IN THE SUPREME COURT OF WEST VIRGINIA

Case No. 21-0456

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

ALEXANDER PAUL DELORENZO,

Defendant Below, Petitioner.

BRIEF OF PETITIONER

(On Appeal from the Circuit Court of Marshall County, Case No. 21-F-4, Superseding Case No. 20-F-6)

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ASSIGNMENTS OF ERROR

1. Petitioner was denied his right to a fair trial when the circuit court granted the State's motion in limine and barred the expert testimony of Michael J. Marshall, Ph.D. regarding the impact of Petitioner's diagnosis of Autism Spectrum Disorder and Obsessive Compulsive Disorder on Petitioner's behavior because the proposed expert testimony was relevant to Petitioner's character traits, state of mind and his credibility and critical to Petitioner's ability to present a full defense.

2. Petitioner was denied his right to a fair trial when the circuit court failed to dismiss the superseding indictment or, in the alternative, to disqualify the Marshall County Prosecuting Attorney's Office as counsel for the State, since the superseding indictment was based on confidential defense attorney-client privileged information and statements made by Petitioner in violation of his Fifth Amendment right to remain silent and contained in a mental evaluation report ordered by the circuit court pursuant to W. Va. Code § 27-6A-4(a) Rule 12.2 of the West Virginia Rules of Criminal Procedure over the objection of Petitioner, which report was sent directly to the Prosecutor rather than to the court.

3. The circuit court erred in denying Petitioner's motion to suppress a statement he made to investigating officer at the time of the search without being advised of his Miranda rights and without being allowed to testify at the suppression hearing solely on the issue of voluntariness, even though the Court barred Petitioner from asking questions beyond the scope of voluntariness.

4. The circuit court committed clear error when it permitted the State's computer expert, Ginger Haring, to testify beyond the scope of her expertise as a digital forensic analyst that it was unlikely that a cyber-criminal would use Petitioner's computer as a proxy server, when

Haring previously had testified that is was technologically possible for a cyber-criminal to use Petitioner's computer in such a way.

5. Petitioner was denied his right to a fair trial when the circuit court permitted the State to play to the jury at trial, over Petitioner's objection, full length videos and still images of child pornography that were not found on Petitioner's computer, but, rather, were obtained from the State's private library of child pornography.

6. Petitioner was denied his right to a fair trial when the circuit court admonished him in the presence of the jury for continuing to talk over an objection and to answer the Prosecutor's questions either "yes" or "no," even though the circuit court knew that Petitioner had been diagnosed with Autism Spectrum Disorder, and individuals on the spectrum have great difficulty narrowing their statements and answering questions with a "yes" or "no" because they are not abstract thinkers.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On March 20, 2020, the Grand Jury handed up an indictment charging Petitioner with, on or about February 19, 2019, committing the offense of "Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct," by unlawfully, knowingly, and willfully possessing six hundred (600) or more images of minors engaged in sexually explicit conduct in violation of West Virginia Code § 61-8C-3(a). (Appx. Vol. 1, p. 20 [Indictment].)

Ten months later, on January 11, 2021, the Grand Jury returned a superseding indictment charging Petitioner with, on or between July 31, 2018 and February 20, 2019, committing the offense of "Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct," by unlawfully, knowingly, and willfully sending, causing to be sent, and/or possessing

six hundred (600) or more images of minors engaged in sexually explicit conduct or images depicting violence against a child in violation of West Virginia Code § 61-8C-3(a). (Appx. Vol. 1, p. 21 [Superseding Indictment].)

The charges in the superseding indictment were tried before a jury in the Circuit Court of Marshall County, the Honorable Jeffrey D. Cramer presiding, from March 10, 2021 through March 12, 2021. On March 12, 2021, the jury returned a verdict finding Petitioner guilty of "Distribution and Exhibiting of Material Depicting Minors Engaged in Sexually Explicit Conduct involving 600 or more images or depicts [sic] violence against a child." (Appx. Vol. 1, p. 7 [Jury Verdict Order of March 15, 2021, p. 2].) The court heard and denied Petitioner's post-trial motions for a new trial and judgment of acquittal on May 5, 2021. (Appx. Vol 1, p. 1[Order of May 7, 2021]; and Appx. Vol. 2, p. 83:16-90:3[5-5-21 Hearing Transcript].) By Order of May 7, 2021, the circuit court sentenced Petitioner to 5 to 15 years in custody, followed by 20 years of extended supervised release. The court also ordered Petitioner to register as a sex offender pursuant to West Virginia Code § 15-12-2(b)(5) and advised Petitioner that it would entertain a timely filed Rule 35 motion for modification of sentence. (Appx. Vol. 1, p. 1[Order of May 7, 2021]; Appx. Vol. 2, p. 95:1-15[5-5-21 Hearing Transcript].) Petitioner timely filed his Notice of Appeal on June 3, 2021.

II. STATEMENT OF THE FACTS

On December 12, 2019, the Magistrate Court of Marshall County issued an arrest warrant for Petitioner based on the criminal complaint of Sgt. Rob Safreed of the Wheeling Police Department that on or about January 10, 2019, Petitioner had knowingly and willfully sent or caused to be sent or distributed, exhibited, possessed, electronically accessed with intent to view or display, or transported any material portraying a minor engaged in sexually explicit conduct involving 600 or more images in violation of West Virginia Code § 61-8C-3(a) and (d). Sgt.

Safreed based his criminal complaint on his own viewing of videos that the West Virginia State Police imaged from hard drives Sgt. Safreed obtained from computers in Petitioner's home pursuant to a search warrant executed on February 20, 2019, and on his interview of Petitioner in his home, conducted at the same time Sgt. Ryan Farrell of the Wheeling Police Department and FBI Special Agent Joe Rogers were carrying out the search warrant. (Appx. Vol. 3, p. 6:5-9 & p. 8:4-6 [6-3-20 Hearing Transcript].) Following a voluntariness hearing on June 3, 2020 (Appx. Vol. 3 [6-3-20 Hearing Transcript]), the court denied Petitioner's motion to suppress the audio recorded interview of the Petitioner (Appx. Vol. 1, p. 39:11 [Certified Circuit Court Record for Case No. 20-F-6, Line 11]) and issued a written order on June 11, 2020 finding that Petitioner's statements to Sgt. Safreed were voluntary and made with full knowledge of his *Miranda* rights after being advised of those rights (Appx. Vol. 1, p. 18 [Order of June 11, 2020]). The court's voluntariness order was based solely on the testimony of Sgt. Safreed and the court's review of the audio recording since the court denied Petitioner's motion to testify solely on voluntariness and to limit the State's cross-examination of the Petitioner to the issue of voluntariness. (Appx. Vol. 1, p. 18 [Order of June 11, 2020]; and Appx. Vol. 3, p. 36:11-37:4 [6-3-20 Hearing Transcript].)

On June 30, 2020, the State filed a Motion in Limine to Prohibit the Testimony of Michael J. Marshall, Ph.D. or for an Evaluation of Defendant Pursuant to W. Va. Code § 27-6A-4 (Appx. Vol. 1, p. 39:31-33 [Certified Circuit Court Record for Case No. 20-F-6, Lines 31-33]), which was opposed by Petitioner (Appx. Vol. 1, p. 39:39-40 [Certified Circuit Court Record for Case No. 20-F-6, Lines 39-40]). On September 18, 2020, the circuit court denied the State's motion to prohibit the testimony of Petitioner's expert, Dr. Marshall, but granted the State's motion for a mental evaluation pursuant to W. Va. Code § 27-6A-4. (Appx. Vol. 1, p. 14 [Order of September 18, 2020].) In its order, the circuit court rejected Petitioner's argument that Dr. Marshall's proposed

testimony was not intended to present a "diminished capacity" defense, found that there was probable cause to believe that Petitioner's criminal responsibility or diminished capacity would be a significant factor in his defense (Appx. Vol. 1, p. 14 [Order of September 18, 2020, p. 1]), found that Petitioner intended to introduce expert testimony relating to a mental disease or defect or any other mental condition of Petitioner bearing on the issue of guilt, and ordered that Petitioner undergo a forensic evaluation regarding Petitioner's state of mind at the time of the offense, his diminished capacity, and any other mental condition bearing upon the issue of guilt (Appx. Vol. 1, p. 15 [Order of September 18, 2020, p. 2]). The evaluation was to be conducted by William J. Fremouw, Ph.D., who was directed to prepare an evaluation report to be filed with the Clerk of the Circuit Court in triplicate. (Id.) Upon further consideration of the State's motion to bar the testimony of Dr. Marshall, on March 5, 2021 the court granted the motion, rejecting Petitioner's arguments that Dr. Marshall's testimony was relevant to Petitioner's credibility and to his subjective perceptions of his own conduct and finding that the expert testimony was actually intended to present an impermissible diminished capacity defense. (Appx. 1, p. 10 [Order of March 5, 2021].)

During the court-ordered mental evaluation of Petitioner, Petitioner revealed confidential communications with his attorney, including aspects of the defense strategy, which were included in the report of the mental health examiner and provided to the Prosecutor, leading to the filing of the superseding indictment. On February 2, 2021, the court denied Petitioner's Alternative Motion to Dismiss Indictment, or, in the Alternative, that Assistant Prosecutor Eric Gordon and the Marshall County Prosecutor's Office be Found to have a Conflict of Interest and be Disqualified from Representing the Interests of the State in this Case. (Appx. Vol. 1, p. 13 [Order of February 2, 2021, filed on February 3, 2021].)

