No. _____

IN THE
Supreme Court of the United States

KEITH ALLEN WOOD,

Petitioner,

v.

SHAWN STRAUGHN, SUPERINTENDENT
NORTHERN REGIONAL CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 25-6842

KEITH ALLEN WOOD, Petitioner-Appellee,
v.
SHAWN STRAUGHN, Superintendent, Northern Regional Correctional Facility, Respondent-Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, District Judge. (3:24-cv-00041-GMG)
Argued: May 6, 2026 Decided: July 17, 2026
Before WYNN, Circuit Judge, FLOYD, Senior Circuit Judge, and Adam B. ABELSON, United States District Judge for the District of Maryland, sitting by designation.

Reversed and remanded with instructions by published opinion. Judge Wynn wrote the opinion, in which Senior Judge Floyd and Judge Abelson joined.

ARGUED: Michael Ray Williams, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellant. Carl A. Frankovitch, FRANKOVITCH, ANETAKIS, SIMON, DECAPIO & PEARL, LLP, Weirton, West Virginia, for Appellee. ON BRIEF: John B. McCuskey, Attorney General, S. Hallie Hovey-Murray, Assistant Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellant. M. Eric Frankovitch, FRANKOVITCH, ANETAKIS, SIMON, DECAPIO & PEARL, LLP, Weirton, West Virginia, for Appellee.

WYNN, Circuit Judge: When a state prisoner seeks federal habeas relief, a federal court may disturb a state-court judgment only if the state court's decision was contrary to, or involved an unreasonable

application of, clearly established Supreme Court precedent, or rested on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). And because Congress enacted those limits through AEDPA, federal review of state-court judgments is highly deferential. Here, Keith Allen Wood argued that his retrial violated the Double Jeopardy Clause because the state trial court declared a mistrial without manifest necessity after defense counsel's opening statement. West Virginia's highest court rejected that argument on direct appeal. Yet the federal district court granted habeas relief after independently concluding that counsel's opening statement did not violate the trial court's pretrial orders and therefore could not justify a mistrial. But the district court's analysis does not comport with AEDPA deference. Applying the correct standard, we reverse the district court's judgment and remand with instructions to deny the petition for habeas corpus.

I.

In 2018, a West Virginia grand jury indicted Wood on multiple counts of sexual offenses against a seven-year-old girl, A.R.R.[1] The indictment described the sexual conduct as occurring between May 1 and July 10, 2017.

A.

Before trial, the parties discussed and litigated evidentiary issues. As relevant here, Wood successfully sought to exclude two categories of evidence. The first was a video interview of A.R.R. taken in July 2017. A few days after A.R.R. told her

[1] Because A.R.R. is a minor, we use only initials to identify her.

mother that Wood had been violating her, law enforcement referred A.R.R. to Comfort House, a child advocacy center, where she was interviewed by "a nonmedical forensic interviewer" named Danielle Stroud. J.A. 230.[2] During their conversation, A.R.R. disclosed that Wood had facial hair that she could feel when he assaulted her. Stroud later testified that she found A.R.R.'s account credible because she described sexual content that a typical seven-year-old would not know. In July 2018, the trial court entered an order noting that the parties had agreed that the video recording of Stroud's interview of A.R.R. "was done for investigative or forensic purposes and not for diagnosis and treatment purposes and [was] therefore inadmissible as evidence" under West Virginia law. Id. (citing *State v. Pettrey*, 549 S.E.2d 323, 326 (W. Va. 2001)). However, the State "intend[ed] to present the live testimony" of A.R.R. at trial, so while the parties stipulated that the video would "not be played to the jury during the presentation of the State's case . . . , the State [did] reserve the right to request" to use the video "if appropriate for rebuttal purposes." Id. The second category of evidence that Wood sought to exclude was expert testimony from Sarah Aspenleiter, a social worker who began providing therapy to A.R.R. in July 2017. Aspenleiter diagnosed A.R.R. with post-traumatic stress disorder. During one session of play therapy, A.R.R. drew two figures in the sand and told Aspenleiter that one was "Keith," meaning Wood, and the other was "[her] brother Keith," possibly referring

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

to an older stepbrother that A.R.R. had only met twice as an infant and toddler. J.A. 237.

In April 2020, on Wood's repeated motion, the trial court ruled that, because Aspenleiter was a clinical social worker and not a "licensed psychiatrist," she was "not qualified to opine as an expert regarding her diagnosis and/or treatment of" A.R.R. under West Virginia law. J.A. 233–34; see id. (citing W. Va. R. Evid. 702 and *State v. Edward Charles L.*, 398 S.E.2d 123, 126 (W. Va. 1990)). The court further concluded—also at Wood's urging—that "any statements made by [A.R.R.] and her mother during counseling sessions" were inadmissible hearsay. J.A. 234. But the court clarified that Aspenleiter could still "testify[] as a lay witness regarding any direct knowledge she may possess about the underlying allegations." Id. Two weeks before trial, the court held a pretrial conference. Wood's counsel noted that the State had listed Stroud and Aspenleiter as witnesses and said that the State needed to "tread lightly there" because of the court's prior orders. J.A. 421–22. Defense counsel also said that the court had ruled that Aspenleiter's records would not come in and that testimony to the effect that "the child told me this, the mother told me that, dad told me this" would be "clearly not admissible." J.A. 422.

B.

The first trial began (and ended) on February 16, 2021. The court conducted voir dire, impaneled the jury, provided preliminary instructions, and told the parties to begin with opening statements. In its opening statement, the State described the indictment and gave an overview of its case against Wood. The State did not mention Aspenleiter or any of A.R.R.'s statements during the Stroud interview at Comfort

House, although it did state in passing that she had been interviewed there and that she had "described the events that occurred." J.A. 102. Wood's counsel then gave his opening statement. Throughout the statement, he referred to specific statements that A.R.R. had made to Stroud and Aspenleiter. For example, he noted that during the Comfort House interview, A.R.R. had said that the person who assaulted her had a beard and that it first happened when she "was four or five or three." J.A. 104. He also noted that A.R.R. had told Aspenleiter that her assailant had a beard and described the play therapy session in which A.R.R. had drawn a figure that she described as her brother Keith. The thrust of the defense's opening statement was to suggest that someone else had assaulted A.R.R.—either her brother Keith or another man with facial hair—because evidence would show that Wood had always been beardless. The State did not object during Wood's opening statement until counsel began discussing the anticipated testimony of character witnesses. The court held a sidebar on that issue, during which the State also asked for an in-chambers meeting at the end of opening statements. Wood concluded his opening statement, and the court then held the requested in camera meeting. During the meeting, the State argued that Wood's opening statement had violated the court's prior orders related to Stroud and Aspenleiter, and therefore the entirety of those records should be admitted. For example, the State argued that Wood's opening statement had referenced statements within the Aspenleiter records in which A.R.R. said that her assailant's name was Keith and that she could feel his facial hair when he assaulted her, and thus the State should be able to present her

treatment statements "identif[ying] Keith Wood as her abuser dozens of times." J.A. 111. Wood's counsel responded by arguing that the opening statement had not violated any pretrial orders. He argued that the order excluding A.R.R.'s statements to Stroud had only been directed at the State and that the order related to Aspenleiter still permitted him to ask her about information within her direct knowledge, which is what his opening statement had alluded to. The trial court responded that it "couldn't disagree with [Wood's counsel] more." Id. The court stated that the records from Stroud and Aspenleiter had been excluded on Wood's motion, so Wood could not rely on them unless Stroud or Aspenleiter made an inconsistent statement—and even then, only for impeachment purposes. However, because the State had not objected during that portion of the opening statement, the court would not give a curative jury instruction, and so Wood was "simply going to have to live with that . . . if the jury finds themselves befuddled as to why they did not hear what [counsel] told them they were going to hear." J.A. 112. Wood's counsel continued to argue that certain of A.R.R.'s statements should be admitted, such as that "she was three years old when this happened," because that statement was inconsistent with the facts in the indictment (which alleged that all of the abuse had occurred while she was seven). Id. When asked why, in that case, he had moved to exclude the Stroud interview, he responded that he had filed that motion "about three years [earlier], before [he] had gotten into this case as thoroughly as [he was] into it now." Id. The court said that the evidence could not come in during cross-examination of Stroud or Aspenleiter, but could come in under cross-examination of A.R.R.—

but that if it did, "then everything is going to come in." Id. Wood agreed. The State also agreed that "[t]hat is what we were asking for," but noted a general concern that it had prepared its witnesses on the assumption that "this was evidence that was unable to come into this trial," yet Wood had "addressed it as evidence that is absolutely coming into this trial." Id. Additionally, though the parties initially agreed that "everything" should be admitted, further discussion revealed that they did not agree on what "everything" was, or how it would come in. They agreed that the entire Stroud interview could come in, including during the State's case-in-chief, if Wood had opened the door during crossexamination. But as to Aspenleiter's records, Wood argued that completeness only required admitting "the two pages or three pages that [he] brought up about the beard, the mustache, and the sand play therapy," but not the full records, which were "at least a half inch thick." J.A. 113. The court disagreed, saying that it was "simply all in or . . . all out," so Wood "need[ed] to decide if [he was] going to withdraw [his] objection to" Aspenleiter's counseling records. J.A. 114. Wood declined to do so, so the court ruled that the records would be excluded—but that if A.R.R. made inconsistent statements and Wood wanted to use the Aspenleiter records to challenge that testimony, "then the entirety of the Aspenleiter records [would] come in." J.A. 115. Upon further discussion of the procedures for admitting extrinsic evidence for impeachment, the State noted that it had "anticipated that this was going to become an issue, but there was no way for [it] to address it as an issue until it actually comes up." *Id.* At that point, the court asked if either of the parties wished to move for a mistrial. The State did so over Wood's objection. The

State argued that Wood's opening statement had "laid out this case" in a way that "makes it impossible to ignore this evidence," such that the State would be prejudiced. *Id.* If the evidence did not come in, the State would be prejudiced by Wood's unproven statements. If the evidence did come in, that would be contrary to the pretrial orders under which the State had prepared its case. Additionally, the State expressed a concern that bringing in inadmissible evidence could lead to reversal even if it did obtain a conviction. Wood argued that there was no error but that if he had opened the door to that evidence, the court should let the evidence in. The court granted the mistrial, stating as follows: As much as the Court has tried to draft solutions to this two-pronged problem that we have with regard to the . . . Comfort House, and the Aspenleiter records, I don't see that we could sufficiently salvage this with the evidentiary rulings and the give and take that has been conducted here in chambers this afternoon. Quite simply, . . . your opening statement ran grossly far afield into argument, and you, sir, interjected evidence that was excluded that could not have been placed before this jury but for responses that may or may not have been elicited in cross-examination. Therefore, I am going to declare a mistrial. J.A. 116. Wood responded that a mistrial was not necessary and that he would stipulate to bringing in the full Comfort House interview and full Aspenleiter records as part of the State's case-in-chief. The court asked the State for a response, noting that Wood's proposal still put the State "at a strategic disadvantage trying a case that [it was] not prepared to try." J.A. 117. The State explained that it was also "at a disadvantage in terms of our opening statement where it seems like we just

ignored all this" because it had been trying to comply with the court's pretrial orders. *Id.* The court then maintained its earlier ruling, stating as follows: The State did not disclose anything that was said in the [Comfort House] interview because they were in compliance with the Court during their opening statement. They did not reference anything in the Aspenleiter treatment [records] because they were in compliance with the Order of this Court. The defense ran grossly far afield and mentioned things that were excluded in the prior Court's rulings in both the Comfort House interview and within the Aspenleiter treatment notes. Then, out of fundamental fairness, I am forced, I have to declare a mistrial, which pains me because we are in a 2021 term of Court for a case that was indicted in 2018. *Id.* The court indicated that the parties would need to discuss, and possibly brief, how to handle the Stroud and Aspenleiter records at the retrial. At no point did the parties or the court explicitly discuss double-jeopardy concerns.

C.

The next month, March 2021, Wood moved to dismiss the indictment on the ground that it violated the Double Jeopardy Clause of the federal and West Virginia constitutions. In June, the trial court denied the motion, concluding that Wood's opening statement "ran so far afoul of previously entered evidentiary Court Orders that this Court had no choice but to grant the State's motion for a mistrial." J.A. 122. Thus, Wood "created a 'manifest necessity' to discharge the jury and re-try the case."[3] J.A. 123

[3] However, the court granted Wood's motion to dismiss the superseding indictment that the State filed after the mistrial, and Wood was retried based on the initial indictment.

(citing *United States v. Perez*, 22 U.S. 579, 580 (1824)). Shortly thereafter, Wood filed a petition for a writ of prohibition with the Supreme Court of Appeals of West Virginia.[4] He argued that the trial court had granted a mistrial "without an adequate showing by the State of a manifest necessity." J.A. 128.

He repeated his arguments that his opening statement did not violate the pretrial orders and argued that the State should have anticipated (and, in fact, did anticipate) issues related to the Stroud and Aspenleiter evidence. Wood also argued that the trial court did not sufficiently consider alternative measures: The court summarily rejected the suggestion that the evidence could be introduced as needed and Wood's subsequent offer to admit the evidence for all purposes, did not discuss any double-jeopardy implications, and did not instead give a limiting instruction to the jury. In July 2021, the Supreme Court of Appeals of West Virginia rejected Wood's petition without providing substantive analysis. Wood then turned to the federal district court, filing a habeas petition and stay motion in the Northern District of West Virginia. *Wood v. Olejasz*, No. 21-cv-103, 2021 WL 4450270 (N.D.W. Va. Aug. 10, 2021). On August 10, 2021—the date retrial was set to commence—the magistrate judge recommended rejecting the petition. *Id.* The district court accepted that recommendation the following month (after the retrial), dismissing the petition without prejudice. *Wood v. Olejasz*, No. 21-cv-103, 2021 WL 4448936

[4] There was no intermediate state appellate court at the time; the Intermediate Court of Appeals of West Virginia began operating in 2022.

(N.D.W. Va. Sept. 28, 2021). D. Wood was retried from August 10 to 13, 2021. The jury convicted him on all counts, after which Wood was sentenced to two terms of 25 to 100 years, plus two terms of 10 to 20 years, all to run consecutively. Wood appealed to the Supreme Court of Appeals of West Virginia. He identified seven issues, including a double-jeopardy argument. In April 2023, the Supreme Court of Appeals affirmed. It concluded that Wood's "right against double jeopardy was not violated because, at his first trial, his counsel created a manifest necessity for the mistrial during his opening statement when he repeatedly referenced evidence that the trial court had clearly ruled inadmissible." *State v. Wood*, No. 21-0964, 2023 WL 2866229, at *5 (W. Va. Apr. 10, 2023) (per curiam). E. Wood timely filed the instant habeas proceedings in federal district court in April 2024, raising a double-jeopardy argument. [5] A magistrate judge recommended that Wood's petition be denied and dismissed with prejudice. The recommendation relied primarily on the Supreme Court's decision in *Arizona v. Washington*, 434 U.S. 497 (1978), and concluded that Wood could not show that the state-court adjudication "was contrary to, or involved an unreasonable application of, clearly established federal law." *Wood v. Straughn*, No. 3:24-cv-41, 2025 WL 2202991, at *9 (N.D.W. Va. May 30, 2025). Wood objected to the report and recommendation, arguing that it failed to recognize differences between his case

[5] This petition is not subject to the rules governing second-or-successive petitions because the first petition was dismissed without prejudice on procedural grounds. E.g., *United States v. Said*, 26 F.4th 653, 658 n.7 (4th Cir. 2022).

and Washington and that it overlooked "binding precedent that strictly limits when a mistrial may be declared over a defendant's objection." J.A. 568. The district court agreed with Wood and granted his habeas petition. It reviewed the pretrial orders and concluded that "nothing in the rulings prohibited the comments [Wood's counsel] made in his opening statements." J.A. 589. That was because, the district court reasoned, the order excluding the Stroud interview "only restricted the State from producing certain evidence in the State's case-in-chief" and so "[n]othing in that Order prohibited defense counsel from doing anything." *Id.*

Similarly, the court determined that the details that Wood's opening statement referenced from the Aspenleiter records "could be established on cross examination of the victim," and only if A.R.R. denied making those statements would the records themselves "become necessary." J.A. 590. Further, the court noted that "the State made no timely objection to any of the statements that supposedly violated the trial court's rulings." J.A. 589. Thus, relying on this Court's decision in *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994), the district court concluded that manifest necessity for a mistrial was lacking. The State timely appealed.

II.

We begin with a review of the substantive law underlying Wood's petition. The Double Jeopardy Clause of the Fifth Amendment declares that no "person [shall] be subject for the same offence to be

twice put in jeopardy of life or limb."[6] U.S. Const. amend. V. "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Baum v. Rushton*, 572 F.3d 198, 206 (4th Cir. 2009). Thus, the double jeopardy prohibition "embraces the defendant's valued right to have his trial completed by a particular tribunal." Id. (quoting Washington, 434 U.S. at 503). That prohibition does not apply if "a defendant seeks or consents to the grant of a mistrial." *Gilliam v. Foster*, 75 F.3d 881, 893 (4th Cir. 1996) (*en banc*) (citing *Oregon v. Kennedy*, 456 U.S. 667, 672–73 (1982)). But "when a defendant objects to a mistrial, he may be retried only if the mistrial was required by manifest necessity." *Seay v. Cannon*, 927 F.3d 776, 781 (4th Cir. 2019) (quotation omitted).

