IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0456

STATE OF WEST VIRGINIA,

Respondent,

v.

ALEXANDER PAUL DELORENZO,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the May 7, 2021, Order
Circuit Court of Marshall County
Case No. 21-F-4

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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 health evaluation report ordered by the circuit court pursuant to W. Va. Code § 27-6A-4(a) [sic] 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 [sic] 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. [sic] 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 it 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

A. Procedural background.

On March 10, 2020, a grand jury for Marshall County, West Virginia, indicted the Petitioner for a single count of violating West Virginia Code § 61-8C-3(a) alleging that on or about February 19, 2019, the Petitioner unlawfully, knowingly, and willfully possessed child pornography. A.R. Vol. I, 20. A superseding indictment was filed on January 11, 2021 charging the Petitioner with a single violation of West Virginia Code § 61-8C-3(a) and alleging that between July 31, 2018, and February 20, 2019, the Petitioner unlawfully, knowingly, and willfully sent or caused to be sent and/or possessed child pornography. A.R. Vol. I, 21. The jury convicted the Petitioner. *See* A.R. Vol. I, 8. The circuit court sentenced the Petitioner to one to fifteen years of incarceration and twenty years of extended supervised release. A.R. Vol. I, 4. The Petitioner was also required to register as a sex offender for life. A.R. 4.

B. Pretrial proceedings.

1. *The voluntariness hearing.*

The Petitioner gave a statement to the police which was the subject of a suppression motion filed by the Petitioner and a corresponding motion for determination of voluntariness filed by the State. *See* A.R. Vol. III, 3.[1] A hearing on these motions was conducted on June 3, 2020. A.R., Vol. III, 1. The lone witness at the suppression hearing was Wheeling Police Detective Rob Safreed. A.R. Vol. III, 2; 3-4. Det. Safreed was the head of the Wheeling Police Department's Detective Division. A.R. Vol. III, 4. Det. Safreed became acquainted with the Petitioner due to a cyber tip

[1]These motions were cited in a circuit court order that is in the Appendix Record in this case, but the Petitioner has not included the motions in the Appendix Record in this case. A.R. ii-iii.

relating to child pornography that Det. Safreed received that resulted in Det. Safreed serving a search warrant at the Petitioner's apartment. A.R. Vol. III, 4-5. On or about February 20, 2019, Det. Safreed, Det. Ryan Farrell, and FBI Special Agent Joe Rodgers served a search warrant on the Petitioner in his apartment. A.R. Vol. III, A.R. 6. The three law enforcement officers were in plain clothes. A.R. Vol. III, 22. The Petitioner permitted the trio entry into the apartment. A.R. Vol. III, 6; 7-8. No one else lived in the apartment other than the Petitioner. A.R. Vol. III, 7. The trio were searching for electronic devices, computers, hard drives, tablets or phones. A.R. Vol. III, 8. The Petitioner remained in his apartment for the entire search. A.R. Vol. III, 8.

While Det. Farrell and Agent Rodgers searched the apartment, Det. Safreed questioned the Petitioner. A.R. Vol. III, 9. Typically when Det. Safreed conducts an interview of the type he conducted with the Petitioner, he would sit down with the interviewee and explain that he had a search warrant and that he would like to talk to the interviewee about the warrant. A.R. Vol. III, 9-10. Det. Safreed advised the Petitioner he was not under arrest, although Det. Safreed testified at the suppression hearing that he did not recall advising the Petitioner he was free to leave. A.R. Vol. III, 10, but likewise he did not specifically recall telling the Petitioner he was not free to leave. A.R. Vol. III, 34 ("I don't believe that I specifically told him that he was not free to leave."). While Det. Safreed also testified that he did not know if he would have let the Petitioner leave the apartment since he would want the Petitioner to observe the search, A.R. Vol. III, 10, he further testified that if the Petitioner indicated he was leaving, then he would have let the Petitioner leave the apartment. A.R. Vol. III, 34-35.

Det. Safreed read the Petitioner his *Miranda* rights from a card he normally carries in his portfolio. A.R. Vol. III, 9. Det. Safreed advised the Petitioner: (1) that he had the right to remain silent; (2) that anything that he said could and would be used against him in a court of law; (3) that

he had the right to seek or obtain an attorney and to have one present while being questioned; (4) that if he could not afford an attorney one would be appointed for him. A.R. Vol. III, 11. He was further advised he could exercise these rights at anytime and stop answering questions. A.R. Vol. III, 11. Det. Safreed asked the Petitioner if he understood these rights. A.R. Vol. III, 11. Det. Safreed testified that "[the Petitioner] would have said that he did understand them because we had an interview." A.R. Vol. III, 11. The Petitioner agreed to speak to Det. Safreed after having been read his *Miranda* rights. A.R. Vol. III, 11.

Det. Safreed testified that at the preliminary hearing in the case he testified that the *Miranda* warnings would have been contained on the recording. A.R. Vol. III, 20-21. Det. Safreed erred in this regard because the *Miranda* warnings given to the Petitioner were not recorded on the device. A.R. Vol. III, 12. He explained at the suppression hearing that the Detective Division had recently received new digital voice recorders and that he was not familiar with how to work the recorder. A.R. Vol. III, 12. He did not realize the recorder was not recording until approximately three minutes into the interview. A.R. Vol. III, 12. Det. Safreed testified at the suppression hearing that he did not listen to the recording prior to the preliminary hearing, but did listen to the recording before the suppression hearing. A.R. Vol. III, 34. Once the device began to record, it captured the entirety of the Petitioner's statement. A.R. Vol. III, 13. Det. Safreed denied either accidentally or deliberately erasing the first three to four minutes of the interview. A.R. Vol. III, 20.

At no time during the interview did the Petitioner request an attorney. A.R. Vol. III, 16. The Petitioner never asked that the questioning stop or stated that he wished to remain silent. A.R. Vol. III, 16.

After Det. Safreed concluded his testimony, the Petitioner asked the circuit court to allow him to testify as to the voluntariness of his statements, but to preclude the State from cross-examining

him on the substance of the charges. A.R. Vol. III, 36. When the circuit court asked the Petitioner's counsel for precedent supporting that request, the Petitioner's counsel replied that he had found some authority from Louisiana, but nothing from West Virginia. A.R. Vol. III, 36-37. The circuit court ruled, "I don't think that there is, so your motion's going to be denied at this time, for the record, with all objections and exceptions noted and saved." A.R. Vol. III, 37.

By order entered on June 11, 2020, the circuit court entered an *Order Finding Defendant's Statements Voluntary* wherein the circuit court found that the Petitioner's statement was "voluntary and made and [sic] with full knowledge of his *Miranda* rights after being advised of the same." A.R. Vol. I, 18. The circuit court further found that the Petitioner "was not in custody at any time during his statements [sic]. As such, the [Petitioner's] arguments regarding . . . being mirandized [sic] (or not) are irrelevant and moot." A.R. Vol. I, 18.

2. *Dr. Michael J. Marshall, Ph.D.*

The State apparently filed a motion in limine to prohibit Michael J. Marshall, Ph.D., from testifying and also for an evaluation of the Petitioner under West Virginia Code § 27-6A-4. *See* A.R. Vol. I, 14.[2] The circuit court denied the State's motion in limine, but granted its motion for a mental evaluation. A.R. Vol. I, 14.

The circuit court found that the Petitioner's response to the State's motions argued that "by calling Dr. Marshall to testify that due to certain mental conditions the [Petitioner] lacked the capacity to form the mens rea to commit the alleged criminal acts, he is not presenting a 'diminished capacity' defense." A.R. Vol. I, 14. "The [Circuit] Court [found] such argument not well-founded." A.R. Vol. I, 14. The circuit court found that "[p]ursuant to WV Code § 27-6A-4(a)

[2]These motions are referenced in the circuit court order but the Petitioner did not include a copy of them in the Appendix Record in this case. A.R. ii-iii.