At trial, Sgt. James Kozik, Director of Crimes Against Children with the West Virginia State Police (Appx. Vol. 4, p. 3:1-16 [Trial Witnesses Transcript].) testified as to the use of Child Protective System ("CPS") tools to identify people using peer-to-peer software to trade images and videos of child exploitation material (Appx. Vol. 4, p. 4:19-21 [Trial Witnesses Transcript]). He clarified that CPS could only identify IP addresses—which are like addresses or phone numbers associated with each computer (Appx. Vol. 4, p. 7:11-17 [Trial Witnesses Transcript])—and not the person using the computer (Appx. Vol. 4. P. 8:7-8, & 41:24-42:2 [Trial Witnesses Transcript]). He stated that during the period between July 31, 2018 and January 6, 2019, CPS tools identified 299 "child notable" files available for sharing from the IP address associated with Petitioner's computer. (Appx. Vol: Vol 4, p. 16:10-13, & 16:16-18 [Trial Witnesses Transcript].) He explained that CPS does not actually give images, but rather identifies hash values at the IP address that correspond to hash values (an algorithm for identifying computer images) of known child exploitation images maintained by the State in a hash library. (Appx. Vol 4, p. 18:6-22 [Trial Witnesses Transcript].) Four of the 299 files identified at the IP address associated with Petitioner's computer had hash values of images in the State's library. (Appx. Vol. 4, p. 22:7-15 [Trial Transcript].) Sgt. Kozik downloaded the images associated with those hash values from the State's library to a thumb drive and gave them to Sgt. Safreed. (Appx. Vol. 4, p. 24:24-25:16 [Trial Witnesses Transcript].)

Over Petitioner's objection, the Prosecutor was allowed to play the videos obtained from the State's library—and not from Petitioner's computer—to the jury. (Appx. Vol. 4, p. 25:21–26:7; 26:17-21; 27:2; 27:11 [Trial Witnesses Transcript].) This included approximately eight minutes of a video that was about 28 to 29 minutes long (Appx. Vol. 4, p. 28:19-20 [Trial Witnesses Transcript 28:19-20) and one minute and 30 seconds of a video that lasted about 15 minutes (Appx.

Vol 4, p. 29:12-14 [Trial Witnesses Transcript]). Also over Petitioner's objection (Appx. Vol 4, p. 35:1-5 [Trial Witnesses Transcript 35:1-5]), the court permitted the Prosecutor to play to the jury 90 images of alleged child exploitation material from a second thumb drive that Sgt. Kozik downloaded from a second database in his office library and not what was actually found by the State's expert on the Defendant's hard drive. The jury viewed these images in sets of 16 images. (Appx. Vol. 4, p. 35:20-21; 35:24–36:1; 36:21; 37–39 [Trial Witnesses Transcript].) The second thumb drive also contained videos similar to what was stored on the first thumb drive. (Appx. Vol. 4, p. 40:2-7 [Trial Witnesses Transcript].)

Sgt. Safreed was contacted by Sgt. Kozik about conducting the investigation into the alleged sharing of child exploitation material because the IP address was associated with a Wheeling address. (Appx. Vol. 4, p. 52:3-7; 53:4-6 [Trial Witnesses Transcript].) After viewing the videos on the first thumb drive given to him by Sgt. Kozik (Appx. Vol. 4, p. 54:7-11 [Trial Witnesses Transcript]) and determining the registered owner of the IP address, Petitioner, as well as address, email address, and possibly phone number, Sgt. Safreed obtained a search warrant for 1101 Stacey Crossing in Wheeling. (Appx. Vol. 4, p. 55:17-23; 56:1-6; 56:17-20 [Trial Witnesses Transcript].) He executed the search warrant in February 2019 and was accompanied by Sgt. Ferrell and Special Agent Rogers. (Appx. Vol. 4, p. 57:17-23 [Trial Witnesses Transcript].)

Petitioner was home at the time of the search, so Sgt. Safreed interviewed him after first walking through the apartment with Petitioner. (Appx. Vol. 4, p. 59:13-22 [Trial Witnesses Transcript].) Sgt. Safreed testified that he read Petitioner his *Miranda* rights from a card on his Padfolio and that Petitioner acknowledged understanding those rights and agreed to talk to him. (Appx. Vol. 4, p. 60:12-61:2 [Trial Witnesses Transcript].) However, Sgt. Safreed explained that the reading of *Miranda* rights was not included on the digital voice recording of the interview

played to the jury (Appx. Vol. 4, p. 65:9 [Trial Witnesses Transcript]) because the record button on the digital voice recorder is also the pause button, and he had mistakenly hit the button twice, pausing the first few minutes of the interview. (Appx. Vol. 4, p. 61:3-5; 61:8-16 [Trial Witnesses Transcript].) Sgt. Safreed acknowledged that he had testified at the preliminary hearing that he recorded the reading of Miranda rights but gave as an excuse that he had intended to record the Miranda rights and did not review the recording prior to the preliminary hearing. (Appx. Vol. 4, p. 61:23–62:3; 62:2-13 [Trial Transcript].) He also testified that he realized a few minutes into the interview that the machine was not recording, but he did not think to go back and record the Miranda rights. (Appx. Vol 4, p. 63:17-19; 63:20-23 [Trial Witnesses Transcript].) Sgt. Safreed admitted that he spoke with Petitioner for several minutes before telling Petitioner he had come to seize child exploitation material, to which Petitioner replied, "I thought this was about a student loan." (Appx. Vol. 4, p. 83:8-18 [Trial Witnesses Transcript].)

According to Sgt. Safreed, Petitioner indicated that his internet was both virus-protected and password-protected. (Appx. Vol. 4, p. 66:8-13 [Trial Witnesses Transcript].); however, on cross-examination, Sgt. Safreed agreed that Petitioner told him that there was no password on the computer equipment itself. (A.ppx. Vol. 4, p. 82:17-21 [Trial Witnesses Transcript].) Petitioner described himself to Sgt. Safreed as "old school," meaning he used a Windows-based system and not a touchscreen computer. (Appx. Vol. 4, p. 66:20-21 [Trial Witnesses Transcript].) He explained peer-to-peer and torrent to Sgt. Safreed and said he had been using torrent since the internet was invented, 20 plus years ago. (Appx. Vol. 4, p. 67:22–68:5 [Trial Witnesses Transcript].) Petitioner stated that child porn as a popup would be on his computer at the end of an *Unsolved Mysteries* episode. (Appx. Vol. 4, p. 75:16-24 [Trial Witnesses Transcript].)

Sgt. Safreed reviewed a property receipt with Petitioner for two external hard drives, a smartwatch and charger, a cellphone, two SD cards, a tower, and a tablet. (Appx. Vol. 4, p. 68:3-11; 69:22–70:14; 70:19-20 [Trial Witnesses Transcript].) Ginger Haring analyzed the hard drives. (Appx. Vol 4, p. 72:1-9; 75:1-9 [Trial Witnesses Transcript].)

Sgt. Safreed acknowledged on cross-examination that although the search warrant directed officers to look for children's toys and children's clothing or undergarments, none were found in Petitioner's apartment. (Appx. Vol. 4, p. 79:11-22 [Trial Witnesses Transcript].) Similarly, although the warrant directed the officers to look for pictures of children on the walls or lying about, Petitioner had no photos of children. (Appx. Vol. 4, p. 79:23-24:6 [Trial Witnesses Transcript].) All the pictures on the walls of Petitioner's bedroom were of an adult Marilyn Monroe, and none were pornographic. (Appx. Vol. 4, p. 80:7-19 [Trial Witnesses Transcript].) Sgt. Safreed also admitted on cross examination that that there are certain behaviors common to individuals involved in the receipt, distribution and possession of child pornography, which behaviors include maintaining their collection in a safe environment, usually in the collector's residence as these individuals prefer not to be without their child pornography for any prolonged period of time. (Appx. Vol 4., p. 77:11-78:24 [Trial Witnesses Transcript]). Sgt. Safreed admitted that Petitioner had told him that Petitioner's side neighbors used his internet connection (Appx. Vol. 4, p. 83:20–84:2 [Trial Witnesses Transcript]), but Sgt. Safreed saw no reason to interview the neighbors, since Petitioner also had told him that he used torrents and dark web to download movies (Appx. Vol. 4, p. 91:18-92:2 [Trial Witnesses Transcript]).

Ginger Haring, a civilian Digital Forensic Analyst with the West Virginia State Police (Appx. Vol 4. p. 101:9-15; 158:3-6 [Trial Witnesses Transcript]), described the process of analyzing hard drives, which involves making an exact forensic copy of a hard drive, bit for bit,

then loading the copy into AXIOM software and looking for suspicious child images. (Appx. Vol 4, p. 101:17-22; 102:19–103:5 [Trial Witnesses Transcript].) Analysis is done of a mirror image of the hard drive, called a clone so as not to make any changes on the original (Appx. Vol. 4, p. 103:6-21 [Trial Witnesses Transcript]).

Ms. Haring examined four drives as part of the investigation. (Appx. Vol. 4, p. 108:19 [Trial Witnesses Transcript].) HD-1 and HD-2 were internal drives, meaning drives contained within the computer case itself, and HD-3 ad HD-4 were external drives, that is, drives having cases of their own which can be plugged into a USB port. (Appx. Vol. 4, p. 113:14-20 [Trial Witnesses Transcript].) She commented that it was unusual, but not odd, to have two internal hard drives. (Appx. Vol. 4, p. 113:21-24 [Trial Witnesses Transcript].) Initially, she analyzed only HD-1 for suspicious images of child exploitation and returned it to Sgt. Safreed after finding 320 child suspicious videos. (Appx. Vol. 4, p. 109:5-9; 109:23–110:1; 110:8-16; 111:7-8 [Trial Transcript].) There were videos on HD-1 that were not child suspicious. (Appx. Vol. 4, p. 110:23–1 [Trial Witnesses Transcript].)

