IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 18-0498

STATE OF WEST VIRGINIA,

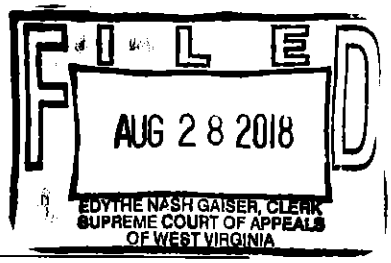
Plaintiff Below, Respondent,

v.

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

MICHAEL SHANE REXRODE,

Defendant Below, Petitioner.



PETITIONER'S APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

A. The Circuit Court Erred in Finding that the Warrantless Arrest of Mr. Rexrode in the Marital Bedroom of His Home Fell Within the Emergency Doctrine Exception to the Warrant Requirement.

B. In the Midst of an Evidentiary Dispute During Trial, the Magistrate Left the Courtroom to Consult Ex Parte with the Circuit Judge About How to Rule on the Pending Evidentiary Matter, and then the Magistrate Based His Ruling Upon the Advice Received from the Circuit Judge.

C. The Magistrate Court Committed Clear Error in Forcing the Victim to Testify Against Mr. Rexrode by Threatening Her with Contempt After She Invoked her Fifth Amendment Privilege Based Upon the Advice of Her Attorney, and the Circuit Court Ratified It.

D. The Prosecuting Attorney's Comments During Rebuttal Clearly Prejudiced Mr. Rexrode and Resulted in Manifest Injustice.

E. The Magistrate Court Erred in Failing to Record the Voir Dire Portion of the Jury Trial, Thereby Preventing Numerous Errors from Being Reflected in the Record.

F. Error was Committed When Cpl. Nazelrod Testified to the Hearsay Within Hearsay Statement Made by an Uninvolved Third Person to a 911 Dispatcher, Particularly After the Prosecuting Attorney Represented to the Court that Such Testimony Would Not be Introduced.

G. The Circuit Court Erred in Failing to Render a Decision on the Appeal Within the Statutorily Required 90-Day Time Period.

H. The Cumulative Effect of the Errors Prevented Mr. Rexrode from Receiving a Fair Trial.

II. STATEMENT OF THE CASE

This case is riddled with error. It began with the warrantless arrest in the home, continued with the magistrate's improper conduct and prosecutor's inflammatory argument at trial, and ended with the circuit court failing to render a decision on the appeal within the statutory required timeframe.

Appellant and defendant below, Michael Shane Rexrode (hereinafter "Mr. Rexrode"), was charged with domestic battery against his wife, [redacted] Rexrode (hereinafter "Mrs.

Rexrode"), on April 19, 2017. In violation of the Fourth Amendment, Mr. Rexrode was arrested in his home without a warrant. Thereafter, Mr. Rexrode was prosecuted at trial with help from the magistrate who 1) failed to record voir dire during which time he made biased comments in favor of the prosecution, 2) engaged in an ex parte conversation with the chief judge during trial on how to rule on an evidentiary matter, and 3) forced Mrs. Rexrode to testify under the threat of contempt. The prosecuting attorney introduced inadmissible hearsay evidence and capped off the jury trial by arguing "*[w]hat do you reckon might happen to [Mrs. Rexrode] if she goes home now after he's had to go through all this?*"

Mr. Rexrode timely appealed his conviction to circuit court. There, his conviction was rubber stamped. The circuit court failed to render a decision on the appeal within the statutory time period, only adding to the other errors prevalent throughout the criminal prosecution.

A. Statement of Facts

Michael Shane Rexrode is a 53 year-old poultry farmer in Maysville, West Virginia. (App. 175). He has been married to [redacted] Rexrode for 16 years. (App. 174). They have no children. *Id.* On the morning of April 19, 2017, Mr. Rexrode arrived at his layer poultry house around 5:00 a.m. to begin a day of gathering eggs. (App. 175, 177). Mr. Rexrode noticed that the feedline was not working because a pin had sheared in one of the gears that run the feedline. (App. 175, 177). He had to fix the problem quick for the chickens to be fed. (App. 175). To repair it, Mr. Rexrode reached down into the feedline to get the chain loose so that he could put the pin back in place. (App. 175, 177). The edges of the pan on the feedline are sharp, and Mr. Rexrode cut his hand while repairing the feedline. *Id.* Specifically, Mr. Rexrode cut the ring finger and side of his right hand. (TT. 175). He is right-hand dominant. *Id.*

After repairing the feedline, Mr. Rexrode gathered eggs until approximately 7:00 p.m.

(App. 175). When Mr. Rexrode arrived back at his house that evening after a long day of work, his wife accused him of having an affair with the female employee that worked at the poultry house. (App. 175-76). Mr. Rexrode brushed it off, knowing the allegation was untrue. (App. 176). Mrs. Rexrode had been drinking heavily and taking pills. (App. 170, 176). She was slurring her speech, staggering, and appeared visibly intoxicated. (App. 176). Mrs. Rexrode clearly admitted that she was "drunk" and "pissed off" at Mr. Rexrode for spending all of his time down at the poultry house. (App. 170).

Rather than engage in a verbal argument with his wife, Mr. Rexrode told her that they would talk the next morning after she sobered up. (App. 176). Mr. Rexrode took a shower and went to bed. *Id.* Being exhausted from working all day, he immediately went to sleep. (App. 179). Mr. Rexrode was adamant and testified repeatedly that he never had a physical altercation with his wife. (App. 176).

Later on that evening, Corporal S.A. Nazelrod of the West Virginia State Police received a call for a "well-being check" at the Rexrode household. (App. 222). Apparently,[1] an uninvolved third party called to report an altercation between Mr. and Mrs. Rexrode. (App. 219, 223). That third party did not, however, witness any altercation or injury to Mrs. Rexrode. (App. 224). Cpl. Nazelrod responded to the Rexrode home.