The phrase "manifest necessity" does not "describe a standard that can be applied mechanically" and "cannot be interpreted literally." Washington, 434 U.S. at 506. Yet there must be a "high degree" of necessity before a mistrial is appropriate. Id. The Supreme Court has, "for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." *United States v. Jorn*, 400 U.S. 470, 480 (1971) (plurality opinion). The Court has described a spectrum that contains "[a]t one extreme ... cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence," and "[a]t the other extreme ... [cases in which] the mistrial [is] premised upon the trial judge's belief that the jury is unable to reach a verdict." Washington, 434 U.S. at

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[6] The double-jeopardy prohibition applies "to the States through the Fourteenth Amendment." Benton v. Maryland, 395 U.S. 784, 794 (1969).

507–09. Generally, a reviewing court gives "great deference . . . to the decision of the trial judge to grant a mistrial." *Gilliam*, 75 F.3d at 894. For example, "we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected" by the circumstances giving rise to the mistrial. *Washington*, 434 U.S. at 511. Even so, this deference "is not unlimited." *Gilliam*, 75 F.3d at 894. "[R]eviewing courts have an obligation to satisfy themselves that ... the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.* (quoting *Washington*, 434 U.S. at 514). A grant of a mistrial that "amounts to an irrational or irresponsible act" is an abuse of discretion. *Id.* (citing *Washington*, 434 U.S. at 514). The Supreme Court has not "explicitly articulated a test for a reviewing court to apply in analyzing whether the exercise of discretion by the trial judge in granting a mistrial was sound as opposed to irrational or irresponsible," though some factors may be gleaned from individual cases. *Id.*; see *id.* at 894–95 (collecting Supreme Court cases). This Court has held that those factors include "whether a trial judge rationally could conclude that the grant of the mistrial was compelled by manifest necessity ... on the peculiar facts presented"; "whether the trial judge acted precipitately"; and "whether the trial judge expressed concern regarding the possible double jeopardy consequences of an erroneous declaration of a mistrial, heard extensive argument on the appropriateness of such a measure, and gave appropriate consideration to alternatives less drastic than granting a mistrial." *Id.* at 894–95. But here, we are not reviewing a federal district court's decision to grant a mistrial on direct appeal. Rather, we are evaluating a state-court decision on collateral review,

applying the additional layer of deference that is required in habeas proceedings. Thus, we next place the double-jeopardy inquiry within the proper framework for this appeal.

III.

We review de novo the district court's decision to grant habeas relief. *Kaur v. Warden, Md. Corr. Inst. for Women*, 151 F.4th 595, 607 (4th Cir. 2025). Within that review, however, "we are 'restricted by the statutory language of 28 U.S.C. § 2254, as amended by'" AEDPA. Id. (quoting *Bowman v. Stirling*, 45 F.4th 740, 752 (4th Cir. 2022)). Under AEDPA, after a state court has adjudicated the merits of a petition for postconviction relief, the federal courts cannot grant relief unless the state-court proceedings "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Wood argues that he is entitled to relief under both subsections. We disagree.

A.

We begin with Wood's disagreement with the state-court determination that his opening statement violated pretrial evidentiary rulings, which he frames as an unreasonable factual determination. But the interpretation of the pretrial order is a legal question, not a factual determination. Cf. *United States v. Parris*, 639 F. App'x 923, 927 (4th Cir. 2016) ("Our case law instructs that the interpretation of a prior order is ultimately a legal question[.]") (citing *Anderson v. Stephens*, 875 F.2d 76, 80 n. 8 (4th Cir.

1989)). The Supreme Court of Appeals of West Virginia found that Wood's counsel had "repeatedly referenced evidence that the trial court had clearly ruled inadmissible." *Wood*, 2023 WL 2866229, at *5. But Wood does not challenge whether he, in fact, referenced the disputed evidence. Instead, he challenges the underlying legal interpretation, arguing that his preferred interpretation would have allowed him to make those references. Because Wood only identifies legal questions, we proceed to our review under § 2254(d)(1), under which we evaluate whether the state-court decision was "contrary to" or "an unreasonable application of" U.S. Supreme Court precedent. Either inquiry first requires us to "identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Currica v. Miller*, 70 F.4th 718, 724 (4th Cir. 2023) (quoting *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013)). Under this standard, "[w]e do not generally review state-court determinations of state-law questions, like the admissibility of evidence." *Richardson v. Kornegay*, 3 F.4th 687, 696 (4th Cir. 2021) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). That is because our jurisdiction over "federal habeas corpus relief does not lie for errors of state law." *Estelle*, 502 U.S. at 67 (quotation omitted). Thus, for us to review a state-law question, a petitioner "must establish either that the error was 'so extreme as to result in the denial of a constitutionally fair proceeding' or that it 'infring[ed] specific constitutional protections.'" *Richardson*, 3 F.4th at 696 (quoting *Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008)). Wood does not argue that the evidentiary ruling itself infringed on his constitutional rights. For example, he does not argue

that excluding the evidence he referenced in his opening statement violated his constitutional right to present a complete defense, or otherwise that any particular interpretation of the pretrial order was constitutionally required. But even assuming that Wood properly raised an argument that the state-court interpretation of the pretrial orders was erroneous in a way that infringed on his federal rights, we conclude that that argument fails. We begin with the order excluding the Stroud video interview, which Wood argues did not apply to him at all. To be sure, the order was directed to the State, ordering that the video interview "will not be played to the jury during the presentation of the State's case" and that the State could request to use the video "if appropriate for rebuttal purposes." J.A. 230–31. Yet the order also states that the parties had stipulated that the video "was done for investigative or forensic purposes and not for diagnosis and treatment purposes and is therefore inadmissible as evidence," J.A. 230 (emphasis added), under the Supreme Court of Appeals of West Virginia's decision in *State v. Pettrey*, 549 S.E.2d 323, 334 (W. Va. 2001), which held that a therapist's testimony is not admissible under an exception to the hearsay rule "if the evidence was gathered strictly for investigative or forensic purposes." West Virginia's general rule against the admissibility of hearsay evidence applies equally to defendants and the *State. E.g., State v. Hundley*, 915 S.E.2d 845, 858 (W. Va. 2025). Still, Wood argues that, even if the order excluded the video as substantive evidence for both parties, his opening statement did not violate the order because he could use the video for impeachment while cross-examining A.R.R. To what extent parties may preview anticipated

impeachment evidence in opening statements is not immediately obvious under West Virginia law. See *State v. Robert Scott R., Jr.*, 754 S.E.2d 588, 596 (W. Va. 2014) (noting that the prosecution "should not have made comments about" the defendant's "anticipated evidence"); see also id. at 595 n.22 ("[A]s a practical matter, prosecutors should avoid commenting upon expected evidence by a defendant during their opening statements. . . . Such comments do nothing more than raise potential grounds for error."). And rulings on the propriety of opening statements are within the state trial court's discretion. *State v. Painter*, 63 S.E.2d 86, 91 (W. Va. 1950). Certainly, we can discern no federal right to preview otherwise-excluded evidence in opening statements. Here, the state trial court found that Wood's opening statement went "far afield" by directly incorporating hearsay evidence "that could not have been placed before this jury but for responses that may or may not have been elicited in cross-examination." J.A. 116. The Supreme Court of Appeals of West Virginia agreed. We see no basis upon which to review that question of state law. Next, we consider the order excluding the Aspenleiter records. The order stated that "any statements made by [A.R.R.] and her mother during counseling sessions with Ms. Aspenleiter are inadmissible hearsay," but it also noted that "this ruling does not prevent Ms. Aspenleiter from testifying as a lay witness regarding any direct knowledge she may possess about the underlying allegations." J.A. 234. During opening statements, Wood explicitly referred to A.R.R.'s statements to Aspenleiter during counseling sessions. And while, again, those statements could have been introduced for impeachment purposes if A.R.R. had

testified inconsistently at trial, they were otherwise inadmissible. Here, too, we see no question of federal law for our review. In sum, we have no occasion to review the Supreme Court of Appeals of West Virginia's conclusion that defense counsel's opening statement referenced evidence that had been excluded by pretrial evidentiary rulings. Wood is not entitled to habeas relief on the basis of those evidentiary rulings. And the fact that we may not review them, but instead must accept them as valid, lays crucial groundwork for our analysis of the heart of Wood's habeas claim.

B.

We therefore turn to that central claim: that the Supreme Court of Appeals of West Virginia's decision rejecting Wood's double-jeopardy argument was "contrary to" or "an unreasonable application of" the U.S. Supreme Court's manifest-necessity standard. See § 2254(d)(1). We conclude that it was not.

1.

First, we conclude that the Supreme Court of Appeals of West Virginia's decision was not "contrary to" Supreme Court precedent. "Under the 'contrary to' clause," federal courts may grant relief "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). This standard "refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision." *Owens v. Stirling*, 967 F.3d 396, 411 (4th Cir. 2020) (quoting *Williams*, 529 U.S. at 412) (cleaned up). Wood points us to Arizona v. Washington, 434 U.S. 497 (1978), for both flavors of

this argument. In *Arizona v. Washington*, the Supreme Court considered, on pre-AEDPA habeas review, a mistrial that was prompted by defense counsel's improper opening statement. 434 U.S. at 498. After a conviction at the first trial, the trial court ordered a new trial "because the prosecutor had withheld exculpatory evidence," a decision that the Supreme Court of Arizona affirmed. *Id.* In his opening statement during the second trial, defense counsel told the jury, "You will hear that because of the misconduct of the County Attorney [in the first trial] and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case." Id. at 499. The State moved for a mistrial. *Id.* The trial court indicated that the evidence of misconduct—"and specifically the ruling of the Arizona Supreme Court"—was likely inadmissible, but defense counsel asked for (and was granted) time to provide authority to support its admissibility. *Id.* at 499–500. The next day, the State renewed the mistrial motion. *Id.* at 500. Defense counsel had found no authority to support the admissibility of the evidence. *Id.* Nevertheless, the parties engaged in an "extended argument" and discussed the double-jeopardy concerns associated with erroneously granting a mistrial. *Id.* at 501. Ultimately, the trial court granted a mistrial without expressly making a finding of "manifest necessity" or stating that the court had considered alternative solutions. *Id.* Upon review, the U.S. Supreme Court concluded that "the difficulty which led to the mistrial in this case . . . falls in an area where the trial judge's determination is entitled to special respect" and that the trial judge had not erred in that case. *Id.* at 510. It explained that, assuming that the evidence was inadmissible, it would "accord the highest degree of

respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511. That was true even though "[i]n a strict, literal sense, the mistrial was not 'necessary,'" and even though the trial judge had not made explicit findings of manifest necessity or that alternative solutions would be insufficient. *Id.* Wood argues that the Supreme Court of Appeals of West Virginia acted contrary to *Arizona v. Washington* when it focused solely on which party was at fault. We disagree with both the premise and the conclusion. The Supreme Court of Appeals held that Wood's counsel had created the manifest necessity that led to the mistrial "during his opening statement when he repeatedly referenced evidence that the trial court had clearly ruled inadmissible." *Wood*, 2023 WL 2866229, at *5. That is not a statement that solely identifies the party at fault. Rather, it referenced the pretrial evidentiary rulings as the core reason for the mistrial. And far from being contrary to *Washington*, that finding matches *Washington's* approval of a mistrial granted "because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury." *Washington*, 434 U.S. at 510. And, of course, we cannot say that the state-court decision came out differently than a Supreme Court case with "materially indistinguishable facts," *Williams*, 529 U.S. at 413, at least when compared to *Washington*, because there, the Supreme Court concluded that the state trial court had properly granted a mistrial, *Washington*, 434 U.S. at 510. Thus, even assuming similarity, the state court here did not decide Wood's case differently than *Washington* when it also approved the grant of a mistrial.

2.

Second, we conclude that the state-court decision was not an "unreasonable application" of Supreme Court precedent. Under this prong, we consider whether the state court's application is one that is "objectively unreasonable, not simply incorrect." *Owens*, 967 F.3d at 411 (quotation omitted). In other words, federal courts cannot grant relief "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Moreover, we must consider a second layer of deference. Even on direct appeal, appellate courts give trial courts "broad deference" when considering whether the "manifest necessity" standard for granting a mistrial has been met. *Renico v. Lett*, 559 U.S. 766, 776 (2010). And manifest necessity is the type of "general standard" that creates a "greater . . . potential for reasoned disagreement among fair-minded judges," which means that state courts have "more leeway . . . in reaching outcomes in case-by-case determinations." *Id.* (quotation omitted). Thus, we apply a "double-deference standard" to determine "whether there is any reasonable argument" that the state trial court acted within its discretion in granting a mistral. *Owens,* 967 F.3d at 411 (quotation omitted) (discussing double deference in the context of an ineffective-assistance-of-counsel claim); see *Renico*, 559 U.S. at 773 ("The question under AEDPA is . . . whether the determination of the [state high court] that there was no abuse of discretion was 'an unreasonable application of . . . clearly established Federal law.'") (quoting 28 U.S.C. § 2254(d)(1)). As we have discussed, to grant a mistrial over a defendant's objection, there must be "manifest

necessity." *Washington*, 434 U.S. at 505. And when defense counsel's improper remarks during opening statement are what led to the mistrial, "we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511. But the trial judge must still have exercised "sound discretion," meaning that the judge cannot have acted "irrationally or irresponsibly." *Id.* at 514. Wood argues that the Supreme Court of Appeals of West Virginia unreasonably applied *Arizona v. Washington* by failing to acknowledge or analyze a requirement to consider alternatives to granting a mistrial. We disagree. As an initial matter, we "have no authority to impose mandatory opinion-writing standards on state courts." *Klein v. Martin*, 607 U.S. 213, 221 (2026) (per curiam) (cleaned up). The state court does not have to "discuss the evidence at all." *Id.* In other words, we do not sit in review of the way the Supreme Court of Appeals framed its inquiry into manifest necessity. Instead, the federal courts "carefully consider all the reasons and evidence supporting the state court's decision." *Id.* (quotation omitted). Here, a review of the record shows that the trial court explicitly considered and rejected at least some alternatives: After the back-and-forth on ways to admit the previously excluded evidence, the court determined that it did not "see that we could sufficiently salvage this with the evidentiary rulings." J.A. 116. But even if the trial court did not consider alternatives, *Washington* does not impose that

requirement.[7] *Renico*, 559 U.S. at 778–79. Indeed, in *Washington*, the state trial judge "had not canvassed on the record the possibility of alternatives to a mistrial," nor had the judge explicitly found manifest necessity. *Washington*, 434 U.S. at 501. The Court nonetheless held that "the record provides sufficient justification for the state-court ruling," such that "the failure to explain that ruling more completely does not render it constitutionally defective." *Id.* at 516–17. Instead, Wood (and the district court) focus on this Court's opinion in *United States v. Sloan*. There, while considering a direct appeal, we reviewed several Supreme Court cases and identified three factors as relevant to whether "a judge had failed to exercise sound discretion": whether the judge "(1) acted precipitately or gave both defense counsel and the prosecutor full opportunity to explain their positions, (2) accorded careful consideration to the defendant's interest in having the trial concluded in a single proceeding, and (3) considered alternatives to declaring a mistrial." 36 F.3d at 394 (cleaned up). So, if Wood was a federal prisoner directly appealing his conviction after retrial in federal district court, this argument would carry some weight. But that is not the standard under AEDPA. In conducting that

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[7] Wood also points to *United States v. Jorn*, 400 U.S. 470, 486 (1971), as imposing a requirement to consider alternatives. Even if we agreed that *Jorn* held as much, it is a non-binding plurality opinion. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("[A] plurality opinion . . . did not represent the views of a majority of the Court, [and] we are not bound by its reasoning."). Thus, it cannot constitute "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

review, the Supreme Court has explicitly held that we cannot rely on our own decisions that interpret *Washington* as setting forth "factors that determine whether a judge has exercised sound discretion in declaring a mistrial." *Renico*, 559 U.S. at 778 (considering a similar test articulated by the Sixth Circuit); see *id.* at 779 ("*Washington* nowhere established [the Sixth Circuit's] three factors as a constitutional test that determines whether a trial judge has exercised sound discretion in declaring a mistrial." (cleaned up)). That is because a federal Court of Appeals decision like *Sloan* does not "constitute 'clearly established Federal law, as determined by the Supreme Court,' § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA." *Id.* at 779. Thus, under § 2254(d)(1), the Supreme Court of Appeals of West Virginia reasonably applied Washington to Wood's case.

* * *

In sum, this case reminds us that the deference we owe state courts under AEDPA "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction." *Owens*, 967 F.3d at 411 (quoting *Harrington*, 562 U.S. at 102). "Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). However, "it does mean that we may not 'second-guess the reasonable decisions of state courts.'" *Owens*, 967 F.3d at 411 (quoting *Renico*, 559 U.S. at 779). If we were reviewing Wood's argument in the context of a direct appeal, we might find it a closer question. But within the confines of AEDPA review, we cannot say

that the state-court decision in this case was unreasonable.

IV.

