IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0082

STATE OF WEST VIRGINIA,

Respondent,

v.

TAMMY GRAY,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the January 4, 2022, Order
Circuit Court of Mineral County
Case No. 19-F-78

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I. INTRODUCTION

Respondent State of West Virginia, by counsel, Mary Beth Niday, Assistant Attorney General, respectfully responds to Tammy Gray's ("Petitioner's") Brief filed in the above-styled appeal. Petitioner's severance hearing did not constitute a critical stage because she had the opportunity to object to the severance following the hearing and to the admission of her statement during trial and did not. Consequently, her right to a fair trial was not affected. To the extent the trial court may have committed any error, such error was harmless given the weight of the overwhelming evidence against her. Petitioner likewise did not preserve an objection to the indictment regarding the conspiracy counts or to the lack of evidence regarding the number of agreements. Her claim is subject to the plain error analysis and because Petitioner failed to develop the issue, there is no indication in the record that the trial court committed any error, let alone plain error. Finally, the search warrant of Petitioner's residence and vehicle identified with particularity a crime against Petitioner and the items to be seized. For these reasons, the trial court's denial of Petitioner's suppression motion should be affirmed. Accordingly, Petitioner has failed to demonstrate the existence of reversible error and, therefore, his convictions and sentence should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner, by counsel, advances three assignments of error in this appeal:

> 1. The Petitioner and her counsel were not present during a critical stage of the proceedings when the Court ordered a severance of her trial from that of her co-defendant, resulting in structural error.
>
> 2. The Petitioner was improperly convicted of two counts of conspiracy stemming from the same agreement.
>
> 3. The circuit court erred by declining to order the suppression of the evidence derived by the search warrants following the suppression hearing.

(Pet'r Br. 1.)

III. STATEMENT OF THE CASE

A. Pretrial Proceedings.

In September 2019, Petitioner was indicted by a Mineral County, West Virginia grand jury and charged with Burglary, Conspiracy to Commit Burglary, Grand Larceny, Conspiracy to Commit Grand Larceny, and Destruction of Property. (App. 3–5.)

Following the return of her indictment, Petitioner filed a pretrial motion seeking to suppress evidence obtained following searches of her residence and vehicle. (App. 332–36.) A hearing on Petitioner's motion was held on June 11, 2020. (App. 40–103.) At the hearing, testimony from Lieutenant Chris Leatherman of the Mineral County Sheriff's Department and Deputy Logan Talley of the Keyser City Police Department was admitted. Law enforcement officers obtained three search warrants prior to the search of Petitioner's residence on July 21, 2020. The first search warrant, 19SW16, was obtained by Deputy Talley and issued on July 12, 2019, by the Mineral County Magistrate Court, based on allegations that Petitioner and her co-defendant broke into the residence of Daniel Mishow and stole items on May 3, 2019. (App. 79–81, 311–17.) The warrant authorized the search of Petitioner's residence and her vehicle, a white Chevrolet Impala, both of which Deputy Talley believed to contain evidence of the break-ins and thefts for which Petitioner was a suspect. (App. 313, 316.) The search warrant enumerated thirty specified items relevant to the investigation, including a "house front door," "kitchen wall cabinets" valued at $1,000, and a "ceiling fan with light 42 inch $75.00," . (App. 313, 316.) Of the thirty specified items, Deputy Talley seized a front door, white kitchen wall cabinet, ceiling fan with lights, white base board strip, and a yellow garden hose. (App. 317.)

The second warrant, 19SW17, was obtained by Deputy Talley and issued on July 21, 2019, by the Mineral County Magistrate Court, based on allegations that Petitioner and her co-defendant

entered without breaking the garage of Timothy McDowell and stole numerous tools and flowers. (App. 82–85, 318–24.) The warrant authorized the search of Petitioner's residence, including a two-car garage and all vehicles in her name, in which Deputy Talley believed would contain evidence of a crime, including sixteen specified items such as flowers, multiple tools, a clock, and wood chest. (App. 322.) The property receipt identified twenty-seven items seized from the residence and vehicles.

The third search warrant, 19SW18, was obtained by Lieutenant Leatherman and issued on July 22, 2019, by the Mineral County Magistrate Court, based on allegations that Petitioner and her co-defendant had either broke into and entered, or entered without breaking, a residence or outbuilding adjoining the residence of James and Jean Nutter, who were then out of town. (App. 56, 326–31.) The warrant authorized the search of Petitioner's residence and her Chevrolet Impala, in which Deputy Talley believed would contain evidence of a crime, including specified items such as "jewelry, hunting equipment, items used for the assembly or manufacture of a garden pond, landscaping equipment or supplies, a hose and any other item that was stolen from the residence, outbuildings or property located at 74 Ellifritz Lane in the Ellifritz addition, Knobley Road in Keyser, Mineral County, West Virginia." (App. 326.)