When the hard drives were returned to her for further inspection (Appx. Vol. 4, p. 111:9-18 [Trial Witnesses Transcript]), she bookmarked 7 images (photos) on HD-2 (Appx. Vol. 4, p. 113:3-6 [Trial Witnesses Transcript]). She found 2,464 images or videos on HD-1. (Appx. Vol. 4, p. 118:11-14, 148:4 [Trial Witnesses Transcript].) There were 1,200 carved files, that is, files that were deleted or moved, but which the computer can tell have been there. (Appx. Vol. 4, p. 121:13-23 [Trial Witnesses Transcript].) There were 1,100 orphaned files, meaning files that remained after the program associated with the files has been deleted. (Appx. Vol 4, p. 122:4-15; 122:21 [Trial Witnesses Transcript].) She stated that a computer user cannot go back and pick up videos or images in orphaned files. (Appx. Vol 4, p. 122:16-19 [Trial Witnesses Transcript].)

On HD-1 there was an encrypted partition called OLDSCH, which Ms. Haring referred to as "Old School," a name which would have had to have been given to it by someone. (Appx. Vol. 4, p. 136:8-17; 137:3-4 [Trial Witnesses Transcript].) Ms. Haring could not determine who named the partition. (Appx. Vol. 4, p. 176:4-7 [Trial Witnesses Transcript].) She stated that videos do not usually go into encrypted files on their own. (Appx. Vol. 4, p. 137:23–138:1 [Trial Witnesses Transcript].) She had no way to observe what was on the encrypted files on HD-1, but she was able to see file names and could connect those file names with the same names in orphaned files and files in the recycle bin. (Appx. Vol. 4, p. 138:2-5; 138:8-11; 138:14-15; 138:19-22 [Trial Witnesses Transcript].) While she did not know what was in the encrypted files because the files were masked coming onto the computer via Tor and Frostwire, based on her training she determined that the files were child exploitation material because the files were sent to others by a regular browser. (Appx. Vol. 4, p. 171:17–174:8 [Trial Witnesses Transcript].) She stated that all of the child suspicious material was found in what she referred t5o as the "Old School" partition. (Appx. Vol. 4, p. 179:1-5[Trial Witnesses Transcript].)

She was able to see that Petitioner used Firefox browser, but there was no search history. (Appx. Vol. 4, p. 140:8-12 [Trial Witnesses Transcript].) Due to the lack of a search history, she could not identify Petitioner's topics of interest in internet research, and she could not determine whether Petitioner did or did not go directly after child pornography. (Appx. Vol. 4, p. 165:5-18 [Trial Witnesses Transcript].) She determined that the computer had had a Tor browser, which masks the IP, but she could not determine what search engine was used in that browser. (Appx. Vol. 4, p. 140:16–141:1; 141:7-13 [Trial Witnesses Transcript].) Developed by the Navy to protect personal privacy of users from anyone conducting network surveillance, Tor software is not privately funded. (Appx. Vol. 4, p. 166:19–167:5 [Trial Witnesses Transcript].) She could make

no determination regarding criminal concealment because the Tor browser is intended to mask IP search history. (Appx. Vol. 4, p. 169:14-22 [Trial Witnesses Transcript].) Since the Tor browser had been deleted from the computer, Ms. Haring was unable to determine whether a user had visited the dark web. (Appx. Vol. 4, p. 141:14-18 [Trial Witnesses Transcript].) She could not determine when the Tor browser had been deleted. (Appx. Vol. 4, p. 141:19-20 [Trial witnesses Transcript].) Ms. Haring opined that the deletion of the Tor browser could cause orphaned files. (Appx. Vol. 4, p. 141:21-23 [Trial Witnesses Transcript].)

Although Ms. Haring was unable to locate a search history, she was able to find familiar child pornography websites on HD-1 through browser, and she found evidence of Frostwire, a peer-to-peer network, on Petitioner's hard drive, but it was not still active when she examined the hard drive. (Appx. Vol. 4, p. 142:4-12; 142:16-24; 143:4-11; 144:1-20 [Trial Witnesses Transcript].) Ms. Haring stated that she was able to match 12 of the 94 images on the second thumb drive created by Sgt. Kozik with images on the hard drive, some of which were partial and some of which were not. (Appx. Vol. 4, p. 144:6-14; 145:7-10; 145:21–146:2; 146:18-24 [Trial Witnesses Transcript]0. She detected no viruses, malware, or spyware on the hard drive. (Appx. Vol. 4, p. 147:4-6; 147:11-15 [Trial Witnesses Transcript].) The hard drive contained active adult pornography, but she did not observe child suspicious material attached to the Unsolved Mysteries episode. (Appx. Vol. 4, p. 147:16–148:1 [Trial Witnesses Transcript].) The hard drive had CCleaner, which will clear some browsing data and cookies. (Appx. Vol. 4, p. 148:9-14 [Trial Witnesses Transcript].) According to Ms. Haring, all computers do not come with CCleaner; it must be downloaded. (Appx. Vol. 4, p. 167:8-11; 167:15-16 [Trial Witneses Transcript].) There was no proxy server on the hard drive. (Appx. Vol. 4, p. 149:6-8 [Trial Witnesses Transcript].)

There was no shredder program on Petitioner's computer. (Appx. Vol. 4, p. 163:18-24 [Trial WitnessesTranscript].)

Ms. Haring expressed the opinion that while it was possible someone could have used Petitioner's server without his knowledge, she would not say that that it was probable. (Appx. Vol. 4, p. 149:22–150:5 [Trial Witnesses Transcript].) She explained that a hacker usually had a financial motive such as obtaining ID or bank numbers and did not typically put pornography on someone else's computer and then delete it. (Appx. Vol. 4, p. 150:7-19[Trial Witnesses Transcript].) According to Ms. Haring, a neighbor using Petitioner's internet would need to have a remote desktop connection in order to download anything to Petitioner's computer, and she saw no such desktop on any of Petitioner's hard drives. (Appx. Vol. 4, p. 151:6-20; 152:13-157 [Trial Witnesses Transcript].) Ms. Haring opined that once something is deleted from the recycle bin the user of the computer would not be able to go back and look at it because the user would not have the type of sophisticated forensic equipment she has. (Appx. Vol. 4, p. 154:3-7 [Trial Witnesses Transcript]). Ms. Haring also testified the child pornography material she found using her forensic Axiom program had been deleted from the recyclke bin. (Appx. Vol 4, p. 156:1-3[Trial Witnesses Transcript]). Similarly, she opined that it was possible that a cyber-criminal could gain access to Petitioner's hard drive by use of a trojan horse, but it was not a likely scenario. (Appx. Vol. 4, p. 157:11-15[Trial Witnesses Transcript].)

She was unable to state whether or not Petitioner paid money to access or was ever paid money for child pornography. (Appx. Vol. 4, p. 168:9-13 [Trial Witnesses Transcript].) Similarly, she could not determine whether Petitioner was maintaining an organized collection of child pornography on his computer. (Appx. Vol. 4, p. 169:6-8 [Trial Witnesses Transcript].)

Petitioner's father, Mark Delorenzo, testified on Petitioner's behalf. Mr. Delorenzo stated that he and Petitioner's mother divorced in 1999 and he was awarded custody and raised both Petitioner and his sister Megan, who is three years younger than Petitioner. He explained that Petitioner has OCD (obsessive compulsive disorder) and autism, a diagnosis that was confirmed after the charges were brought in this case. (Appx. Vol. 4, p. 188:24–189:12 [Trial Witnesses Transcript].) Furthermore, Petitioner has always had anxiety issues. He has never gotten a restful night's sleep. He overindulges and goes to extremes when he wants to learn something. He never skims the surface, but always goes deep, digging up every fragment of information about whatever category he's interested in. (Appx. Vol. 4, p. 182:2-8 [Trial Witnesses Transcript].) Petitioner would do extensive research before visiting historical sites on family trips, even to the point of helping the tour guide and backing up the tour. (Appx. Vol. 4, p. 184:9-19 [Trial Witnesses Transcript].)

Because of his autism and OCD, if anything is out of place or moved, his level of anxiety is hyped up. He questions and diagnoses everything, obsessing over the simplest test question. As an example, he could not simply answer "what color is the sky?" He would want to know whether it was night or day, and if it was day, he would want to know whether it was morning or afternoon. (Appx. Vol. 4, p. 182:9-17 [Trial Witnesses Transcript].) According to his father, Petitioner does not intend to give anyone a hard time; he just needs to be precise. He is honest and truthful and has a good moral character. (Appx. Vol. 4, p. 182:18-24 [Trial Witnesses Transcript].)

Petitioner attended Catholic school K-12, received the sacraments of Confirmation and Holy Communion, was an alter server, studied the Bible, and never had a problem with grades. The study of the Bible gave him a love for ancient history. In fact, after graduating from West

Liberty University, Petitioner took a year off and then spent two years working on a Master's in Ancient History but did not complete it. (A.R. ___ [Trial Transcript 183:1--20].)

Mr. Delorenzo never saw his son seek or view child pornography on computers. (Appx. Vol. 4, p. 183:10-12 [Trial Witnesses Transcript].) He does not believe Petitioner committed the offense charged. (Appx. Vol 4, p. 187:15-17 [Trial Witnesses Transcript].)