For the foregoing reasons, we reverse the district court's judgment and remand with instructions to deny the petition for habeas corpus.

REVERSED AND REMANDED WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: July 17, 2026
No. 25-6842, Keith Wood v. Shawn Straughn
3:24-cv-00041-GMG

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund.

An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's website, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)). Filed: 07/17/2026

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from

the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-6842
(3:24-cv-00041-GMG)

KEITH ALLEN WOOD, Petitioner-Appellee
v.
SHAWN STRAUGHN, Superintendent, Northern Regional Correctional Facility, Respondent-Appellant

JUDGMENT

FILED: July 17, 2026

In accordance with the decision of this court, the judgment of the district court is reversed. This case is remanded with instructions to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG

KEITH ALLEN WOOD, Petitioner,
v.
SHAWN STRAUGHN, Respondent.
Civil Action No. 3:24-CV-41 (GROH)

ORDER ADOPTING R&R IN PART, SUSTAINING PETITIONER'S OBJECTION ONE, AND GRANTING PETITIONER'S WRIT OF HABEAS CORPUS UNDER § 2254

This case presents a challenge under § 2254. Petitioner advances two grounds for why he is entitled to relief from his state court convictions. Magistrate Judge Robert W. Trumble entered an R&R on May 30, 2025. Petitioner timely filed objections to the R&R, and Respondent filed a response in opposition. Having carefully considering Petitioner's objections, examining the record, and applying the relevant legal analysis, the Court sustains Petitioner's first objection and grants the petition for writ of habeas corpus.

As a preliminary matter, the Court notes Petitioner does not object to the R&R's recitation of the background, procedural history, or applicable legal standards in this case. Accordingly, the portions of the R&R to which no party objected are adopted to the extent they are consistent with this Order.

1. Objection Two

Petitioner advances two specific objections, and the second concerns his argument that one of the trial court's jury instructions impermissibly shifted the

burden of proof. This objection claims "the instruction diluted the reasonable doubt standard and undermined the presumption of innocence[, violating] the Fifth and Fourteenth Amendments." ECF No. 15 at 9.

The Supreme Court of Appeals of West Virginia found the challenged instruction was an appropriate statement of law and aligned with instructions it previously approved in other cases. State v. Wood, No. 21-0964, 2023 WL 2866229, at *3 (W. Va. Apr. 10, 2023) (citing State v. McPherson, 179 W. Va. 612, 371 S.E.2d 333 (1988) and State v. Haid, 228 W. Va. 510, 721 S.E.2d 529 (2011)). The Court has reviewed those cases, the decision in Petitioner's state appeal, and the R&R's analysis on this argument.

The Undersigned agrees with the R&R, which mirrors the Supreme Court of West Virginia's (SCAWV's) analysis on this issue. Of particular importance to this Court is that the trial court's jury charge, when read as a whole, does not have the dramatic effect Petitioner alleges. "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973). Moreover, the Court has explained: If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Francis v. Franklin, 471 U.S. 307, 315 (1985) (citing Cupp, 414 U.S. at 147). Petitioner therefore has not demonstrated that the

instruction was contrary to or involved an unreasonable application of clearly established federal law. Accordingly, Petitioner's objection two is **OVERRULED**, and Section IV.C.2 the R&R is **ADOPTED**.

2. Objection One

Turning to the first objection, Petitioner specifies several ways in which he believes the R&R's analysis is misplaced. The Undersigned has thoroughly reviewed the trial court's pretrial orders and its rulings, the transcript from the first trial, orders, motions and appeals that followed, and the briefing filed in this case. Having carefully considered everything, the Undersigned finds Petitioner has satisfied his burden to demonstrate that the prior adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The Fourth Circuit's Sloan opinion comprehensively explains the legal framework relevant to instant inquiry and warrants verbatim inclusion here:

> When a mistrial is declared over a criminal defendant's objection, retrial is permitted only when "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824). First enunciated 170 years ago, this bedrock principle has been consistently reiterated and followed. See, e.g., Arizona v. Washington, 434 U.S. 497, 506 n.18, 98 S.Ct. 824, 830 n.18, 54 L.Ed.2d 717 (1978); Illinois v. Somerville, 410 U.S. 458, 461, 93 S.Ct.

1066, 1069, 35 L.Ed.2d 425 (1973); United States v. Jorn, 400 U.S. 470, 481, 91 S.Ct. 547, 555, 27 L.Ed.2d 543 (1971); United States v. Shafer, 987 F.2d 1054, 1057 (4th Cir.1993). Its basis is the Fifth Amendment's Double Jeopardy Clause: no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "Because jeopardy attaches before the judgment becomes final," it has been held that the double jeopardy clause protects a defendant's "valued right to have his trial completed by a particular tribunal," and so prohibits the declaration of a mistrial absent manifest necessity. Washington, 434 U.S. at 503, 98 S.Ct. at 829 (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949)); Jorn, 400 U.S. at 484, 91 S.Ct. at 556-57 (also quoting Wade, 336 U.S. at 689, 69 S.Ct. at 837).

A trial court has "broad discretion" in determining whether manifest necessity requires declaration of a mistrial. Somerville, 410 U.S. at 462, 93 S.Ct. at 1069. Thus, an appellate court reviews a trial court's invocation of the manifest necessity doctrine and denial of a motion to dismiss a subsequent indictment only for an abuse of this discretion. Shafer, 987 F.2d at 1058; Harris v. Young, 607 F.2d 1081, 1085 (4th Cir.1979), cert. denied, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980).

A judge cannot find that manifest necessity requires declaration of a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." Jorn, 400 U.S. at 485, 91 S.Ct. at 557.

Furthermore, "[i]f the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for ... deference by an appellate court disappears." Washington, 434 U.S. at 510 n. 28, 98 S.Ct. at 832 n. 28.

A trial judge need not make an explicit finding of manifest necessity. Id. at 516-17, 98 S.Ct. at 835-36. But in determining if a judge has failed to exercise sound discretion, the Supreme Court has looked to whether the judge (1) "act[ed] precipitately ... [or] gave both defense counsel and the prosecutor full opportunity to explain their positions," id. at 515-16, 98 S.Ct. at 835; (2) "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding," id. at 516, 98 S.Ct. at 835; and (3) considered alternatives to declaring a mistrial. See, e.g., Jorn, 400 U.S. at 487, 91 S.Ct. at 558; see also Von Spivey, 895 F.2d at 178; United States v. Sartori, 730 F.2d 973, 976 (4th Cir.1984); Harris, 607 F.2d at 1085. Indeed, the need for careful consideration of alternatives to mistrial, and the hard lesson of retrials barred by double jeopardy when there was no such consideration, was one of the factors that led to the promulgation of Fed.R.Crim.P. 26.3, which took effect just five days before the commencement of Sloan's trial. That rule requires that "[b]efore ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives." Fed.R.Crim.P. 26.3.

Although the constitutional basis for the manifest necessity doctrine and the standard of review of a trial court's invocation of that doctrine are clear, precisely what constitutes manifest necessity is not at all clear. The Supreme Court has emphasized that because these cases turn on their own facts they "escape meaningful categorization." Somerville, 410 U.S. at 464, 93 S.Ct. at 1070; see also Washington, 434 U.S. at 506, 98 S.Ct. at 831 (manifest necessity standard cannot be "applied mechanically"); Jorn, 400 U.S. at 485, 91 S.Ct. at 557 (Supreme Court has refused to make rules "based on categories of circumstances"); Downum v. United States, 372 U.S. 734, 737, 83 S.Ct. 1033, 1035, 10 L.Ed.2d 100 (1963) ("[e]ach case must turn on its facts."); Sartori, 730 F.2d at 975. A single test is thus not appropriate, or even possible.

It is well established, however, that "manifest necessity" means that a "high degree" of necessity is required before a "mistrial is appropriate." Washington, 434 U.S. at 506, 98 S.Ct. at 830; United States v. Council, 973 F.2d 251, 255 (4th Cir.1992); see also Somerville, 410 U.S. at 471, 93 S.Ct. at 1073 (declaration of mistrial "where jeopardy has attached is not ... to be lightly undertaken"); Downum, 372 U.S. at 736, 83 S.Ct. at 1034 ("valued right" of a defendant to have trial completed by the same jury "may be subordinated to the public interest-when there is an imperious necessity to do so"); United States v. Coolidge, 25 F.Cas. 622, 623 (1815) (mistrial to be granted "only in very extraordinary and striking circumstances"). Accordingly, "the prosecutor must shoulder the burden of justifying the mistrial if he

is to avoid the double jeopardy bar" and that burden is a "heavy one." Washington, 434 U.S. at 505, 98 S.Ct. at 830; see also Council, 973 F.2d at 255.

While a declaration of mistrial "to afford the prosecution a more favorable opportunity to convict" is, of course, barred, this sort of "extreme" case does not "mark the limit" of the double jeopardy "guarantee." Downum, 372 U.S. at 736, 83 S.Ct. at 1034. In fact, the Supreme Court has rejected the view that the double jeopardy bar can only be invoked as the result of a "mistrial declaration which 'unfairly aids the prosecution or harasses the defense.'" Jorn, 400 U.S. at 483, 91 S.Ct. at 556 (quoting Govt. Brief at 8). This is so because "independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury." Jorn, 400 U.S. at 485, 91 S.Ct. at 557; see also Washington, 434 U.S. at 508 n. 25, 98 S.Ct. at 832, n.25 (defendant's right to have the empaneled tribunal decide his case is implicated "whenever a mistrial is declared over the defendant's objection and without regard to the presence or absence of governmental overreaching") (quoting Jorn, 400 U.S. at 485, 91 S.Ct. at 557). Accordingly, "even in circumstances where the problem [giving rise to the possible declaration of mistrial] reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation" constitutes manifest necessity warranting declaration of a mistrial. Jorn, 400 U.S. at 486, 91 S.Ct. at 557 (emphasis added).

> In order to invoke the "double jeopardy bar," a defendant need not demonstrate that the declaration of a mistrial prejudiced him in any way other than infringement on the "valued right" to have the empaneled tribunal decide his cause. Somerville, 410 U.S. at 471, 93 S.Ct. at 1073-74. Thus, the Double Jeopardy Clause may preclude retrial when a mistrial was neither requested nor desired by the prosecution. See Jorn, 400 U.S. at 490, 91 S.Ct. at 559 (majority holds declaration of mistrial was not supported by manifest necessity, although, in words of the dissent, "the mistrial was not requested by the prosecutor, and there is not the slightest indication that he desired it to occur.") (Stewart, J., dissenting). See also United States v. Council, 973 F.2d at 255 (mistrial improper even when not requested or desired by government and only declared because of "the interest of the defendant"); Sartori, 730 F.2d at 977 (mistrial improper although not requested or desired by government and declared solely because of court's possible conflict with defense position).
>
> With these principles in mind, we turn to the case at hand.

United States v. Sloan, 36 F.3d 386, 393–95 (4th Cir. 1994).

Turning to Petitioner's first objection here, he argues the trial court's stated reason for declaring a mistrial was defense counsel's violation of two pretrial evidentiary rulings during his opening statement. Petitioner contends trial counsel never violated the pretrial rulings. The Undersigned agrees.[1]

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1 The Court notes Respondent's response to Petitioner's objections says, "Petitioner makes the incredulous argument

A review of the trial court's rulings reveals exactly what Petitioner has argued throughout this case: nothing in the rulings prohibited the comments defense counsel made in his opening statements. The trial transcript further shows the State made no timely objection to any of the statements that supposedly violated the trial court's rulings. One of the orders is titled, "Stipulation and Agreed Order Precluding the State's use of Video Recorded Interview of Alleged Victim During Presentation of State's Case in Chief." ECF No. 1-2 at 182. The other Order provided, "Ms. Aspenleiter is not qualified to render an expert opinion in this case[,]" but the trial court's "ruling does not prevent Ms. Aspenleiter from testifying as a lay witness regarding any direct knowledge she may possess about the underlying allegations." Id. at 186.

Nothing in trial counsel's lengthy opening statement ran afoul of either of these rulings. The first only restricted the State from producing certain evidence in the State's case-in-chief. Nothing in that Order prohibited defense counsel from doing anything. Further, as defense counsel explained during the discussion in chambers, his opening statement's inclusion of certain details about the child's abuser's facial hair and the name "Keith" could be established on cross examination of the victim. Only if the victim denied making those statements would an impeachment procedure that may have

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that the pretrial order prevented only the State and not him from referencing the excluded facts." ECF No. 16 at 1-2. However, Respondent fails to explain why this argument is incredulous; and for the reasons explained here, the Undersigned explicitly rejects the notion that the argument is incredulous.

eventually involved Ms. Aspenleiter's testimony or records become necessary for impeachment. Nothing in the Court's pretrial ruling prevented defense counsel from doing that or referring to his theory and the evidence he intended to illicit during opening statements.

"It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the [attorney] reasonably expected to produce." Frazier v. Cupp, 394 U.S. 731, 736 (1969). Sloan also examined a Ninth Circuit case where prior to opening statements there was doubt regarding whether a key prosecution witness would testify at trial, so the court instructed counsel not to discuss any facts that could only be established by that witness's testimony. United States v. Shaw, 829 F.2d 714, 718–19 (9th Cir. 1987). Nevertheless, defense counsel repeatedly stated that the "key" witness had admitted to an investigator that the weapon in question "belonged to her . . . was in her possession" and not in the defendant's. Id. at 719. When the "key" witness, who was immunized, refused to testify and it was "clear from the record" that the court considered a curative instruction and concluded it "could not cure the prejudice to the government's case," manifest necessity to declare a mistrial was appropriate. United States v. Sloan, 36 F.3d 386, 399 (4th Cir. 1994) (quoting Shaw, at 720).

Just like the Court held in Sloan, "[t]he opening statement here was not the sort of highly improper, noncorrectable statement at issue in Shaw. Rather, it is even more innocuous than the Frazier statement." United States v. Sloan, 36 F.3d 386, 400 (4th Cir.

1994). Thus, "[t]here was no manifest necessity for the district court's sua sponte declaration of a mistrial over Sloan's objections." Id. at 401. The same is true here.

The Supreme Court has explained "the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." Arizona v. Washington, 434 U.S. 497, 506 (1978). "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" Downum v. United States, 372 U.S. 734, 736 (1963) (quoting United States v. Ball, 163 U.S. 662, 669 (1896)).

A review of both the R&R and SCAWV's decision denying Petitioner's criminal appeal reveals a lack of detailed explanation regarding the manifest necessity to declare a mistrial. Both decisions cite defense counsel's repeated references to "evidence that the trial court had clearly ruled inadmissible" during his opening statement but nothing more. ECF No. 14 at 17.

As the undersigned has explained, defense counsel's comments during his opening statement, which the State did not object to when they were made, did not run afoul of the Court's pretrial rulings. This is further evidenced by the nature of the discussion held in the trial court's chambers after the opening statements concluded.

Respondent contends that the "transcript reflects over twenty-three pages of discussion devoted to this issue alone during which the court and the parties discussed several alternatives to a mistrial[.]" ECF No. 16 at 2. This statement requires clarification. There was a detailed discussion in chambers amongst the trial court and counsel regarding opening statements and their impact on the trial. Specifically, these discussions initially—and predominantly—were focused upon the State's request for the court to permit the previously excluded evidence into trial. See ECF No. 1-2 at 62. The State was arguing in essence that defense counsel opened the door to allow it to present previously excluded evidence in its case in chief. Or, in the alternative, the State at a minimum sought clarification from the trial court on what would be allowed for both parties. Id. The twenty-three transcript pages of discussion occur prior to any mention of a mistrial. Only after this discussion, in which a mistrial does not appear to be contemplated by any of the attorneys, did the trial court ask, "[d]o either of the parties wish to put forth a motion for a mistrial?" Id. at 67. Defense counsel declined, and the prosecution team asked for time to talk it over.

There are only four transcript pages between the trial court's sua sponte call for a mistrial motion to its ruling. Id. at 67–68. That discussion was mostly defense counsel offering to concede to the admission or use of whatever evidence the State wanted to introduce to avoid a mistrial. Despite counsel's concessions, the trial court ruled that defense counsel "interjected evidence that was excluded that could not have been placed before this jury but for responses that may or may not have been elicited in cross-examination." Id. at 68. This ruling, even when taken

into context with the rest of the discussion, does not demonstrate any necessity much less "manifest necessity" to any of the degrees the Supreme Court has contemplated—no matter how broadly that definition may be stretched.

After the trial court's ruling, defense counsel persisted in objecting and trying to avoid a mistrial. The court responded by asking if defense counsel's proposal, to allow the State to admit previously excluded evidence, would put the State at a strategic disadvantage. The prosecutors said it would, so the trial court also ruled that fundamental fairness required the court to declare a mistrial. Id. at 69. The trial court also noted that it was "not going to reschedule this matter anytime soon because the mistrial was occasioned by the defense." Id.

The Supreme Court's legal framework for determining whether a criminal defendant's double jeopardy rights have been impermissibly infringed spans two centuries. See Perez, 22 U.S. 579. "Perez itself noted that the judge's exercise of discretion must be sound, and [the Supreme Court has] made clear that if the record reveals that the trial judge has failed to exercise the sound discretion entrusted to him, the reason for such deference by an appellate court disappears." Washington, 434 U.S., at 510, n.28. Thus "if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate." Renico v. Lett, 559 U.S. 766, 775 (2010).