The affidavit in support of the application for search warrant indicated that on July 21, 2019, someone called Mineral County 911 reporting that Petitioner was parked in front of the Nutter residence and had been so parked for several hours. (App. 330.) Lt. Leatherman, Deputy Talley, and Captain Wingler responded to the area and observed multiple items outside a storage building adjacent to the Nutter residence, which officers believed were left so that they could be quickly retrieved at a later time. (App. 330.) The officers drove to Petitioner's residence, where they observed Petitioner's white Impala parked in the driveway. (App. 330.) The officers observed

the interior of the vehicle contained multiple items that appeared to have been taken from the Nutter residence. (App. 330.) After knocking on the door to Petitioner's residence without any response, the officers contacted a neighbor who advised she and her co-defendant were inside. (App. 330.) Entry into Petitioner's home was subsequently made by the officers through an unlocked front door pursuant to prior search warrants. (App. 330.) The officers found Petitioner and her co-defendant asleep in the living room. (App. 330.) Jewelry was recovered from the co-defendant's pockets and both Petitioner and her co-defendant were arrested. (App. 330.)

At the police station Petitioner gave a Mirandized statement in which she confessed to taking away items from the Nutter residence. (App. 330–31.) The co-defendant instructed Petitioner to take the trailer that was attached to her vehicle to her residence and then return to the Nutter residence. (App. 331.) Petitioner returned without the trailer and the co-defendant indicated he wanted her simply to empty the trailer and return with it. (App. 331.) Nevertheless, she and her co-defendant carried several items to her car from the Nutter property including what "she believed to be a tree stand, plastic for garden pond, piping for a pond, a plastic jug, hose, and a basket with a tarp." (App. 331.) Petitioner never saw her co-defendant enter the Nutter residence but she played games in her vehicle and eventually fell asleep before driving back to her house. (App. 331.) She went in the house and her co-defendant returned to the house on foot. (App. 331.)

The property receipt identified the seizure of twenty-eight items. (App. 66–67, 328–29.) Lt. Leatherman testified at the suppression hearing that because the Nutters were out of town and unable to do a walk-through of their residence to identify stolen items (App. 70–71), he seized nearly everything from Petitioner's vehicle based upon his plain view of the items and their consistency with the items that were reported stolen from the Nutter's residence. (App. 68.)

The trial court denied Petitioner's motion to suppress the items seized from searched of Petitioner's vehicle and residence, finding "that the search warrants were properly issued and properly executed." (App. 7, 102.) In reference to Petitioner's argument that the items seized were not particularly described in the search warrant, the trial court noted "there's only so many ways I can describe a blue box, a blue tote, or a green garden hose. I mean, there's only some ways you can describe that." (App. 102.) Moreover, the trial court noted that if the police officers went into Petitioner's residence or vehicle and "finds something that is illegal contraband, [in plain view,] he can take it." (App. 102.)

By Order dated June 17, 2020, the trial court denied Petitioner's motion to suppress. (App. 7–8.) At a further pretrial motions hearing on March 15, 2021, Petitioner's then co-defendant's counsel advised the trial court that the trials were "together so far." (App. 118.) The trial court, therefore, scheduled a consolidated trial to begin on August 4, 2021. (App. 119.)

B. Trial and Sentencing.

On the morning of trial, the State, Petitioner's co-defendant and his counsel, and the trial court convened regarding the severance of the co-defendant's trial from Petitioner. (App. 337–42.) The trial court indicated that it was "advised last night that we have a problem with a *Bruton* issue." (App. 339.) The State explained that it was faced with the issue where "we have a co-defendant; we have a statement out there by the other co-defendant. I don't believe that there's any way to resolve this issue, Your Honor, other than bifurcate this case at this matter." (App. 339.) The State explained that co-defendant's counsel brought the matter to the State's attention "yesterday morning." (App. 340.) Counsel for the co-defendant asserted that his client "is prepared for trial today. The trial has been set for months. His preference would be to go to trial today with the exclusion of the statement." (App. 340.) In severing the trials of the co-defendant and Petitioner,

the trial court responded that that "the only way we could have [proceeded to joint trial today] is if we had two different juries and they stepped out while she gave her testimony—or the testimony about [the co-defendant] was introduced, his jury would have to step out." (App. 340.) The trial of Petitioner's co-defendant, therefore, was continued for a few weeks. (App. 340–41.)