Ashley Helfer, who has known Petitioner through her husband for 13 years, testified that she recognizes characteristics in Petitioner similar to those in her 10-year-old son who was diagnosed with high functioning autism when he was 4 years old: both get stuck on things and want to know things and neither recognizes fear when trying to figure something out until something bad happens (Appx. Vol. 4, p. 191:18–192:1; 192:20-24; 193:2-14 [Trial Witnesses Transcript]). Petitioner is socially awkward and obsessive. He researches everything about a topic and tells her about it, even if she does not want to know. (Appx. Vol. 4, p. 194:2–195:5 [Trial Witnesses Transcript].)

Ms. Helfer has lived a couple of apartment buildings away from Petitioner for six years and can see his apartment from her residence. She goes to his house pretty often. (Appx. Vol. 4, p. 200:13-14 [Trial Witnesses Transcript].) She believes Petitioner is peaceful and not a threat to society, she assumes he is interested in adult pornography because "he's a male," but she does not believe he is interested in child pornography. (Appx. Vol. p. 195:8-21 [Trial Witnesses Transcript].) She believes Petitioner is of good moral character, is truthful, and knows right from wrong. (Appx. Vol. 4, p. 195:22-196:4 [Trial Witnesses Transcript].)

Ms. Helfer has let only a few people babysit her three children and Petitioner is one of them. He has babysat even after she heard the charges against him. (Appx. Vol. 4, p. 196:8-12 [Trial WitnessesTranscript].) His interactions with her children are normal and they prefer him to

babysit over their grandfather. (Appx. Vol. 4, p. 196:20-24 [Trial Witnesses Transcript].) In the past, she was in contact with someone who was convicted of child abuse, the father of her cousin's children. He was very "touch-feely," talked to you inappropriately, and went too far in his interactions. She has not observed the same traits in Petitioner. (Appx. Vol. 4, p. 197:1-15 [Trial Witnesses Transcript].) She was shocked and saddened by the charges against Petitioner because she knew they could not be true. (Appx. Vol. 4, p. 197:17-24 [Trial Witnesses Transcript].)

Andrew Helfer, Petitioner's friend since they met in second grade, testified on Petitioner's behalf. (Appx. Vol. 4, p. 203:5-10; 203:22-24 [Trial Witnesses Transcript].) He stated that he saw character traits in Petitioner that were similar to those of his son who has high-functioning autism, "some would consider it Asperger's." (Appx. Vol. 4, p. 202:16-24; 204:7-8 [Trial Witnesses Transcript].) He described Petitioner as "one of the most nonthreatening people I've met." (Appx. Vol. 4, p. 204:9-12 [Trial Witnesses Transcript].)

Mr. Helfer stated that Petitioner has high anxiety and has trouble with people getting close to him; he is very jumpy. (Appx. Vol. 4, p. 204:15-19 [Trial Witnesses Transcript].) Petitioner also has severe OCD. If something is moved in the room, he must put it back immediately. Mr. Helfer gave as an example a former girlfriend who, when they got in an argument, would swipe the remotes from the ottoman where he kept them because she knew he would immediately have to put them back. Petitioner makes to-do lists from which he will not deviate.

Petitioner researches topics heavily and likes to debate. Recently Mr. Helfer and Petitioner discussed a movie, The Death of Stalin, and when it was apparent that Mr. Helfer knew more about World War II, Petitioner did some research and told Mr. Helfer things he did not know about Russian history in that era. (Appx. Vol. 4, p. 205:11-19 [Trial Witnesses Transcript].) Petitioner has difficulty in social situations. He can come off as condescending and aloof of social cues.

Mr. Helfer and Petitioner were altar servers in the Catholic Church until high school. Petitioner is very devout and was really disturbed by the priest child sex abuse scandal because it cast a bad light on all Catholics. Petitioner has a strict moral code. He is truthful and honest, even when he gets in trouble. (Appx. Vol. 4, p. 206:8–207:3-10 [Trial Witnesses Transcript].)

Mr. Helfer testified that he had observed Petitioner's habits and routine regarding use of the computer. Petitioner has no password on his computer. He usually identifies files by a single number or letter. Mr. Helfer has never seen Petitioner assign a name to a partition file of five or six letters. (Appx. Vol. 4, p. 207:14–208:8 [Trial Witnesses Transcript].)

Mr. Helfer has observed Petitioner around his children. They love him and there have been no problems at all. Petitioner has watched his children several times since the charges were issued because Mr. Helfer does not believe he committed the offense. (Appx. Vol. 4, p. 208:9-24 [Trial Witnesses Transcript].) He was once in contact with his wife's cousin's boyfriend, who was charged with molesting the boyfriend's nephew. The boyfriend was very odd. He liked to get uncomfortably close to people and was "touchy-feely," "even with males." Mr. Helfer would not permit someone like that to babysit his kids, but he did not see those traits in Petitioner. (Appx. Vol. 4, p. 209:3-19 [Trial Witnesses Transcript].) Mr. Helfer stated that he would do anything for Petitioner, but he would not lie for him. (Appx. Vol. 4, p. 211:12-13; 211:21-22 [Trial Witnesses Transcript].)

Petitioner testified on his own behalf. He had difficulty giving answers that were not detailed and on at least two occasions the court admonished him in the presence of the jury not to talk over an objection and even threatened to discontinue his testimony if he did not stop talking. (Appx. Vol. 4, p. 223:22-23; 233:18–234:1; 234:19-20 [Trial Witnesses Transcript].) He also had difficulty answering questions "yes" or "no" on cross-examination and on another occasion the

court threatened in front of the jury to strike his entire testimony if he did not comply. (Appx. Vol. 4, p. 292:18-24; 293:21–294:18 [Trial Witnesses Transcript].)

Petitioner stated that he grew up in the Catholic Church, was an altar server, went to Catholic schools, and was even nominated to a Jesuit seminary. (Appx. Vol. 4, p. 214:14–215:8 [Trial Witnesses Transcript].) He does not lie because it is messy and "the truth is the truth is the truth is the truth. It doesn't change; you don't have to think about it." (Appx. Vol. 4, p. 215:10-17 [Trial Witnesses Transcript].) He understands right from wrong and stated, "Do unto others as you would have done unto yourself or the ones you love." (Appx. Vol. 4, p. 215:18-21 [Trial Witnesses Transcript].) He has a B.S. in Communications, with a focus on the technical aspects, and a minor in Computer Information Systems, and has two years toward a Masters in Greek and Roman history. (Appx. Vol. 4, p. 216:2-7; 287:5-21 [Trial Witnesses Transcript].)

He acknowledged his diagnosis of Autism Spectrum Disorder ("ASD") and explained this means his mind does not shut off. For example, during trial, he had researched a stone sitting on a circular plot outside the courthouse. (Appx. Vol. 4, p. 217:8-18; 219:21–220:4; 221:4-14 [Trial Witnesses Transcript].) As a child, he was the weird guy the kids picked on. He has trouble being in groups, even of close relatives, but he is good with one-on-one exchanges and was able to work in car sales because that is filling a role and he memorized all the information on each car. He is a massive gamer and finds it easier to socialize on a headset than in real life. (Appx. Vol. 4, p. 230:18-20 [Trial Witnesses Transcript].) Driving is difficult for him because there are too many stimuli. Every night he writes a list of things he will do the next day and is excited to cross things off the list. His house is meticulously ordered, and a change in routine makes him very upset, even if it was for a good reason, such as, for example, setting up his father to testify from home when

he was being quarantined for COVID. (Appx. Vol. 4, p. 225:3–226:24 [Trial Witnesses Transcript].)

Petitioner explained that when he watches TV and movies on the internet and was telling Sgt. Safreed that he would never share those files because of copyright concerns. (Appx. Vol. 4, p. 230:21; 232:5–233:1 [Trial Witnesses Transcript].) He does not watch child pornography and thought he had made that clear to Sgt. Safreed. (Appx. Vol. 4, p. 233:2-6 [Trial Witnesses Transcript].)

Petitioner did not make a partition called "Old School" and did not know such a partition existed on his computer. (Appx. Vol. 4, p. 237:4-7 [Trial Transcript].) He does not use more than two symbols in naming files and would not name a file with six letters, since he would have to type it in DOS ("Disk Operating System") and would not be able to remember it. (Appx. Vol. 4, p. 235:8–236:4; 236:5-16 [Trial Witnesses Transcript].) The partitions on his hard drive are "C" and "D." If he had added another partition, he would have called it "E." (Appx. Vol. 4, p. 274:10-14 [Trial Witnesses Transcript].) He stated that he had never encrypted a file in his life. There must be a password to open encrypted files, and there is no password on his computer, and there was no password on the computer between July 31, 2018 and February 20, 2019, which he told Sgt. Safreed. (Appx. Vol. 4, p. 245:10-19; 246:3 [Trial Witnesses Transcript].)

Petitioner became interested in the dark web when he learned about it on YouTube. He looked up statistics and discovered that 96 percent of data available on the internet was on the dark web. He felt he was being lied to because so much information was "below the waterline," to use his iceberg metaphor. (Appx. Vol. 4, p. 229:12–230:6; 250:14-19; 251:4-6; 252:10-12 [Trial Witnesses Transcript].) He learned that the dark web contained both legal and illegal content and that the CIA, FBI, ProPublica, and the BBC have portals on the dark web, and Facebook has started

to use it to bring social media to China. (Appx. Vol. 4, p. 257:1-16 [Trial Witnesses Transcript].) The Tor browser, which is necessary for the dark web, was created by the U.S. Navy to be used by government organizations to keep information outside of public eye. Now it is used by the general world community. (Appx. Vol. 4, p. 257:20–258:2 [Trial Witnesses Transcript].)