In sum, the trial court's decision to sua sponte suggest a mistrial because defense counsel's opening statement outlined details about the case he intended to elicit from the State's witnesses and to order a

mistrial over defense counsel's objection and concession to permit the State to introduce the evidence at issue in its case in chief, demonstrates the sort of failure to exercise sound discretion that mitigates the deference this Court must apply. Accordingly, the Court finds it appropriate to **SUSTAIN** Petitioner's first objection.

Based upon the record here and the Supreme Court's well established body of law surrounding double jeopardy, the Court **ORDERS** that Petitioner's Objection One be **SUSTAINED** for the reasons stated herein and those more fully stated within Petitioner's filings, but Objection Two is **OVERRULED**; Judge Trumble's R&R is **ADOPTED IN PART**, and **DECLINED TO ADOPT IN PART** [ECF No. 14], Respondent's Motion for Summary Judgment [ECF No. 8] is **GRANTED in PART** and **DENIED in PART**, and Petitioner's Petition for Writ of Habeas Corpus under § 2254 is **GRANTED**. ECF No. 1. **DATED**: September 30, 2025

/s/ Gina M. Groh
UNITED STATES DISTRICT JUDGE

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia, Plaintiff Below, Respondent,
vs.) No. 21-0964 (Brooke County No. 18-F-21)
Keith Allen Wood, Defendant Below, Petitioner.

MEMORANDUM DECISION
FILED: April 10, 2023

Petitioner Keith Allen Wood appeals the November 22, 2021, order sentencing him on two counts of sexual assault in the first degree and two counts of sexual abuse by a guardian. [1] Petitioner's female victim, A.R.R.,[2] was seven years old at the time of the assaults/abuse. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. See W. Va. R. App. P. 21.

At petitioner's trial, testimony was produced that petitioner sexually assaulted A.R.R. when the child was alone with petitioner in his house. A jury found petitioner guilty on all counts. The trial court

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[1] Petitioner appears by counsel William E. Galloway. Respondent appears by Attorney General Patrick Morrisey and Assistant Attorney General Andrea R. Nease Proper.

[2] Because of the sensitive nature of the facts alleged in this case, we use the initials of the affected parties. *See State v. Edward Charles L.*, 183 W. Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n. 1 (1990) ("Consistent with our practice in cases involving sensitive matters, we use the victim's initials. Since, in this case, the victim . . . [is] related to the appellant, we have referred to the appellant by his last name initial." (citations omitted)); *see also* W. Va. R. App. P. 40(e).

sentenced petitioner to (1) not less than 25 nor more than 100 years in prison and a $5,000 fine on each of the two counts of sexual assault in the first degree, and (2) not less than 10 nor more than 20 years in prison and a $5,000 fine on each of the two counts of sexual abuse by a guardian. The sentences were ordered to run consecutively and to be followed by 25 years of supervised release.

Petitioner now appeals raising seven assignments of error. Petitioner first argues that he was denied his right to a fair trial when the trial court barred the testimony of his expert witness, Donald Kissinger, Ph.D. Petitioner claims Dr. Kissinger would have testified that petitioner did not have a psychological disorder or any sexual interest in children, was not at risk with children, did not fit the psychological profile of a sexual offender, and was at low risk for committing a sexual offense against a child. Petitioner claims this evidence was critical to the jury's ability to assess his credibility and that the jury was instructed that character trait evidence inconsistent with the crime charged can give rise to reasonable doubt. The circuit court found Dr. Kissinger's opinions to be irrelevant and inadmissible because they addressed whether petitioner had a proclivity to sexually abuse children in the future rather than whether he committed the past crimes of which he was charged.

"'The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.' Syllabus Point 1, in part, *McDougal v. McCammon*,

193 W.Va. 229, 455 S.E.2d 788 (1995)." Syl. Pt. 9, *Smith v. First Cmty. Bancshares, Inc.*, 212 W. Va. 809, 575 S.E.2d 419 (2002).

We find the circuit court did not abuse its discretion in excluding Dr. Kissinger's testimony. The testimony was not relevant because it went only to petitioner's future potential to sexually assault children and not to his past behavior. As for petitioner's reliance on *State v. Beck*, 167 W. Va. 830, 840, 286 S.E.2d 234, 241 (1981), in support of his claim that a defendant may offer expert character evidence testimony showing that he is not a sexual psychopath, it is misplaced as the Beck court was not asked to determine whether proclivity testimony was relevant or admissible. *Id.* at 839-40, 286 S.E.2d at 240-41. Accordingly, we find no error.

In petitioner's second assignment of error, he argues that he was denied his right to a fair trial when the trial court erroneously elevated A.R.R. to a "Super Witness" by instructing the jury, over petitioner's objection, as follows:

> You are instructed that you may find the Defendant guilty of a sexual offense based on the uncorroborated testimony of the complaining witness unless you find the complaining witness is inherently incredible. The Court instructs the jury that inherent incredibility is more than a contradiction and lack of corroboration. Inherent incredibility thus requires a determination by the jury of complete untrustworthiness. The Court instructs the jury that if they believe from the evidence the crimes charged against [petitioner] rests alone on the testimony of the complaining witness, then the jury should scrutinize such

> testimony with care and caution. You are the sole judge of credibility of each witness.

Petitioner states that the circuit court refused to give a similar instruction in favor of petitioner's testimony.

"[I]f an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise de novo review." *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995). However, "when an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, this Court will review under an abuse of discretion standard." Id.

> [W]e review jury instructions to determine whether, taken as a whole and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the objecting party. So long as they do not, we review the formulation of the instructions and the choice of language for an abuse of discretion. We will reverse only if the instructions are incorrect as a matter of law or capable of confusing and thereby misleading the jury.

Id. at 671-72, 461 S.E.2d at 177-78. We find the challenged instruction to be a correct statement of the law in light of the jury instructions in *State v. McPherson*, 179 W. Va. 612, 371 S.E.2d 333 (1988), and *State v. Haid*, 228 W. Va. 510, 721 S.E.2d 529 (2011), on which the trial court relied. In McPherson, we approved an instruction that provided:

> [T]he Court instructs the jury that if you believe from the evidence in this case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, . . . then you should scrutinize her testimony with care and

> caution; although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible.

179 W. Va. at 616, 371 S.E.2d at 337. Similarly, in *Haid*, we approved the following instruction:

> A conviction for the crimes charged by the indictment may be obtained or rest on the uncorroborated testimony of the alleged victim, unless you determine that such testimony is inherently incredible. The term "inherently incredible" means more than a contradiction, inconsistency or lack of corroboration. For the jury to decide that testimony is inherently incredible, you must decide that there has been a showing of complete untrustworthiness. In this regard, you should scrutinize her testimony with care and cause.

Id. at 516, 721 S.E.2d at 535. The *Haid* Court found that:

> The instruction in *McPherson* and the instruction given in the case at bar are quite similar. Both correctly state that a conviction for the sexual offenses so charged may be had on the uncorroborated testimony of the victim, unless the testimony of the victim is inherently incredible. Both instructions direct the jury to assess the credibility of the prosecuting witness with care and caution. The circuit judge's decision to instruct the jury, without the addition of the language as requested by the petitioner, was not an abuse of discretion, inasmuch as the instruction was a correct statement of the law, and more particularly, when we consider the entirety of the jury charge as a whole.

Id. at 521, 721 S.E.2d at 540. Here, because the trial court's instruction was comparable to those upheld in McPherson and Haid, we find no error.

In his third assignment of error, petitioner again challenges the trial court's denial of his request for a reasonable doubt jury instruction ending with the phrase, "the reasonable doubt requirement is met if the evidence is such that the finding of guilt is based on a moral certainty." Petitioner cites to *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967), which provides that "the reasonable doubt requirement is met if the evidence is such that the finding of guilt is based on moral certainty. 30 Am. Jur.2d, Evidence, Section 1125." 151 W. Va. at 805, 155 S.E.2d at 855. The trial court rejected this language claiming that the phrase "moral certainty" was ambiguous. It specifically precluded petitioner's counsel from using the term "moral certainty" in closing argument.

We find no error as the instructions given by the trial court sufficiently defined reasonable doubt and were not misleading. We have said:

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise

extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Guthrie, 194 W. Va. at 169-70, 461 S.E.2d at 663-64, Syl. Pt. 4. Here, the trial court found that the addition of the phase "moral certainty" would create "a whole other level of ambiguity for this jury to deal with." Importantly, the trial court instructed the jury that petitioner "is never to be convicted on mere suspicion or conjecture" and, if in doubt, "the jury should of course adopt the conclusion of innocence." The court further instructed that "guilt must be established by strong and sufficient evidence to remove from the minds of the jury every reasonable doubt to the contrary." These instructions were correct as a matter of law. Thus, the court's decision not to give petitioner's requested reasonable doubt instruction did not "seriously impair" his ability to present his defense.

In his fourth assignment of error, petitioner argues that he was denied the right to a fair trial when the trial court denied his request to redact hearsay statements made by A.R.R. and her father to medical personnel that were recorded in A.R.R.'s medical record. For instance, the nurse who examined A.R.R. wrote the examination was "concerning" without further elaboration. Petitioner argues that those statements were not necessary for treatment purposes and, therefore, the medical records exception to the hearsay rule, found in West Virginia Rule of Evidence 803(4), did not apply.

We disagree and find that the trial court acted within the bounds of its discretion. *Smith*, 212 W. Va. at 812, 575 S.E.2d at 422, Syl. Pt. 9. The trial court properly admitted the victim's unredacted medical records under the business and medical records

exceptions found in Rule 803(4). That exception allows the admission of records containing a "statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause[.]." Further, in Syllabus Point 6 of *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010), we noted that such statements in medical records are admissible:

When a child sexual abuse or assault victim is examined by a forensic nurse trained in sexual assault examination, the nurse's testimony regarding statements made by the child during the examination is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive for making the statement was consistent with the purposes of promoting treatment and the content of the statement was reasonably relied upon by the nurse for treatment. In determining whether the statement was made for purposes of promoting treatment, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose, but it is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.

Additionally, Rule 803(6) provides that a record of an "act, event, condition, opinion, or diagnosis" is admissible if

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

The statement-containing records petitioner cites fall clearly within these hearsay exceptions. The examination occurred for the purpose of treatment, i.e., A.R.R. was sent to the hospital for a physical examination in light of her claim of sexual abuse, and the hospital records document contemporaneous statements by those who examined A.R.R. regarding their diagnosis. Moreover, the trial court noted that, for the medical documents to be complete, they needed to be admitted in their entirety. Under Rule 106 of the West Virginia Rules of Evidence, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party my request the introduction, at the time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Thus, under Rule 106, the court properly found that the records were admissible in their entirety. Therefore, we find no error.

In his fifth assignment of error, petitioner argues that he was denied his right to a fair trial due to the trial court's plain error in permitting "large, burly bikers wearing their BACA ("Bikers Against Child Abuse") insignia" to sit in the courtroom in view of the jury. Petitioner contends that the bikers' presence

likely influenced the jury and indirectly labeled him as a child sex offender.

It is within a trial court's discretion to determine, under a clear and convincing standard, whether or not a jury was subjected to an improper influence that affected their verdict. See Syl. Pt. 1, *Lister v. Ballard*, 237 W. Va. 34, 784 S.E.2d 733 (2016). Petitioner presents no evidence that the jury was unduly influenced by the presence of the bikers. Further petitioner failed to object to their presence or move that the bikers be excluded from the courtroom. Accordingly, we review this assignment of error under a plain error analysis. "To trigger application of the plain error doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Petitioner fails to satisfy this standard. "Where a defendant moves to exclude members of the public from observing his jury trial, the ultimate question is whether, if the trial is left open, there is a clear likelihood that there will be irreparable damage to the defendant's right to a fair trial." Syl. Pt. 7, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982). Petitioner fails to show how the bikers' mere presence impeded his right to a fair trial. Moreover, it was petitioner who drew attention to the bikers when his counsel asked the victim and her mother if they knew the bikers, and twice pointed the bikers out to the jury. Thus, petitioner cannot show, under a plain error standard, that the bikers' presence in the courtroom affected his substantial rights or seriously affected the fairness, integrity, or public reputation of his judicial proceedings.

Petitioner's sixth assignment of error raises a double jeopardy challenge. Petitioner's first trial was declared a mistrial due to his counsel's improper comments on opening. Thereafter, the trial court denied petitioner's motion to dismiss all charges on double jeopardy grounds. "[T]he circuit court's decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Thornton*, 228 W.Va. 449, 459, 720 S.E.2d 572, 582 (2011).

West Virginia's double jeopardy clause provides, in part, that "[n]o person shall be . . . twice put in jeopardy of life or liberty for the same offence." W. Va. Const. art. III, § 5. A trial court may grant a mistrial, and avoid the double jeopardy clause, only if there is a "manifest necessity" to terminate the trial. *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983).

> The term "manifest necessity' covers a broad spectrum of situations which in some instances bear little relationship to the literal meaning of this phrase. This is particularly true in cases where the conduct of one party at trial has created sufficient jury prejudice toward the other that it is unfair to continue with the trial and a mistrial is warranted.

Keller v. Ferguson, 177 W. Va. 616, 620, 355 S.E.2d 405, 409 (1987). Here, petitioner's right against double jeopardy was not violated because, at his first trial, his counsel created a manifest necessity for the mistrial during his opening statement when he repeatedly referenced evidence that the trial court had clearly ruled inadmissible. On this record, we find no error in the trial court's refusal to dismiss

petitioner's charges on double jeopardy grounds before his second trial.

In his seventh and final assignment of error, petitioner argues that the trial court abused its discretion in sentencing him to consecutive sentences and in denying his request for probation. Sentencing orders are reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). Sentences are not subject to appellate review "if within statutory limits and if not based on some [im]permissible factor[.]" Syl. Pt. 4, in part, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Sexual assault is a violent crime. *See State v. Hoyle*, 242 W. Va. 599, 615, 836 S.E.2d 817, 833 (2019). Moreover, petitioner's victim was a seven-year-old child. Finally, under West Virginia Code § 61-11-21, the presumption is that criminal sentences will run consecutively. Given petitioner's heinous acts against a child, we find no abuse of discretion in the court's denial of probation and imposition of consecutive sentences.

Affirmed.

ISSUED: April 10, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice C. Haley Bunn

DISSENTING:

Wooton, Justice, dissenting:

I would have set this case for oral argument on the Rule 19 docket to thoroughly examine the following

three assigned errors raised by petitioner Keith Allen Wood: 1) whether the circuit court erred in excluding petitioner's expert; 2) whether the circuit court erred in giving a "super witness" instruction over petitioner's objection; and 3) whether the circuit court committed plain error in allowing the courtroom to be filled with bikers wearing BACA ("Bikers Against Child Abuse") buttons. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted – not a memorandum decision. Accordingly, I respectfully dissent.

First, petitioner argues that the circuit court erred in excluding the testimony of his expert witness, Donald Kissinger, Ph.D., a psychiatrist. Dr. Kissinger would have testified that his examination of petitioner showed that petitioner did not have a psychological disorder or any sexual interest in children, was not at risk with children, did not fit the psychological profile of a sexual offender, and was at low risk for committing a sexual offense against a child. Petitioner argued that he had a right to offer evidence of an inconsistent character trait, *see* W. Va. R. Evid. 404(a)(2)(A), 3 and the right to an instruction that such evidence can give rise to reasonable doubt.

West Virginia Rule of Evidence 404(a)(2)(A) provides that "a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it[.]" *Id.*; see Syl. Pt. 7, *State v. Benny W.*, 242 W. Va. 618, 837 S.E.2d 679 (Continued . . .) Petitioner argues that in this case, where the victim's testimony was uncorroborated, Dr. Kissinger's testimony was a critical linchpin of the defense.

In *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981), we recognized the admissibility of a defendant's psychological examination indicating that it would be unlikely petitioner would have committed the charge sexual offense, characterizing this evidence as a "species of character testimony." *Id.* at 839 n.8, 286 S.E.2d at 241 n.8. We stated that

> [t]he trial court's initial decision to permit the psychological testimony was apparently based on authority that permits psychological testimony in regard to whether the defendant's psychological profile would suggest that he has predilections to commit the specific crime charged. *See generally*, C. McCormick, Evidence Chapter 17 (2d ed. 1972). This type of evidence would appear to be mainly confined to sexually deviant crimes. The leading case is *Freeman v. State,* 486 P.2d 967 (Alaska 1971):
>
> > "It appears to be uniformly accepted that psychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should properly be regarded to be character evidence. *See People v. Spigno*, 156 Cal.App.2d 279, 319 P.2d 458 (1957); *State v. Cypher*, 92 Idaho 159, 438 P.2d 904, 916 (1968); *State v. Sinnott*, 24 N.J. 408, 132 A.2d 298, 304–311 (1957); *Ward v. Turner*, 12 Utah 2d 310, 366 P.2d 72, 74 (1961); *State v. Bromley*, 72 Wash.2d 150, 432 P.2d 568 (1967); *See also* Curran, [Expert *Psychiatric Evidence of Personality Traits*, 103 U.Pa.L.Rev. 999 (1955)] *supra* note 4; Falknor & Steffan, [Evidence of Character: *From the "Crucible of the Community" to the "Couch of the Psychiatrist*, 102 U.Pa.L.Rev. 980 (1954)]

> *supra* note 4; and Deering's Calif.Ev.Code Ann. § 1102, at 9 (1966) (Law Revision Commission comment)." 486 P.2d at 972 note 8.