Petitioner proceeded to a jury trial on August 4, 2021. (App. 9, 121–295.) The State presented the testimony of Deputy Talley, Captain R.J. Wingler of the Mineral County Sheriff's Department, Lt. Leatherman, and Mrs. Jean Nutter. The jury convicted Petitioner of all five counts as charged. (App. 10, 172.)

Petitioner appeared for sentencing in December 2021, at which time the trial court sentenced her to consecutive terms of imprisonment of not less than one nor more than fifteen years for Burglary, not less than one nor more than five years for Conspiracy to Commit Burglary, and not less than one nor more than five years for Conspiracy to Commit Grand Larceny. (Ap. 13–14.) She was further sentenced to terms of imprisonment of not less than one nor more than ten years for Grand Larceny and to one year for the misdemeanor offense of Destruction of Property, both to run concurrently with the previously stated consecutive terms of imprisonment. (App. 14.)

Petitioner appealed.

IV. SUMMARY OF THE ARGUMENT

Petitioner first argues that the trial court committed structural error when both she and her counsel were denied the right to appear at a severance hearing, which she contends is a critical stage. Petitioner, however, had the opportunity to object to the severance prior to the beginning of trial but the record fails to indicate that she did. Similarly, Petitioner did not object during trial to the admissibility of her statement to Lt. Leatherman, the admission of which she complains prejudiced her at trial. Consequently, Petitioner's ability to object to the severance, even though

she did not, demonstrates that the severance hearing was not a critical stage as her right to a fair trial was not affected. *See Van v. Jones*, 475 F.3d 292, 293 (2007). Assuming arguendo that the hearing was a critical stage, her ability to object, despite her failure to do so, rendered any error by the trial court harmless.

Petitioner's second assignment of error likewise is without merit. Thought Petitioner argues that the State failed to prove the existence of two separate conspiracy agreements, Petitioner has failed to demonstrate pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure that she preserved her objection below. As such, Petitioner's claim is subject to plain error analysis. *See* Syl. Pt. 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Under this plain error analysis, Petitioner is unable to prove any error, let alone plain error, because the record below was not developed as to the totality of circumstances test set forth in Syllabus Point 8, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 341 (1988).

Petitioner's final assignment of error—that the trial court erred in denying her motion to suppress the evidence obtained pursuant to the search warrant—is also without merit. The applicable search warrant particularly described the places to be searched and the things to be seized. *See* Syl. Pt. 3, in part, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996). Moreover, the warrant identified the crime for which the evidence was to be seized. *See United States v. Blakeney*, 949 F.3d 851, 862–63 (4th Cir. 2020). The warrant need not have described every item to be seized so long as the officer knew what was to be seized as was the case here. Accordingly, this Court should affirm Petitioner's convictions and sentence.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent disagrees with Petitioner that oral argument is necessary and asserts that this case is suitable for disposition by memorandum decision because the record is fully developed and

the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

VI. ARGUMENT

A. Petitioner had no constitutional right to be tried together with her co-defendant and, therefore, the hearing to sever Petitioner's trial from that of her co-defendant was not a critical stage requiring either hers or her counsel's presence. Likewise, Petitioner's alleged error is not structural because it is an allegation of error in the trial process which Petitioner failed to preserve. Consequently, Petitioner's claim fails under a plain error analysis because she cannot demonstrate any error, let alone plain error.

In her first assignment of error, Petitioner argues that neither she nor her counsel were present when the trial court ordered a severance of her co-defendant's trial from hers, thereby resulting in structural error. (Pet'r Br. 5–9.) "Where the issue on an appeal from the circuit court is clearly a question of law . . . 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 Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee the right of defendants charged with felonies to be present at all critical stages of their trials. *See State v. Boyd*, 160 W.Va. 234, 246, 233 S.E.2d 710, 718–19 (1977). A critical stage has been defined as "one where the defendant's right to a fair trial will be affected." *Id.* at 246, 233 S.E.2d at 719; *see also Bell v. Cone*, 535 U.S. 685, 696 (2002) (characterizing a critical stage as one that "held significant consequences for the accused."). The critical stage requirement is "subject to the harmless error test." *Boyd*, 160 W.Va. at 247, 233 S.E.2d at 719. In addition to the accused being guaranteed the right to be present at all critical stages, the Sixth Amendment, and Section 14, Article III of the West Virginia Constitution, similarly "safeguards [ ] an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004). In *United States v. Cronic*, the United States Supreme Court held that a court may presume that an accused has

suffered unconstitutional prejudice when he "is denied counsel at a critical stage of his trial." 466 U.S. 648, 659 (1984).

