extent that Respondent is somehow relying upon that transcript entry to show counsel was aware *voir dire* was not being recorded, and therefore "invited error," such an argument would be total disingenuous.

Respondent's remaining arguments concerning the magistrate's expression of bias ring hollow. The issue is that the *voir dire* portion of the jury trial – specifically including the portion where the magistrate exhibited bias – was not recorded. This Court cannot provide any meaningful appellate review of the magistrate's actions because of the plain error in failing to record the *voir dire* portion of the trial.

Mr. Rexrode is prejudiced by the mere fact that the magistrate court failed to comply with its statutory[8] duty to record *voir dire*, thereby preventing this Court from meaningfully reviewing the magistrate's biased comments for error.

[8] *See* W. Va. Code § 50-5-8(e) ("For purposes of appeal, when a jury trial is had in magistrate court, the magistrate court shall be a court of limited record. Trials before a magistrate when a jury is empaneled shall be recorded electronically."); Rule 17(d) of the Rules of Criminal Procedure for the Magistrate Courts of West Virginia ("Every jury trial shall be recorded electronically by a magistrate.").

F. The Record Clearly Demonstrates that Cpl. Nazelrod's Hearsay Within Hearsay Statement was Offered for the Truth.

A cursory review of the transcript completely undermines the Respondent's argument that Cpl. Nazelrod's recitation of the 911 call was not offered for the truth. After an anticipatory objection was raised, the following representations were made in the presence of Cpl. Nazelrod:

MR. MOORE:	Well, what was he going to say?
MR. OURS:	What the dispatch told him and why he went out.
MR. MOORE:	What did the dispatch say?
MR. OURS:	Well-being checkup.
MR. MOORE:	If he's only going to say I was dispatched for a well-being check, that's fine.
MR. OURS:	That was the question.
MR. MOORE:	If he says anything else, obviously it's a different situation.
MR. OURS:	All right.

(App. 157).

Contrary to the prosecutor's representation, immediately upon resuming his testimony, Cpl. Nazelrod blurted out that "[d]ispatch advised it was reported that ***there had been a physical altercation at the Rexrode*** . . . ." *Id.* (emphasis added). There can be no question that the statement was offered for the truth – *i.e.,* that a physical altercation had occurred at the Rexrode house. If Respondent had merely intended to offer the statement for "why the man left to go investigate" (App. 157), then Cpl. Nazelrod would have simply stated for a "well-being check" as the prosecutor had represented to the magistrate moments before. *Id.* Cpl. Nazelrod testified that a third-party caller told dispatch that there had been a *physical altercation,* and it was done

so for the purpose of establishing that a physical altercation had taken place. The record establishes that the statement was offered for the truth.

G. Mr. Rexrode was Prejudiced by the Circuit Court's Error in Delaying Its Decision on the Appeal.

Unquestionably, the circuit court violated W. Va. Code § 50-5-13(c)(6) by failing to complete a review of Mr. Rexrode's conviction within 90 days. Indeed, the circuit court did not render a ruling until *seven months* after the appeal was placed on the docket. In enacting W. Va. Code § 50-5-13(c)(6), the legislature obviously anticipated a dire need to decide appeals from magistrate court promptly. Magistrates are not required to have a law or college degree, and it is evident that swift action to correct an erroneous application of criminal procedure principles was important in imposing the 90-day turn-around. A cursory viewing of the trial record demonstrates the need for a quick decision on the appeal.

During the extended waiting period, Mr. Rexrode suffered through the stress and strain of not knowing whether his conviction would be upheld or reversed. As the saying does, justice delayed is justice denied. After his conviction in magistrate court, Mr. Rexrode was required to surrender his firearms. As a farmer and outdoorsman, that was a significant deprivation.

H. The Cumulative Effect of the Errors Require Reversal.

To the extent that this Court finds the aforementioned errors to be individually unworthy of reversal, then their cumulative effect certainly requires reversal pursuant to Syl. Pt. 5, *State v. Smith,* 156 W.Va. 385, 193 S.E.2d 550 (1972). Error was prevalent throughout Mr. Rexrode's criminal prosecution.

IV. CONCLUSION

WHEREFORE, Mr. Rexrode requests that this Honorable Court reverse the judgment below and remand this case with instructions to enter a dismissal order.

Respectfully submitted,
Petitioner,
By Counsel.

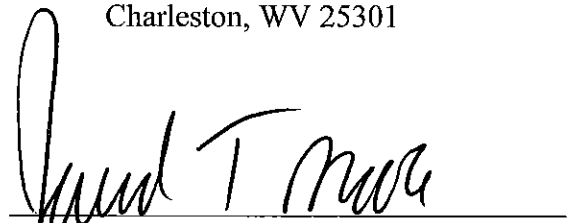
Jerry D. Moore (WV State Bar No. 2609)
The Moore Law Firm, PLLC
P.O. Box 8
74 Walnut Street
Franklin, WV 26807
(304) 358-2208

Jared T. Moore (WV State Bar No. 11988)
The Moore Law Firm, PLLC
P.O. Box 8
74 Walnut Street
Franklin, WV 26807
(304) 358-2208

CERTIFICATE OF SERVICE

I, Jared T. Moore, counsel for the Petitioner herein, do hereby certify that a true copy of the foregoing *Petitioner's Reply Brief* was served upon the following counsel of record via United States Mail on this 22nd day of October, 2018:

Elizabeth D. Grant
Assistant Attorney General
Office of the Attorney General
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301



Jared T. Moore (WV State Bar No. 11988)
The Moore Law Firm, PLLC
P.O. Box 8
74 Walnut Street
Franklin, WV 26807
(304) 358-2208