. . . upon representations of counsel for the [Petitioner], that there is probable cause to believe that the [Petitioner's] criminal responsibility or diminished capacity will be a significant factor in his . . . defense." A.R. Vol. III, 14. The circuit court further found "pursuant to Rule 12.2 of the West Virginia Rules of Criminal Procedure, the [Petitioner] intends to introduce expert testimony relating to a mental disease or defect or ***any other mental condition of the [Petitioner]*** bearing on the issue of guilt." A.R. Vol. I, 15 (emphasis in circuit court order). Thus, in accordance with West Virginia Code § 27-6A-4, the circuit court ordered the Petitioner to undergo an initial forensic evaluation "regarding the [Petitioner's] state of mind at the time of the offense(s), 'diminished capacity' or any mental condition of the [Petitioner] bearing upon the issues of guilt, if any." A.R. Vol. I, 15.

It appears that the State subsequently submitted a supplemental motion to prohibit Dr. Marshall from testifying. *See* A.R. Vol. I, 10. Apparently, the Petitioner filed response to this motion and the circuit court directed the State to reply. A.R. Vol. I, 10. The circuit court granted the State's motion. A.R. Vol. I, 10.[3]

The circuit court's order granting the State's motion recognized that in his original disclosure of Dr. Marshall, the Petitioner identified that Dr. Marshall would testify in accordance with his supplemental report of February 28, 2020, *to wit*, that due to the Petitioner's "'simultaneous presence of two mental disorders, namely ASD and OCD, he will hyper-focus on a topic that he is motivated to investigate . . . *with a lack of appreciating whether something is right or wrong, . . .* .'" A.R. Vol. I, 11 (emphasis added by circuit court). The circuit court then observed that in the

[3]Although referenced in the circuit court order, the Petitioner did not include copies of any of these filings in the Appendix Record in this case. A.R. ii-iii.

Petitioner's most recent pleadings and at a recent pretrial hearing,[4] the Petitioner shifted from his initial assertions to arguing that Dr. Marshall will testify as to the Petitioner's credibility, his subjective perceptions, to explain his conduct, "and to assert the [Petitioner] was doing 'non-criminal research on the dark web.'" A.R. Vol. I, 11. Because the Petitioner did not file any supplemental disclosures required by Rule of Criminal Procedure 16(b)(1)(C) or Trial Court Rule 32.03(b)(6), the circuit court was compelled to "assume that if permitted, Dr. Marshall would opine that the [Petitioner's] 'research' was 'non-criminal' because of his mental diagnoses." A.R. Vol. I, 11. The circuit court explained:

> The Court continues to be of the opinion that regardless of how the [Petitioner] couches Dr. Marshall's testimony, he is attempting to assert a diminished capacity/lack of criminal responsibility defense, which is unsupported by both the Court ordered evaluation conducted by Dr. Baker and Dr. Marshall himself. Further, the [Petitioner] cites no West Virginia cases where such expert testimony as he proposes was permitted in a felony criminal trial. The Court finds the out of jurisdiction cases cited by the [Petitioner] to be unpersuasive and not applicable to the present case.

A.R. Vol. I, 11. Thus the circuit court found Dr. Marshall's testimony improper and irrelevant and granted the State's motion in limine to exclude the testimony. A.R. Vol. I, 11.

3. *The Motion to Dismiss the Indictment or to disqualify the Prosecuting Attorney.*

The Petitioner filed a motion to dismiss the indictment or to disqualify the Prosecuting Attorney's Office. *See* A.R. Vol. I, 13.[5] In an order entered February 3, 2021, the circuit court denied the motions, "[t]he Court has received and reviewed all filings and arguments, both in

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[4]Although referenced in the circuit court order, the Petitioner did not include copies of these pleadings or a transcript of the pretrial hearing. A.R. ii-ii.

[5]This motion was referenced in the circuit court order, but the Petitioner did not include a copy of this motion in the Appendix Record. A.R. ii-iii.

support of and opposing said Motion, and hereby DENIES the [Petitioner's] Motions in their entirety." A.R. Vol. I, 13.[6]

C. Trial testimony.

1. *The State's witnesses.*

The State's first witness was West Virginia State Police Sergeant James Kozik. A.R. Vol. IV, 3. Sgt. Kozik is the director of the State Police's Crimes Against Children section and is the Commander of West Virginia's Internet Crimes Against Children Task Force. A.R. Vol. IV, 3. During his employment, Sgt. Kozik has used "Child Protective System," (CPS) which is "a suite of tools that is used to identify people using peer-to-peer software to trade images and videos of child exploitation." A.R. Vol. IV, 4. Sgt. Kozik defined peer-to-peer as a "whole community of computers sharing files back and forth." A.R. Vol. IV, 7. Sgt. Kozik further explained that an internet provider provides an IP address when the provider provides internet services. A.R. Vol. IV, 7. When using the CPS, the CPS identifies those who are sharing child exploitation by IP address. A.R. Vol. IV, 8. No one can share a file from their computer without that file actually being on the sharing computer. A.R. Vol. IV, 9. A shared folder is a location on a computer where shared folders are stored. A.R. Vol. IV, 9. Sharing files mean that you are advertising the files for download. A.R. Vol. IV, 8. A file must be on the active file to be shared. A.R. Vol. IV, 11.

The CPS looks for "high value target[s]" or the "'worst' offenders in the State." A.R. Vol. IV, 11. Sgt. Kozik identified a high value target in the Wheeling area. A.R. Vol. IV, 11. He identified

[6]The Petitioner did not include any of these filings referred to in the circuit court's order in the Appendix Record. A.R. ii-iii.

the IP address of this offender. A.R. Vol. IV, 11. CPS was tracking this IP address for approximately six months, from January 31, 2018 to January 6, 2019. A.R. Vol. IV. 12-13.

Sgt. Kozik further testified that CPS does not provide an actual image of child pornography. A.R. Vol. IV, 18. He explained at trial that the police have a "hash library of known child images and the hash of a file." A.R. Vol. IV, 18. He elucidated that "[t]he hash is essentially the DNA fingerprint of the file, but it's much more precise than DNA." A.R. Vol. IV, 18. According to Sgt. Kozik, it is "way better than DNA, way better than hitting the lottery." A.R. Vol. IV, 24. According to Sgt. Kozik, the hash is a mathematical algorithm. A.R. Vol. IV, 18. Because everything dealing with computers is made up of ones and zeros, the algorithm can tell whether one file is an exact copy of another file. A.R. Vol. IV, 18. Sgt. Kozik has never observed two identical hash values not contain the exact same video or image. A.R. Vol. IV, 23. Sgt. Kozik testified the police have a library of files that are associated with the hash values of high value targets. A.R. Vol. IV, 18-19.

Sgt. Kozik was able to determine the content for the IP address he had identified earlier. A.R. Vol. IV, 22. Four files in the IP address that Sgt. Kozik had identified earlier matched with files in the library of child pornography kept by the police. A.R. Vol. IV, 22. Sgt. Kozik provided a thumb drive to Det. Safreed that contained four videos. A.R. Vol. IV, 24. At trial, Sgt. Kozik testified that the images were not altered, and were the same length and format as in the police library. A.R. Vol. IV, 25. The State offered the thumb drive into evidence and the Petitioner objected:

> The Defendant objects because as the witness has testified, what is on the thumb drive is not what was actually recreated from the IP address. By the State's own expert Ginger Herring, what is on that thumb drive is what was downloaded from the government's own stash or library of pornographic materials.
>
> So had [the State] offered that particular thumb drive as to what Ms. Herring recreated from the IP address associated with Defendant's computer, I would not be making an objection, but I am making this objection because it is not the same.

A.R. Vol. IV, 25-26. The State responded:

> [THE STATE]: Your Honor, if I could just briefly comment. One, it is an identical match with what was seen on the [Petitioner's] IP address on the dates in question. It is identical. It is actually probably better than what is contained in the computer, and the witness has testified to it; that it was observed. He's testified to the reliability of the SHA-1 values, and it meets the criteria for being able to be played.

A.R. Vol. IV, 26. The circuit court overruled the objection finding that the witness authenticated the information sufficiently to allow it to be admitted. A.R. Vol. IV, 26.