Generally, and especially in conspiracy cases, when defendants are indicted together, they are typically tried together. *See United States v. Najjar*, 300 F.3d 466, 473 (4th Cir. 2002) (acknowledging that "there is a preference in the federal system for joint trials of defendants who are indicted together"). In certain circumstances, however, a consolidated trial may be inappropriate and, under such circumstances, Rule 14 of the West Virginia Rules of Criminal Procedure, empowers trial courts to order a severance. *See* W.Va. R. Crim. P. 14(b) ("If the joinder of defendants in an indictment, . . . or a consolidation for trial appears to prejudice a defendant or the State, the Court may sever the defendants' trials, or provide whatever other relief that justice requires.").

One circumstance requiring severance is when the extra-judicial statement of a non-testifying defendant to be admitted at trial directly inculpates another defendant. *See Bruton v. United States*, 391 U.S. 123, 137 (1968). In *Bruton*, the Supreme Court reasoned that when the non-testifying defendant's statement is considered as evidence against the other defendant, that defendant is denied his Sixth Amendment right to confrontation, even when a limiting instruction is provided. *Id.* at 127–28, 137 ("Despite the concededly clear instructions to the jury to disregard [the co-defendant's] inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.").

Here, Petitioner was not indicted with her co-defendant, though the trial was scheduled to be a consolidated trial. (App. 118.) On the eve of trial, Petitioner's co-defendant and the State conferred regarding a possible *Bruton* issue because Petitioner's statement to Deputy Leatherman

was to be admitted at trial in the face of Petitioner's statement at the January 5, 2021, pretrial hearing that he did not have a motion to suppress Petitioner's statement. (App. 113.) When Petitioner was arrested on July 21, 2019, Lt. Leatherman interviewed her at which time Petitioner gave a Mirandized statement implicating her co-defendant in the conspiracy, burglary, and theft of items from the Nutter property. (App. 212–17.) Consequently, on the morning of trial the State moved to sever the trials of the two co-defendants. (App. 339–40.) The co-defendant objected to the severance and requested that the trial proceed as scheduled, without the admission of Petitioner's statement. (App. 340.) The trial court, acting pursuant to Rule 14 of the West Virginia Rules of Criminal Procedure, granted the State's motion and continued the co-defendant's trial to later date in August 2021. (App. 340.) Neither Petitioner nor her attorney were present at this hearing. (App. 341.) Petitioner's trial, however, proceeded that day as previously scheduled. (*See generally*, App. 121–295.) Petitioner and her counsel were obviously notified of the trial court's decision to sever the co-defendants' trials, but the Appendix Record does not memorialize this conveyance of information.

Petitioner argues that the hearing on the State's motion to sever was a "critical stage" requiring the presence of both Petitioner and her counsel. The very nature of Rule 14 of the West Virginia Rules of Criminal Procedure demonstrates that the trial court's ability to sever is a discretionary function. Petitioner, therefore, had no constitutional right to be tried jointly with her co-defendant. In *State v. Rueckert*, the Supreme Court of Kansas so found that "[a] motion to sever is not a 'critical stage' of the proceeding which requires counsel to be present as is an arraignment, preliminary hearing, or custodial interrogation." 561 P.2d 850, 855 (Kan. 1977). The Kansas Supreme Court explicitly found that because the "granting of separate trials is a discretionary

power which rests in the hands of the trial court . . . .[a] defendant does not have the right to be tried with or separate from a codefendant if no prejudice to his rights can be shown." *Id.*

Similarly, in *Van v. Jones*, 475 F.3d 292, 293 (2007), as cited by Petitioner, the Sixth Circuit Court of Appeals concluded that a defendant's consolidation hearing was not a critical stage. In so finding, the Court of Appeals reasoned that because the defendant's counsel could have cured the potential harm arising from his absence by filing a motion to sever later in the proceedings, then the defendant did not suffer significant consequences from his total denial of counsel at the consolidation hearing. *Id.* at 314.

Petitioner asserts that the facts of *Van* are inapposite to her case because "[b]y the time the Petitioner's counsel even knew severance was being considered, the co-defendant's trial had already been called off, and the jury had arrived." (Pet'r Br. 8.) The record, as provided by Petitioner, however, is silent as to when and how she learned of the severance. Moreover, there is no indication that counsel even objected to having not been present or requested a continuance to sort out the severance issue. Not to mention, Petitioner's counsel explicitly stated pre-trial he was not moving to suppress Petitioner's statement, (App. 113), and even after the trial was severed Petitioner did not object to the admission of her statement at trial by Lt. Leatherman (App. 198–99). She cannot stand silent on what she now claims was a critical stage and in turn allege that the severance hearing was a critical stage when she always had the opportunity to object to the severance of the trial but chose not to or to the admission of her statement. Consequently, Petitioner's absence and her counsel's absence from the severance hearing does not rise to the level of either a critical stage or a structural error. A structural error "affect[s] the framework within which the trial proceeds," as opposed to "being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, __ U.S. __, 137 S.Ct. 1899, 1907–08 (2017) (quoting *Arizona v. Fulminante*,

499 U.S. 279, 309–10 (1991)). Petitioner's alleged error is one of an error in the trial process itself and, thus, is not a structural error.