Upon arrival, Cpl. Nazelrod did not witness any altercation between Mr. and Mrs. Rexrode. (App. 160, 226). He did not hear any arguing or yelling. *Id.* Cpl. Nazelrod knocked on the door and was greeted by Mrs. Rexrode on the front porch. *Id.* Importantly, Mrs. Rexrode was not trying to escape from Mr. Rexrode or fleeing the house for her safety. (App. 160, 226-27). She did not say anything to Cpl. Nazelrod to give him the impression that she was fearful for her safety or felt that she was in danger. (App. 227).

[1] The third party did not testify at any hearing or at trial.

Cpl. Nazelrod observed an injury to Mrs. Rexrode's eye and naturally asked about how the injury occurred. (App. 227-28). Mrs. Rexrode replied that she had injured her eye on farm equipment earlier in the day. (App. 228). Without asking permission, Cpl. Nazelrod forced his way into the Rexrode home. (App. 160, 228). Mrs. Rexrode specifically opposed and objected to Cpl. Nazelrod entering the home. (App. 160, 228). He went in anyway. *Id.*

After forcing his way into the home over Mrs. Rexrode's objection, Cpl. Nazelrod walked directly to the marital bedroom, passing through a second door. (App. 160-61, 229). There, he found Mr. Rexrode lying in the marital bed under the covers. (App. 161, 229-30). Cpl. Nazelrod had no information that a weapon had been involved in the alleged altercation. (App. 231). Nonetheless, he shouted to Mr. Rexrode "show me your hands!" (App. 161, 220). Mr. Rexrode complied. *Id.* Without asking any questions, Cpl. Nazelrod immediately detained Mr. Rexrode and placed him in handcuffs. (App. 161, 230). Cpl. Nazelrod then marched Mr. Rexrode out to the kitchen. *Id.* Mr. Rexrode was only wearing his underwear. *Id.* Shortly thereafter, Mr. Rexrode was placed in the back of the police cruiser and taken to jail. Cpl. Nazelrod did not have an arrest warrant or search warrant before forcing his way into the Rexrode home to seize Mr. Rexrode. (App. 233).

After detaining Mr. Rexrode, Cpl. Nazelrod and Deputy S. Rohrbaugh of the Grant County Sheriff's Office proceeded to interrogate Mrs. Rexrode. (App. 171). Importantly, Mrs. Rexrode refused to speak with officers when they initially arrived at the Rexrode household. (App. 172). Mrs. Rexrode only gave a statement after Mr. Rexrode was hauled out of the bedroom in handcuffs and she was pressed by the officers. *Id.* Mrs. Rexrode gave a statement to Cpl. Nazelrod and Deputy Rohrbaugh that her husband jabbed her in the face and held her down on the living room floor. (App. 103, 169). The statement was handwritten by Cpl. Nazelrod, who

testified that he "typically dictate[s] a statement for a victim." (App. 173). Later, Mrs. Rexrode very adamantly testified her statement to the officers that evening was "a lie" because she was "drunk" and "pissed off" at Mr. Rexrode. (App. 169-70).

B. Procedural History

Mr. Rexrode was arrested in his home without a warrant on April 19, 2017. (App. 007). He was taken before the magistrate court to be arraigned on April 20, 2017. (App. 010). Thereafter, Mr. Rexrode filed numerous motions, including a motion to dismiss based upon the unlawful warrantless arrest, and multiple suppression motions. (App. 028-36). A suppression hearing was held on June 27, 2017. At the conclusion of the hearing, the magistrate court denied Mr. Rexrode's motion to dismiss and motion to suppress evidence. Interestingly, the magistrate court's *sole finding* was that "the officer not only acted lawfully, but appropriately, under the circumstances." (App. 242). The magistrate court did not prepare a written order, failed to make any meaningful factual findings, and did not perform any type of legal analysis. *Id.*

Immediately before the jury trial on August 14, 2017, the magistrate court held a further suppression hearing on Mr. Rexrode's previously filed motion to suppress statement. The magistrate court denied the motion, stating that "the evidence can come in in the prosecution's case-in-chief." (App. 153). Again, no legal reasoning was set forth on the record for the decision. *Id.* A jury was then impaneled. The voir dire portion of the jury trial was not recorded by the magistrate court unbeknownst to the parties. (App. 154).

During the jury trial, Mr. Rexrode moved for a mistrial on several occasions, including when 1) Cpl. Nazelrod testified to hearsay within hearsay after the prosecuting attorney confirmed he would not testify to such statement; 2) the magistrate court conferred with the circuit judge about how to rule on an evidentiary matter; 3) the magistrate court forced the victim

to testify by threatening her with contempt; and 4) the prosecuting attorney made a highly inflammatory remark during rebuttal argument. (App. 157-58, 166-68, 187-88). The magistrate court denied all the motions. *Id.*

The jury found Mr. Rexrode guilty of domestic battery, and he was sentenced on September 22, 2017 to ten days in jail. Pursuant to a previously filed *Notice of Appeal*, Mr. Rexrode filed his *Petition for Appeal* on October 12, 2017, thereby regularly placing his appeal on the circuit court's docket. (App. 127). On November 1, 2017, Mr. Rexrode filed his *Notice of Filing of Transcript, Designation of Record, and Additional Assignment of Error in Further Support of Petition for Appeal.* (App. 144). A hearing was held on January 22, 2018. After hearing the arguments of the parties, the circuit court stated that it would render a decision "in about ten days or two weeks." (App. 260).

On April 30, 2018, Mr. Rexrode filed his *Motion to Vacate Magistrate Court Conviction and Dismiss Appeal* based upon the circuit court's failure to render a decision on the appeal within the statutorily required 90 day time period. (App. 200). On May 24, 2018, 220 days after being placed on its docket, the circuit court entered an *Order Denying Appeal.* (App. 204). A timely appeal to this Court followed.

III. SUMMARY OF THE ARGUMENT

Cpl. Nazelrod was dispatched to the Rexrode home for a well-being checkup after a third person reported a physical altercation between the Rexrodes. Upon arrival, Cpl. Nazelrod observed an injury to Mrs. Rexrode's eye to which she indicated she had injured on farm equipment earlier in the day. Over Mrs. Rexrode's objection, Cpl. Nazelrod forced his way into the home and immediately arrested Mr. Rexrode who was asleep in the marital bedroom. No warrant was obtained. Although the State flip flopped on which exception it was relying upon to

justify the warrantless arrest, the lower courts found no problem with the warrantless entry and arrest of Mr. Rexrode in the marital bedroom of his home. Unfortunately for Mr. Rexrode, that was only the first of many constitutional and statutory violations in the criminal prosecution of his case.