Sgt. Kozik testified that about a month before trial that he searched another database in his office for more files matching the hash values of files seen on the Petitioner's computer. A.R. Vol. IV, 31. He found 90 or so additional matches including both videos and pictures. A.R. Vol. IV, 31. Sgt. Kozik put the files on a thumb drive. A.R. Vol. IV, 33. The files on the thumb drive were exact matches to files advertised by the Petitioner's IP address. A.R. Vol. IV, 33. Sgt. Kozik again authenticated the thumb drive's contents. A.R. Vol. IV, 33-34. The files constituted all the files that would have been shared from the Petitioner's IP address between July 31, 2018, and January 6, 2019. A.R. Vol. IV, 34. Over objection the thumb drive was admitted into evidence. A.R. Vol. IV, 34-35. The thumb drive contained files with names incorporating the phrase PTHC or "'Preteen Hard-Core,'" "Girl gracel hmm man pthc sound_of_silence vaginal.mpg[,]" "2009 girl hmm Lea oral pthc Rona sound_of_silence[,]" Twp girl gracel hmm man ptch sound_of_silence vaginal[,]" "Cum shot girl gracel hmm man oral pthc sound vaginal[.]" *See, e.g.*, A.R. Vol. IV, 36-39. Some of these files were advertised for sharing. A.R. Vol. IV, 40.

Det. Safreed testified for the State. A.R. Vol. IV, 50. Sgt. Kozik contacted Det. Safreed and informed him that he had discovered an IP address in Wheeling involved in advertising child exploitation material. A.R. Vol. IV, 52-53. Sgt. Kozik provided Det. Safreed with certain materials

and Det. Safreed obtained a search warrant and a subpoena for the IP address. A.R. Vol. IV, 54. Det. Safreed received a fax from Comcast (the internet service provider) that stated the registered owner of the IP address was the Petitioner. A.R. Vol. IV, 55. It also provided the Petitioner's address. A.R. Vol. IV, 55. Based on this information, Det. Safreed applied for a search warrant of the Petitioner's residence. A.R. Vol. IV, 56. Det. Safreed executed the search warrant with Sergeant Farrell and Special Agent Rogers. A.R. Vol. IV, 57. It appeared that the Petitioner lived alone. A.R. Vol. IV, 59. Det. Safreed interviewed the petitioner after reading the Petitioner his *Miranda* rights and obtaining a waiver of them from the Petitioner. A.R. Vol. IV, 60-61.

During the search, the officers seized a Matsunichi brand external hard drive, a Western Digital external hard drive, a black smartwatch and charger, an LG cell phone, a Dell Inspiron tower, an Acer tablet, and 2 SD cards. A.R. Vol. IV, 70. Det. Safreed extracted two hard drives from the Dell tower and took them and the remaining hard drives to the West Virginia State Police. A.R. Vol. IV, 71. The hard drives were tested by Ginger Herring. A.R. Vol. IV, 72. They were subsequently reanalyzed. A.R. Vol. IV.

Ginger Herring additionally testified. A.R. Vol. IV, 98. Ms. Herring is a Digital Forensic Analyst for the West Virginia State Police. A.R. Vol. IV, 101. Without objection, Ms. Herring was admitted as an expert in the field of digital forensic analysis. A.R. Vol. IV, 108. Ms. Herring testified she received four hard drives in this case. A.R. Vol. IV, 108. Ms. Herring analyzed the first hard drive and discovered enough images that she called Det. Safreed to see if the images would suffice or if she needed to continue. A.R. Vol. IV, 109. Det. Safreed told Ms. Herring she could stop. A.R. Vol. IV, 109. Ms. Herring returned the hard drives to Det. Safreed. A.R. Vol. IV, 111. Subsequently, she was asked to analyze all four hard drives. A.R. Vol. IV, 111. The hard drives contained child pornography, with the majority being located on the first hard drive Ms.

Herring examined. A.R. Vol. IV, 114. Ms. Herring located evidence of sites that generally contained child pornography on the Petitioner's hard drive, including *Motherless.com* and *Lolita*. A.R. Vol. IV, 142.

Ms. Herring testified that she spoke to the Petitioner's counsel. A.R. Vol. IV, 149. The Petitioner's counsel asked Ms. Herring if it was possible that someone could have used his computer as a server without the Petitioner's knowledge. A.R. Vol. IV, 149. Ms. Herring responded it was possible. A.R. Vol. IV, 150. The State then asked Ms. Herring if it was probable. Ms. Herring responded:

> [MS. HERRING]: It is—it is possible. I mean, it's possible for any home computer to be–to be gotten into and used. However, most of the time when that's the case, there's a monetary—they're looking for monetary reasons to do it. They want your identity. They want your bank numbers. They want your credit card numbers. In most cases that is more what it's for, is for monetary gain.
>
> [THE STATE]: So it—correct me if I'm wrong. People don't typically use it then to put pornography on somebody else's computer.
>
> [MS. HERRING]: No.
>
> [THE STATE]: And then delete it.
>
> [Ms. Herring]: No.

A.R. Vol. IV, 149-50. Ms. Herring testified that she was unfamiliar with any virus malware, hacking, or downloads that go onto a computer, install files and then delete them. A.R. Vol. IV, 150. Ms. Herring did not locate any remote desk top on any of the petitioner's hard drives. A.R. Vol. IV, 152.

2. *The Petitioner's witnesses.*

The Petitioner called Mark DeLorenzo, the Petitioner's father. A.R. Vol. IV, 179, 181. Mr. DeLorenzo testified that his son had Autism, OCD, and anxiety issues. A.R. Vol. IV, 182. The Petitioner goes to extremes when he wants to learn something, "[h]e has to go deep into everything

he does, dig up every fragment of information about anything having to do with the category that he's in." A.R. Vol. IV, 182; *see also* A.R. Vol. IV, 183. The Petitioner never had any issues in school, received good grades, graduated from College with a degree in communications, and had worked toward a master's degree. A.R. Vol. IV, 188. Mr. DeLorenzo testified that the Petitioner was only confirmed with Autism after the charges were filed against him in this case. A.R. Vol. IV, 189.

The Petitioner called Ashley Helfer. A.R. Vol. IV, 190. Ms. Helfer came to know the Petitioner through her husband Andrew. A.R. Vol. IV, 193. She has known the Petitioner for 13 years. A.R. Vol. IV, 193. She lives a couple of apartment buildings away from the Petitioner, A.R. Vol. IV, 193, and has done so for 6 years. A.R. Vol. IV, 193. Ms. Helfer explained the Petitioner is obsessed with things and "wants to learn everything there is to learn about a topic." A.R. Vol. IV, 194. She testified that the Petitioner gets stuck on things and wants to know things and will go wherever he needs in order to figure it out. A.R. Vol. IV, 192. The Petitioner is not aware of fear when trying to figure things out. A.R. Vol. IV, 193. The Petitioner wants to learn everything there is to learn about a topic. A.R. Vol. IV, 194. Ms. Helfer testified the Petitioner is awkward when there are a lot of people around. A.R. Vol. IV, 194.

The Petitioner then called Andrew Helfer. A.R. Vol. IV, 201. Mr. Helfer opined that the Petitioner has high anxiety and very high strung. A.R. Vol. IV, 204. He testified that the Petitioner has Autism, and suffers badly from OCD. A.R. Vol. IV, 202, 204. Mr. Helfer testified that the Petitioner has difficulty in a lot of social situations. A.R. Vol. IV, 202, 205. According to Mr. Helfer, the Petitioner can come off as "condescending," "somewhat aloof of social cues at times." A.R. Vol. IV, 206.

The Petitioner testified on his own behalf. A.R. Vol. IV, 212. The Petitioner testified he became infatuated with the dark web. A.R. Vol. IV, 229. The Petitioner denied watching child pornography. A.R. Vol. IV, 233. The Petitioner testified he was led to investigate child pornography because he stumbled across a website where participants debated whether it was permissible to have sexual relations with children. A.R. Vol. IV, 253. This led him to view an episode of the national television series *Unsolved Mysteries* that dealt with child pornography. A.R. Vol. IV, 254-55.