Moreover, Petitioner failed to preserve her claim of structural error below and, therefore, her claim is subject to plain error analysis. In *Johnson v. United States*, the United States Supreme Court expressly stated that the seriousness of a claimed structural error "does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure," and proceeded to consider the petitioner's claim under the plain error analysis under Rule 52(b) of the Federal Rules of Criminal Procedure. 520 U.S. 461, 466 (1997); *see also* W.Va. R. App. P. 10(c)(3) ("If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the . . . Supreme Court to the fact that plain error is asserted.").

Plain error has been defined by this Court as "(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 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *Id.* at 18, 459 S.E.2d at 129. Petitioner cannot meet the first requirement of the analysis—that the trial court committed error—let alone demonstrate that any error was plain. Neither this Court nor the Supreme Court of the United States has identified a hearing on the severance of co-defendants' trial as a critical stage. Petitioner, therefore, has not and cannot assert any authority upon which the trial court committed *any* error. *See United States v. Vizcaino*, 202 F.3d 345, 348 (U.S. App. D.C. 2000) ("Even assuming the district court erred, absent precedent from either the Supreme Court or this court holding that relevant conduct's disproportional weight may form a basis for a section 5K2.0 departure, the asserted error—failure

to recognize authority to depart on those grounds—falls far short of plain error."). Petitioner, therefore, cannot satisfy the elements of plain error and her claim is without merit.

B. Pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, Petitioner has failed to demonstrate where her alleged error was preserved below. The Court should refuse to consider her claim based on this failure. To the extent the Court considers Petitioner's claim, it can only be considered under the plain error doctrine. Due to Petitioner's failure to preserve the alleged error below, this Court is without a sufficient record to determine under the totality of the circumstances test whether one or multiple conspiracy agreements existed.

Next, Petitioner alleges that the trial court violated the Double Jeopardy Clause of the West Virginia Constitution by allowing Petitioner to be convicted and sentenced for both Conspiracy to Commit Burglary and Conspiracy to Commit Grand Larceny as both counts of the indictment stemmed from the same agreement. (Pet'r Br. 9–11.) Petitioner asserts that the same co-conspirators were alleged in the indictment for each conspiracy, that the larceny charge was within the mental scope of the burglary charge, and that the "allegations involve a single target property and the moving of goods from that property to a single nearby property." (Pet'r Br. 11.) Consequently, Petitioner contends that she was subjected to consecutive sentences for conspiracy in violation of the principles of double jeopardy and her sentence should be vacated. (Pet'r Br. 11.)

Petitioner has failed to make any citation to the record demonstrating how this alleged error was preserved for appeal. Pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure the argument section of the brief "must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." The Rule further provides that the "Court may disregard errors that are not adequately supported by specific references to the record on appeal." W.Va. R. App. P. 10(c)(7). Moreover, this Court has noted, pursuant to an Administrative Order entered on December 10, 2012, *Re: Filings That Do Not Comply With the Rules of Appellate*

Procedure, that "[b]riefs that lack citation of authority [or] fail to structure an argument applying applicable law" do not comply with the Court's rules. *See State v. Anderson*, No. 18-1129, 2020 WL 3410249, at *5 (W.Va. Supreme Court, June 18, 2020) (memorandum decision). This Court, therefore, should not consider Petitioner's claim for his failure to comply with Rule 10(c)(7).

Nevertheless, to the extent that the Court considers Petitioner's claim, it must be considered under the plain error analysis. *See* W.Va. R. App. P. 10(c)(3); Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114.

"[A] double jeopardy claim [is] reviewed *de novo*." *State v. Duke*, No. 21-0162, 2022 WL 1115093, at *7 (W.Va. Supreme Court, Apr. 14, 2022) (to be published) (quoting Syl. Pt. 1, in part, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996)). "The double jeopardy clause of the Fifth Amendment prohibits the prosecution of a single conspiracy as two more conspiracies under a general conspiracy statute merely because two separate substantive crimes have been committed." Syl. Pt. 7, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 341 (1988).