Beck, 167 W. Va. at 839 n.8, 286 S.E.2d at 241 n.8.

In the instant case, the circuit court excluded the expert's testimony on the ground that the testimony went solely to the possibility of future harm and was irrelevant to the question of whether he had perpetrated the offenses charged in the indictment. In my view, the court's reasoning was illogical and misguided. This testimony was highly probative of petitioner's defense, which was (2019) ("Under Rule 404(a)(2)(A), of the West Virginia Rules of Evidence, a defendant in a criminal prosecution may offer evidence of the defendant's pertinent character trait."). that he was not a pedophile and did not assault and abuse this child. *See State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744 (1994) ("Rule 401 defines relevant evidence in terms of probability. The relevant inquiry is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence."). The expert's testimony would have assisted the trier of fact in evaluating petitioner's defense, and the probative value of the evidence was not "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." W. Va. R. Evid. 403.

Second, petitioner argued that the circuit court erred in giving the jury a "super witness" instruction over his objection. The instruction given to the jury was as follows:

> You are instructed that you may find the Defendant guilty of a sexual offense based on the uncorroborated testimony of the complaining witness unless you find the complaining witness is inherently incredible. The Court instructs the jury that inherent incredibility is more than a contradiction and lack of corroboration. Inherent incredibility thus requires a determination by the jury of complete untrustworthiness. The Court instructs the jury that if they believe from the evidence the crimes charged against [petitioner] rests alone on the testimony of the complaining witness, then the jury should scrutinize such testimony with care and caution. You are the sole judge of credibility of each witness.

This instruction was based upon the law enunciated by Justice Miller in syllabus point five of Beck: "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." 167 W. Va. at 831, 286 S.E.2d at 236, Syl. Pt. 5.

Subsequently, this Court revisited the Beck instruction in *State v. Haid*, 228 W. Va. 510, 721 S.E.2d 529 (2011), wherein we stated that

> [w]hile the instruction does not constitute prejudicial error under the particular circumstances of this case, we do feel that the following instruction is a better statement of law in sexual assault cases where the victim's testimony is uncorroborated:
>
> > The court instructs the jury that the defendant may be convicted on the uncorroborated testimony of the alleged victim in this case. However, you should scrutinize the alleged

> victim's testimony with care and caution. Although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the alleged victim, you must be convinced beyond a reasonable doubt that the defendant is guilty. If you are not convinced beyond a reasonable doubt of the defendant's guilt, based upon the uncorroborated testimony of the alleged victim, then you shall find the defendant not guilty.

Id. at 522, 721 S.E.2d at 541. Under the facts and circumstances of this case, where a Beck instruction was given rather than the preferred instruction established in Haid, I believe a closer examination by this Court is warranted into the issue of possible prejudice to petitioner. See id.

Finally, petitioner argues that he was denied his right to a fair trial when the circuit court allowed bikers wearing BACA ("Bikers Against Child Abuse") insignia to sit in the courtroom in the jury's view. On appeal, petitioner argues that the bikers' presence indirectly labeled him as a child sex offender and improperly influenced the jury, a claim this Court can only address on plain error because petitioner failed to object below to the presence of the bikers. In this regard, "[t]o trigger application of the plain error doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Our law provides that "[w]here a defendant moves to exclude members of the public from observing his jury trial, the ultimate question is whether, if the trial is left open, there is a clear likelihood that there will

be irreparable damage to the defendant's right to a fair trial." Syl. Pt. 7, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982). I strongly disagree with the majority's determination that the presence of the biker's wearing BACA insignias failed to constitute plain error as it did not cause "irreparable damage" to petitioner's right to a fair trial. By allowing a group of people to sit in the courtroom and lobby for a conviction – which is exactly what occurred – the circuit court seriously jeopardized petitioner's right to be tried by jurors who would approach their task with open minds, uninfluenced by outside messaging. This was plain error that undoubtedly affected petitioner's substantial rights and seriously affected the fairness, integrity, or public reputation of his judicial proceedings. *See Miller*, 194 W. Va. at 7, 459 S.E.2d at 118, Syl. Pt. 7.

For all the foregoing reasons, I respectfully dissent.

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff,
v.
KEITH ALLEN WOOD, Defendant.
Case No. 18-F-21 MJO

ORDER

ENTERED: June 8, 2021

Before the Court is Defendant Keith Wood's Motion to Dismiss on Double Jeopardy Grounds and Memorandum of Grounds in Support Thereof (Motion). After reviewing the Motion, response and reply, both Indictments, the applicable law, and hearing oral argument, the Court has determined to **GRANT, in part, and DENY, in part**, Defendant's Motion.

This litigation stems from allegations of sexual assault on the part of the Defendant. The State of West Virginia brought forth criminal charges against the Defendant, which were formally indicted on March 5, 2018. After numerous waivers for term and extensive discovery, the case was eventually brought before this Court for trial. However, on the first day of trial, during opening statement, defense counsel ran so far afoul of previously entered evidentiary Court Orders that this Court had no choice but to grant the State's motion for a mistrial. In the following term of Court, the State filed a Superseding Indictment containing six (6) additional criminal counts. Hence, in Defendant's Motion, he asserts that both Indictments should be dismissed due to the legal principle of double jeopardy and W. V. R. Crim. P.

8(a)(2). Conversely, the State argues double jeopardy was surrendered by the Defendant when his opening argument caused the Court to declare a mistrial. The State of West Virginia does not address W. V. R. Crim. P. 8(a)(2), Mandatory Joinder, which requires the State bring all charges stemming from the underlying set of facts in one Indictment.

Defendant's request to dismiss all charges is untenable. The State's assertion that it was Defense counsel's actions causing the mistrial is accurate; and thus, there is no double jeopardy. Under West Virginia law, '[a]bsent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.' *State v. Lowery*, 222 W. Va. 284, 664 S.E.2d 169 (2008); quoting *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citations omitted)). However, in the present case, Defense counsel violated the Court's pre-trial evidentiary Orders. The first Order, entered on July 10, 2018, prohibited the playing of a video of the complaining witness's forensic interview taken by the Comfort House. Second, the Court entered an Order on April 17, 2020 finding that a witness designated by the State, Sarah Aspenleiter, did not qualify as an expert witness; and thus, was prohibited from testifying as such at trial. However, during defense counsel's opening statement, although it sounded much more like argument, he referenced the forensic interview on multiple occasions including detailing questions and answers that took place during that interview. Moreover, defense counsel referenced Ms. Aspenleiter's testimony and credentials. As a result of these actions, the State made a motion for a mistrial. After discussing possible

curative actions to salvage the trial with all attorneys and parties present in chambers, the Court determined it had no choice but to grant the mistrial. The Defendant cannot enjoy the fruits of double jeopardy acquittal when his actions created a 'manifest necessity' to discharge the jury and re-try the case. *See United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

Nonetheless, the State is barred from bringing a new Indictment with charges stemming from the same factual circumstances. Under W. V. R. Crim. P. 8. W. V. R. Crim. P. 8(a)(2),

> *Mandatory Joinder*. If two or more offenses are known or should have been known by the exercise of due diligence to the attorney for the state at the time of the commencement of the prosecution and were committed within the same county having jurisdiction and venue of the offenses, all such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution if they are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, whether felonies or misdemeanors or both. Any offense required by this rule to be prosecuted by a separate count in a single prosecution cannot be subsequently prosecuted unless waived by the defendant. Id.

The rule on mandatory joinder is unambiguous; and thus, the Superseding Indictment must be, and hereby is, **DISMISSED**, with prejudice. However, the initial Indictment will remain on the Court's docket and will be reset for trial.

It is further **ORDERED** that the Circuit Clerk of Brooke County provide a copy of this Order to all counsel of record.

ENTERED this 8th day of June 2021.

/s/ Michael J. Olejasz
First Judicial Circuit Court Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Glenda Brooks, Clerk, Circuit Court, Brooke County, West Virginia.
By: /s/ [*signature illegible*], Deputy

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held in Charleston, Kanawha County, on July 15, 2021, the following order was made and entered in **vacation**:

State of West Virginia ex rel.
Keith Allen Wood, Petitioner,

vs) No. 21-0518

Honorable Michael J. Olejasz, Judge of the Circuit Court of Brooke County, and the State of West Virginia, Respondents.

ORDER

ENTERED: July 15, 2021

On June 30, 2021, the petitioner, Keith Allen Wood, by counsel, William E. Galloway, Galloway Law Offices, presented to the Court a petition for a writ of prohibition and a separate motion for stay.

On July 12, 2021, the respondent, State of West Virginia, by Katherine M. Smith, Assistant Attorney, filed a response to the petition and a separate motion for leave to file a supplemental appendix. Rule 16(g) of the Rules of Appellate Procedure allows for the respondent to file a supplemental appendix in original jurisdiction cases. The respondent's supplemental appendix is ordered filed.

Upon consideration and review, the Court is of the opinion that a rule should not be awarded, and the writ prayed for by the petitioner is refused. The motion for stay is refused as moot.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

[Seal of the Supreme Court of Appeals of West Virginia]

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff,
v.
KEITH ALLEN WOOD, Defendant.
Case No. 18-F-21

STIPULATION AND AGREED ORDER PRECLUDING THE STATE'S USE OF VIDEO RECORDED INTERVIEW OF ALLEGED VICTIM DURING PRESENTATION OF STATE'S CASE IN CHIEF

ENTERED: July 10, 2018

The parties hereby inform the Court that they have had discussions concerning reaching a resolution of the Defendant's following position: the 7-10-2017 video recorded interview of A.R., the alleged child victim in this case, by Danielle L. Stroud, a nonmedical forensic interviewer at Comfort House, was done for investigative or forensic purposes, and not for diagnosis and treatment purposes and is therefore inadmissible as evidence pursuant to Syllabus Pt. 9, State v. Pettrey, 209 W. Va. 449, 549 S.E.2d 323, (W. Va. 2001).

The State intends to present the live testimony of A.R. at the trial of this case.

The parties further inform the Court that they have reached an agreement regarding the use of said 7-10-2017 video recorded interview of A.R. and they hereby Stipulate that it will not be played to the jury during the presentation of the State's case; however, the State does reserve the right to request the Court

to use the 7-10-2017 video recorded interview if appropriate for rebuttal purposes.

The parties request the Court to enter an Order incorporating their foregoing Stipulation.

After due consideration, and pursuant to the agreement of the parties, the Court does ADJUDGE, ORDER, AND DECREE that the 7-10-2017 video recorded interview of A.R. will not be played to the jury during the presentation of the State's case; however, the State does reserve the right to request this Court to use the 7-10-2017 video recorded interview if appropriate for rebuttal purposes. The Court does further Order that the Clerk shall send a copy of this Stipulation and Agreed Order to counsels of record.

ENTERED this 10th day of July, 2018.

ENTER:

/s/ Ronald Wilson
JUDGE RONALD WILSON

Have Seen and Approved:
/s/ David F. Cross
David F. Cross
Counsel for State

/s/ William E. Galloway
William E. Galloway
Counsel for Defendant

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Glenda Brooks, Clerk, Circuit Court, Brooke County, West Virginia.
By: */s/* [*signature illegible*], Deputy

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff,
v.
KEITH ALLEN WOOD, Defendant.
Civil Action No. 18-F-21 MJO

ORDER

ENTERED: April 17, 2020

Currently pending before the Court is Defendant's Renewed Motion to Suppress Alleged Expert Testimony the State Intends to Offer as Evidence from Sarah Aspenleiter, MSW, LICSW and Memorandum of Grounds in Support Thereof (Motion). After considering the Motion, the applicable law and any Responses and Replies, this Court **FINDS** the Motion should be **GRANTED in part.**

Defendant contends that Ms. Aspenleiter's testimony is inadmissible at trial. First, Defendant argues that there is no generally accepted psychological profile that applies to sexually abused children as a class. Thus, it would be prejudicial to Defendant if Ms. Aspenleiter is designated as an expert witness and opines that a profile exists and the alleged victim fits it. Second, Defendant contends that any statements made to Ms. Aspenleiter by the alleged victim and/or her mother during Ms. Aspenleiter's counseling sessions with the alleged victim are inadmissible hearsay as Ms. Aspenleiter is not qualified to be deemed a treating physician.

Conversely, the State of West Virginia (State) contends that under *State v. Edward Charles L.*, 183 W. Va. 641, 644, 398 S.E.2d 123, 126 (1990), Ms.

Aspenleiter's testimony is admissible at trial. The State primarily relies upon *Edward Charles L.*, under which the West Virginia Supreme Court held,

> Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. *Id.* at Syl. P. 7.

Therefore, in accordance with the above case law, if Ms. Aspenleiter were a licensed psychiatrist, West Virginia law would permit the State to set forth her expert testimony. However, it is vital to understand that the Supreme Court opinion in *Edward Charles L.* does not expressly condone the expert testimony from a clinical social worker. Importantly, the gravamen of the underlying Motion is Ms. Aspenleiter's qualifications and whether they are sufficient for her to be permitted to testify at trial as an expert witness. As counsel is aware, the West Virginia Rules of Evidence require a designated expert witness to qualify as such in order to offer an expert opinion at trial. Specifically, W. Va. R. Evid. 702 states,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Importantly, in the evidentiary hearing held by this Court regarding Ms. Aspenleiter's qualifications as an expert witness, Ms. Aspenleiter admitted via

testimony that she does not have sufficient 'training' or 'education' to be designated an expert as she testified that she is not a licensed Psychologist or a licensed Psychiatrist; and thus, she cannot engage in the practice of psychology or psychiatry in the State of West Virginia. See W. Va. Code Ann. § 30-21-1 and W. Va. Code § 30-3-1. Further, she testified that she has a minimal academic background in psychology and/or psychiatry. Moreover, Ms. Aspenleiter's testimony confirmed that she does not have the requisite 'skill', 'experience' or 'training' necessary to be designated an expert as she exhibited a lack of knowledge of medical literature regarding the medical debate over a psychological profile for sexual abuse victims as a class. Finally, Ms. Aspenleiter testified that she has never qualified as an expert witness in any previous legal proceeding. Therefore, Defendant's contention that Ms. Aspenleiter is not qualified to render an expert opinion in this case is conclusive. Hence, in light of Ms. Aspenleiter's testimony, this Court **FINDS** that Ms. Aspenleiter is not qualified to opine as an expert regarding her diagnosis and/or treatment of the alleged victim.

Further, because Ms. Aspenleiter's qualifications are not sufficient for her to be deemed a treating physician for the alleged victim, any statements made by the alleged victim and her mother during counseling sessions with Ms. Aspenleiter are inadmissible hearsay as the hearsay exception under W. Va. R. Evid. 803(4) does not apply. However, this ruling does not prevent Ms. Aspenleiter from testifying as a lay witness regarding any direct knowledge she may possess about the underlying allegations. Accordingly, for the aforementioned reasons, this Court **FINDS** that the *Motion* is

GRANTED regarding any expert testimony the State desires to set forth via Ms. Aspenleiter.

It is so **ORDERED.**

It is further **ORDERED** that the clerk of the Court shall send attested copies of this Order to counsel of record.

ENTER this 17th day of April, 2020.

/s/ Michael J. Olejasz
First Judicial Circuit Court Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Glenda Brooks, Clerk, Circuit Court, Brooke County, West Virginia.
By: */s/* [*signature illegible*], Deputy

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

STATE OF WEST VIRGINIA

v.

KEITH ALLEN WOOD

Case No. 18-F-21

Circuit Court of Brooke County, West Virginia

February 16, 2021

Original Transcript Pages 207-269

Joint Appendix Pages 103-118

State vs. Wood

MR. GALLOWAY: Yes, Your Honor. Thank you. Members of the jury, good afternoon. I want to start out by telling you, each and every one of you, that Keith Wood is not guilty. If you had to vote right now as the Judge already instructed you, the presumption of innocence protects all citizens of the United States, including Mr. Wood, and you would have to return a verdict right now of not guilty, you all understood that, because there has been no evidence presented.

And, as Mr. Cross accurately pointed out to you about the indictment, it is not evidence at all. It's simply a charging document. It means nothing. It's worthless, other than to bring us all into this courtroom.

As Mr. Cross already pointed out to you, the evidence is what comes from the witness stand or the Judge might instruct you as to some stipulations. One such stipulation will be that a hair or a fiber that was found on this child turned out to be an animal hair. So it's of no significance at all.

But the words of the prosecutor are those of a lawyer. They are not evidence. So you've got to really look closely at the evidence in this case.

And when you do, you'll see why I stood before you and said this to you.

Mr. Cross pointed out that the purpose of the opening is to provide you all with a preview or a list of what to expect, and I know it's going to be hard for you to remember everything because, you know, you can't take notes. So you're going to have to really focus and concentrate hard on what you're hearing. And you'll be at a disadvantage because I have notes, okay. So I ask you to pay close attention to that so that it doesn't present a problem for you later.