During his testimony, the circuit court advised the Petitioner that when the State objects, he must stop speaking. A.R. Vol. IV, 223. Subsequently, the Petitioner again spoke after the circuit court sustained an objection and the following exchange occurred:

> THE COURT: Mr. Delorenzo, I've sustained the objection. You're not permitted to answer.
>
> THE WITNESS: I was just making a statement. I'm sorry.
>
> THE COURT: You're not allowed to just make statements. You have to answer questions.
>
> THE WITNESS: Oh. Excuse me?
>
> [DEFENSE COUNSEL]: Do you understand?
>
> [THE WITNESS]: I have a microphone in front of me, yeah.
>
> [DEFENSE COUNSEL]: Do you understand now?
>
> [THE WITNESS]: Yeah.
>
> [DEFENSE COUNSEL]: Okay.
>
> [THE WITNESS]: But, actually, this is an example as well. I didn't—
>
> [DEFENSE COUNSEL]: You're just now doing it. I didn't even ask you a question and you're just starting to talk.
>
> [THE WITNESS]: Due to—

[DEFENSE COUNSEL]: Now you understand why I asked you to get examined, right?

[THE WITNESS]: Yeah.

[THE STATE]: Your Honor—

[THE COURT]: Mr. [defense counsel]—

[THE STATE]: —this is improper.

[The COURT]: —if the witness can't follow the rules of the Court, your examination is going to be concluded.

A.R. Vol. IV, 233-34.

The Petitioner claimed that his identity was stolen from his computer, A.R. Vol. IV, 237-38, and that someone had put the child pornography on his computer without his knowledge. A.R. Vol. IV, 248. He claimed he was innocent of the accusation in the indictment. A.R. Vol. IV, 283.

During cross-examination, the following exchange occurred:

[THE STATE]: —that was a "yes" or "no" question.

THE COURT: Mr. Delorenzo, if you can answer the question "yes" or "no," you need to answer "yes" or "no" without expounding on it.

THE WITNESS: That I cannot answer just "yes" or "no."

THE COURT: If you can't answer "yes" or "no," I'm going to strike your entire testimony.

THE WITNESS: Is admission not betrayal if I admit facts?

[DEFENSE COUNSEL]: Your Honor, may I approach?

THE COURT: You may approach.

(Bench conference)

[DEFENSE COUNSEL]: He's not trying to be combative. It might look like that, but he's not. I detected that when he first came into my office. That's why I sent him to Doctor Marshall in the first place. That's why I ask for leeway.

I think when he answers "yes," he wanted to explain his answer. That's what he was in the process of doing. I don't think he was trying to make anybody annoyed or angry. He was just explaining his answer.

THE COURT: Well, he still has to follows the rules of question and answer. You'll have an opportunity to explain everything when you redirect him.

[DEFENSE COUNSEL]: Okay. I can explain that to him.

THE COURT: I will explain it to him.

(open court.)

THE COURT: Mr. Delorenzo, I need to explain to you that right now [the Assistant Prosecuting Attorney] is asking you questions that he is looking for particular answers from. Many of the questions he asks are going to be able to be answered with a simple "yes" or "no."

When [the Assistant Prosecuting Attorney] is questioning you, you need to make every effort to answer his questions with a simply "yes" or "no." When [Defense Counsel] has an opportunity to do what's called "redirect examine" you, then if you need to explain one of your answers, he'll go through that with you.

THE WITNESS: Okay. Yes, sir.

THE COURT: But with regard to [the Assistant Prosecuting Attorney]'s questions, it it's a "yes" or "no" question, you need to just answer "yes" or "no" and leave it at that.

THE WITNESS: Even if it doesn't have a "yes" or "no" answer like the one he just asked?

THE COURT: Well, I think it did have a "yes" or "no" answer.

THE WITNESS: Respectfully, I disagree. But, yes, sir. I'll do my best.

THE COURT: Well, do better than your best.

THE WITNESS: Is that possible?

A.R. Vol. IV, 292-95. The jury convicted the Petitioner. *See* A.R. Vol. I, 8.

D. Post-trial proceedings.

During the sentencing hearing in the case, the Petitioner called Michael Marshall, Ph.D., to testify. A.R. Vol. II, 9. Dr. Marshall is a licensed psychologist in West Virginia. A.R. Vol. II, 10. In January, 20202, Dr. Marshall conducted a psychological evaluation of the Petitioner. A.R. Vol. II, 16-17. He concluded the Petitioner falls on the Autism spectrum and that the Petitioner has obsessive-compulsive disorder, depression, anxiety, and panic disorder. A.R. Vol. II, 17. According to Dr. Marshall, if a person was unaware of the Petitioner's Autism and were unaware of factors and issues involved in Autism, the Petitioner would come across to that person as someone who is not agreeable. A.R. Vol. II, 19. Nevertheless, Dr. Marshall testified that the Petitioner cooperated well during the entire evaluation. A.R. Vol. II, 22. Dr. Marshall did not find any traits marking the Petitioner as a danger to society. A.R. Vol. II, 22. Dr. Marshall testified the Petitioner thinks concretely and not conceptually. A.R. Vol. II, 24. Dr. Marshall testified that the Petitioner would not recognize the dangers of going on the dark web. A.R. Vol. II, 26. A person with Autism would have difficulty in answering questions yes or no. A.R. Vol. II, 31. According to Dr. Marshall, the Petitioner would testify competently to a jury about the charges against him, but the jury could misinterpret his symptoms. A.R. Vol. II, 40.

SUMMARY OF ARGUMENT

The Petitioner initially contends that he was denied a fair trial by the circuit court's decision to exclude Dr. Marshall from testifying at trial. The circuit court did not abuse its broad discretion in declining to allow Dr. Marshall to testify. In any event, because the testimony to be offered by Dr. Marshall was covered by other witnesses who testified at trial, any error in excluding Dr. Marshall's testimony was harmless.

The Petitioner next asserts that the circuit court erred in denying his motion to dismiss to superseding indictment or, alternatively, to disqualify the Marshall County Prosecuting Attorney's

Office. Because the Petitioner's brief and appendix record are woefully inadequate to address this claim, it should be summarily rejected by this Court.

The Petitioner argues that the circuit court erred in admitting the Petitioner's statement to Det. Safreed. Because the circuit court's decision was based upon its credibility determination of Det. Safreed at the suppression hearing, this Court should not substitute its judgment for that of the circuit court. To the extent the Petitioner claims the circuit court erred in how it conducted the suppression hearing, that claim is not properly presented to this Court.

The Petitioner also avers that a portion of Ms. Herring's testimony constituted plain error. Because the Petitioner has not met the high threshold the plain error standard imposes on him to obtain relief, the judgment of the circuit court should be affirmed.

The Petitioner pentultimately claims that the circuit court erred in allowing the State to play for the jury certain pornographic images of children that were in the State's hash library and were reflected in the Petitioner's computer. Because this evidence was necessary for the State to prove its case against the Petitioner, its admission was not error. To the extent the Petitioner argues the evidence was needlessly cumulative and invokes West Virginia Rule of Evidence 403 in his Brief, the Petitioner never made a Rule 403 objection at trial and any error in this regard is waived.

Finally, the Petitioner condemns the circuit court for admonishing him in front of the jury that he had to follow the rules of court when testifying. Because the circuit court did not abuse its discretion in its admonishments, which were essential for the State to obtain a fair trial, the Petitioner has not shown his entitlement to relief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not warranted in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. The circuit court did not abuse its broad discretion in declining to permit Dr. Marshall to testify.

The Petitioner contends that the circuit court abused its discretion in refusing to allow Dr. Marshall to testify at trial. Pet'r Br. at 28. Because the circuit court did not abuse its broad discretion in refusing to permit Dr. Marshall to testify at trial, the judgment of the circuit court should be affirmed.

"[A] decision regarding the admission of evidence is within the broad discretion of the trial court and will be overturned only upon an abuse of that considerable discretion." *State v. Roy*, 194 W. Va. 276, 286, 460 S.E.2d 277, 287 (1995). This imposes a high burden on the Petitioner because "[a]n appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally[,]" *State v. Beard*, 194 W. Va. 740, 748, 461 S.E.2d 486, 494 (1995), and "should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion." *State v. David D. W.*, 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003) (per curiam) (Maynard, J., concurring), *majority opinion overruled by State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008). While a circuit court "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 are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution[,]" Syl. Pt. 3, in part, *State v. Jenkins*, 195 W. Va. 620, 466

S.E.2d 471 (1995), nevertheless "'a defendant's right to present a defense is not absolute: criminal defendants do not have a right to present evidence that the district court, in its discretion, deems irrelevant or immaterial.'" *United States v. Lighty*, 616 F.3d 321, 358 (4th Cir. 2010) (quoting *United States v. Prince–Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003)).