When called to testify by the State during trial, Mrs. Rexrode invoked her Fifth Amendment privilege based upon the advice of her attorney. In the midst of arguments on Mrs. Rexrode's invocation of her constitutional right, the magistrate left the courtroom to call the chief judge of the 21st judicial circuit to ask him what to do. Relying upon the advice obtained from the chief judge during an ex parte conversation, the magistrate compelled Mrs. Rexrode to testify over strenuous objections from her own separate counsel and Mr. Rexrode. Worse, the magistrate threatened Mrs. Rexrode with contempt if she refused to testify.

The prosecuting attorney ended the trail by making an inappropriate argument concerning the future well-being of Mrs. Rexrode in an effort to inflame the passions of the jury. It worked. After the trial, it was discovered that the magistrate court did not record voir dire. This is especially problematic given the numerous statements made by the magistrate to demonstrate his bias towards the prosecution. The other significant error committed during trial was Cpl. Nazelrod blatantly blurting out hearsay immediately after the prosecuting attorney stipulated that such testimony would not be introduced. Based upon the magistrate's errors and the prosecutor's free rein, Mr. Rexrode was convicted.

The conviction was timely appealed to circuit court where it was rubber stamped. Only adding to the numerous other errors throughout the criminal prosecution, the circuit court did not render a decision on the appeal until 220 days after it was placed on the docket. The statute requires a decision within 90 days. In consideration of the entire record, it is evident that Mr.

Rexrode was denied a fair trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case involves assignments of error in the lower courts' application of settled law. The Petitioner requests this Court to set this case for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure. Oral argument is necessary in this case to provide the Court with an opportunity to inquire into the specific facts surrounding the application of law to the specific facts of this case.

V. ARGUMENT

A. Standard of Review

With regard to the unlawful arrest, "the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo.*" Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). Concerning the application of constitutional and statutory requirements, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

The standard for reviewing the prosecuting attorney's inflammatory remarks has been explained as "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *State v. Sugg,* 193 W.Va. 388, 456 S.E.2d 469 (1995). Regarding the magistrate's erroneous evidentiary rulings, "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998).

Finally, this Court has long held that "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, *State ex rel. Grob v. Blair,* 158 W.Va. 647, 214 S.E.2d 330 (1975).

B. The Circuit Court Erred in Finding that the Warrantless Arrest of Mr. Rexrode in the Marital Bedroom of His Home Fell Within the Emergency Doctrine Exception to the Warrant Requirement.

Mr. Rexrode was seized in the marital bedroom of his home without a warrant after officers forced their way into the home over Mrs. Rexrode's objection. The *only* information available to Cpl. Nazelrod was 1) a report from an uninvolved third party that an altercation had taken place earlier that evening, and 2) observing an injury to Mrs. Rexrode's eye, to which she stated she injured on farm equipment earlier that day. With only this information, and over Mrs. Rexrode's objection, Cpl. Nazelrod forced his way into the home and immediately went to the marital bedroom for the purpose of seizing Mr. Rexrode. On appeal, the circuit court found that this warrantless entry fell within the emergency doctrine exception despite the State's reliance on the community caretaker doctrine exception. Neither exception applied to the facts set forth in the record evidence.

i. Warrantless Seizures in the Home are Per Se Unreasonable, and the State has the Burden of Proving an Exception to the Warrant Requirement.

The Fourth Amendment of the United States Constitution and Article III, § 6 of the West Virginia Constitution protect the rights of citizens from unreasonable searches and seizures in their homes. Searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specially established and well-delineated exceptions." *State v. Duvernoy*, 156 W.

Va. 578, 583, 195 S.E.2d 631, 634–35 (1973); *See also Katz v. United States*, 389 U.S. 347 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

For nearly 100 years, this Court has emphasized the necessity of a warrant for a search or seizure performed in the home. *See State v. Wills*, 91 W.Va. 659, 114 S.E. 261 (1922) ("Any search of a person's house without a valid search warrant is an unreasonable search under Sec. 6, Art. 3, Constitution of West Virginia . . . Being unreasonable, it is unlawful . . . if the warrant be not so issued . . . it is void, and the search, seizure and arrest thereunder are unreasonable."). The home is the pinnacle of Fourth Amendment protection. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U. S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* (quoting *Silverman* v. *United States*, 365 U. S. 505, 511 (1961)). "There is no question ... that activities which take place within the sanctity of the home merit the most exacting protection." *State v. Lacy,* 196 W.Va. 104, 111, 468 S.E.2d 719, 726 (1996).

According, the Supreme Court of the United States has stated that "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586 (1980) (citations and quotations omitted). Similarly, this Court has plainly stated that "[i]n West Virginia, we jealously guard a person's right to privacy in the home and have strictly limited the circumstances justifying a warrantless arrest in the home." *State v. Mullins*, 177 W. Va. 531, 533–34, 355 S.E.2d 24, 26 (1987). It is a well settled principle that "[i]n the absence of one of the exemptions to the warrant requirement, the police must obtain an arrest warrant before

entering a home to seize a person." *State v. Peacher,* 167 W.Va. 540, 570–71, 280 S.E.2d 559, 579 (1981) (*citing State v. McNeal,* 162 W.Va. 550, 251 S.E.2d 484 (1978)).

Procedurally, the State had the burden of proving that its warrantless entry into Mr. Rexrode's home fell within one of the "jealously and carefully drawn" exceptions. *Jones v. United States*, 357 U.S. 493 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. McNeal*, 162 W. Va. 550, 251 S.E.2d 484 (1978); *see also Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.").