Petitioner explained the steps he took to access the dark web, starting with typing in "tutorials on how to log into the dark web" on Bing or Google. (Appx. Vol 4, p. 251:12-13, 252:13-14 [Trial Witnesses Transcript].) This search returned step-by-step instructions on how to download Tor. He downloaded Tor, which showed only a white screen since it is only a browser, and then went back to Bing and typed in "list of current deep and dark websites," which produced a list of websites with names like 123FRGMZ.oinion and no indication of what they were about. Rather than go through the list of websites, he typed "web tracker" into Bing and got websites with high levels of traffic. The one with the most traffic turned out to be a forum advocating for sexual relations with children. (Appx. Vol. 4, p. 253:10-24 [Trial Witnesses Transcript].)

Although Petitioner was shocked by the arguments in favor of sexual relations with minors, he started reading because he wanted to understand and, particularly since Bishop Bransfield of the Wheeling-Charleston area was being investigated for improper behavior, wondered if Church leaders engaging in this type of activity had some knowledge he did not. (Appx. Vol. 4, p. 254:1-12 [Trial Witnesses Transcript].) This forum led him to link to an episode of the TV show Unsolved Mysteries on a victim of child pornography, which, unexpected to Petitioner, included the actual video the girl was discussing after the closing credits. (Appx. Vol. 4, p. 254:23–256:8; 259:11 [Trial Witnesses Transcript].) He did not knowingly and willfully seek out or access the video at the end of Unsolved Mysteries and exited out of Unsolved Mysteries when he saw it. (Appx. Vol. 4, p. 259:6-9; 259:12-15; 260:3-5 [Trial Witnesses Transcript].) When he reviewed

the videos and images produced by the State with his attorney, he denied having seen them before. (Appx. Vol. 4, p. 261:15-19; 295:13-16 [Trial Witnesses Transcript].) Petitioner did not watch the videos shown to the jury and found it "appalling" that they were shown. He never knowingly and willingly downloaded or looked for any child pornography (Appx. Vol. 4, p. 273:6-12 [Trial Witnesses Transcript]), and he has no interest in child pornography (Appx. Vol. 4, p. 275:2-4 [Trial Transcript]).

At some point, Petitioner thought something might be hidden on his computer because when he and Andrew Helfer played "Rust," which requires a lot of bandwidth, his computer was very slow. He started wiping the hard drive using the PC cleaner in an effort to figure out what was going on. (Petitioner stated that Ms. Haring was incorrect in testifying that there is no cleaner that comes with Windows. (Appx. Vol. 4, p. 270:14-15 [Trial Witnesses Transcript].)) He then organized the hard drive by date and realized that the problems started happening around the time he installed the Tor browser, so he deleted everything from the Tor browser and older, thinking there was a virus. He was not trying to hide where he had been on the internet. He did not open any files before deleting because there was no need since they were all associated with the Tor browser. (Appx. Vol. 4, p. 248:16–249:11; 260:9-15; 280:1-6 [Trial Witnesses Transcript].) Petitioner cleans his computer once per month to avoid sluggish performance. (Appx. Vol. 4, p. 279:8-24 [Trial Witnesses Transcript].) He did not delete the Unsolved Mysteries episode because he believed it was streaming and he never saw it on his PC. (Appx. Vol. 4, p. 260:7-9 [Trial Witnesses Transcript].)

Petitioner thought that others could have put something on his computer, since his side neighbors shared a network with him and they could access his internet and could print or file even if he was not home. (Appx. Vol. 4, p. 246:7-13 [Trial Witnesses Transcript].) He believed his

computer could be used as a server by anyone in a peer-to-peer network. (Appx. Vol. 4, p. 246:14-17 [Trial Witnesses Transcript].) Also, during the summer of 2020 cyber criminals obtained his checking account and debit card information and attempted to make a $2,000 charge, which was caught by United Bank. (Appx. Vol. 4, p. 237:16–238:14; 239:4-14; 240:2-7; 273:18–274:1 [Trial Witnesses Transcript].) He believes this fraudulent activity may have come about because he was surfing the internet in the dark web previously. (Appx. Vol. 4, p. 244:3-24 [Trial Witnesses Transcript].) Petitioner initially had no fear of the dark web, but now he knows never to go back. (Appx. Vol. 4, p. 278:22–279:4 [Trial Witnesses Transcript].)

Petitioner testified as to his confusion when the search warrant was executed. When he was told the officers were there to take his electronics, he believed it had something to do with his student loans and assured them that he had a payment plan for the loans. (Appx. Vol. 4, p. 264:22–265:5; 267:10-16 [Trial Witnesses Transcript].) As a person with Autism and OCD, he panicked because he was worried about what the officers were doing and touching, but he was told he could not watch. He experienced dry mouth and shaking limbs. He became anxious that they were taking his electronics because he was about to start a new job selling cell phones and the officers were taking his "library" of information about the cell phone products that he needed for his job. (Appx. Vol. 4, p. 265:8-11; 265:16-19; 265:20-23 [Trial Witnesses Transcript].) He did not really calm down until he talked to Andrew Helfer after the officers left.

Petitioner thought that Sgt. Safreed asked "uncouth" questions, but he responded truthfully. (Appx. Vol. 4, p. 263:5-8 [Trial Witnesses Transcript 263:5-8].) He did not know why Sgt. Safreed was asking about pornography, and although he heard the sergeant refer to "child exploitation material" when the recording of the interview was played to the jury, at the time of the interview he did not comprehend that Sgt. Safreed was talking about child pornography and thought he was

talking about legal adult pornography. (Appx. Vol. 4, p. 266:20–267:3; 267:23–268:7; 268:8-11 [Trial Witnesses Transcript].) Therefore, he responded to Sgt. Safreed's questioning that he liked Cosplay girls, who are adult girls who dress up as graphic novel characters at Comic-Con. (Appx. Vol. 4, p. 263:9-23 [Trial Witnesses Transcript].) As a person with autism, Petitioner is unable to filter when people are being deceptive or deceitful or joking. (Appx. Vol. 4, p. 268:12-17].) [Trial Witnesses Transcript].) He could not confirm Sgt. Safreed's testimony that he pushed the pause button on the recorder and could not testify as to how he was operating equipment the day of the search. (Appx. Vol. 4, p. 267:18-22 [Trial Witnesses Transcript].)

Although the court had barred Petitioner from introducing the testimony of Michael J. Marshall, Ph.D. as to Petitioner's credibility and his subjective perception of his actions (Appx. Vol. 1, p. 10 [Order of March 5, 2021]), at the sentencing hearing the court permitted the Petitioner to preserve Dr. Marshall's testimony for appeal, and heard heard Dr. Marshall's testimony regarding his diagnosis of Petitioner with ASD, OCD, depression, anxiety, and panic disorder (Appx. Vol. 2, p. 17:2-8 & 39:20-22 [May 5, 2021 Hearing Transcript].) Dr. Marshall observed several of Petitioner's behaviors that would put him on the mild end of the autism spectrum. (Appx. Vol. 2, p. 23:11-12 [May 5, 2021 Hearing Transcript].) Petitioner was socially odd, he lacked social skills, and he did not engage in typical niceties of reciprocal conversation. For example, he talked only about his interests, pointing out the window to various buildings and identifying the persons and events associated with buildings, without picking up that Dr. Marshall was bored. (Appx. Vol. 2, p. 21:9–22:2 [May 5, 2021 Hearing Transcript].)

Dr. Marshall noticed other traits in confirming his diagnosis of ASD. (Appx. Vol. 2, p. 24:18-20 [May 5, 2021 Hearing Transcript].) Petitioner thinks concretely, not conceptually, meaning that unlike neurotypicals (i.e., those without ASD), who are "top down" thinkers in that

they grasp a concept, then look for consistencies or inconsistencies, Petitioner and those with ASD are "bottom up" thinkers, who start with details and look for more details, often missing the concept. People with ASD have trouble with abstractions. (Appx. Vol. 2, p. 24:22–25:2-12; 59:3-8 [May 5, 2021 Hearing Transcript].) For example, a neurotypical would not go on the dark web knowing that is where criminals hang out or concerned that they could be hacked or come across forbidden information, but a person with ASD will enter the dark web step-by-step, compulsively gathering information and not processing danger. (Appx. Vol. 2, p. 25:13–26:21 [May 5, 2021 Hearing Transcript].) Other ASD symptoms Dr. Marshall observed in Petitioner were difficulty understanding others' feelings, difficulty with a change in routine, repetitive behavior (in Petitioner's case, biting knuckles), nonreciprocal speech, and sensory defensiveness (i.e., adversely affected by sensations; with Petitioner it is certain sounds, light, temperature, and food textures). (Appx. Vol. 2, p. 28:12–29:5; 39:1-4 [May 5, 2021 Hearing Transcript].) His findings were confirmed by a score of 114 on the autism portion of the Gilliam Autism Rating Scale, which indicates a very high probability of having autism. (Appx. Vol. 2, p. 37:19–38:3 [May 5, 2021 Hearing Transcript].) Dr. Marshall believes that Petitioner could have testified competently but warned that a jury might misinterpret his autism symptoms and mistake his lack of eye contact as being deceptive, his flat emotions for insensitivity, and going off on a tangent for being difficult or uncooperative and hiding something. (Appx. Vol. 2, p. 39:23–40:2; 40:7–41:3 [May 5, 2021 Hearing Transcript].)

Dr. Marshall noticed no traits indicating Petitioner is a danger to society (Appx. Vol. 2, p. 22:20-23 [May 5, 2021 Hearing Transcript].) In fact, Petitioner scored a very low 8 out of a possible 40—with 18 being an average score and 30 being an unacceptable score—on the HCR-

20 ("Historic Clinical Risk-20") that measure risk for violence. (Appx. Vol. 2, p. 43:15-21; 44:5–45:5; 45:14-18 [May 5, 2021 Hearing Transcript].)