The circuit court order declining to allow Dr. Marshall to testify recognized that the Petitioner's original disclosure of Dr. Marshall identified that he would testify in accordance with his supplemental report of February 28, 2020, *to wit*, that due to the Petitioner's "simultaneous presence of two mental disorders, namely ASD and OCD, he will hyper-focus on a topic that he is motivated to investigate . . . *with a lack of appreciating whether something is right or wrong, . . .* ." A.R. Vol. I, 11 (emphasis added by circuit court). The circuit court then observed that in the Petitioner's most recent pleadings and at a recent pretrial hearing, the Petitioner shifted from his initial assertions to arguing that Dr. Marshall will testify as to the Petitioner's credibility, his subjective perceptions, to explain his conduct, "and to assert the [Petitioner] was doing 'non-criminal research on the dark web.'" A.R. Vol. I, 11. Because the Petitioner did not file any supplemental disclosures required by Rule of Criminal Procedure 16(b)(1)(C) or Trial Court Rule 32.03(b)(6), the circuit court was compelled to "assume that if permitted, Dr. Marshall would opine that the [Petitioner's] 'research' was 'non-criminal' because of his mental diagnoses." A.R. Vol. I, 11. The circuit court explained:

> The Court continues to be of the opinion that regardless of how the [Petitioner] couches Dr. Marshall's testimony, he is attempting to assert a diminished capacity/lack of criminal responsibility defense, which is unsupported by both the Court ordered evaluation conducted by Dr. Baker and Dr. Marshall himself. Further, the [Petitioner] cites no West Virginia cases where such expert testimony as he proposes was permitted in a felony criminal trial. The Court finds the out of jurisdiction cases cited by the [Petitioner] to be unpersuasive and not applicable to the present case.

A.R. Vol. I, 11. Thus the circuit court found Dr. Marshall's testimony improper and irrelevant and granted the State's motion in limine to exclude the testimony. A.R. Vol. I, 11.

On appeal the Petitioner contends that Dr. Marshall's testimony would have gone to two areas: (1) it would have given the jury context for evaluating the Petitioner's character traits and credibility such as explaining the Petitioner's lack of eye contact, flat emotions, and going off on tangents; and, (2) would have explained the Petitioner's compulsion to explore the dark web when a normal person would avoid the dark web because of its dangerous potential. Pet'r Br. at 29.

The Petitioner does not cite any West Virginia cases to support his claim, but cites two out of jurisdiction cases: *State v. Boyd*, 143 S.W.2d (Mo. Ct. App. 2004) and *State v. Burr*, 948 A.2d 627 (N.J. 2008). Pet'r Br. at 30. At the outset the absence of West Virginia law supporting his claim presents a difficult hurdle for the Petitioner to overcome. *See State v. Canaday*, No. 20-0188, 2021 WL 2580666, at *3 (W. Va. June 23, 2021) (memorandum decision) (refusing a petitioner's argument that he was entitled to a jury instruction under the buyer-seller rule "because neither this Court nor the Legislature has adopted the buyer-seller rule."); *State v. Cooper*, No. 17-0357, 2018 WL 2129741, at *4 (W. Va. May 9, 2018) (memorandum decision) (refusing to adopt the State's argument that probation does not start until accepted because "[t]he State has not cited any West Virginia law supporting its position"). Moreover, the two out of state cases the Petitioner cites are distinguishable.

In *Boyd*, Boyd was convicted of first degree murder. 143 S.W.3d at 37. Boyd wished to offer evidence that he suffered from Asperger's Syndrome, an aspect of Autism. *Id.* The trial court refused to permit Boyd to introduce the evidence. *Id.* Boyd argued that this evidence was relevant 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. *Id.* at 39. The appellate court reversed the trial court. *Id.* at 47. There are no similarities between *Boyd* and the Petitioner's case. The grounds in *Boyd* went directly to the ability of Boyd to commit the crime for which he was charged. Here, Dr. Marshall's testimony does not relate to whether or not the Petitioner was capable of committing the crime.

In *Burr*, a jury convicted Burr of second-degree sexual assault and third-degree endangering the welfare of a child, based on allegations he had touched inappropriately a young female student while teaching her piano. 948 A.2d at 629. At trial the alleged victim testified that, on numerous occasions, Burr touched her "private parts" over her clothes. *Id.* at 630. She also testified Burr often pulled her onto his lap, although he did not touch her inappropriately at those times. *Id.* Three other witnesses confirmed Burr permitted children to sit on his lap. *Id.* During summation, the prosecution argued that Burr's purpose for allowing the alleged victim to sit on his lap was to "groom" her for sexual assault by making her feel comfortable when being held by him in a compromising position. *Id.* The New Jersey Supreme Court concluded that Burr

> must be permitted to introduce expert testimony on Asperger's Disorder to defend against any allegation of "grooming" his victim that the State may advance, as well as to explain himself and his actions to the jury regardless of whether the State pursues its "grooming" theory. The testimony is equally relevant to [Burr's] efforts to have the jury understand any unusual demeanor or mannerisms he may have as a result of the Asperger's Disorder and to explain his asserted shortcomings in perceiving and reacting to basic interpersonal cues when engaging in social interactions. He must be permitted the opportunity to present at trial evidence that tends to prove that he has a medical basis for such behaviors in order to explain himself and his condition and, thereby, to lessen the chance of being misunderstood by the jury.

Id. at 634. In this case, the State produced no evidence of "grooming" like that in *Burr*.

Finally, any error in the exclusion of Dr. Marshall's testimony is harmless. This Court has "noted that '[t]he doctrine of harmless error is firmly established by statute, court rule and decisions as a salutary aspect of the criminal law of this State.'" *State v. Howells*, 243 W. Va. 1, 7, 842 S.E.2d 205, 211 (2020) (quoting *State v. Blair*, 158 W. Va. 647, 659, 214 S.E.2d 330, 337 (1975) (citations omitted)); *see, e.g.*, W. Va. Code § 62-2-11 ("Judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case."); W. Va. R. Crim. P. 52 (a) "(Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."); *State v. Rush*, 108 W. Va. 254, 150 S.E. 740, 742 (1929) ("The rule of 'harmless error' is settled law in this state."). Thus, "[a] judgment will not be reversed merely because of error committed by the trial court, but only when the error has been harmful to the accused." Syl. Pt. 2, in part, *State v. Smith*, 119 W. Va. 347, 193 S.E. 573 (1937).

Where evidence is excluded by one witness, but is provided to the jury by another witness, any error in the exclusion of evidence from the first witness is harmless. *See, e.g., Womack v. State*, 555 So. 2d 299, 301 (Ala. Ct. Crim. App. 1989) ("Even if the excluded testimony was error, it was harmless, because substantially the same evidence was elicited from other witnesses."). In this case, the Petitioner was able to elicit testimony from his witnesses at trial that would parallel that he wished to elicit from Dr. Marshall. Mr. Delorenzo testified that the Petitioner has Autism and OCD, A.R. Vol. IV, 182, and Mr. Helfer confirmed this. A.R. Vol. IV, 202. Mr. Delorenzo also testified as to the Petitioner's obsessive behavior. Mr. Delorenzo testified the Petitioner goes to extremes when he wants to learn something, "[h]e has to go deep into everything he does, dig up every fragment of information about anything having to do with the category that he's in."A.R.

Vol. IV, 182; *see also* A.R. Vol. IV, 183. Similarly, Ms. Helfer explained the Petitioner is obsessed with things and "wants to learn everything there is to learn about a topic." A.R. Vol. IV, 194. She testified that the Petitioner gets stuck on things and wants to know things and will go wherever they need in order to figure it out. A.R. Vol. IV, 192. The Petitioner is not aware of fear when trying to figure things out. A.R. Vol. IV, 193. The Petitioner wants to learn everything there is to learn about a topic. A.R. Vol. IV, 194. Moreover, Mr. Helfer testified that the Petitioner has difficulty in a lot of social situations. A.R. Vol. IV, 205. And Mr. Helfer testified the Petitioner can come off as "condescending," "somewhat aloof of social cues at times." A.R. Vol. IV, 206. The testimony Dr. Marshall would have provided was provided by the Petitioner's other witnesses. As such, any error in excluding Dr. Marshall was harmless.