"In order for the State to prove a conspiracy under W.Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." *Id.* at Syl. Pt. 6, *Johnson*, 179 W.Va. 619, 371 S.E.2d 341. When "multiple conspiracy agreements were made to commit the several substantive crimes, then the accused may be charged with multiple conspiracies to commit each of these crimes." *Id.* at 630, 371 S.E.2d at 351. A "totality of circumstances test" is utilized to determine whether a single or multiple conspiracy agreements exist. *Id.*

> The following factors are normally considered under a totality of circumstances test to determine whether one or two conspiracies are involved: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses

> charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. These factors are guidelines only. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object.

Syl. Pt. 8, *Johnson*, 179 W.Va. 619, 371 S.E.2d 341.

In *Johnson*, the defendant planned to break-in a market with a friend. *Id.* at 622, 371 S.E.2d at 343. Johnson drove the friend to the market and waited in the vehicle while the friend broke-in and took several hundred dollars from the cash register. *Id.* at 622–23, 371 S.E.2d at 343–44. The *Johnson* Court held that pursuant to West Virginia Code 61-10-31,[1] "if it is determined that multiple conspiracy agreements were made to commit the several substantive crimes, then the accused may be charged with multiple conspiracies to commit each of these crimes." *Id.* at 630, 371 S.E.2d at 351. In applying the five-factor test, the Court ultimately found that the evidence demonstrated only one agreement—an agreement to rob the market. *Id.* "The fact that the act of robbing the store constituted two distinct crimes, breaking and entering and larceny, cannot transform one agreement into two agreements under the conspiracy statute." *Id.*

Similarly, in *State v. Judy*, 179 W.Va. 734, 736, 372 S.E.2d 796, 798 (1988), the defendant entered into an agreement with three others to burglarize and steal approximately $19,000 in cash from a safe in the home of the victims. The defendant, who lived across the road from the victims' country store four miles from their residence, agreed to act as a lookout and alert the others if the victims left the store. *Id.* One of the co-defendants testified that defendant also suggested that they look for cabinets in a cabinet shop, where two light bulbs were taken. *Id.* The defendant was convicted of burglary, grand larceny, breaking and entering, petit larceny, and four counts of

[1] West Virginia code § 61-10-31 states, in part, that "[i]t shall be unlawful for two or more persons to conspire (1) to commit any offense against the State or (2) to defraud the State . . . if, . . . one or more of such persons does any act to effect the object of the conspiracy."

conspiracy. *Id.* The Court concluded that the defendant's multiple conspiracy convictions were improper under Johnson because, at most, there were only two agreements—an agreement to break-in the victims' residence and an agreement to break-in the cabinet shop. *Id.* at 737, 372 S.E.2d at 799.

Notwithstanding *Johnson* and *Judy*, this Court, in the absence of Petitioner having preserved the issue below, is without a sufficient record to consider the five-factor, totality of circumstances test to determine "whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object." *See* Syl. Pt. 8, in part, *Johnson*, 179 W.Va. 619, 371 S.E.2d 341. For instance, in *United States v. Thomas*, the Eighth Circuit Court of Appeals looked beyond the indictments to consider the evidence before it, including "evidence adduced at the previous trial, evidence expected to be presented at the second trial, and information developed at the evidentiary hearing conducted on the double-jeopardy issue." 759 F.2d 659, 662 (8th Cir. 1985). In the instant case, the Court has only the indictment and the evidence adduced at trial, which did not necessarily relate to the number of agreements for double jeopardy purposes. Petitioner's double jeopardy claim is more appropriately raised in a habeas corpus petition where the circuit court could create a record as to the totality of the circumstances test in an omnibus evidentiary hearing. For this reason, the trial court did not commit error, let alone plain error, and Petitioner's claim should be refused.

C. The trial court did not err in denying Petitioner's motion to suppress evidence because the search warrant identified the items to be seized with particularity.

Finally, Petitioner alleges that the trial court erred in failing to suppress the evidence seized from a valid search of her residence and vehicle. (Pet'r Br. 11–15.) Specifically, Petitioner asserts that the trial court erred in admitting all items seized "instead of just those [items] asserted with particularity and seized in conformity with the properly particularized scope of the respective

warrants." (Pet'r Br. 14.) Petitioner argues that the trial court justified the seized of the items she alleges were not specified with particularity in the various search warrants because the items were in plain view. (Pet'r Br. 15.) "If the plain view exception, rather than the scope of the warrant as ratified by the magistrate's signature, would justify the seizure of non-specified items, then the State, not the Petitioner had the burden of proof in the suppression hearing to establish that." (Pet'r Br. 15.)