In magistrate court, the State first attempted to justify the warrantless arrest in the marital bedroom of Mr. Rexrode's home under the emergency doctrine exception to the warrant requirement as set forth in Syllabus Point 2 of *State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983). Likely recognizing that the emergency doctrine exception would not withstand scrutiny on appeal, the State abandoned its reliance on the emergency doctrine exception in circuit court. Instead, it argued that the warrantless arrest was valid under community caretaker doctrine as set forth in *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010). The circuit court rejected the State's reliance on the community caretaker doctrine[2] and *sua sponte* found that the emergency doctrine exception validated the warrantless arrest.

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[2] As pointed out during oral argument on January 22, 2018, neither this Court, the Supreme Court of the United States, nor the Fourth Circuit has applied the community caretaking exception to justify the warrantless, nonconsensual search of a home. (App. 248-49). The Courts have applied the community caretaker exception minimally, only ever to vehicles, and have never held that the community caretaker exception applied to homes. *See Ullom v. Miller,* 227 W. Va. 1, 705 S.E.2d 111 (2010); *Cady v. Dombrowski,* 413 U.S. 433 (1973); *South Dakota v. Opperman,* 428 U.S. 364 (1976); *United States v. Johnson*, 410 F.3d 137 (4th Cir. 2005).

ii. The Emergency Doctrine Exception did Not Apply Because Cpl. Nazelrod's Intent in Entering the Home was to Arrest Mr. Rexrode Rather than Render Assistance in the Protection of Human Life.

This Court has described the emergency doctrine exception as follows:

> [a]lthough a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the "emergency doctrine" exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry.

Syl. Pt 2, *State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983). Stated more generally,

> the emergency doctrine has been defined in various ways and must be considered upon a case by case basis.... [T]he emergency doctrine may be said to permit a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question.

Cecil, 173 W.Va. at 32, 311 S.E.2d at 149 (internal citations omitted). "Thus, the case-by-case analysis rests on the reasonableness of the actions of the police . . ." *State v. Bookheimer*, 221 W. Va. 720, 726, 656 S.E.2d 471, 477 (2007). It has been further explained:

> the reasonableness of a warrantless search or entry under the emergency doctrine is established by the compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection.

Cecil, 173 W.Va. at 32, 311 S.E.2d at 150 (internal citations and quotations omitted).

The circuit court erred in finding that the emergency doctrine exception applied to the circumstances of this case. It is clear that Cpl. Nazelrod's intent in entering the home was to arrest Mr. Rexrode, not to render immediate assistance to Mrs. Rexrode. At the suppression

hearing, Cpl. Nazelrod boldly stated that he entered the home "to locate and detain Mr. Rexrode who [Mrs. Rexrode] said was inside." (App. 219). Further, when Cpl. Nazelrod entered the marital bedroom, the first thing he shouted to Mr. Rexrode was "show me your hands!" (App. 161, 220). Such a command is certainly not indicative of an intent to protect human life inside the home. Without asking any questions, Cpl. Nazelrod immediately detained Mr. Rexrode, placed him in handcuffs, and paraded him out into the kitchen – all while Mr. Rexrode was still in his underwear. (App. 161, 230). This amounts to an arrest under our jurisprudence. *See State v. Milburn*, 204 W. Va. 203, 214, 511 S.E.2d 828, 839 (1998) (Davis, C.J., dissenting) (explaining that "[o]ur case law long ago abandoned the notion that law enforcement officers must formerly state to a suspect that he or she is under arrest in order for an arrest to actually occur.").

Cpl. Nazelrod was dispatched to the Rexrode home for a "well-being check" for *Mrs. Rexrode*. (App. 222). In particular, he was advised that Mrs. Rexrode has been in an altercation with her husband and that *she* may be injured. Upon arrival, Cpl. Nazelrod did not hear or see any type of altercation between the occupants of the Rexrode home. (App. 160, 226). Mrs. Rexrode, who was undisputedly intoxicated, answered the door and met Cpl. Nazelrod on the front porch. *Id.* Importantly, Mrs. Rexrode was not attempting to flee the house for her safety. (App. 160, 226-27).

Cpl. Nazelrod noticed an injury to Mrs. Rexrode's eye and arm. (App. 227). Upon asking what happened, Mrs. Rexrode replied that she injured herself on farm equipment earlier in the day. (App. 228). Mrs. Rexrode did not say anything to give the impression that she was fearful for her safety or in danger. (App. 227). No additional information was obtained by Cpl. Nazelrod before he entered the home.

Based upon the information known to Cpl. Nazelrod – specifically the contents of the 911 call and the appearance of Mrs. Rexrode upon arrival – the "emergency" of the situation was the condition of Mrs. Rexrode. There was no indication that Mr. Rexrode or any other person *inside the home* was in danger or in need of emergency care. The emergency – *i.e.,* Mrs. Rexrode – was on the front porch, not in the home. Thus, any "compelling need to render immediate assistant to the victim" would have taken place without entry into the home because Mrs. Rexrode was outside on the front porch.

Cpl. Nazelrod did not testify that he perceived an immediate need for assistance in the protection of human life inside the home. Rather, he plainly testified that he entered the home "to locate and detain Mr. Rexrode who [Mrs. Rexrode] said was inside." (App. 219). Cpl. Nazelrod tried to justify the warrantless entry by proclaiming it was for "officer safety." (App. 220, 229). To justify a warrantless search or seizure for officer safety, there must be a reasonable belief that the officer is dealing with an armed and presently dangerous individual. *See Terry v. Ohio,* 392 U.S. 1 (1968); *State v. Choat,* 178 W.Va. 607, 363 S.E.2d 493 (1987). Cpl. Nazelrod distinctly testified that he had no information that a weapon was involved. Similarly, the record is void of any evidence that Mr. Rexrode was dangerous. By all accounts, at the time officers entered the home, Mr. Rexrode was in bed asleep.

Cpl. Nazelrod's conclusory justification of officer safety, without articulable facts in support, does not suffice to circumvent the warrant requirement, especially in the home. As this Court has recognized, "simply articulating a safety reason is insufficient; the burden of proof is with the party asserting the exception to establish that the exception is legitimate and not pretextual. A lower level of judicial scrutiny would only serve to increase the possibility of

collusion and compound the difficulty encountered in detecting the real purpose of a warrantless search." *State v. Lacy*, 196 W. Va. 104, 111, 468 S.E.2d 719, 726 (1996).