Because the Petitioner has not shown any harmful error, the judgment of the circuit court should be affirmed.

B. The Petitioner's claim that the circuit court erred in failing to dismiss the superseding indictment or disqualify the Prosecuting Attorney of Marshall County are not properly briefed before this Court and this Court should simply decline to address this issue.

The Petitioner claims that the circuit court erred in not dismissing the superseding indictment or in failing to disqualify the Prosecuting Attorney of Marshall County. Pet'r Br. at 33. The Petitioner claims that a forensic evaluation was sent to the Prosecuting Attorney's office that contained attorney-client privileged material. Pet'r Br. at 34. He claims that the Prosecuting Attorney used this material to bring the superseding indictment. Pet'r Br. at 34. The Petitioner does not provide this Court with a copy of this forensic report or with any of the pleadings he filed in circuit court in this regard in the Appendix Record. A.R. ii-iii. The Petitioner's mere averments in his brief as to what occurred during the course of the proceedings below are not evidence and this Court cannot rely on them in rendering judgment in this case. "'[A] party can not establish facts

in a case by asserting them in a brief. Those are nothing more than an attorney's statements, which are not evidence.'" *State v. Benny W.*, 242 W. Va. 618, 629, 837 S.E.2d 679, 690 (2019) (quoting *City of Helena v. Whittinghill*, 219 P.3d 1244, 1248 (Mont. 2009) (citation omitted)). "'Counsel's unsupported statements are, of course, not evidence.'" *Id.*, 837 S.E.2d at 690 (quoting *United States v. Diaz*, 533 F.3d 574, 578 (7th Cir. 2008)). This Court will "'take as non[-]existing all facts that do not appear in the [appendix] record and will ignore those issues where the missing record is needed to give factual support to the claim.'" *Hairston v. W. Virginia Dep't of Health & Hum. Res. Bd. of Rev.*, No. 20-0326, 2021 WL 982643, at *3 n.3 (W. Va. Mar. 16, 2021) (memorandum decision) (quoting *State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994)). For the foregoing reasons, this Court should simply decline to address this issue.

C. **The Petitioner's *Miranda* claims.**

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court "held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence." *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000). The Petitioner claims that *Miranda* was violated in his case. It was not.

The Petitioner makes two claims related to his statement to Det. Safreed: (1) that the circuit court erred in ruling that if the Petitioner testified at the suppression hearing that his cross-examination would not be limited solely to the issue of voluntariness; and, (2) that the circuit court erred in finding the Petitioner's statement to Det. Safreed to be voluntary. Pet'r Br. at 35. Because the first claim is not properly perfected in the Petitioner's brief it should not be addressed by this Court. Because the Petitioner's second claim is belied by the law and facts of this case, the decision of the circuit court should be affirmed.

1. *The claim that the circuit court erred in ruling that if the Petitioner testified at the suppression hearing that his cross-examination would not be limited solely to the issue of voluntariness is not properly before this Court.*

The Petitioner asserts in his brief that the circuit court erred in denying the Petitioner's motion to suppress his recorded statement to Det. Safreed without allowing the Petitioner to testify solely on the issue of voluntariness. Pet'r Br. at 35. In the body of his argument, the Petitioner merely cites to the Appendix Record to detail the facts of what occurred below. He does not accompany the facts with a reasoned (or actually any) legal argument such as citing authority and tying that authority into the facts of the case. "Merely citing to some of the facts involved with an issue does not satisfy the requirements of West Virginia Rule of Appellate Procedure 10(c)(7), which requires that the brief 'contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on[.]'" *Benny W.*, 242 W. Va. at 632 n.23, 837 S.E.2d at 693 n.22; *see also State v. Douglas N.*, No. 18-0380, 2019 WL 5853261, at *3 n.5 (W. Va. Nov. 8, 2019) (memorandum decision) ("Additionally, in support of his assignment of error . . . petitioner fails to cite to any statute, case, or other authority to support his position, as required [by] W. Va. R. App. P. 10(c)(7)[.]"). Accordingly, the Petitioner's assertion should not be addressed by this Court.

2. *The circuit court did not err in admitting the Petitioner's statement to Det. Safreed.*

The Petitioner contends that "[t]he circuit court erred in finding that the State met its burden through Sgt. Safreed's testimony." Pet'r Br. at 35. The Petitioner is incorrect.

The Petitioner raises a suppression issue. This Court has set forth the standard of review governing this issue:

> On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. Pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994). Further,

> an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. Pt. 1, in part, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996). The clear error standard of review is highly deferential. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995). "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. Pt., 1, in part, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). "[A] reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* Under the clear error standard, "[w]e will disturb only those factual findings that strike us wrong with the 'force of a five-week-old, unrefrigerated dead fish.'" *Brown v. Gobble*, 196 W. Va. 559, 563, 474 S.E.2d 489, 493 (1996) (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir. 1993)).

At the outset, it must be observed that *Miranda* warnings are only required when there is a confluence of custody and interrogation. "Two elements must be present before *Miranda* warnings are required: first, the person must be in custody, and, second, he or she must be interrogated." *State v. Honaker*, 193 W. Va. 51, 60, 454 S.E.2d 96, 105 (1994). Where there is no custody, *Miranda* warnings are not required before police question a suspect. "A suspect who is not in custody does not have *Miranda* rights." *State v. McKenzie*, 197 W.Va. 429, 438, 475 S.E.2d 521, 530 (1996). Therefore, "*Miranda* warnings are not necessary when a person is not in custody."

State v. Tyler G., 236 W. Va. 152, 159 n.10, 778 S.E.2d 601, 608 n.10 (2015). The Petitioner bears the burden of proving custody for *Miranda* purposes. *See State v. James*, 225 P.3d 1169, 1172 (Idaho 2010) ("the vast majority of courts that have considered the issue . . . hold that the burden of showing custody rests on the defendant seeking to exclude evidence based on a failure to administer Miranda warnings."); *United States v. Artis*, No. 5:10-CR-15-01, 2010 WL 3767723, at *4 (D. Vt. Sept. 16, 2010) ("The weight of authority appears to hold that a defendant bears the burden of establishing that he or she was subjected to custodial interrogation in order to establish a constitutional violation as the basis for suppression of evidence.").

"Telling a suspect that he/she is not under arrest and is free to leave usually is sufficient to prevent a finding of custody and will circumvent a finding of de facto arrest." *State v. Farley*, 192 W. Va. 247, 255 n.10, 452 S.E.2d 50, 58 n.10 (1994); *accord Painter v. Ames*, No. 17-1010, 2019 WL 2452674, at *8 (W. Va. June 12, 2019) (memorandum decision); *Tyler G.*, 236 W. Va. at 159 n.10, 778 S.E.2d at 608 n.10; *State v. Todd Andrew H.*, 196 W. Va. 615, 621, 474 S.E.2d 545, 551 (1996).[7] In the instant case, Det. Safreed testified that he advised the Petitioner that he was not under arrest. A.R. Vol. III, 10. The circuit court credited that testimony because it found in its

[7]While there is some question if Det. Safreed would have let the Petitioner leave the residence during the search, *compare* A.R. Vol. III, 10 *with* A.R. Vol. III, 34-35, even if Det. Safreed intended to prevent the Petitioner from leaving, this does not aid the Petitioner. Det. Safreed did not tell the Petitioner he was not free to leave. A.R. Vol. III, 34. "Whether the defendant was 'in custody' is determined by an objective test[.]" *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742, 752 (1996). "As the Supreme Court has emphasized repeatedly, the inquiry in *Miranda* cases is not into the officer's subjective intent, suspicion, or views." *United States v. Kiam*, 432 F.3d 524, 528 (3d Cir. 2006). "Thus, the interrogating officer's intent, not communicated to the individual being questioned, is irrelevant to the inquiry." *United States v. Hughes*, 640 F.3d 428, 435 (1st Cir. 2011). Even if Det. Safreed intended to prevent the Petitioner from leaving, this uncommunicated intent is not relevant to the *Miranda* custody analysis. *See, e.g., United States v. Beard*, 119 F. App'x 462, 466 (4th Cir. 2005) (no custody because, in part, the defendant "was in his own house, even his own room, and was never told that he was not free to leave."); *United States v. Faucette*, 26 F. App'x 91, 92 (4th Cir. 2001) (no custody based, in part, on the fact that "Detectives never told [the defendant] he was not free to leave.").

order admitting the Petitioner's statement that "the [Petitioner] was not in custody at any time during his statements." A.R. Vol. I, 18.