Petitioner scored 1 on the CPORT ("Child Pornography Offender Risk Tool"), which translates to a risk of recidivism of 6% or a 94% chance he will not recidivate. (Appx. Vol. 2, p. 50:18–51:9 [May 5, 2021 Hearing Transcript].) Dr. Marshall pointed out that research shows that a neurotypical person, i.e., a person that does not have ASD, without a history of a contact offense will almost never commit a contact offense following a child pornography conviction and testified that he believed that a person with ASD would be even less likely to commit a contact offense after a child pornography conviction because such a person would lack the social skills to engage in grooming behavior typical of child molesters. (Appx. Vol. 2, p. 51:10-16–52:10 [May 5, 2021 Hearing Transcript].)

SUMMARY OF THE ARGUMENT

The overriding error in this case is quite basic: the circuit court prevented the jury from hearing relevant evidence on the issue of intent and in doing so denied Petitioner his right to present a full defense. The court confused the issue of whether Petitioner had the mental capacity to form the intent to commit the offense—an inquiry relevant to a diminished capacity defense—with the question of whether Petitioner actually formed the intent to commit the offense charged in this particular case. Although Petitioner never alleged that he lacked the mental capacity to commit the offense due to his diagnoses of ASD and OCD, the circuit court ordered a forensic evaluation—over Petitioner's objection—and upon the conclusion of the examiner that Petitioner was not acting under a diminished capacity barred Petitioner from introducing the expert testimony of Michael J. Marshall, Ph.D., who diagnosed Petitioner with ASD and OCD and could have provided testimony regarding the characteristics of individuals on the autism spectrum, including Petitioner—such as

pedantic speech, flat affect, the need to be specific, and a hyperfocus that creates a need to thoroughly research a subject—that would have assisted the jury in evaluating Petitioner's credibility at trial and in determining whether he knowingly and willfully possessed and sent child pornography or whether he was simply engaged in research into the dark web, as he testified. Without this testimony, the jury was left with a defendant who appeared uncooperative and combative on the stand and no explanation for why child exploitation material may have appeared on his computer at one time.

The circuit court's lack of understanding of Petitioner's defense led to other problems. Over the course of the Court ordered forensic evaluation, Petitioner reported certain confidential conversations with his attorney regarding trial strategy, which were incorporated into the written forensic report and delivered unredacted to the Prosecutor, instead of filed with the court as required by statute. The State then used this information to obtain a superseding indictment expanding the relevant period of time and adding an allegation that Petitioner sent as well as possessed unlawful images in clear violation of Petitioner's right to counsel and his right to remain silent. Furthermore, the court admonished Petitioner at least two times at trial regarding his inability to answer "yes" or "no" on cross-examination and his failure to stop talking following an objection—typical behavior from someone on the autism spectrum—and even threatened to discontinue or strike Petitioner's testimony, unnecessarily putting him in a bad light before the jury.

The circuit court allowed the State to play Plaintiff's recorded statement to the jury, even though there was no evidence other than the testimony of the officer conducting the interview, Sgt. Safreed, that Petitioner had been read his Miranda rights and had waived them, since the officer failed to record the reading of the Miranda rights. Furthermore, Petitioner was not able to testify

at the hearing on the voluntariness of his statement since the court refused to limit the State's cross-examination to the issue of voluntariness.

The circuit court committed plain error in allowing the State's digital forensic analyst, Ginger Haring, to testify that it was not likely that a cybercriminal would have used Petitioner's computer as a proxy server and placed unlawful material on his computer after having testified that it was possible for a cybercriminal to use Petitioner's computer in such a way. This testimony was beyond Ms. Haring's expertise as a computer expert, but would not be beyond the expertise of a criminologist, which Ms. Haring clearly was not.

Petitioner was denied a fair trial by the State's playing to the jury of lengthy portions of videos of child pornography which were not found on Petitioner's computer, but, rather, were obtained from the State's private library of child pornography. Petitioner denied having viewed the videos before they were produced to his attorney in discovery and the length of the materials from the State's private library unnecessarily inflamed the jury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument in order to respond to any questions the Court may have regarding the written argument. Oral argument is appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure because this case involves error in the application of settled law and unsustainable exercise of discretion where the law governing that discretion is settled.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the circuit court's evidentiary rulings, Syl. Pt. 11, State v. White, 228 W. Va. 530, 722 S.E.2d 566 (2011), and its decisions regarding mental competency evaluations,

State v. Sanders, 209 W. Va. 367, 379, 549 S.E.2d 40, 52 (2001), for abuse of discretion. Questions of law are reviewed under a de novo standard of review. State v. Ward, 858 S.E.2d 207, 210 (W. Va. 2021). Rulings on a motion to suppress are reviewed under a two-tiered standard: (1) the findings of fact are reviewed for clear error, and (2) any questions of law and "the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action" are reviewed de novo. State v. Lilly, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995). In the absence of an objection, this Court reviews all other errors for plain error, that is, an error "so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting the error." State v. Marple, 197 W. Va. 47, 52, 475 S.E.2d 47, 52 (1996).

II. PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL AND TO PRESENT A FULL DEFENSE WHEN THE CIRCUIT COURT BARRED THE EXPERT TESTIMONY OF MICHAEL J. MARSHALL, PH.D. REGARDING THE IMPACT OF PETITIONER'S DIAGNOSIS OF ASD AND OCD ON PETITIONER'S BEHAVIOR BECAUSE THE PROPOSED EXPERT TESTIMONY WAS RELEVANT TO PETITIONER'S CHARACTER TRAITS, STATE OF MIND AND HIS CREDIBILITY AND MIGHT HAVE INFLUENCED A DETERMINATION OF GUILT

> Whether grounded in the Sixth Amendment's guarantee of compulsory process or in the more general Fifth Amendment guarantee of due process, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a ***complete defense***.' " Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). This right includes, "at a minimum, ... the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

United States v. Lighty, 616 F.3d 321, 358 (4th Cir. 2010) (emphasis added). The right to present a full or complete defense is also found in article III, section 14 of the West Virginia Constitution, and this Court has recognized that "'[A] trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right ... to offer testimony in support of his or her defense ... which [is] essential for a fair trial.'" Syl. Pt. 1, State v. Whitt, 220 W. Va.

685, 687, 649 S.E.2d 258, 260 (2007), holding modified on other grounds by State v. Herbert, 234 W. Va. 576, 767 S.E.2d 471 (2014) (quoting Syl. Pt. 3, in part, State v. Jenkins, 195 W. Va. 620, 466 S.E.2d 471 (1995)) (alterations in original). In a concurring opinion in State v. Calloway, 207 W. Va. 43, 528 S.E.2d 490 (1999), Chief Justice Starcher explained why the constitutional right to present a full defense is so important: "One reason is that the criminal trial process is far from perfect. Factually guilty people are sometimes not convicted of a crime they actually committed. And sometimes innocent people are convicted of crimes they did not commit." Id. at 53, 528 S.E.2d at 500.

In this case, Petitioner was convicted of a crime he did not commit because he was prohibited from introducing the expert testimony of Dr. Marshall regarding Petitioner's diagnosis of ASD and ODC. That testimony, which would have been similar to that offered by Dr. Marshall at the sentencing hearing (except where the testimony was specific to sentencing), was necessary to give the jury a context for evaluating Petitioner's character traits, credibility and for assessing his subjective perceptions of what he was doing when he engaged in research on the dark web. As Dr. Marshall explained at the sentencing hearing, a jury might misinterpret the lack of eye contact of a person with ASD as being deceptive, the flat emotions of a person with ASD as demonstrating insensitivity, and might see the propensity of a person with ASD to go off on a tangent as a sign that the person was being difficult or uncooperative and hiding something. (Appx. Vol. 2, p. 39:23–40:2; 40:7–41:3 [May 5, 2021 Hearing Transcript].) Similarly, a jury might not understand the compulsion of a person with ASD to explore the dark web when a neurotypical person would stay away from it because of the potential dangers of the dark web. (Appx. Vol. 2, p. 25:13–26:21 [May 5, 2021 Hearing Transcript].) Notwithstanding the fact that Petitioner admitted that, consistent with the psychological evidence in the record, he knew right from wrong (Appx. Vol.

4, p. 215:18-21 [Trial Witnesses Transcript])—which was also confirmed by Ashley Helfer (Appx. Vol. 4, p. 195:22–196:4 [Trial Witnesses Transcript]) as well as by Dr. Marshall (Appx. Vol. 2, p. 52:24 & 53:1-2—the court still barred Dr. Marshall's testimony because the court determined it to be an impermissible attempt to present an impermissible diminished capacity defense. The court did not find the non-West Virginia case law, discussed herein below, the Petitioner provided in support of the proposed testimony of Dr. Marshall to be persuasive. (Appx. Vol. 1, p. 10 [Order of March 5, 2021].) This was error.

State v. Boyd, 143 S.W.3d 36 (Mo. Ct. App. 2004) and State v. Burr, 195 N.J. 119, 948 A.2d 627 (2008) are, of course, not binding on the trial court, but neither case was based on a novel construction of state law. In both cases, the courts conducted a simple relevancy analysis and concluded that it was reversible error to bar expert testimony concerning the defendant's Asperger's syndrome (now included in ASD) diagnosis. Both cases provide strong persuasive authority for holding that Petitioner should have been allowed to put on the testimony of Dr. Marshall.