It's going to be what you can expect to see as evidence, what you expect to hear as evidence. And I know you all want to do a good job. There is no doubt about it. You want to do a good job. You're American citizens, and the right to trial by jury is important to all of us. So I know you want to do a good job, and that's why you really need to pay close attention to the evidence.

If you feel yourself getting tired, I feel that way sometimes, I'll reach for the bottle of water so I can drink it, or I might ask the Court's permission, may I stand, okay, so that you don't get

dozy, you don't get noddy, because you're going to be there for a while hearing testimony. So, please, do whatever it takes to stay alert the entire time.

You will be considering the charges. The charges that Mr. Cross pointed out are that Mr. Wood allegedly placed his mouth on the vagina, and licked it twice, of a seven-year old. Actually, she was born in January of 2010. So this, supposedly, happened May 1 of 2017. So she would have been seven years, four months old. And also licking the anus, allegedly, of this child one time and having the child touch his penis one time.

Interestingly, the child has never testified in this case, never, not at the preliminary hearing in magistrate court, not at the Grand Jury. Never, I've never had an opportunity to talk with this child, ever. So be paying very close attention when the child does finally testify.

The main factual point of this case that you need to keep in mind is this: There is absolutely no corroborating evidence in this case, meaning it's the child saying this happened, and the father -- and Mr. Wood saying it didn't. That's it. It's a maybe case. It's a he said/she said. We all have common

sense on trying to look at that, trying to decide the truth of a situation like that where there's no corroborating evidence, and where you have a maybe, that's not enough, not beyond a reasonable doubt. Mr. Cross indicated that he was told at some point that John Rudland or Christine Rudland asked Mr. Wood to babysit, and yet you will hear testimony, because I have it transcribed from the preliminary hearing, that Christine Rudland testified, and I asked her point blank, did you ever ask Keith Wood to babysit your child, and the answer was no. Now, all of a sudden it's yes. You know, you can't change your testimony. That testimony took place in 2017 after Mr. Wood had been arrested in, I believe it was late summer. I'll have to look at the date, but it was summertime. At any rate, you will be very mindful of that when you look at this to see what doesn't add up. And speaking of adding up, the deputy, Siranovic, who was investigating this case, he was called on -- well, he reported to the Rudland business, place of business on July the 7th, 2017, and then on July the 10th is when the interview took place at the Comfort House by a social worker to talk

to the child, a forensic interview; what happened, this sort of thing.

And you're going hear what happened there. And what happened there is what has been troubling me for the last several years working on this case.

The child, Aeolian Rudland, aged at that time seven and a half years, indicated to the person interviewing her, that the person who licked my vagina had a beard. Beard.

Keith, please, take off your mask for a moment. As you can see, this man has a very young looking face, and we will have witnesses that have known him his entire life, one of which is his ex-wife. Keith Wood has never had a beard, never had a moustache in his entire life, and his ex-wife will testify, I don't even think he can grow one.

Yet this child said, the beard touched my privates, and that deputy heard that. Did nothing else of it; just believed the child, caused Mr. Wood to be interviewed and arrested. No followup on beard.

You will also hear that this child -- wait a minute. Let me back up for a second. The charges in this case, Mr. Cross has just said to you that all of

these charges, all of these alleged lickings, sexual bad things happened between May 1 of 2017 and July -- I think he said the 10th, but the last time the child was ever in the presence of the Defendant was July the 6th, okay. And that will come out. That's not contested.

But what's important here is when asked by the person at Comfort House interviewing the child, when was the first time this happened to you, the child said, well, I was five, and then she was asked again. The second time she was asked, she said, I was four or five or three.

Now, I submit to you a child age three who has been sexually abused does probably not remember that. But it doesn't stop there, because the interviewer then said, okay, so tell me about the first time this happened to you when you were five. The child said, no, I think it was when I was three. So she said "three" two times and corrected the interviewer to say it was three.

Now, Mr. Wood was never alone with this child when she was three. All of the allegations say they happened for the very first time -- any time he was ever alone with this child started when the child

was seven years old. Mr. Cross just represented that to you. And yet here, you have the child saying three. And that deputy was in another room and heard that. So wait a minute, something doesn't add up. A person with a beard licked the child and now the child is saying three years old.

Who was around this child when she was three years old? Wouldn't that be something that you would want to investigate? I know I would want to investigate it. But I'm a little bit handcuffed here. I can't just start talking to the child. The deputy could, and he didn't. I asked him, did you figure out who else was in that house? No.

And the father, you'll see later, and I'm trying to cast no aspersions on the father because I am not the Prosecuting Attorney and I am not the police officer in this case, but the father has a full beard and a mustache. And I asked this mother on the witness stand in magistrate court, does the child ever sleep with the father? I don't know anything about this case. I'm brand new into the case, just trying to do an investigation. Answer, no.

I hadn't found that picture yet that the

child was in bed with the father. I found it later on social media. So we couldn't ask Ms. Rudland to explain that, as Desi Arnaz used to say to Lucille Ball, 'splain it to me, because that just does not add up.

So now there's a lot of things here that don't add up. Child says three years old. Child says beard. Okay. And the mother is not telling the truth about the child being in bed with the father, sleeping. Their eyes are closed. You'll see the photograph.

But it doesn't stop there. Now we go from -- the lady's name is Danielle Stroud at Comfort House, Danielle Stroud, Comfort House. At some point, the child starts getting counseling by a social worker named Sarah Aspenleiter, just clinical counseling, talking to the child, and the child tells Sarah Aspenleiter that the person's beard touched my privates.

So, again, not just the first person, but a second person. But it doesn't stop there because she goes on and says that the mustache, on another occasion, the mustache, that this man who is licking my privates has, hurt.

Well, as you saw with Keith Wood, he has never -- well, he showed you just now, he's never -- he doesn't have a beard, doesn't have a mustache and never has. And had that deputy interviewed any of the neighbors who have known Keith Wood for 20, 30 years, any of his family members, anybody in the community, church, et cetera, they're all going to verify he's never had a beard or a mustache, has never been rough-shaven.

It gets even worse for the prosecution's case. Why do I say that? Because the child was then playing in the sand at Sarah Aspenleiter's place, and put, I guess it's called sand therapy, something like that, and he put -- she, the child, put two male figures in the sand. And Sarah Aspenleiter says, who are those male figures?

The child says, that's Keith, you know, the one who -- eventually, through coaxing, who Sarah Aspenleiter got the word out of her mouth -- abused me. I have two kids, and I've never heard them say "abused" when they're seven years old, but this one said it. I don't know, coaching, maybe? Keep an eye out, let's hear it from the witness stand.

So one is Keith who abused me. She says,

okay. Who is that other figure? Who is that other man? Oh, that's my brother, Keith. Bells and whistles went off in my head when I saw that because I didn't have that information at the preliminary hearing. I got it later conducting my investigation in this case.

And I remember, specifically, asking the mother, Christine Rudland, does this child have any siblings? She has one, an older sister. And I didn't know at the time. What about brothers? No, she has no brothers. So something doesn't add up here, and Christine Rudland is going to have some more explaining to do.

Why would Aeolian, the child, tell Sarah Aspenleiter that that other figure is her brother? It gets better.

She said, what's your brother's name? Keith. So then when the child starts saying, Keith did this and Keith did that, you have to pay a lot of close attention, who is she talking about? And when I say Keith did this, Keith did that, I'm not talking nice things, I'm talking sexual things. That raised the antenna for me big-time.

So I had to investigate further, and you

will find out that at one point, Christine Rudland was previously married to someone by the name of McManaway. They had gotten married in Pennsylvania. You don't come by this evidence easy, people. Okay. You have to look for it.

So McManaway was a prior name. So with McManaway in tow, I just took a wild guess. Let's see if there's a Keith McManaway. There is. He's now 34 years old.

At the time, he would have been 30, 31 years old. And he has a scruffy beard and a scruffy mustache. You know, not this kind of a beard which is kind of long and soft. He's got the kind of beard and mustache that is bristly, tick -- you know, stubby, that's the word, stubby, okay, the kind that would hurt if he would kiss you or lick you.

And, fortunately, I was able to obtain a picture of Keith McManaway. So we're going to ask the child about that. And, again, the mother, who is this Keith McManaway? Who knows, maybe she was -- maybe it was a stepchild of the mother. I don't know.

But I do know that when I was asking these kinds of questions, she denied it, and yet the child

says she has a brother named Keith. Things just don't add up here, they don't.

So, you know, at the end of this trial, you're going to be asked to find somebody guilty beyond a reasonable doubt. It's not going to happen. What I'm telling you now, which I wish you could take notes, what I'm telling you now, hold me to this, is how the facts will be when they come into this courtroom. I'm positive of it.

So there is no corroborating evidence in this case. The allegations are simply those of this Aeolian Rudland, who, I guess now she's about 11. Yeah. She was born in 2010.

So what other evidence don't they have?

Well, Mr. Cross mentioned DNA, and we probably heard DNA, if you watch any of the TV shows with the cops and that kind of stuff, DNA is, basically, a genetic fingerprint. Okay. So you know if you have a fingerprint, it's yours, and it's nobody else's. It's unique to you.

Well, the DNA is a genetic fingerprint. It's unique to the person who left the DNA there or the DNA got left there. And I said that deliberately. So watch my words carefully.

Basically, it's body cells. Whatever body cells you have will leave DNA.

So, for example, if I shook your hand, I left DNA on you because I'm always -- people are always shedding their DNA. You didn't know this. Maybe you did. But if I shook your hand, I left DNA on your hand.

Now, if the person's hand that I shook went out and did something bad with a gun or a bat, it's quite possible, and Brittany Antonucci will confirm this, it's quite possible that my DNA could be left on that bat or left on that gun because I simply shook your hand. It makes you think about it the next time you shake somebody's hand. I'm always doing fist bumps now. But not for that reason; because of COVID. But now that I've gone over this case, maybe I will.

So there's two different types of DNA. One is called primary DNA, where, if I touch you or touch something here, that's my primary, I left it there. But if you come along, if I touch that door knob and you grab that door knob and you get DNA on you, that's secondary DNA. So there's any way, shape or form -- DNA can be spread any way, shape or form, and

it's quite possible that that happened.
Now, talking a little bit more about the DNA and I'll move on. The child was last in the presence of Mr. Wood on July the 6th. On July the 7th -- oh, I've got to tell you this. On July the 6th, the child came back from visiting Mr. Wood. She loved to go there, absolutely loved it, because he would let her, oh, watch cartoons or he would let her play darts. He would do things with her.
You have to remember that the parents are running a business and they're not necessarily paying attention to the child. And as Mr. Cross pointed out, one of the character traits of Keith Wood is he is a helpful person, kind, gentle, caring, helpful person, and he could see how the child was just bored to tears.
And when asked, could she ever come over and just play with your dogs sometime, well, okay. She can come over for an hour. It wasn't him asking them; it was them asking him. And because of the kind of man he is, he permitted it.
You're going to hear testimony from character witnesses that are going to verify that that's the kind of character trait he has. He's a

kind, gentle and caring man. If he's guilty of anything, it's being kind, caring and gentle. And that's not a crime.

You will see that the DNA was found then on July the 10th. The last time she was with him was on July the 6th, had a nice time, came back, and what she did when she returned on July the 6th was she painted a picture for him.

As Mr. Cross pointed out to you about children's mannerisms, there's no sign that says leave your common sense out. I mean, you're allowed to have common sense. What child who is being abused would want to paint a picture for the abuser and then go back and give it to the abuser? You know, they're going to want to stay away.

So she painted a picture, and the mother and father wouldn't let her go back to give it to him. Oh, no, no, no, you have been over there already, you don't need to go. Well, you will hear that this child was pretty insistent and she actually threw a hissy fit, if that's the right word, or got very upset, wanted to go back, was absolutely adamant that she wanted to go back. And, of course, she was told no, and that ended the evening. She wasn't allowed

to go back.
The next day, the mother asked, you know, what caused this, and that's when the allegations came out about Keith, which doesn't make any sense. I mean, here's a child who's bored, craves attention, who is prone to being very outspoken to get her way, and now she's making allegations like this. It just doesn't add up.
But when the deputy talked to the child, and he'll indicate he talked to her for like ten or twenty seconds, that was it, that was it. Everything else was with the mother, the one who denied the father sleeps with the child, the one who denies that she has a son, you know, that mother.
So anyway, on the 10th is when she went through this test at UPMC. It's a sex crime kit. Most forensic scientists will call it a sex crime kit. They don't call it a rape kit. There's no allegation of rape here, okay. But it was six, seven, eight, nine, ten day -- four days. Four days.
Now, I would have loved it if they would have taken her immediately, okay. But they didn't. They waited until the 10th. So by the time she went there on the 10th, and you're going to hear testimony

from Brittany Antonucci, if this child took a shower, that will wash off DNA. If this child wiped herself, you know, after urinating or after defecating, wiped herself, DNA goes away.

And there's no indication from Brittany Antonucci, that's the forensic scientist, has no idea whose DNA that is. It could be anybody's. It could be primary DNA. It could be secondary DNA. It could be DNA -- I even asked her, I said, is it possible somebody was folding laundry, a male was folding laundry, and then the child put on the underwear? Mr. Galloway, anything is possible with that kind of stuff.

So I don't know whose DNA it is, but the government has the responsibility of proving that Keith Wood did this. They simply can't.

So let's keep on going with what the evidence will not be. There was no sperm found at all, no sperm, none, zero, zip, zero, none. No hairs or fibers, because it was already stipulated the hair or fiber they found was, what, an animal hair, not a human hair. No DNA in the vagina. Nothing.

So then they examine the body at UPMC and made a notation that it's a normal genital exam.

Now, they did find some inflammation in or around, and you're going to get a little bit of an anatomy lesson here, you've got the vagina, you have the vulva, you've got the labia minora, that kind of stuff all going on with the female anatomy. And they did find some inflammation there. But when you read through the UPMC records -- and you're going to get them, you'll have a chance to look at them -- the type of inflammation they used is a real big word. I don't even want to try to remember it. But it boils down to inflammation, and I'll ask the UPMC expert when they testify. Just boil it down to inflammation.

And how could it have got there? Not proper hygiene. Ah, another bell went off in my head; not proper hygiene.

They do not have running water at this business. So if they have to go to the bathroom, they go into the forest and go to the bathroom. Well, okay for a guy, it's easy to do that, but for a young lady to go to the bathroom, a little girl to go to the bathroom, if she doesn't wipe herself properly, that can cause this kind of inflammation.

Here's another important thing. So I'm going to move on from there. Oh, by the way, the child, as part of her talking with Sarah Aspenleiter, made a little book, a storybook, and it's entitled How Aeolian Got Abused. And I'm curious how that title came up. Again, seven-year old using that word just doesn't fit. But anyhow, that's what it's titled.

And in that book, there's a part where it says, he put -- he put his privates into my privates, and she already explained that privates for a guy is a penis because she had pictures and she circled the penis, and privates for a girl is her vagina, also butts, but that wasn't what was part of the storybook. But yet she has a normal genital exam and no indication that there was any penetration at all, yet the child says, he put it in me. So it doesn't add up again. Things just don't add up here.

Next is something else that they do not have. The child -- think about this. Remember, you don't have to leave your common sense outside. Somebody abuses you, run home, mommy, mommy, guess what the neighbor just did to me, that's called an excited utterance, that's admissible. Even though

it's hearsay, it's admissible because it's deemed to be reliable because it's an excited utterance where you don't have time to even think about it. You're just screaming it out. Like if I was standing on a street corner and I saw a car jump the corner and hit a child, I could say, oh, my gosh, the car just hit the child. And even though they couldn't find me, I'm no longer available, somebody heard me say that, I've actually had that admitted in a Court before. That's an excited utterance, that kind of stuff. That didn't happen here. This child never ran home and exclaimed, hey, guess what happened to me. No excited utterances, no instantaneous outbursts -- about this kind of stuff -- nothing. There was also no eyewitnesses, none. It's what I told you in the beginning, it's a he said/she said. That's a maybe. Not beyond a reasonable doubt.

The government has no evidence, you'll see, the government has no evidence to satisfy its burden of proving that the child is telling the truth. The government has the burden of proving the child is telling the truth. Remember, the Defendant has no burden. The Defendant is presumed innocent. They

can never ask and, unfortunately, he didn't ask that in opening, but they can never ask why would the child lie. That's not up to us to figure out. Why would a child lie; how many stars are in the sky? Seriously, think about that.

You were asked earlier, do you think that it's possible for a child to lie, and you were all like, yeah. And for what reason? I don't know. We can get into that in a little bit. But, again, I don't have to prove that. They have to prove she is telling the truth and overcome all of these doubts that I just told you.

Now, you're going to hear testimony from quite a number of witnesses that are character witnesses, and they are going to talk about Keith's character traits, like he's clean-shaven. You're going to hear from Keith's ex-wife, ex-wife, ex-wife, she is remarried, so it's ex-wife. When asked about Keith, and I said, I have something very personal to ask you, she said, I think I know what you're going to ask me, because she knew what the charges were. She says, Keith Wood has never committed oral -- done oral sex to me, never, never done oral sex. Ask Keith Wood why. Because he doesn't want to put his

tongue where people pee. And now he's being accused of putting his tongue where a child pees, a seven-year old child, where a child poops? It doesn't add up, and you're going to hear from Karen Petrella. She's actually a retired nurse now. She lives in Steubenville.