Moreover, Det. Safreed testified he read the Petitioner his *Miranda* rights from a card he normally carries in his portfolio. A.R. Vol. III, 9. Det. Safreed advised the Petitioner: (1) that he had the right to remain silent; (2) that anything that he said could and would be used against him in a court of law; (3) that he had the right to seek or obtain an attorney and to have one present while being questioned; and, (4) that if he could not afford an attorney one would be appointed for him. A.R. Vol. III, 11. He was further advised he could exercise these rights at anytime and stop answering questions. A.R. Vol. III, 11. Det. Safreed asked the Petitioner if he understood these rights. A.R. Vol. III, 11. Det. Safreed testified that "[the Petitioner] would have said that he did understand them because we had an interview." A.R. Vol. III, 11. The Petitioner agreed to speak to Det. Safreed after having been read his *Miranda* rights. A.R. Vol. III, 11. The circuit court specifically found that, based on Det. Safreed's testimony and its review of the Petitioner's statement, that "the same was voluntary and made and with [sic] full knowledge of his *Miranda* rights after being advised of the same." A.R. Vol. I, 18. The circuit court judged the credibility of Det. Safreed and believed him. As this Court has identified, "we should not reverse a trier of fact on a question of credibility when the trier of fact had the advantage of hearing the testimony." *Stuart*, 192 W. Va. at 433, 452 S.E.2d at 891.[8]

The judgment of the circuit court should be affirmed.

D. The Petitioner has not shouldered his heavy burden of demonstrating plain error concerning testimony from Ginger Herring.

[8]The Petitioner attempts to use his trial testimony to challenge the circuit court's suppression order. Pet'r Br. at 36. The Petitioner should not be permitted to assail the circuit court's suppression order with evidence that the circuit court did not have before it at the suppression hearing.

During her testimony, Ms. Herring testified that she spoke to the Petitioner's counsel. A.R. Vol. IV, 149. The Petitioner's counsel asked Ms. Herring if it was possible that someone could have used his computer as a server without the Petitioner's knowledge. A.R. Vol. IV, 149. Ms. Herring responded it was possible. A.R. Vol. IV, 150. The State then asked Ms. Herring if it was probable and Ms. Herring responded:

> [MS. HERRING]: It is—it is possible. I mean, it's possible for any home computer to be–to be gotten into and used. However, most of the time when that's the case, there's a monetary—they're looking for monetary reasons to do it. They want your identity. They want your bank numbers. They want your credit card numbers. In most cases that is more what it's for, is for monetary gain.
>
> [THE STATE]: So it—correct me if I'm wrong. People don't typically use it then to put pornography on somebody else's computer.
>
> [MS. HERRING]: No.
>
> [THE STATE]: And then delete it.
>
> [Ms. Herring]: No.

A.R. Vol. IV, 149-50. The Petitioner did not object to this testimony and now falls back upon plain error. Pet'r Br. at 37. Because the Petitioner did not carry his heavy burden of showing plain error, the judgment of the circuit court should be affirmed.

West Virginia adheres to the raise or waive rule. "This Court has consistently held that 'silence may operate as a waiver of objections to error and irregularities[.]'" *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 220, 719 S.E.2d 381, 388 (2011) (quoting *State v. Grimmer*, 162 W. Va. 588, 595, 251 S.E.2d 780, 785 (1979), *overruled on other grounds by State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980)). Under the raise or waive rule, "[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound

forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996). "Of course, the raise or waive rule is not absolute." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." W. Va. R. Crim. P. 52(b). Thus, "[t]he 'plain error' doctrine creates a limited exception to the general rule that a party's failure to object waives any right to appeal an issue." *Honaker v. Mahon*, 210 W. Va. 53, 60, 552 S.E.2d 788, 795 (2001). Nevertheless, "[t]he plain error standard is . . . a high bar that is difficult to clear." *United States v. Hassan*, 742 F.3d 104, 137 (4th Cir. 2014).

"[C]ourts should use great caution when considering utilization of the plain error doctrine." *Brooks v. Galen of West Virginia, Inc.*, 220 W. Va. 699, 706, 649 S.E.2d 272, 279 (2007). "By its very nature, the plain error doctrine is reserved for only the most flagrant errors." *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 310, 787 S.E.2d 572, 581 (2016). "[I]t is only in rare cases that the plain error doctrine is invoked[.]" *Cartwright v. McComas*, 223 W. Va. 161, 165, 672 S.E.2d 297, 301 (2008) (per curiam). Consequently, the plain error doctrine is to be used only "'sparingly[,]'" *State v. Woodson*, 222 W. Va. 607, 614, 671 S.E.2d 438, 445 (2008) (per curiam) (quoting Syl, Pt. 2, in part, *State v. Thompson*, 220 W. Va. 298, 647 S.E.2d 834 (2007)), and then "only in extreme circumstances." *State v. Keesecker*, 222 W. Va. 139, 148, 663 S.E.2d 593, 602 (2008) (per curiam).

In order "[t]o trigger application of the 'plain error' doctrine, there must be (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. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The Petitioner must satisfy all four of the plain error factors before he is entitled to relief. *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021). "Satisfying all four prongs of the

plain-error test 'is difficult.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). In short, while appellate courts may review forfeited objections for plain error "such error is rarely found." 9 James Wm. Moore et al., *Moore's Federal Practice* ¶ 46.02[2] (3d ed. 2002). The Petitioner does not raise such a rare case here and the Court should affirm his conviction.

The Petitioner cites no cases where this Court has applied plain error to a claim that an expert witness testified outside her area of expertise. While he cites the general plain error test, Pet'r Br. at 38, merely citing to a general standard without specific cases to support how the court should apply that test is insufficient to bring the issue before this Court. *Cf. State v. Braxton*, No. 19-0327, 2020 WL 5269745, at *2 (W. Va. Sept. 4, 2020) (memorandum decision) (merely citing standard for evidentiary sufficiency insufficient to have this Court to address the claim of evidentiary insufficiency).

Moreover, the Petitioner has failed to show that any error (if error there was) was "plain." "To be 'plain,' the error must be 'clear' or 'obvious.'" Syl. Pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The Petitioner's counsel claims he needed several minutes to realize that the alleged error had occurred, Pet'r Br. at 37, which itself cuts against a claim that the error (if any) was clear and obvious.

Finally, Ms. Herring testified at trial that she had a degree in cyber security/computer forensics. A.R. Vol. IV, 98. She further testified that cyber security "would be protecting computer systems from intrusions." A.R. Vol. IV, 98. Thus, Ms. Herring was at least familiar with the kinds of intrusions that occur in order to defend against them. Since Ms. Herring could have been qualified as an expert to give the testimony she gave, any error is certainly not plain error. *United States v. Perkins*, 470 F.3d 150, 156–57 (4th Cir. 2006).

There was no plain error in this case and the judgment of the circuit court should be affirmed.

E. The circuit court did not err in admitting the child pornography that was traceable to the Petitioner's hash files in the Petitioner's computer.

The Petitioner claims on appeal that the circuit court erred in allowing the jury to view child pornography that was taken from the State's hash library and tied to the Petitioner's computer. Pet'r Br. at 38. He claims before this Court 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." Pet'r Br. at 38. He concludes that "[i]t was, therefore, unnecessary for the State to present the images to the jury." Pet'r Br. at 38. He further contends that the introduction of the images constituted the needless presentation of cumulative evidence "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." Pet'r Br. at 38-39.

"As recognized above, our review of the lower court's admission [of evidence] is limited to the abuse of discretion standard." *State v. Gray*, 204 W. Va. 248, 253, 511 S.E.2d 873, 878 (1998) (per curiam). Because the circuit court did not abuse its discretion in admitting the evidence, its judgment should be affirmed.