This Court has held that "[w]hen reviewing a ruling on a motion to suppress, we take the facts in the light most favorable to the State, review the circuit court's factual findings for clear error, and conduct a de novo review of the determination of whether the search violated the Fourth Amendment." *State v. Deem*, 243 W.Va. 671, 676, 849 S.E.2d 918, 923 (2020). In reviewing a trial court's denial of a motion to suppress, the evidence shall be considered "in the light most favorable to the prosecution." *State v. Barefield*, 240 W.Va. 587, 593, 814 S.E.2d 250, 256 (2018) (quoting *State v. Lilly*, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995). "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." Syl. Pt. 1, in part, *Lacy*, 196 W.Va. 104, 468 S.E.2d 719. This Court has firmly established that

> 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*. . . . Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

Syl. Pt. 1, *State v. Barefield*, 240 W.Va. 587, 814 S.E.2d 250 (2018) (quoting Syl. Pt. 2, in part, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996)).

The Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution protect against unreasonable searches and seizures. "'The ultimate touchstone of the Fourth Amendment is reasonableness.'" *United States v. Lyles*, 910 F.3d 787, 791 (4th Cir. 2018) (quoting *Fernandez v. California*, 571 U.S. 292, 298 (2014)). "A warrant issued for probable cause is the presumptive means of ensuring that a search or seizure is reasonable and does not offend those protections." *Deem*, 243 W.Va. at 676–77, 849 S.E.2d at 923–24. "A search warrant must particularly describe the place to be searched and the things or persons to be seized." Syl. Pt. 3, in part, *Lacy*, 196 W.Va. 104, 468 S.E.2d 719. "The United States Supreme Court has said it is enough if the description of the place intended to be searched in a search warrant is such that the executing officer can, with reasonable effort, ascertain and identify the place." *State v. Harper*, No. 14-0220, 2014 WL 6607659, at *3 (W.Va. Supreme Court, Nov. 21, 2014) (memorandum decision) (citing *Steele v. United States*, 267 U.S. 498 (1925)).

Regarding the particularity requirement, the Fourth Circuit Court of Appeals has described the test as a pragmatic one: "The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved. There is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of items to be seized." *United States v. Cobb*, 970 F.3d 319, 327 (4th Cir. 2020), *as amended* (Aug. 17, 2020), *cert. denied*, 141 S.Ct. 1750 (2021) (internal quotations marks and citations omitted). Within the Fourth Circuit, warrants generally satisfy the particularity requirement when they allow officers to seize evidence of a particular crime. *See United States v. Young*, 260 F.Supp.3d 530, 546 (E.D. Va. 2017), *aff'd*, 916 F.3d 368 (4th Cir. 2019). If a search "warrant does not otherwise describe the evidence to be seized, that gap can be filled, at least sometimes, if the warrant instead specifies the relevant offense." *United States v. Blakeney*, 949

F.3d 851, 862–63 (4th Cir. 2020). "A warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized. Frequently, it is simply impossible for law enforcement officers to know in advance exactly what records the defendant maintains or how the case against him will unfold." *Cobb*, 970 F.3d at 327–28 (citation omitted).

Law enforcement officers obtained three search warrants prior to the search of Petitioner's residence on July 21, 2020. The first search warrant, 19SW16, was obtained by Deputy Talley and issued on July 12, 2019, by the Mineral County Magistrate Court, based on allegations that Petitioner and her co-defendant broke into the residence of Daniel Mishow and stole items on May 3, 2019. (App. 79–81, 311–17.) The warrant authorized the search of Petitioner's residence and her vehicle, a white Chevrolet Impala, in which Deputy Talley believed would contain evidence of a crime, namely thirty specified items, including a "house front door," "kitchen wall cabinets" valued at $1,000, "ceiling fan with light 42 inch $75.00," . (App. 313, 316.) Of the thirty specified items, Deputy Talley seized a front door, white kitchen wall cabinet, ceiling fan with lights, white base board strip, and a yellow garden hose. (App. 317.)

The second warrant, 19SW17, was obtained by Deputy Talley and issued on July 21, 2019, by the Mineral County Magistrate Court, based on allegations that Petitioner and her co-defendant entered without breaking the garage of Timothy McDowell and stole a lot of his tools and flowers. (App. 82–85, 318–24.) The warrant authorized the search of Petitioner's residence, including a two-car garage and all vehicles in her name, in which Deputy Talley believed would contain evidence of a crime, including sixteen specified items such as flowers, multiple tools, a clock, and wood chest. (App. 322.) The property receipt identified twenty-seven items seized from the residence and vehicles.