Cecil permits the invasion of a citizen's home for the limited purpose of protecting human life that is believed to be inside the home. The emergency doctrine does not allow the police to invade a citizen's home for the purpose of effectuating an arrest. Here, there was absolutely no showing that Cpl. Nazelrod entered the home because he believed someone was inside that needed assistance. The actions of Cpl. Nazelrod are clearly indicative of an intent to arrest, rather than render assistance to an emergency as required by *Cecil*.

Additionally, the circuit court disregarded Cpl. Nazelrod's testimony wherein he clearly stated that he treats *all* domestic situations as emergencies. (App. 222). The testimony at the suppression hearing went as follows:

> Q. And just for clarification, you treat all domestic situations as an emergency?
>
> A. Yes.
>
> Q. And based upon that, if you get a call for a domestic situation, you believe you can automatically enter a house just because it's a domestic?
>
> A. We kind of - we play them out to see how they go. If there is someone in the house that you can't locate or establish that he's, you know, not actively attempting to harm someone yes, I would believe I have permission to enter the house and secure that person.
>
> Q. Okay. And when you arrived at the Rexrode's residence, was Mr. Rexrode actively trying to harm Mrs. Rexrode?
>
> A. I don't know.
>
> Q. You didn't - I mean, did you see it? When you got to the door was he there yelling, shouting?
>
> A. No, he wasn't at that time.

Q. That there wasn't a situation at that time; right?

A. It could've been occurring two seconds before I got there.

Q. Again, you're speculating; right? When you got there, was their situation at that moment?

A. I did not-I don't know. I did not hear anything going on; however, I don't know what was occurring when my car pulled in the driveway.

(App. 235-36).

Cecil unequivocally requires that the "emergency doctrine must ... be considered upon a case by case basis . . ." *Cecil,* 173 W.Va. at 32, 311 S.E.2d at 149 (internal citations omitted). Contrary to the holding in *Cecil*, Cpl. Nazelrod testified that it was his belief that he can enter a home without a warrant to secure a person if it is a domestic situation. It is apparent that Cpl. Nazelrod did just that – enter the Rexrode home to arrest Mr. Rexrode because it appeared to be a domestic situation. The law does not give officers unfettered access to search and seize occupants of a home just because they are there for a domestic situation.

The circuit court's findings to support its application of the emergency doctrine exception were not supported by the record evidence. For example, the circuit court found that Cpl. Nazelrod did not believe Mrs. Rexrode's explanation that she injured her eye on farm equipment and found such conduct to be suspicious and not credible. (App. 206). Additionally, the circuit court found that Cpl. Nazelrod entered the home "because the safety and well-being of the occupants was in doubt at the time of entry." *Id.* Cpl. Nazelrod did not testify to such facts, either at trial or during the suppression hearing. Most significantly, the suppression hearing transcript was not prepared until July 10, 2018, several weeks after the circuit court affirmed the conviction and made such findings. (App. 243). It remains unknown how the circuit court could make such

findings when they were not contained within the record. The circuit court's application of the emergency doctrine exception is simply not supported by the record evidence.

Under the facts, it is inconceivable that the circuit court would rely upon the emergency doctrine as a justification for the police invading Mr. Rexrode's home without a warrant, especially when the State had abandoned its reliance on that exception. Without a warrant and over Mrs. Rexrode's strenuous objection, officers entered the Rexrode home to effectuate an arrest of Mr. Rexrode who was in his underwear under the covers in the marital bed. By applying the emergency doctrine to the record evidence, the circuit court has nullified the warrant requirement of the Fourth Amendment to the United States Constitution and Article III, § 6 of the West Virginia Constitution to seizures in the home.

C. In the Midst of an Evidentiary Dispute During Trial, the Magistrate Left the Courtroom to Consult Ex Parte with the Circuit Judge About How to Rule on the Pending Evidentiary Matter, and then the Magistrate Based His Ruling Upon the Advice Received from the Circuit Judge During.

The State's second witness was Mrs. Rexrode. After testifying to her name, Mrs. Rexrode invoked her Fifth Amendment privilege upon the advice of her attorney, who was present with Mrs. Rexrode at trial. (App. 165). An evidentiary battle then ensued regarding Mrs. Rexrode's invocation of her Fifth Amendment privilege. (App. 165-66). In the midst of hearing arguments on Mrs. Rexrode's invocation of right against self-incrimination, the magistrate, uncertain how to rule, left the courtroom and telephoned the chief judge of the 21st judicial circuit to ask for his advice. (App. 166). Upon return, the magistrate proudly stated that he had spoken with the chief judge about how to rule on the matter:

> THE COURT: I've heard the argument of both sides. I'm going to allow you to question, and I'm going to direct you to answer any question that is not soliciting an answer that would implicate you in a crime. You don't have the Fifth Amendment right if the

> question does not pertain to a crime. And you're being compelled to testify.
>
> ***Mr. Moore, before you rant and rave, I've spoken with the Chief Judge in regards to this, and this is my ruling.***
>
> MR. MOORE: I want our objection to be put on the record as strenuously as it can be. And I'm sure Ms. Nelson[3] also wants the same. You know, you cannot compel a person to testify. You cannot.
>
> THE COURT: Well, she's being compelled to testify, and so ordered.

(App. 166) (emphasis added). A timely objection and motion for mistrial was made. (App. 167-68). During further discussions on the ruling, the magistrate exclaimed to the undersigned defense counsel "[y]ou're aware this is appealable to the Circuit Court. ***And your opinion is not going to change there.***" (App. 167).

This Court has specifically held that "a criminal defendant is entitled to an impartial and neutral judge." *State v. Thompson*, 220 W. Va. 398, 410, 647 S.E.2d 834, 846 (2007). "A criminal defendant's right to be tried by an impartial judge and jury is sacrosanct, regardless of the evidence against him or her." *State v. Thompson*, 240 W. Va. 406, 813 S.E.2d 59, 64 (2018) (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). The right to a fair trial is so basic that it has been called "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532, 540 (1965). "It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression." *Neb. Ass'n v. Stuart*, 427 U.S. 539, 586 (1976). "A fair trial in a fair tribunal is a basic requirement of due process. ... This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Turner v. Louisiana,* 379 U.S. 466, 472 (1965) (quotation marks and citations omitted).