The Petitioner claims that it was unnecessary for the State to present the images to the jury. Pet'r Br. at 38. This is incorrect.

"The State must prove all the elements of a crime beyond a reasonable doubt." *State v. Less*, 170 W. Va. 259, 264, 294 S.E.2d 62, 66 (1981). Thus, "[a] simple plea of not guilty puts the prosecution to its proof as to all elements of the crime charged." *Mathews v. United States*, 485 U.S. 58, 64–65 (1988) (internal citation omitted). Consequently, a defendant's decision not to contest an essential element of a crime does not remove the government's burden to prove that

element. *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). In this case the Petitioner was charged with violating West Virginia Code § 61-8C-3(a). A.R. Vol. I, 21. Under West Virginia Code § 61-8C-3(a), it is a felony for "[a]ny person [to] knowingly and willfully, send[] or cause[] to be sent or distribute[], exhibit[], possess[], electronically access[] with intent to view or displays or transport[] any material visually portraying a minor engaged in any sexually explicit conduct[.]" West Virginia Code § 61-3C-3(b)-(d) makes the sentences for the crime of distributing and exhibiting child pornography a function of the number of images falling within subsection (a)'s prohibition.

The State was obligated to prove to the jury that the Petitioner, *inter alia*, had "material visually portraying a minor engaged in any sexually explicit conduct[,]" as well as the number of such images. The State had the corresponding right to present the images to the jury that constituted an essential part of the State's case.

Second, the Petitioner contends that the evidence was needlessly cumulative. Pet'r Br. at 38. He contends on appeal that this needlessly cumulative evidence "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." Pet'r Br. at 38-39. The Petitioner did not object below on Rule 403 grounds. A.R. Vol. IV, 25-26. Rather, he objected because "what is on that thumb drive is not what was actually recreated from the IP address." A.R. Vol. IV, 25. The circuit court understood the Petitioner's objection to be to the authenticity and foundation of the images. A.R. Vol. IV, 29.[9] The Petitioner cannot now on appeal rely on Rule 403 because he did not make a Rule 403 objection at trial.

[9]The remainder of the Petitioner's objections related back to the original objection, A.R. Vol. IV, 30, 35, and did not reference Rule 403.

> "It is well established that where the objection to the admission of testimony is based upon some specified ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since specifying a certain ground of objection is considered a waiver of other grounds not specified."

State v. DeGraw, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) (quoting *Leftwich v. Inter–Ocean Casualty Co.*, 123 W. Va. 577, 585–86, 17 S.E.2d 209, 213 (1941) (Kenna, J., concurring)). Accordingly, "'[o]nly those objections or grounds of objection which were urged on the trial court, without change and without addition, will be considered on appeal.'" *Finley v. Norfolk & W. Ry. Co.*, 208 W. Va. 276, 282, 540 S.E.2d 144, 150 (1999) (citation omitted). Because the Petitioner did not object under Rule 403 below, he cannot rely on that Rule in this Court. *See Brock v. State*, 495 S.W.3d 1, 12 (Tex. App. 2016) (authentication objection does not preserve a Rule 403 objection).

The circuit court's judgment should be affirmed.

F. The circuit court did not deny the Petitioner a fair trial when it required the Petitioner to testify in a manner consistent with the rules and practices of witnesses testifying in court.

During the Petitioner's testimony, the circuit court was obliged to admonish the Petitioner to abide by the rules of court such as stopping talking during objections and answering "yes" or "no" questions with a "yes" or "no." A.R. Vol. IV, 223; A.R. Vol. IV, 233-34; A.R. Vol. IV, 292-95. The Petitioner accuses the circuit court of "needlessly threaten[ing] [the] Petitioner before the jury even though [the] Petitioner was having difficulties consistent with someone with ASD." Pet'r Br. at 39.

The Petitioner tries to bring his case within the rule that a trial judge is not permitted to indicate an opinion on any fact in issue. Pet'r Br. at 40 (citing *State v. Thompson*, 220 W. Va. 398, 412, 647 S.E.2d 834, 848 (2007)). The Petitioner asserts that "[w]hile 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." Pet'r Br. at 40.

"To safeguard the integrity of its proceedings and to insure the proper administration of justice, a circuit court has inherent authority to conduct and control matters before it in a fair and orderly fashion." *State v. Fields*, 225 W. Va. 753, 760, 696 S.E.2d 269, 276 (2010). Therefore, this Court has recognized that trial courts enjoy considerable discretion in trying cases "to handle the manifold exigencies that may arise." *State v. Burton*, 163 W. Va. 40, 54, 254 S.E.2d 129, 138 (1979). "Our review of the trial court's manner of conducting the trial is for an abuse of discretion[.]" *State v. Davis*, 232 W. Va. 398, 414, 752 S.E.2d 429, 445 (2013).

In the instant case, the circuit court did not express an opinion on any fact in issue or call into question the Petitioner's credibility. Rather, the circuit court merely admonished the Petitioner that if he was going to testify, he had to do within the bounds applicable to any other witnesses for his testimony to be considered by the jury. *See People v. Williams*, 558 N.E.2d 1258, 1267 (Ill. Ct. App. 1990) (holding that trial court's admonishing defense expert to answer "yes" or "no" questions with "yes" or "no" and not to ramble were within judge's discretion, and did not constitute efforts to discredit witness or defense in general); *see also Campbell v. Drollinger*, 198 Wash. App. 1057 (2017) (Table) (text available at 2017 WL 1534998) ("courts often admonish witnesses[] to answer yes or no to questions calling for yes or no answers.").

This case does not present an issue of the circuit court abusing its authority, but properly exercising it. Indeed, the judge had an obligation not only to the Petitioner, but to the State—which is also entitled to fair treatment in the criminal process. "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), *overruled on*

other grounds by Malloy v. Hogan, 378 U.S. 1 (1964). Thus, "[j]ust as a defendant has a right to a fair trial, so does the State. The defense has to comply with the established rules of procedure and evidence in the same manner as the prosecution." *State v. Baker*, 230 W. Va. 407, 418–19, 738 S.E.2d 909, 920–21 (2013) (Loughry, J., dissenting).[10] In other words, "[t]he rights of the State to a fair, orderly, impartial trial are to be protected by the court to the same extent as defendant's." *People v. Dilger*, 465 N.E.2d 937, 940 (Ill. Ct. App. 1984).

The judgment of the circuit court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Marshall County, West Virginia, should be affirmed.

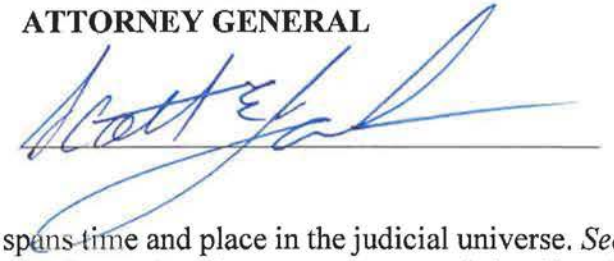
Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



[10]This point is neither novel nor neoteric; it spans time and place in the judicial universe. *See, e.g.*, *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979) ("the government . . . is itself entitled to a fair trial in a criminal case"); *United States v. Pridgeon*, 462 F.2d 1094, 1095 (5th Cir. 1972) ("It goes without saying that the prosecution, just as the defense, is entitled to a fair trial."); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) ("The concept of a fair trial applies both to the prosecution and the defense."); *United States v. McDade*, 827 F. Supp. 1153, 1191 (E.D. Pa. 1993) ("It must be remembered that it is not just the defendant, but also the government, that is entitled to a fair trial."), *aff'd in part, appeal dismissed in part*, 28 F.3d 283 (3d Cir. 1994); *Commonwealth v. Lowder*, 731 N.E.2d 510, 519 (Mass. 2000) ("The Commonwealth, as well as a criminal defendant, has the right to a fair trial."); *People v. Dikeman*, 555 P.2d 519, 521 (Colo. 1976) ("It is a rudimentary proposition of law that a criminal trial must be a fair trial not only for a defendant but also for the People.")

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0456

STATE OF WEST VIRGINIA,

Respondent,

v.

ALEXANDER PAUL DELORENZO,

Petitioner.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, 1 October, 2021, and addressed as follows:

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