All of the other character witnesses are going to testify similar to that, that they have never seen him do any inappropriate conduct toward children, that he has always been kind and caring and gentle and all he wants to do is help people. And none of them believe that this is true.

MR. BARKI: Objection. Can we approach?

THE COURT: Yes, you may.

(The following discussion was held at sidebar, out of the presence of the jury.)

MR. BARKI: This is ridiculous, Your Honor. First of all, first off, he violated the Court's Order from this morning when he specifically didn't start talking -- he's talking about terrible acts that they observed and didn't observe as opposed to charter traits.

Second off, their belief as to what he did or did not do is not even relevant testimony to be

presented in this case, and he knows that. And for him to be making these representations in opening arguments is inappropriate.

THE COURT: Mr. Galloway, the last thing anyone wants to do is object on the opening or closing of another lawyer's statement, but I have found your opening to be rife with argument, and you must now stick to the basic facts of things that you know are to be admissible from witnesses and conclude.

I'm going to sustain the objection. Please continue.

MR. BARKI: While we are off the record out of the presence of the jury, when we conclude opening statements, I would like to have a brief meeting in chambers before we start taking witnesses.

(In open court.)

MR. GALLOWAY: You will see that the evidence is that the Defendant has never had a beard and never had a mustache, yet the child claims that that happened.

Sometimes, you know, children use -- children report abuse to deflect blame. It puts them in a dilemma. They don't want to disclose who is

actually committing the abuse, but they want it to stop, yet they're fearful of the consequences of truthful disclosure. Sometimes children lie for attention. Again, how many stars are in the sky. I don't know. But this is what's going to come out and you are still allowed to apply your good common sense to this. Such misreports will often deflect blame from the true perpetrator.

So in conclusion, ladies and gentlemen, in conclusion, you will see that this case is going to boil down to nothing but a he said/she said, it's a maybe, and there's no corroborating evidence at all. It can't be corroborated. It can't be supported. In fact, it's very contradictory.

The deputy, in his own words, you will hear his audio at some point, he said that this case was given to him by the sheriff and the chief deputy with the goal being to clear the case, period. And I listened to that two or three times. That's all he said. It wasn't to clear the case by charging the correct person with the crime. It was to clear the case.

So you're going to be asked in closing here to -- and that was just one thing in that audio. But

listen to it very closely. Listen to Mr. Wood, who was absolutely flabbergasted and surprised as to why he was even being interviewed by the police. He had no idea. They hadn't warned him in advance. And when this was sprung on him, it was, what? Okay. So whether this child was sexually abused or not, I don't know. Maybe she was, but it wasn't by Keith Wood. But the investigation did not go far enough and that's the deputy's fault.

So you are going to be requested to refrain from deciding this case until you're told to do so, until you're said, okay, now you can decide the case. And up to that point, you're always going to be maintaining the presumption of innocence.

Of course, your decision is going to be extremely important, as you might imagine. It's going to have a tremendous impact on the life of Mr. Wood. Will he be allowed to return to a normal life, to his family, to his friends, or will he be labeled as convicted as a sex offender, as a felon. And, of course, then he'd have to be dealt with by the Judge because that's the Judge's responsibility if he's convicted.

I will speak with you again after all the

evidence has been presented. Remember what I told you. And I assure you that what I've told you is how the facts are going to come out. It's a he said/she said, and there's no corroborating evidence. It just doesn't add up.

In fact, in the audio, the deputy even says words to that effect; it just doesn't make any sense, it just doesn't add up. Well, yeah, it doesn't. And by the time he interviewed Keith Wood, the deputy interviewed Keith Wood, he'd already heard the child say, a person with a beard touched my privates, and he'd already heard the child say, age three, twice. That's why it doesn't make sense.

Thank you for your attention. I will talk with you later.

THE COURT: Thank you, Mr. Galloway.

Any motions to sequester witnesses?

MR. BARKI: I'll move to sequester witnesses, Your Honor.

THE COURT: Very good. Then, ladies and gentlemen, everyone that's here in the gallery, if there is any way that you feel, whether you are under Subpoena or you are otherwise in attendance here for the purposes of rendering testimony, or if there is

any reasonable assumption that you may be called upon to render any rebuttal testimony, you are to leave the courtroom. If you do not leave the courtroom now and you remain during the pendency of testimony in this case, and then later you will be excluded and you will not be allowed to testify.

MR. BARKI: Your Honor, that is, of course, except for our case agent, Deputy Shane Siranovic.

THE COURT: Exactly, except for the State's representative.

Any matters that the parties desire to take up before we hear from our first witness?

MR. BARKI: Yes, Your Honor, briefly.

THE COURT: Ladies and gentlemen, we are going to go ahead and we're going to take a ten-minute break. The jury room is now yours. Once the court personnel and the parties' lawyers leave the courtroom, no one will be permitted to remain in this courtroom except for security, Court personnel and our jurors. This is their room whenever we are on break.

Feel free to stretch your legs. And if you need to use the facilities outside the door, please let the bailiff know before you go.

All right. We'll stand adjourned for a moment.

(In chambers.)

THE COURT: We are now on the record in chambers away from our jury in the matter of State versus Wood, 18-F-21. Opening statements have just concluded. At the request of the prosecution, we have adjourned to take up a matter. Before we begin, let me just ask, please, counsel, everyone to keep their voices down since the jury is not in a jury room. They are in the courtroom right behind that thin wall.

And just that being said; Mr. Barki?

MR. BARKI: Your Honor, defense counsel's opening statement raises two huge red flags to the State regarding what evidence is to be admitted in this trial and what evidence is to be excluded in this trial, and with leave of the Court, I will ask Mr. Cross be able to chime in if need be because some of these evidentiary rulings were not made in my presence. It was prior to me joining the trial of this matter.

But, in particular, there was a motion made before Judge Wilson, that this Court subsequently

adopted, that the statement of the child made during the course of her Comfort House interview, statements made to the -- I can't remember her name, Danielle Stroud, and the recording were deemed inadmissible.

In opening statement, defense counsel was going over and over and over again statements that he was recounting made by the child to Danielle Stroud during the course of the interview. So the statements made are either admissible or inadmissible.

He asked for them to be excluded, now he seeks to cherry-pick certain statements out to use in his opening statement, and I can only presume he intends to back that up with evidence to be presented at the trial, which would then undoubtedly make the Comfort House reporting and interview incomplete admissible to this trial.

The same thing applies to Sarah Aspenleiter's treatment. We had a whole hearing on this where the Court made a determination that because she was not, in the Court's eyes, a psychological medical provider, that her -- the statements made during the course of the counseling and treatment were thus inadmissible. Yet defense

counsel went on and on about statements made during the course of treatment.

The Defendant doesn't get to pick and choose what is admissible in these statements and what is not admissible.

So it is important for the State to know, at this point, are these coming in, so that we know how we can question our witnesses or are they excluded.

MR. CROSS: Your Honor, Rule 105 of the West Virginia Rules of Evidence is specifically on point in regard to this issue. The rule says, if the Court admits evidence that is admissible against a party for any purpose, but not against another party or for another purpose, the Court on timely request must restrict the evidence to its proper scope and instruct the jury accordingly.

And then we have Rule 106, which is the remainder or related writings or recorded statements. And it says, if a party introduces all or a part of a writing or recorded statement, an adverse party may request the introduction at that time of any other part or any other writing or recorded statement that, in fairness, ought to be considered at the same time.

At this point, based on Mr. Galloway's

opening statement, it is clear that the entire recording of the child's statement given to Danielle Stroud at the Comfort House should, in fact, be admitted so that the jury can actually see what the evidence is, since Mr. Galloway, in violation of the Court's prior Order, went for five minutes during opening statement addressing what that evidence would show.

Additionally, the medical records that the Court excluded were also referenced repeatedly by Mr. Galloway. They are medical records pertaining to the child's treatment by Sarah Aspenleiter. He referred to them during his opening statement and the Court indicated previously that she couldn't testify as an expert and her medical records were not admissible at the trial of the matter.

So those medical records should now be admissible and Sarah should be able to testify as an expert in her field, not just a fact witness, but as an expert in regard to counseling because Mr. Galloway, also during his opening statement, addressed those things as well. He raised the issue well, nobody can say, you know, what would cause a child to do this, that kind of thing.

So that raises the specter of whether she should be able to render an opinion with respect to her treatment of the child and why the child may say or do certain things based upon the fact that she has been sexually abused.

THE COURT: Mr. Cross, the statements that you're referencing, are those some of the things that came about when the counsel was discussing the sand play?

MR. CROSS: Yes.

MR. BARKI: Part of it is the sand play, Your Honor. The other part, and I have reviewed the records myself, very clearly, there is a statement where she says, Keith's beard scratched me down there. And it was a very direct statement, when the child said it was Keith's beard. He did reference that.

Again, obviously, that is relevant to the defense he intends to present, and that's fine. But she also identifies Keith Wood as her abuser dozens of times during the course of her treatment. So he doesn't get to cherry-pick the one Keith's beard language because it helps his defense and have everything else excluded because it hurts it.

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THE COURT: Mr. Galloway?

MR. GALLOWAY: Yes, sir. Thank you. In regards to the two points that the government has raised, the ruling of Judge Wilson indicated that the Comfort House forensic interview is not to be admissible as part of the State's case in chief but is available for rebuttal. That was the ruling. It had nothing to do with me. I did not violate that Order whatsoever.

Second, Mr. Cross keeps wanting to refer to Sarah Aspenleiter's notes as medical records. They are not. She has clearly been cross-examined extensively. She is not a psychologist, not a psychiatrist, not a medical provider. She even admitted that at that very lengthy hearing which, fortunately, that was yours, you didn't need to rely on Judge Wilson, and you indicated that, no, she is not a psychologist, not a medical provider and those are not medical records, and they don't come in. So her records were not admissible.

Nonetheless, in your ruling, you indicated that doesn't mean that she -- if she has some direct evidence, that she is allowed to address that, and direct evidence is exactly what Mr. Barki had pointed

out as part of my defense.
The man's beard was scratchy and it hurt me down there, the man's mustache was -- it hurt me down there; and I have no problem, she did say Keith, he is right, that is written in the report, that is important to see, but with the sand play, she identified a brother. So what -- anyway, I believe they are able to come in.
And if they want to cross-examine her or not cross-examine her, if they want to examine her on that and pursue that, fine. That is exactly what they should be allowed to do. I have no problem with that. But to say I can't bring anything where the child says she was three years old twice, that's really relevant and that needs to come in and that's still part of the evidence in this case.
MR. BARKI: Your Honor.
THE COURT: One second, Mr. Barki.
Mr. Galloway, I couldn't disagree with you more. And I probably should have seen the Pandora's box that was being opened when I saw you filed the transcript from the Harmony House interview.
Sir, you simply can't move to exclude evidence of the Harmony House, which I am absolutely

certain should be excluded under the Pettrey, and then go ahead and start alluding to statements made in that interview. The only way that that could possibly be relevant and admissible would be under cross-examination if -- I'm sorry, what's her name -- if Danielle Stroud started testifying in a way that was inconsistent with what she had said during interview.

But that is a legal impossibility since Ms. Stroud was only going to be able to testify that this child actually was referred to her agency for an interview.

Then with regard to Ms. Aspenleiter, we have the same problem again, sir.

Upon your motion, we excluded all of the counseling and all of the hearsay that would be refuted in the record of the girl speaking with Aspenleiter. You cannot then, in this inadmissible evidence, bring it back around to try and introduce it unless it would be for purposes of cross-examination if, in fact, Ms. Aspenleiter made inconsistent statements.

But -- because she is also being severely restricted to only state that the girl was referred

to her for counseling, counseling was undertaken to try and refute any kind of claim of the defense of a theory of was she really abused if she didn't go and seek treatment. I thought the rulings were very clear on here.

However, Mr. Barki and Mr. Cross were extremely indulgent and did not object to these particular things as they came in. It was only later on in your opening statements where Mr. Barki did then lodge an objection. And you were warned that you went far afield, didn't even blur the distinction between an opening statement and actual argument. But because there was no particular objection lodged while the statements were being made to the jury, I'm not going to -- I'm not going to give any kind of curative instruction to the jury with regard to what was or was not said at the Harmony House or what was or was not said at Aspenleiter's treatment. You are simply going to have to live with that, sir, if the jury finds themselves befuddled as to why they did not hear what you told them they were going to hear.

Anything further, gentlemen?

MR. GALLOWAY: Yes. In regard to the

Comfort House interview, the child's statements that she was three years old when this happened are absolutely relevant and they need to come in. To exclude those could very well subject this man, who I believe to be not guilty, to a conviction.

THE COURT: You have to stop that, Mr. Galloway.

MR. GALLOWAY: I understand. But you can see why I'm saying that, because after I saw all these things that just don't add up, that has to come in.

THE COURT: Then, Mr. Galloway, why did you move to exclude that interview which the State was trying to enter?

MR. GALLOWAY: When I did that, that was about three years ago, before I had gotten into this case as thoroughly as I am into it now, and when I got into it now and saw the child is actually saying age three and the mother had said no, she was never alone with Mr. Wood until age seven, that changed the whole complexion of it.

So it is absolutely critical for his defense that it comes in.

THE COURT: All right, then. To be fair,

and I was not looking at this with both eyes open, but it is not simply admissible for the cross-examination of the interviewer or the counselor. It could come in under cross-examination of the complaining witness.

MR. GALLOWAY: Yes.

THE COURT: But I have to caution you, if you are going to utilize this during cross-examination of the complaining witness, then, you know, under Rule 105 and 106, then everything is going to come in.

MR. GALLOWAY: I understand that and that would be acceptable.

THE COURT: State's position?

MR. CROSS: That is what we were asking for, that everything should come in.

MR. BARKI: I just wanted to -- we were either pregnant or not pregnant. That was the issue. We prepared our witnesses like this was evidence that was unable to come into this trial, and then he addressed it as evidence that is absolutely coming into this trial. So once that door is open, I'm just -- I just wanted to make it clear now that once that door is open, it needs to all come in, like the Court

had indicated.
And it's the same with Ms. Aspenleiter.
While there may be a few things there and the State's complete intention was to call Ms. Aspenleiter, talk about her counseling, talk about PTSD treatment, talk about the things she has identified during her counseling and PTSD and not any specific sexual assault statements, anything of that nature, and -- but once we start digging into that, it can't just be excluded to one phrase. It has to be all of it, all of the statements that the child has made. So --
MR. CROSS: Your Honor, I have a question. I think it's my understanding of the Court's ruling, at this point, that those items would be admissible. Do we need -- Mr. Galloway's requesting that they be permitted.
So can we introduce that evidence in our part of the case or is it something we need to wait until cross-examination for? I mean, he has changed his position completely in regard to the not wanting these things excluded but actually admitted.
MR. GALLOWAY: Mr. Cross is addressing my position. I want to make my position -- it's not quite like that.

THE COURT: Please do.
MR. GALLOWAY: I agree in regard to the Comfort House interview, if under Rule 105, 106, in the interest of completeness if they feel they need to play that whole interview because I'm asking questions about it, that is understandable, and it is acceptable.
In regards to Ms. Aspenleiter's notes, she already indicated she is not an M.D. Those are not medical records. So there is a lot of hearsay in there. And they -- excuse me, there is a lot of hearsay in there. There is a lot of, well, I was told this by the father, I was told this by the mother, and it doesn't make sense, and it's not necessary to come in because I think it will be confusing to the jury as to what is necessary for treatment of this child and what is not.
So I have a problem with all of Aspenleiter's records. If -- the two pages or three pages that I brought up about the beard, the mustache, and the sand play therapy, I understand that and I knew I was running that risk. If they want to bring in the entire page that's on, they're going to attempt to do so, I caution them they are

doing so at their own risk because there are some statements in there that are clearly not admissible. But I understood that when I brought this out and if they want to bring it out, that's fine. I just ask you to take a look at it before you say it's admissible. I understand that.

So those three areas, that's fine. But Sarah Aspenleiter's records are at least a half inch thick.

THE COURT: And Mr. Galloway -- and I do appreciate that. There is a difference between the statements that were made by the Rudland girl to the person at Harmony House. That's a -- it has a definite beginning and end. It all happened at the same time. It's a statement, question and answer. And if you discuss that in cross-examination, then, yes, it should come in in its entirety.

With regard, though, to the Aspenleiter records, we are not going to bring them in in their entirety, but all the salient parts, whether it be from that particular line of therapy or on those particular items that were mentioned, then they could come in.

But, sir, I want to make it very clear for

the record, you are now conceding and not objecting to the State using the Harmony House interview in its case in chief?

MR. GALLOWAY: If that's the only way that I can get that evidence in, then yes, I am agreeable to that.

THE COURT: No, sir, it is not the only way. But if you, on cross-examination, go down that road with any prior inconsistent statements of either the girl or the interview, then it would come in.

MR. GALLOWAY: Okay. That's understandable.

THE COURT: So let me ask you again, are you agreeing to allow the prosecution to use that statement in its case in chief?

MR. GALLOWAY: As you have just explained it, yes, sir.

THE COURT: All right.