In Boyd, as in this case, the trial court got bogged down with the diminished capacity defense and concluded that because a diagnosis of Asperger's does not establish that a defendant lacks responsibility for his conduct, evidence of his mental condition was inadmissible. However, in Boyd, just as here, the defendant was not claiming lack of responsibility for his acts. Rather, Boyd, like Petitioner, argued that he did not commit the crime and his diagnosis

> "was relevant [to the charge of murder] because it would have (1) shown that he was too uncoordinated to single-handedly overpower and stab a victim twice his size; (2) shown that he could not have navigated the woods and led others to the victim's body there; (3) provided an innocent explanation for the State's focus on his unusual interests, including violent books; and (4) shown that he has an unusual gullibility or susceptibility to being framed."

143 S.W.3d at 39. On appeal, the appellate court found that the testimony of all three proposed experts should have been admitted. Two of the experts would have provided testimony "relevant to understanding Asperger's syndrome itself and to whether Mr. Boyd has it," providing a context for the testimony of the third expert, who addressed many of the propositions the defendant raised in this defense. Id. at 45.

Similarly, in Burr, a child sexual assault prosecution, the trial court became "distracted" by a diminished capacity defense not put forward by the defendant, 195 N.J. at 128, 948 A.2d at 632, and barred the proposed expert testimony concerning the defendant's Asperger's disorder. The intermediate appellate court reversed, State v. Burr, 392 N.J. Super. 538, 921 A.2d 1135 (App. Div. 2007), and the New Jersey Supreme Court affirmed the reversal. 195 N.J. 119, 948 A.2d 627 (2008). The state supreme court found that the Asperger's expert testimony was relevant in two ways: (1) to rebut the State's assertion that the defendant groomed the child, since people with Asperger's do not have the ability to manipulate others due to their difficulty in detecting social cues, and (2) "to provide an explanation for defendant's noncriminal behavior (of allowing children to sit in his lap) that the jury might otherwise consider consistent with common assumptions about sexual abuse." Id. at 129, 948 A.2d at 633. The court also commented that "evidence of mental defect, illness, or condition [could be] admitted . . . for other purposes, such as to assess credibility or otherwise evaluate the subjective perceptions of an actor." Id. at 128, 948 A.2d at 632.

In West Virginia, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." W. Va. R. Evid. 401. Dr. Marshall's expert testimony was relevant both to Petitioner's credibility and to rebut the conclusion that because Petitioner went on the dark web, he "knowingly and willfully" sent or possessed child pornography in violation of section 61-8C-

3(a) of the West Virginia Code. The fact that the court intervened in the Petitioner's testimony on several occasions due to manifestations of his ASD—even threatening to discontinue or strike Petitioner's testimony (Appx. Vol. 4, p. 223:22-23; 233:18–234:1; 234:19-20; 292:18-24; 293:21–294:18 [Trial Witnesses Transcript])—illustrates why it was necessary for the jury to understand the effects of ASD so that they could fairly judge his credibility.

Furthermore, evidence that negates intent is highly relevant to the defense and should not be confused with evidence that a defendant does not have the capacity to form intent, which is a diminished capacity defense. See, e.g., People v. Larsen, 205 Cal. App. 4th 810, 827, 140 Cal. Rptr. 3d 762, 777-78 (2012) ("evidence that defendant suffered from Asperger's Syndrome, and its manifested symptoms, directly and materially reflected on his claim that he did not actually intend to solicit the victim's murder, but instead was engaged in some form of game-playing brought on by his mental disorder," and he was entitled to a jury instruction to that effect; requested instruction "do[es] not focus on whether a defendant had the mental capacity to form a specific intent, a prohibited inquiry in any event, but rather on whether a defendant actually formed a mental state that is an element of a charged offense") (internal citations omitted) (emphasis in original); see also Va. Code Ann. § 19.2-271.6 (allowing defendant to introduce evidence of mental condition, including ASD, at the time of the offense to show lack of intent and clarifying that this statute does not affect the requirements for an insanity defense). This Court has held that evidence that a defendant meets the profile for Battered Women's Syndrome "is admissible to explain to the jury how domestic abuse may affect a defendant's reasoning, beliefs, perceptions, or behavior." State v. Stewart, 228 W. Va. 406, 415, 719 S.E.2d 876, 885 (2011). Such "evidence is relevant because it may negate an essential element of the crime charged, such as premeditation,

malice or intent." Id. The law should be applied no differently where there is evidence that symptoms of the defendant's diagnosed ASD could have negated an element of the defense.

The trial court erred in precluding the expert testimony of Dr. Marshall. The court's ruling certainly influenced the jury's determination of guilt. The fact that Petitioner was allowed to put on lay testimony about his behavior could have come off as self-serving and not scientifically established. Therefore, that testimony was not an adequate substitute for the expert testimony of Dr. Marshall. If the court was concerned that Petitioner was going to sneak in a diminished capacity defense, he could have given an appropriate jury instruction rather than interfering with the Petitioner's defense. Because Petitioner was denied the opportunity by the trial court to present a full and complete defense, his conviction should be reversed.

III. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, TO DISQUALIFY THE PROSECUTOR'S OFFICE BECAUSE THE SUPERSEDING INDICTMENT WAS BASED ON CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS OBTAINED FROM PETITIONER IN A MENTAL EVALUATION CONDUCTED BY ORDER OF THE CIRCUIT COURT PURSUANT TO W. VA. CODE § 27-6A-4(a) AND RULE 12.2(c) OVER THE OBJECTION OF PETITIONER AND IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT

West Virginia Code section 27-6A-4(a) authorizes a trial court to order "a forensic examination of the defendant's state of mind at the time of the alleged offense" upon a finding that "there is there is probable cause to believe that the defendant's criminal responsibility or diminished capacity will be a significant factor in his or her defense," based on representations of defense counsel or other evidence. W. Va. Code § 27-6A-4(a). Rule 12.2(c) of the West Virginia Rules of Criminal Procedure authorizes the court to order a forensic mental examination upon the motion of the State. Upon completion of the examination, which may include a "defendant

interview," the forensic examiner shall provide a written report "to the court of record." Id. § 27-6A-4(c).

> "No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony." W. Va. R. Crim. P. 12.2(c).

At no time in this matter did Petitioner assert a diminished capacity defense. It was the State and not the Petitioner who requested the forensic examination. Accordingly, the forensic examination was a custodial interrogation by a state agent implicating the privilege against self-incrimination guaranteed by the Fifth Amendment and Article 3, section 5 of the West Virginia Constitution. State v. Jackson, 171 W. Va. 329, 334, 298 S.E.2d 866, 871 (1982). The situation was further complicated by the fact that some of Petitioner's compelled statements to the forensic examiner involved discussions of trial strategy, invoking the "venerable attorney-client privilege." State v. Rodoussakis, 204 W. Va. 58, 68, 511 S.E.2d 469, 479 (1998).

While these statements could have been redacted by the court, see, e.g., Jackson, 171 W. Va. at 334, 298 S.E.2d at 871, that opportunity was foreclosed when the report was sent directly to the Prosecutor. Under these circumstances, Petitioner was denied his right to a fair trial when the State used some of the material Petitioner had discussed with his attorney—including the fact that the State had no evidence that Petitioner possessed alleged suspicious child exploitation material on his computer on February 19, 2019—to bring a superseding indictment extending the relevant period from a single date, February 19, 2019, to the period between July 31, 2018 and February 20, 2019, and adding that Petitioner not only possessed images of minors engaged in sexually explicit conduct, but that he also sent such images via his computer. The conviction

should be reversed because the circuit court misapplied the law in refusing to dismiss the superseding indictment or to disqualify the Prosecuting Attorney's Office.

IV. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS HIS RECORDED STATEMENT TO SGT. SAFREED WTHOUT ALLOWING PETITIONER TO TESTIFY SOLELY ON THE ISSUE OF VOLUNTARINESS

The only evidence submitted on the issue of voluntariness was the testimony of Sgt. Safreed, who conducted the interview of Petitioner while Sgt. Farrell and Special Agent Adams conducted the search. (Appx. Vol. 3, p. 6:5-9; 30:22–31:3 [6/3/20 Hearing Transcript].) Sgt. Safreed texted the other two officers to see if they heard him read Petitioner his Miranda rights, but neither officer responded nor was available to testify at the voluntariness hearing. (Appx. Vol. 3, p. 26:10-16 [6/3/20 Hearing Transcript].) Petitioner did not testify because the circuit court denied his motion for permission to testify solely on the issue of voluntariness and to limit cross-examination to the issue of voluntariness. (Appx. Vol. 3, p. 36:11–37:4 [6/3/20 Hearing Transcript].) The court made this ruling while at the same time limiting Petitioner's cross-examination of Sgt. Safreed to the issue of voluntariness.

On a motion to suppress a confession or statement of the accused, the State bears the burden of proving by a preponderance of the evidence that the statement was voluntary. Syl. Pt. 5, State v. Starr, 158 W. Va. 905, 906, 216 S.E.2d 242, 244 (1975). The circuit court erred in finding that the State met its burden through Sgt. Safreed's testimony. Significantly, Sgt. Safreed did not testify to what he did, but as to what he "would have done." For example, he "would have" read Petitioner his rights from a card in his Padfolio. (Appx. Vol. 3, p. 9:12-20 [6/3/20 Hearing Transcript].) Although Sgt. Safreed "would have advised Petitioner he was not under arrest." (Appx. Vol. 3, p. 10:11-12 [6/3/20 Hearing Transcript]), he would not have let him leave or move freely about the apartment during the search (Appx. Vol. 3, p. 10:14-19; 24:4-13; 25:19-24].) [6/3/20 Hearing

Transcript].) When asked whether Petitioner responded that he understood his rights, Sgt. Safreed responded, "He would have said that he did understand them because we had an interview." (Appx. Vol. 3, p. 11:17-18 [6/3/20 Hearing Transcript].) Sgt. Safreed's testimony was not confirmed by any other source. Although he said he recorded all but what he said was the first three minutes of his interview of Petitioner, Sgt. Safreed did not record the reading of the Miranda rights due to operator error on a digital recording device. (Appx. Vol. 3, p. 11:22–12:8; 12:16-18 [6/3/20 Hearing Transcript].) He did not use a Miranda checklist form to be signed by Petitioner because he intended to record everything. (Appx. Vol. 3, p. 19:7-17 [6/3/20 Hearing Transcript].) Sgt. Safreed did not ask Petitioner to sign the police report summarizing the interview. (Appx. Vol. 3, p. 28:6-13 [6/3/20 Hearing Transcript].)