[3] Attorney Jonie E. Nelson was counsel for Mrs. Rexrode.

In conformity with these fundamental principles, a trial court is under a solemn duty to base its ruling upon the evidence presented without extrajudicial influence. Ex parte communications are strictly prohibited. Under Rule 2.9(A)(3) of the Code of Judicial Conduct, a magistrate may consult with other judges "provided the judge makes reasonable efforts to *avoid receiving factual information that is not part of the record*, and *does not abrogate the responsibility personally to decide the matter.*" (emphasis added). Comment 5 specifically provides that "[a] judge may consult with other judges on pending matters, ***but must avoid ex parte discussions of a case*** with judges who have previously been disqualified from hearing the matter, and ***with judges who have appellate jurisdiction over the matter.***" (emphasis added).

Undisputedly, the magistrate left the courtroom and, unbeknownst to the parties, called the chief judge to ask for his opinion on how to rule on the pending evidentiary matter. Upon return, the magistrate announced that his ruling was based upon the advice and recommendation he received from the chief judge. It remains unknown what information was provided to the chief judge as the parties were not privy to that conversation.

Clearly, the magistrate's decision to compel Mrs. Rexrode to testify was based upon his ex parte conversation with his chief judge. The circuit court has appellate jurisdiction over any appeal from the magistrate court pursuant to Article VIII, § 6 of the West Virginia Constitution. By conferring with the chief judge during the trial and in specific regard to a pending evidentiary matter, the magistrate court violated Rule 2.9(A)(3) of the Code of Judicial Conduct. Such action was also violative of Mr. Rexrode's constitutional right to a fair and impartial judge.

The circuit court, on appeal, summarily disposed of the error by concluding that the chief judge "is not, under the 21st Circuit's case load rotation, the appellate judge for criminal appeals." The circuit court has appellate jurisdiction over cases in magistrate court. Simply

because the 21st circuit has a particular case rotation does not alleviate the chief judge of jurisdiction. If the other judge in the circuit was unable to hear Mr. Rexrode's appeal, then the chief judge would have been assigned the case. Noteworthy, the same chief judge entered the *Order Granting Stay of Execution of Sentence* in this case. (App. 215).

Approving a trial judge's actions in contacting an appellate judge for advice on how to rule on a pending evidentiary matter sets a disastrous precedent. Appellate courts are busy enough, and they do not need the stress and strain of being on call for evidentiary advice. Clear error was committed by the magistrate court and condoned by the circuit court on appeal. Because the actions of the lower courts violated Mr. Rexrode's right to a fair trial before an impartial tribunal, reversal is required.

D. The Magistrate Court Committed Clear Error in Forcing the Victim to Testify Against Mr. Rexrode by Threatening Her with Contempt After She Invoked her Fifth Amendment Privilege Based Upon the Advice of Her Attorney, and the Circuit Court Ratified It.

When called to testify against her husband, Mrs. Rexrode invoked her Fifth Amendment privilege against self-incrimination[4] based upon the advice of her attorney. (App. 165). After consulting with the chief judge, the magistrate ordered that Mrs. Rexrode testify. (App. 166-67). The magistrate court threated Mrs. Rexrode with contempt if she continued to invoke her Fifth Amendment privilege and failed to testify against Mr. Rexrode. *Id* Mrs. Rexrode's attorney made clear for the record that Mrs. Rexrode "is testifying under fear of being held in contempt by the Court." (App. 167). Threated with contempt by the magistrate and possibly being thrown in jail herself, Mrs. Rexrode succumbed to the magistrate's bullish actions and testified.

[4] As Mrs. Rexrode later testified after being coerced with the threat of contempt by the magistrate, the statements she gave to Cpl. Nazelrod on the night in question were false. (App. 169). Therefore, she was in a position of incriminating herself by admitting to providing false information to state trooper in violation of W. Va. Code § 15-2-16.

A magistrate has no authority to hold any witness in contempt for exercising their Fifth Amendment privilege. The authority for contempt in magistrate court is found in W. Va. Code §50-5-11, which provides in pertinent part:

> A magistrate may punish for contempt of court a person guilty of any of the following acts:
>
> (a) Contemptuous or insolent behavior toward such magistrate while engaged in the trial of a case or in any other judicial proceeding;
>
> (b) Any breach of the peace, willful disturbance, or indecent conduct in the presence of such magistrate while so engaged, or so near as to obstruct or interrupt the proceedings;
>
> (c) Violence or threats of violence to such magistrate, or any officer, juror, witness, or party going to, attending, or returning from, any judicial proceeding before the court with respect to anything done or to be done in the course of such proceeding;
>
> (d) Flagrant misbehavior of any officer of the county acting in his official capacity with respect to any action or judicial proceeding had or pending before the court, or any process, judgment, order or notice therein; or
>
> (e) Willful resistance by an officer of the court, juror, witness, party or other person to any lawful process or order of the court.

Contemptuous conduct does not include the exercise of constitutional rights. Mrs. Rexrode was merely exercising her constitutional right against self-incrimination based upon the advice of her attorney. Under the circumstances, the magistrate usurped his legitimate authority and committed clear error by bullying and coercing Mrs. Rexrode to testify under the threat of contempt. This action was completely improper and is an embarrassment to any notion of due process in the criminal justice system.

The prejudice to Mr. Rexrode is self-evident – the jury failed to believe Mrs. Rexrode's testimony after she invoked her Fifth Amendment privilege and then was forced to testify by the

magistrate. In fact, it is difficult to imagine a more devastating attack on a witness's credibility than being forced to testify after expressing an indication that doing so would incriminate yourself. Based upon the verdict, the jury gave Mrs. Rexrode's testimony absolutely zero weight.