MR. BARKI: I'm a little bit confused, Your Honor. Just regarding the Aspenleiter records, so I understand, the Court is ruling that all of her records are not coming in, and I understand that Mr. Galloway intends to ask her some specific statements regarding the child making specific statements, sand play, beard, whatever else.

The Court's ruling is that I can't just then throw the whole pile of records in, but once he opens up the door as to specific statements that the child made regarding Keith Wood, there, again, are dozens of specific statements the child made regarding Keith Wood in that she identifies him; specifically, she describes the acts that took place.

I think once you open that Pandora's box, all of that comes in. Whether the actual record itself is admitted is really -- you've got to go through a whole procedure to admit that as a cross-examination extrinsic document, anyways, but once she opens that door, I think the State gets to follow up with some redirect on all the subsequent or additional statements, if I'm understanding correct.

THE COURT: What are the particular issues that you addressed in your opening, other than the sand play issue, the issue of identity of Keith and the beard? What else was there?

MR. GALLOWAY: And the mustache. There was an indication that the beard scratched me, there was an indication that the mustache scratched me, and there was an indication that there are two Keiths in the sand play. So those are the three areas I

touched on from Sarah Aspenleiter's records.
MR. BARKI: There was more than that, Your Honor. He went on and on about the child using the term "abused," what seven-year old would come up with the word "abused," which Ms. Aspenleiter would be able to address specifically, but also the book that was utilized or written by the child, how Aeolian was abused, was one of the other things.
But, again, the point is, Your Honor, is that he is picking certain statements regarding Keith allegedly abusing the child but ignoring all the other statements regarding Keith abusing the child that are in no way consistent or helpful to him.
And I get the Court's ruling, but there still has to be a completeness to this line of questioning in regards to instead of just getting to ask the one question that is helpful, but excluding the State from asking any of the other questions that are hurtful.
It is just -- it doesn't balance out. It doesn't make any sense. If the door is opened to ask the helpful question, it opens the door for the ones that are consistent with her statements.
When you are proving her inconsistency, we

then get to establish, no, she has actually been way more consistent than inconsistent.

THE COURT: Mr. Galloway?

MR. GALLOWAY: Yes. In regard to the little book the child prepared, that was disclosed as an exhibit of mine and Mr. Cross is very much aware of that, and in that book, it says, abused by. So that's fair game.

In regard to the State wanting to ask Ms. Aspenleiter then to try to rehabilitate, whatever word she wants to use when I'm asking about Keith, the brother, go ahead. I mean, ask him did she ever accuse Keith -- I don't think she ever said Keith Wood.

I think you said Keith, you know, and then she points to her private areas, yeah, that's fair game. I wouldn't have raised that if I didn't think that was fair game. But as having that as fair game on this testimony to combat that is completely different to saying here's all of these notes. That's not appropriate. There is no exception to the hearsay rule.

MR. BARKI: I'm sorry. See, Mr. Galloway has hit the nail directly on the head. In the

statement that he wants to use where she refers to him as Keith, she says, I don't know that she ever really refers to him as Keith Wood. There are dozens of statements and identification throughout her counseling of Keith Wood. And he wants to segregate all of those and say, well, look, she doesn't even identify him as Keith Wood.

She talks about Keith, the neighbor. And he wants to keep it focused on this one small incident that occurred and, obviously, I don't remember the date, but I don't even know that it was in 2017. It may have been in a 2018 counseling session which occurred, you know, more than a year later, and he wants to segregate it and say, just look at this and ignore all the other times where she did describe Keith, her neighbor, who she visited, who was her best friend, who did this to her.

And I think you have to be able to give the complete picture of the identifications or it has to stay out.

THE COURT: I agree, Mr. Barki. I don't think I'm going to be able to craft a reasonable solution to this problem.

Mr. Galloway, it is simply all in or it is

all out. So you need to decide if you're going to withdraw your objection to the medical records of Ms. Aspenleiter, counseling records of Ms. Aspenleiter which are replete with hearsay of the child, then the State will be allowed to use it in its case in chief.

If you persist and don't object and want the Court to stand by its prior ruling that the Aspenleiter treatment notes will not come in, then you can't get them in through Ms. Aspenleiter. But if he gets them in through the child because of inconsistent statements, then the child will be able to testify to other parts of that record and the State would then be able to call Ms. Aspenleiter for her full counseling notes.

MR. GALLOWAY: I believe that the sand play therapy where she identified the brother absolutely is relevant and has to come in.

I believe that identifying the person that listed --

THE COURT: Stop right there, sir. What you need to remember is it has been excluded because it is an out-of-court statement going to the truth of the matter asserted. It is hearsay which has been

ruled by this Court, at your motion, to be excluded. You cannot decide which parts of the hearsay that you now want to dip into the treatment to pull out and, as Mr. Barki used the word, cherry-pick.

MR. GALLOWAY: I understand what you're saying. Maybe I'm not explaining myself very well. But if the child makes an inconsistent statement, for example, if I said, did you ever identify somebody as your brother when you were talking to Sarah Aspenleiter, if she says, yes, then, obviously, I don't need to ask Sarah Aspenleiter about it. But if she says no, I need to ask Sarah. So yes, I intend to ask the questions of the complaining witness, but you have to have Ms. Aspenleiter there just in case. Now, if the State puts on the child first, that may resolve the whole thing because I may never need to ask Aspenleiter anything because the child may say, yes, I did say beard, I did say mustache; in fact, I wrote it in that little book, I said mustache, and yes, I did identify my brother Keith, I don't need anything from Aspenleiter. So if they put on the child first, that could solve the whole problem.

THE COURT: Well, we can't dictate how the

State tries their case.
All right. Then the Aspenleiter treatment notes will still be excluded from the State's case in chief. You will not be permitted to ask Ms. Aspenleiter about the treatment because it has been excluded as far as the details of the treatment which would in any way, shape or form erect that hearsay monster of what this girl said to her during that treatment.
But when the complaining witness herself, who is responsible for the statements, if she is inconsistent with regard to what was said to her counselor or if she ever said anything that was inconsistent with direct testimony, then the entirety of the Aspenleiter records will come in.
MR. GALLOWAY: If I understand you correctly, then I can ask the complaining witness about brother Keith, about the beard and about the mustache?
THE COURT: Yes.
MR. GALLOWAY: If she denies any of that, at that point I would be able to bring Ms. Aspenleiter back on as my witness and ask her those questions.
MR. BARKI: If I could just interject,

actual trial procedural note, he can't do that and I would object to that. He actually has to follow a specific procedure in order to admit extrinsic evidence to try to impeach a witness.

So we're talking about an 11-year old who is bright enough and able to read sufficiently, he would have to ask her that, give her an opportunity to review Ms. Aspenleiter's note because that's what he's basing this question on, presuming she understands what a treatment note even is and presuming she will have any memory of what she said two years ago in this one particular note.

But he would have to follow that procedure before he could call Ms. Aspenleiter back on the stand.

MR. GALLOWAY: That's correct.

THE COURT: I understand. And I think it's very dicey, but there is no exception that I am aware of to where this young girl wouldn't be subjected to that.

MR. BARKI: I understand, Your Honor, and, again, as the Court pointed out, you know, I frankly, David and I have discussed this for a week because we anticipated that this was going to become an issue,

but there was no way for us to address it as an issue until it actually comes up.
And now it has, and --
THE COURT: Do either of the parties wish to put forth a motion for a mistrial?
MR. GALLOWAY: No, on behalf of the Defendant.
MR. BARKI: Can I talk to Mr. Cross for a second?
THE COURT: Take your time.
(Discussion was held off the record.)
THE COURT: Still on the matter of State versus Wood. Mr. Barki?
MR. BARKI: This is the first time I have ever made a motion for a mistrial, Your Honor, in 20 years, but I am going to make a motion for a mistrial and I will just lay it -- the Court understands all the issues.
The main issue is the opening statement has laid out this case in such a fashion that it almost makes it impossible to ignore this evidence. And if it doesn't come in, then that becomes an issue for the State as to all of the representations that were not proven in an opening statement. And if it does

come in, it is all coming in in violation of the pretrial rulings that we prepared our case for. And it makes me nauseous to do it, but I am going to move for a mistrial.

THE COURT: Mr. Galloway?

MR. GALLOWAY: Your Honor, I believe that it has already been indicated if they wish to bring in the entire Comfort House oral interview, that can happen. So there is no mistrial there. In fact, we would love to have that, although I think I would even want it to come in more.

As for Aspenleiter treatment records, they may or may not come in because if the child admitted, yes, I said a beard; yes, I said mustache; in fact, she put it in writing about the mustache in that little book; and yes, I said about the brother, so brother, beard and moustache, there's no problem with Aspenleiter's records.

If not, I bring in Aspenleiter's records insofar as that is concerned. And if the government insists on bringing in the rest of the records and the Court feels they need to come in, they come in. I would rather they come in than stay out, because it is critical to the defense here that these

inconsistent statements of this child come before the jury.

So if everything has to come in, bring it all in. I'm not afraid of that. But I was just cautioning because after reading these treatment records, just some stuff in there that is really inappropriate, but if they want to bring them in, if that's what they want to do to avoid a mistrial, bring in the Comfort House video and then that will prevent a mistrial because they want to have the ability to counteract.

MR. BARKI: I have one other point based on the representation Mr. Galloway made. He said on numerous occasions the treatment records have additional issues in it that create issues in the trial, i.e., that there are evidentiary issues, other types of hearsay contained in these records, that type of thing.

And what we're talking about doing then, without figuring this issue out is, specifically, interjecting error into this trial which will end up, even if there is a conviction, will end up getting it reversed potentially because we have interjected error before we even started the trial, and that's

what the opening argument did.
MR. GALLOWAY: I disagree. There is no error put in the case. If the government wishes to say -- I forget what the word is. In the interest of thoroughness, if they need to bring in the entire Comfort House -- is that the right word -- bring it in. In the interest of thoroughness, they are going to say they should be allowed to talk to Sarah Aspenleiter about other parts of her treatment records to counteract what I intend to bring in, which is brother, beard and moustache, then fine, bring it in. I don't think there's any error been committed at this point. And if I opened the door to that, then I opened the door to that and they should have the absolute right to bring that in and let the jury make a decision based upon all the evidence. So I don't feel there is any mistrial here. There is no error.
THE COURT: As much as the Court has tried to draft solutions to this two-pronged problem that we have with regard to the Harmony House -- it's not Harmony House -- Comfort House, and the Aspenleiter records, I don't see that we could sufficiently salvage this with the evidentiary rulings and the

give and take that has been conducted here in chambers this afternoon.

Quite simply, Mr. Galloway, your opening statement ran grossly far afield into argument, and you, sir, interjected evidence that was excluded that could not have been placed before this jury but for responses that may or may not have been elicited in cross-examination.

Therefore, I am going to declare a mistrial. I would like -- I'm not sure if our clerk's office could get us a new jury tomorrow or not.

MR. GALLOWAY: Before we do that, I am willing to stipulate that the Comfort House could come in that was ruled out because of my motion and, if necessary, I will stipulate they can bring in the Aspenleiter.

We don't need to declare a mistrial. They wanted to bring them in. They feel I opened the door, fine, I will stipulate that they come in because -- so if I am stipulating the Comfort House interview comes in, and I am stipulating that Sarah Aspenleiter's treatment records come in, because it's critical that I have that information that came out, I don't want to have a new trial and then that

information not come in.
So I would rather all of Comfort House comes in and all of Aspenleiter's records come in than to not be allowed to bring in those points.
THE COURT: So your position is you are willing to withdraw your position to exclude the Harmony House -- Comfort House and all the hearsay contained therein and also withdraw your motion to have the Aspenleiter treatment records come in as well and agree to have that brought in in the State's case in chief?
MR. GALLOWAY: Yes.
THE COURT: Mr. Barki, if that is, in fact, the way of it, then while it puts you at a strategic disadvantage trying a case that you were not prepared to try --
MR. BARKI: It absolutely does and it puts us at a disadvantage in terms of our opening statement where it seems like we just ignored all of this -- I could clean that up as much as possible in closing, but it's -- I mean, it was, specifically, ignored.
THE COURT: Because of the rulings of this Court?

MR. CROSS: Correct. We were trying to stay within the bounds.

THE COURT: The State did not disclose anything that was said in the Harmony House (sic) interview because they were in compliance with the Court during their opening statement. They did not reference anything in the Aspenleiter treatment because they were in compliance with the Order of this Court.

The defense ran grossly far afield and mentioned things that were excluded in the prior Court's rulings in both the Comfort House interview and within the Aspenleiter treatment notes.

Then, out of fundamental fairness, I am forced, I have to declare a mistrial, which pains me because we are in a 2021 term of Court for a case that was indicted in 2018. All right. Let's go ahead and let's go off the record. I want to talk about some nuts and bolts mechanics of getting back here.

(Discussion was held off the record.)

THE COURT: All right. Back on the record in the matter of State versus Wood. Some technical discussions were had off the record as to the

availability of witnesses given -- if we would try and start the trial -- restart the trial, also an improbability or possibility of the Brooke County clerk's office getting us a jury tomorrow or the next day and also the Court's current pending felony trial docket.

We are not going to reschedule this matter anytime soon because the mistrial was occasioned by the defense. I am going to find good cause and continue this matter into the March 2021 term of the Brooke County Grand Jury term of Court.

What I would like to do, gentlemen, because everything that we have been discussing in this -- in this hearing outside the presence of our jury today, this afternoon, was trying to fashion particular remedies from what led to the mistrial, I am going to have to ask the parties to readdress their positions as to the admissibility of the statements within the Comfort House interview and as to the Aspenleiter treatment records. If the parties cannot come to an agreement, then we will conduct a brief hearing. From then, we may need to have briefs filed and the Court, if necessary -- if the parties do not come to an agreement, we may review the prior rulings

of the Court.
Any objection to Mr. Wood's bond continuing?
MR. BARKI: No, Your Honor.
THE COURT: Very good. Then it is 5:00.
Let's go dismiss this jury.
MR. BARKI: Judge, so you do know, because it is different in every court, we run March to June in this next term. It is a short one, call it the short term.
THE COURT: Probably have to bump a civil trial.
(In open court.)
THE COURT: Thank you, ladies and gentlemen. Please be seated. Back on the record in State versus Wood with our jury.
Ladies and gentlemen, thank you again for your continuing indulgence. After a hearing on the record with the attorneys and parties in this matter, it has been concluded by this Court that there were certain irregularities, legal irregularities which forced a motion for a mistrial in this case. Unfortunately, despite lengthy efforts in trying to find ways to resolve those issues, put the cats back in the bag, the parties simply were not able to do so

in a fashion that would provide each party with a fair trial.

You have my sincere heartfelt apology, but a mistrial has been declared, and I'm going to thank you for your service, and you are now released.

(Jury dismissed.)

THE COURT: Still on the record. All right. Then, again, in this matter, the Court has found good cause to continue this matter into the next term of court. The parties are to readdress the issues with regard to the Harmony House -- the Comfort House interview, as well as the Aspenleiter treatment records.

Mr. Galloway, I would ask you to please meet with Mr. Wood, discuss with him your original intentions as to why you moved to exclude those two pieces of evidence but why it is you feel now that you want these pieces of evidence to come in, if that is still your position after you consult with your client, weighing fully whatever benefits or deficits that are showed in either one of those previously excluded pieces of evidence.

MR. GALLOWAY: Yes, sir.

THE COURT: After you confer with your

client, sir, hopefully you can then confer with the county Prosecuting Attorney's Office and we will go from there. If that means having another hearing or additional briefing or if there is a joint stipulation that can be --

MR. GALLOWAY: I think we can stipulate. I have a pretty good rapport with the prosecutor's office.

THE COURT: Is there anything that either one of you would like to put on the record before we adjourn for the night?

MR. BARKI: Your Honor, I will prepare an Order, it would be the State's intention to do a complete Order reflecting everything that occurred here today, right up until the mistrial and the ruling on that, just so there is an adequate record documenting the trial proceedings today, unless the Court directs otherwise.

THE COURT: Very good. Thank you, Mr. Barki.

It may be helpful if you can endeavor to make that an agreed Order. As contentious as things were, I'm not sure --

MR. BARKI: Obviously, I will submit it to

defense counsel. If he wants to make any additions or corrections, we'll discuss that. I'm sure we will be able to get an agreed Order. It will be general in its verbiage, but it will be complete in documenting from our initial appearances this morning, addressing the motion that was filed by Mr. Galloway yesterday, up and to the mistrial.

THE COURT: Very good. Anything you would like to put on the record?

MR. GALLOWAY: No, sir. I think Mr. Barki is correct; we have always been able to work things out and I believe we will be able to.

THE COURT: There has been no objection placed on the record to Mr. Wood's bond continuing. He may remain free under the terms and conditions of that previous bail/bond agreement. However, the Brooke County Circuit Clerk is directed to enumerate their costs for today in obtaining these witnesses. Mr. Wood is not being represented as an indigent. Because this mistrial was occasioned by the defense, the defense will be responsible for the cost of bringing out that jury and any other attenuating costs to the Brooke County Circuit Clerk.

State vs. Wood

All right. If there's nothing further, we will stand adjourned. Thank you.

(At 5:10 p.m., the proceedings were adjourned.)