The third search warrant, 19SW18, was obtained by Lieutenant Leatherman and issued on July 22, 2019, by the Mineral County Magistrate Court, based on allegations that Petitioner and her co-defendant had either broke into and entered, or entered without breaking, a residence or outbuilding adjoining the residence of James and Jean Nutter, who were then out of town. (App. 56, 326–31.) The warrant authorized the search of Petitioner's residence and her Chevrolet Impala, in which Deputy Talley believed would contain evidence of a crime, including specified items such as "jewelry, hunting equipment, items used for the assembly or manufacture of a garden pond, landscaping equipment or supplies, hose and any other item that was stolen from the residence, outbuildings or property located at 74 Ellifritz Lane in the Ellifritz addition, Knobley Road in Keyser, Mineral County, West Virginia." (App. 326.)

The affidavit in support of the application for search warrant indicated that on July 21, 2019, someone called Mineral County 911 reporting that Petitioner was parked in front of the Nutter residence and had been so parked for several hours. (App. 330.) Lt. Leatherman, Deputy Talley, and Captain Wingler responded to the area and observed multiple items outside a storage building located adjacent to the Nutter residence, appearing as if someone would retrieve them later. (App. 330.) The officers drove to Petitioner's residence, where they observed Petitioner's white Impala parked in the driveway, the interior of which contained multiple items that appeared to have been taken from the Nutter residence. (App. 330.) After knocking on the door to Petitioner's residence without any response, the officers contacted a neighbor who advised she and her co-defendant were inside. (App. 330.) Entry into Petitioner's home was subsequently made by the officers through an unlocked front door pursuant to prior search warrants. (App. 330.) The officers found Petitioner and her co-defendant asleep in the living room. (App. 330.) Jewelry was

recovered from the co-defendant's pockets and both Petitioner and her co-defendant were arrested. (App. 330.)

At the police station Petitioner gave a Mirandized statement in which she confessed to taking away items from the Nutter residence. (App. 330–31.) The co-defendant instructed Petitioner to take the trailer that was attached to her vehicle to her residence and then return to the Nutter residence. (App. 331.) Petitioner returned without the trailer and the co-defendant indicated he wanted her simply to empty the trailer and return with it. (App. 331.) Nevertheless, she and her co-defendant carried several items to her car from the Nutter property including what "she believed to be a tree stand, plastic for garden pond, piping for a pond, a plastic jug, hose, and a basket with a tarp." (App. 331.) Petitioner never saw her co-defendant enter the Nutter residence but she played games in her vehicle and eventually fell asleep before driving back to her house. (App. 331.) She went in the house and her co-defendant returned to the house on foot. (App. 331.)

The property receipt identified the seizure of twenty-eight items. (App. 66–67, 328–29.) Lt. Leatherman testified at the suppression hearing that because the Nutters were out of town and unable to do a walk-through of their residence to identify stolen items (App. 70–71), he basically seized everything from Petitioner's vehicle. (App. 66.) Lt. Leatherman was able to see in plain view items in Petitioner's vehicle that were consistent with items believed to have been stolen from the Nutters. (App. 68.)

The trial court denied Petitioner's motion to suppress the items seized from searched of Petitioner's vehicle and residence, finding "that the search warrants were properly issued and properly executed." (App. 7, 102.) In reference to Petitioner's argument that the items seized were not particularly described in the search warrant, the trial court noted "there's only so many ways I can describe a blue box, a blue tote, or a green garden hose. I mean, there's only some ways you

can describe that." (App. 102.) Moreover, the trial court noted that if the police officers went into Petitioner's residence or vehicle and "finds something that is illegal contraband, [in plain view,] he can take it." (App. 102.)

The search warrant for the Nutter property, 19SW18, not only described with particularity the nature of the crime, breaking and entering the Nutter property, *see Blakeney*, 949 F.3d at 862–63, but also described with particularity the items to be seized based on the information provided by Petitioner and as supplemented later by the officer the day of the search as indicated by the Nutters. *See Cobb*, 970 F.3d at 327–28. Despite having identified approximately five categories of items to be seized, the officers seized approximately twenty-eight items. The search warrant, however, cannot be read "as a constitutional strait jacket: that only those items particularly described in a warrant may be seized without regard to the facts and circumstances of the particular case." *Id.* at 328. Petitioner herself told Lt. Leatherman of some of the items she and her co-defendant took from the Nutter property, which items were some of those seized pursuant to the warrant. Given that the victims were unable to conduct a walk-through of their residence prior to the application of the warrant, the particularized description of the crime was reasonable under the Fourth Amendment. For these reasons, this Court should affirm the trial court's denial of Petitioner's suppression motion.

VII. CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court affirm Petitioner's convictions and sentence.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0082

STATE OF WEST VIRGINIA,

Respondent,

v.

TAMMY GRAY,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, 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, July 25, 2022, and addressed as follows:

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