Moreover, the magistrate's actions in strong-arming Mrs. Rexrode to testify showed his partiality towards the State and bias against Mr. Rexrode. In particular, the magistrate clearly stated that if Mrs. Rexrode did not testify, then he would admit her out-of-court statement in violation of the Confrontation Clause. (App. 167). This Court has found reversible error when a judicial official abandons his role of impartiality and neutrality as imposed by the Sixth Amendment of the United States Constitution and assists the State with prosecuting a criminal defendant. *See State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007). There can be little doubt that forcing Mrs. Rexrode to testify under the circumstance was a partial action towards the State's case. Accordingly, this Court should reverse Mr. Rexrode's conviction.

E. The Prosecuting Attorney's Comments During Rebuttal Clearly Prejudiced Mr. Rexrode and Resulted in Manifest Injustice.

The prosecuting attorney made an improper and highly prejudicial statement during rebuttal argument. Without any provocation, the prosecuting attorney ended the trial by arguing

> Here's a man that doesn't want to fact the result of what he's done. Here's a woman crying, you see seen what the evidence says he did to her one. ***Do any of you doubt that she is afraid about going home?*** Think about it. Your mouth got me in this trouble. What she said in the statement was you're making people walk on eggs, and for that and that, and that alone, she got beaten to the point that those pictures show you. ***What do you reckon might happen to her if she goes home now after he's had to go through all this?***

(App. 187) (emphasis added). A timely objection and motion for mistrial was made. (App. 187-88). The magistrate court denied the motion and gave no curative instruction. *Id.*

While a prosecuting attorney may "strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). A prosecutor cannot argue for a conviction based upon the threat of a criminal defendant committing another crime in the future. "Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt." *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994).

"A prosecuting attorney has a duty not to make statements concerning facts not in evidence or not inferable from the evidence." *State v. Critzer*, 167 W. Va. 655, 659, 280 S.E.2d 288, 291 (1981). "An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom." Syl. *State v. Moose*, 110 W.Va. 476, 158 S.E. 715 (1931).

"Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syl. Pt. 2, *State v. Kennedy,* 162 W.Va. 244, 249 S.E.2d 188 (1978); *See also State v. McCracken,* 218 W.Va. 190, 624 S.E.2d 537 (2005) (finding that a prosecutor's recitation of the "Now I Lay Me Down To Sleep" prayer during closing argument was improper

and not based upon properly introduced evidence); *State v. Poore*, 226 W. Va. 727, 704 S.E.2d 727 (2010) (finding prosecutor's reading of obituary and displaying photographs of grave so damaging as to require reversal of conviction).

In *State v. Sugg,* 193 W.Va. 388, 405, 456 S.E.2d 469, 486 (1995), this Court reiterated "[c]learly, a prosecuting attorney should refrain from referring to questionable evidence that may poison the jury's mind against the defendant." The *Sugg* Court went on to hold that

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Sugg at Syl. Pt. 6.

First, the prosecuting attorney's remarks were the product of mere speculation and conjecture, not upon the evidence presented. There was absolutely no evidence or indication that Mr. Rexrode would harm his wife in the future. The prosecuting attorney's suggestion that Mr. Rexrode would harm his wife if she went home with him was based exclusively upon the allegation that he harmed her in the past. The Rules of Evidence do not permit such inferences. *See* Rule 404(b). Accordingly, the prosecuting attorney's comments during rebuttal misstated the evidence and constituted an impermissible inference. The comments were made to inflame the passions of the jury and induce a guilty verdict warped by prejudice. It is readily apparent that the improper comments prejudiced Mr. Rexrode.

Second, the prosecuting attorney made two separate references to the fear and harm Mrs. Rexrode may suffer if she "goes home" with Mr. Rexrode. Third, absent the remarks, the competent proof introduced to establish guilt was not strong. Mrs. Rexrode adamantly denied

that Mr. Rexrode hurt her and repeatedly testified that she lied to the police on the night in question. (App. 169-70). She reiterated that she was "drunk" that night and "pissed off." (App. 170). Mr. Rexrode repeatedly denied having any physical contact with his wife. (App. 176).

Fourth, it can only reasonably be concluded that the comments were deliberately placed before the jury to divert attention to extraneous matters. The prosecuting attorney's argument was a classic example of fear mongering. The future well-being of Mrs. Rexrode was not relevant to the question of Mr. Rexrode's guilt, and the prosecuting attorney knew it. When an objection was raised at the improper comments, the prosecuting attorney did not even attempt to justify his comments – he merely ended his rebuttal. (App. 187).

The prosecuting attorney's remarks clearly prejudiced Mr. Rexrode and resulted in manifest injustice. In conclusion, the prosecuting attorney's comments were so damaging that reversal is required.

F. The Magistrate Court Erred in Failing to Record the Voir Dire Portion of the Jury Trial, Thereby Preventing Numerous Errors from Being Reflected in the Record.

For unknown reasons, the voir dire portion of the trial was not recorded. (App. 154). A jury trial in magistrate court must be recorded for appellate review purposes. *See* W. Va. Code § 50-5-8(e) ("For purposes of appeal, when a jury trial is had in magistrate court, the magistrate court shall be a court of limited record. Trials before a magistrate when a jury is empaneled shall be recorded electronically."); Rule 17(d) of the Rules of Criminal Procedure for the Magistrate Courts of West Virginia ("Every jury trial shall be recorded electronically by a magistrate.").

This Court has recognized that the failure to provide a criminal defendant with a record from which to appeal a conviction can result in the granting of a new trial. *See State ex rel. Kisner v. Fox,* 165 W.Va. 123, 267 S.E.2d 451 (1980); Syl. Pt. 2, *State v. Chanze*, 211 W. Va.

257, 565 S.E.2d 379 (2002) ("When an electronic record of a magistrate court jury trial in a criminal case is so defective that no record or virtually no record is available from which to prepare an appeal or to conduct appellate review, the criminal defendant is entitled to obtain meaningful review of the magistrate court proceedings by informing the circuit court of the faulty record and reconstructing the record or, if reconstruction is impossible, receiving a new trial by jury in magistrate court.").