In short, there is no evidence that Petitioner was read and understood his Miranda rights other than Sgt. Safreed's completely unsubstantiated recreation of what he "would have done." On the contrary, Petitioner's testimony at trial indicates that he was confused about the purpose of the search, initially believing it was related to his student loans and then assuming Sgt. Safreed was interested in adult pornography, which Petitioner found uncouth. He also stated that he was in a state of panic. (Appx. Vol. 4, p. 230:21; 232:5–233:6; 263:5-8; 264:22–265:23; 266:7-11; 266:20–267:3; 267:10-16; 267:18–268:11 [Trial Witnesses Transcript].) Given Petitioner's propensity for over explaining, as a symptom of his ASD, the fact that nowhere on the recorded part of the interview did he ask Sgt. Safreed to stop questioning him or otherwise indicate he wanted to remain silent (Appx. Vol. 3, p. 16:14-19 [6/3/20 Hearing Transcript]) does not bolster Sgt. Safreed's testimony. Accordingly, the circuit court erred in admitting the recorded interview into evidence. See Syl. Pt. 3, State v. Harris, 169 W. Va. 150, 286 S.E.2d 251 (1982) (listing criteria that must be

met in order to admit into evidence a tape-recorded inculpatory statement, including that the statement was voluntarily made without inducement). The conviction should be reversed.

V. THE CIRCUIT COURT PLAINLY ERRED IN PERMITTING THE STATE'S DIGITAL FORENSIC ANALYST TO TESTIFY BEYOND THE SCOPE OF HER EXPERTISE

Because there was no suspicious child exploitation material on Petitioner's computer, the State's case rested on the testimony of Ginger Haring, a digital forensic computer analyst who cloned the hard drives on Petitioner's computer and attempted to identify child exploitation material the State believed had been on Petitioner's computer previously a forensic Axiom program not available to the public. Petitioner does not challenge her credentials as an expert digital forensic computer analyst. However, the State did not submit evidence that Ms. Haring had expertise as a criminologist, and, therefore, the court should not have allowed Ms. Haring to testify, outside the scope of her expertise, that it was not probable that a cybercriminal would have used Petitioner's server to place images on his computer without his knowledge after having testified within the scope of her expertise that it was technologically possible for a cybercriminal to use Petitioner's computer in such a way. (Appx. Vol. 4, p. 149:22–150:5 [Trial Witnesses Transcript].) This error was exacerbated when Ms. Haring offered that a hacker was usually looking for financial information, such as bank numbers, and would not typically put pornography on someone else's computer and then delete it, which is beyond the scope of her expertise and the expert disclosure provided by the State. Unfortunately, it took several minutes for defense counsel to process that the prosecutor had posed a question outside Ms. Haring's area of expertise and, thus, he was unable to make a timely objection. This egregious act constituted plain error.

The plain error doctrine is triggered by the presence of "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation

of the judicial proceedings." Syl. Pt. 1, State v. Scott, 206 W. Va. 158, 159, 522 S.E.2d 626, 627 (1999) (internal citation omitted). That doctrine allows this Court to remedy an unpreserved error when "the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect." Syl. Pt. 2, Scott. It serves "to avoid a miscarriage of justice." Id. Given the central role that Ms. Haring's testimony played in the prosecution, the jury no doubt gave a great deal of credence to her testimony. Under these circumstances, allowing this testimony perpetrated a miscarriage of justice and denied Petitioner his right to a fair trial.

VI. THE CIRCUIT COURT ERRED WHEN IT PERMITTED THE STATE TO PLAY FOR AN UNNECESSARY LENGTH OF TIME VIDEO AND STILL IMAGES OF CHILD EXPLOITATIVE MATERIAL CONTAINED IN THE STATE'S LIBRARY AND NOT FOUND ON THE PETITIONER'S COMPUTER

Over Petitioner's objection, the Prosecutor was allowed to play eight minutes of one video, one and one-half minutes of another video and approximately 90 still images of child exploitation pulled from the State's library—not from the Defendant's computer. (Appx. Vol. 4, p. 25:21–26:7; 26:17-21; 27:2; 27:11; 28:19-20; 29:12-14; 35:1-5; 31:12-24; 32:1-20; 34:17-19; 35:20-21; 35:24–36:1; 36:21; 37–39 [Trial Witnesses Transcript].) Petitioner did not dispute that the material fell within the prohibition of West Virginia Code §61-8C-3. Indeed, Petitioner found it "appalling" that the images were shown to the jury. (Appx. Vol. 4, p. 298:5-8 [Trial Witnesses Transcript].) Rather, it is Petitioner's position that the images were not on his computer at the time the computer was seized and if the images appeared on his computer at any time before the computer was seized it was not accomplished through his knowing and willful act. It was, therefore, unnecessary for the State to present the images to the jury. To the extent the images were necessary to the State's case, the presentation in this case constituted a "needless presentation of cumulative evidence," State v. Rollins, 233 W. Va. 715, 739, 760 S.E.2d 529, 553 (2014), which could have been avoided by balancing the probative value of the evidence against the danger of unfair prejudice pursuant to

Rule 403 of the West Virginia Rules of Evidence. The circuit court's failure to engage in this balancing process denied Petitioner a fair trial and, thus, his conviction should be reversed.

VII. PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE CIRCUIT COURT ADMONISHED HIM IN THE PRESENCE OF THE JURY FOR CONTINUING TO TALK OVER AN OBJECTION AND TO ANSWER THE PROSECUTOR'S QUESTIONS EITHER "YES" OR "NO," EVEN THOUGH THE CIRCUIT COURT KNEW THAT PETITIONER HAD BEEN DIAGNOSED WITH ASD, AND INDIVIDUALS ON THE AUTISM SPECTRUM HAVE GREAT DIFFICULTY NARROWING THEIR STATEMENTS AND ANSWERING QUESTION WITH A "YES" OR "NO" BECAUSE THEY ARE NOT ABSTRACT THINKERS

Although the circuit court barred Dr. Marshall's testimony at the trial, the court had read Dr. Marshall's 13-page report and, thus, was aware that one of the characteristics of a person with ASD is a difficulty with abstract thought. (Appx. Vol. 1, p. 10 [Order of March 5, 2021, n.1]; Appx. Vol. 2, p. 24:22–25:2-12; 59:3-8 [May 5, 2021 Hearing Transcript].) Nonetheless, the court admonished Petitioner at least twice in front of the jury to stop talking over an objection or the court would discontinue the testimony. (Appx. Vol. 4, p. 223:22-23; 233:18–234:1; 234:19-20 [Trial Witnesses Transcript].) Later, on cross-examination, the court threatened to strike Petitioner's entire testimony—again, in the presence of the jury—if he did not answer the Prosecutor's questions "yes" or "no," even though Petitioner, as a person with ASD, said he could not answer that way. (Appx. Vol. 4, p. 292:18-24; 293:21–294:18 [Trial Witnesses Transcript].) The court needlessly threatened Petitioner before the jury even though Petitioner was having difficulties consistent with someone with ASD.

Since the jury was not allowed to hear expert testimony on the characteristics of those with ASD in general and those characteristics exhibited by Petitioner in particular, it is very likely that the jury misconstrued his behavior as indicating that he was being difficult or uncooperative or was hiding something, as predicted by Dr. Marshall. (Appx. Vol. 2, p. 39:23–40:2; 40:7–41:3

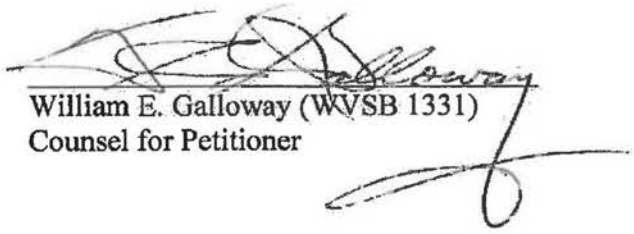
[May 5, 2021 Hearing Transcript].) While the circuit court has every right to maintain decorum in the courtroom and to ensure that the trial runs smoothly, it must not do so at the expense of the credibility of the defendant. "The orderly conduct of criminal trials requires that the trial judge be extremely cautious not to intimate in any manner by word, tone, or demeanor, his opinion upon any fact in issue." State v. Thompson, 220 W. Va. 398, 412, 647 S.E.2d 834, 848 (2007) (reversing reverse and remand and finding appellant did not receive a fair and impartial trial because trial judge engaged in extensive participation in examination of witnesses and provided guidance to prosecuting attorney). In calling out the Petitioner in front of the jury, the trial court unfairly prejudiced him and denied him a fair trial. Therefore, his conviction should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner was denied a fair trial and, therefore, his conviction must be reversed, and this matter be remanded to the Circuit Court of Marshall County for a new trial.

Dated: September 7, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on September 7, 2021, a true and correct copy of the foregoing Brief of Petitioner was served on counsel for the Respondent, by putting the same in regular U.S. Mail, postage prepaid, and addressed as follows:

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