Here, the record is inadequate to provide meaningful appellate review of the voir dire portion of the trial. This is particularly important in this case based upon the magistrate court expressing bias by 1) making the comment that several members of the panel were form Maysville, the same location as Mr. Rexrode, and he had concerns that the panel members may "know the Defendant" and "like him;" 2) expressing displeasure in the prosecuting attorney's failure to strike a prospective juror that disclosed his past experience of being wrongly accused of domestic violence; and 3) failing to strike a prospective juror that had previously been represented by the prosecuting attorney. (App. 132-135). Each of the aforementioned factors addresses fundamental rights of a criminal defendant to a fair and impartial tribunal and jury. However, based upon error committed in the magistrate court, this Court cannot provide meaningful appellate review.

G. Error was Committed When Cpl. Nazelrod Testified to the Hearsay Within Hearsay Statement Made by an Uninvolved Third Person to a 911 Dispatcher, Particularly After the Prosecuting Attorney Represented to the Court that Such Testimony Would Not be Introduced.

The State's first witness at trial was Cpl. Nazelrod. Shortly into his testimony, the prosecuting attorney asked "[w]hat was the message you got when you were dispatched?" (App. 157). An anticipatory objection was made before Cpl. Nazelrod testified to the contents of the statement made by the unavailable declarant caller to the unavailable declarant 911 dispatcher

and then relayed to him. *Id.* Recognizing that it could not get around the rules of hearsay, the State unequivocally represented that Cpl. Nazelrod would *only* testify that he was dispatched for a well-being checkup:

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

(App. 157).

Contrary to the State's representation, immediately upon resuming his testimony, Cpl. Nazelrod blurted out that "[d]ispatch ***advised*** it was ***reported*** that there had been a physical altercation at the Rexrode . . . ." *Id.* (emphasis added). A timely objection and motion for a mistrial was made. (App. 157-58). The magistrate court denied the motion for mistrial and gave no limiting instruction to the jury. (App. 158).

First, the statement falls under the definition of hearsay because 1) it is an out-of-court statement made by an unavailable declarant and 2) it was offered for the truth of the matter asserted therein. *See* W. Va. R. Evid., Rule 801(c). Neither the 911 dispatcher nor the individual who called 911 were present at trial to testify. With no other legal basis to rectify its error, the State reverted to the proverbial "it was not offered for the truth" contention. Clearly, it was.

The State stipulated moments before that Cpl. Nazelrod would only testify that he was dispatched for a well-being checkup. By blurting out "there had been a physical altercation," it is apparent that the statement was being offered for the truth – *i.e.*, that a physical altercation did, in fact, take place. The State took it too far by introducing the statement about there being a "physical altercation," which was plainly offered for the truth.

Actually, the statement was hearsay within hearsay because Cpl. Nazelrod testified about the contents of a statement made by a caller to a 911 dispatcher, and then relayed by the 911 dispatcher to him. Rule 805 requires both levels of hearsay to fall within an exception to be admissible. The State did not attempt to categorize the statement under any exception to the hearsay rule. Instead, it argued that the statement was not offered for the truth, which, as explained above, is incorrect.[5]

The introduction of the hearsay within hearsay statement cannot be considered harmless. That statement provided the jury with information from an independent third party that confirmed a physical altercation took place at the Rexrode home. This hearsay evidence was in direct conflict with the testimony elicited at trial from Mr. and Mrs. Rexrode.

H. The Circuit Court Erred in Failing to Render a Decision on the Appeal within the Statutorily Required 90-Day Time Period.

Pursuant to his *Notice of Appeal*, Mr. Rexrode filed his *Petition for Appeal* on October 12, 2017, thereby regularly placing the instant appeal on the circuit court's docket. (App. 127). A hearing was held on January 22, 2018 at which time the circuit court advised that it would render a decision in "ten days or two weeks." (App. 260). It did not. The circuit court finally rendered

[5] Noteworthy, the circuit court found that "[t]he 911 call which was the basis for the officer's interaction with the Defendant was not offered for the truth of the matter asserted ***and*** is an exception to the hearsay rule." (emphasis added) (App. 207). By definition, hearsay must be offered for the truth. Thus, the circuit court's finding that the statement was both not offered for the truth ***and*** an exception to hearsay is clearly erroneous.

a ruling on May 24, 2018 – seven months after the appeal was regularly placed on the circuit court's docket and after Mr. Rexrode filed a *Motion to Vacate Magistrate Court Conviction and Dismiss Appeal* on April 25, 2018 based upon the unnecessary and unexplained delay. Noteworthy, the circuit court's *Order Denying Appeal* dubiously found all of the grounds for error to be "without merit." (App. 204-09).

W. Va. Code § 50-5-13(c)(6) provides that "[t]he review by the court and a decision on the appeal ***shall*** be completed within ninety days after the appeal is regularly placed upon the docket of the circuit court." (emphasis added). Clearly, the circuit court did not complete review of the conviction within 90 days, thereby violating the statutory mandate of W. Va. Code § 50-5-13(c)(6).

I. The Cumulative Effect of the Errors Prevented Mr. Rexrode from Receiving a Fair Trial.

The cumulative effect of the errors prevented Mr. Rexrode from receiving a fair trial. This Court has recognized that "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 5, *State v. Smith,* 156 W.Va. 385, 193 S.E.2d 550 (1972).

The aforementioned errors are individually serious and significant. To the extent that this Court finds the individual errors harmless standing alone, the cumulative effect of such a multitude of errors tainted Mr. Rexrode's trial. Moreover, the record reflects that the magistrate, a former sheriff, was so overwhelmingly partial to the prosecution that the jurors were impressed to the point that the magistrate's demeanor became a factor in their determination to convict. In consideration of the record, it is evident that Mr. Rexrode was denied the right to a fair trial.

VI. CONCLUSION

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

Respectfully submitted,
Petitioner,
By Counsel.

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CERTIFICATE OF SERVICE

I, Jared T. Moore, counsel for the Petitioner herein, do hereby certify that a true copy of the foregoing *Petitioner's Appeal Brief* was served upon the following counsel of record via United States Mail on this 24th day of August, 2018:

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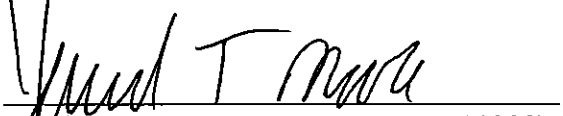

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