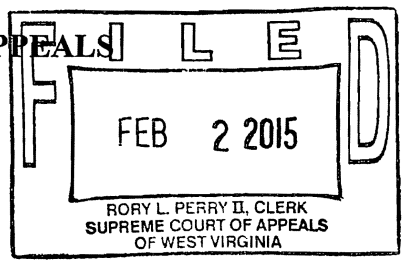
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**
**CHARLESTON, WEST VIRGINIA**




**STATE OF WEST VIRGINIA, Plaintiff Below,**
**Respondent,**

**v.** **Supreme Court Docket No.: 14-0968**

**RICHARD WAKEFIELD, Defendant Below,**
**Petitioner.**

FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA'S**
**RESPONSE TO PETITION FOR APPEAL**

Brandon C. H. Sims
Assistant Prosecutor
Jefferson County Prosecutor's Office
201 North George Street
Post Office Box 729
Charles Town, West Virginia 25414
304-728-3342 Telephone
304-728-3293 Facsimile

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## ALLEGED ASSIGNMENTS OF ERROR

I. The Circuit Court erred when it permitted the State's expert witness to testify regarding drug facilitated sexual assaults.

II. The Circuit Court erred when it limited the examination of a witness based on the State's previously filed rape shield motion.

III. The Circuit Court erred in instructing the jury.

IV. The Circuit Court erred when a juror advised a bailiff regarding previously undisclosed knowledge of a potential State's witness who did not later testify during the trial.

## STATEMENT OF THE CASE

On February 18, 2014, at the conclusion of a three-day jury trial, the Petitioner, Richard Joseph Wakefield, IV, was convicted of all four counts of Jefferson County Indictment 13-F-63, which charged two counts of sexual assault in the second degree and two counts of sexual assault in the third degree. Thereafter, following a sentencing hearing on July 14, 2014, the Court, by order entered July 16, 2014, sentenced the Petitioner to an effective sentence[1] of not less than ten nor more than twenty-five years in the penitentiary. Thereafter, following a hearing on August 4, 2014, and by order entered August 6, 2014, pursuant to West Virginia Code § 62-12-26, the court further ordered the Defendant to be subject to the mandatory minimum of two years of supervised release following his release from incarceration. It is from these convictions, and sentences that the Petitioner now appeals.

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[1] The Petitioner was sentenced to not less than ten nor more than twenty-five years for his two convictions for sexual assault in the second degree, which sentences were ordered to be served concurrently to one another. Further the Petitioner was sentenced to not less than one nor more than five years for each of his two convictions for sexual assault in the third degree, which were ordered to be served consecutively to one another but concurrently to his sentences for sexual assault in the second degree. The sentences as imposed thus constituted an effective term of not less than ten nor more than twenty-five years in the penitentiary.

The evidence at trial was that on June 10, 2012, the defendant, the victim, P.L[2], and a third person, William Carper, met at Glory Days restaurant in Ranson, Jefferson County for an early dinner. It was after an evening spent together that the Petitioner sexually assaulted P.L. inside Mr. Carper's house in the early morning hours of June 11, 2012.

At the time he committed the sexual assault of P.L., the Petitioner was 56 years old and a police officer with the Department of Homeland Security who worked with Mr. Carper at the Mount Weather facility in Loudoun and Clarke Counties in Virginia. The Petitioner and his wife resided in Titusville, Pennsylvania but he commuted to Virginia several days each week residing at the barracks at Mount Weather. A.R. 323:11 – 22. During the months preceding the sexual assault the bunk rooms at Mount Weather were renovated so when he was in the area for work the Petitioner began to stay with his co-worker, Mr. Carper, who had a guest room. A.R. 323:23 – 324:5. Thereafter the Petitioner began to regularly stay at Mr. Carper's residence whenever he was in the area, including on weekends when he was not working. A.R. 324:17 -19. Mr. Carper, a native of the Jefferson County area, took the Petitioner out sightseeing to give him "a good feel for the area" as well as to dinner and local bars in the area. A.R. 326:2 – 13. Mr. Carper introduced the Petitioner to the victim on an evening prior to night of the sexual assault. A.R. 328:8 – 15; 536:16 – 22.

Sometime prior to June 10, 2012, the three planned to meet for an early dinner at Glory Days. A.R. 328:16 – 24; 537:12 - 23. The men arrived first around 4 p.m., and ate and drank two beers while watching the televised NASCAR race. A.R. 329 – 330. P.L., a 25 year old co-worker at Mr. Carper's second job, joined the men later, sometime after five o'clock. A.R.

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[2] Consistent with Rule of Appellate Procedure 40(e) the identity of the victim of the sexual assault is restricted and initials are used throughout this brief.

330:21 – 23; 538:4 – 6; 568:7 - 9. P.L. ate an appetizer and drank a draft beer. A.R. 209: 2 – 3; 539:13 – 17.

After P.L. finished eating, the three drove in their separate cars to Mr. Carper's residence where the men showered and changed to go out for the evening. A.R. 539: 18 – 540:1. Approximately 45 minutes to an hour later the three left Mr. Carper's residence, all in the Petitioner's vehicle which he was driving. A.R. 332: 5 – 19; 540:10 – 13; 541:1 - 5. The three traveled to the Vista[3] lounge where the victim ate another appetizer and drank part of a beer. A.R. 541:3; 11 – 12. According to the victim, "we weren't there for very long, just long enough to eat." A.R. 541:17 – 18. The three then went to The Turf in Charles Town but decided not to stay because the jukebox was broken. A.R. 336:9 – 15; 541:20 – 542:2. From The Turf, the three went to Doc's bar, also in Charles Town, where they remained for several hours over the rest of the evening. A.R. 542:8 – 9; 19 - 20. At Doc's the victim drank several drinks, but testified that she did not finish all of them. During direct examination P.L. testified:

> Q: Well, how did that happen that you didn't drink all of those?
> A: I got to the point where I felt like I didn't want to drink anymore. I started sipping on the last beer that I had, and it started to get really warm and I sat and sipped on that for probably a good hour.
> Q: Did you ultimately finish that beer that had gotten warm?
> A: No, ma'am.
> Q: Did you have anything else to drink after that?
> A: No, ma'am. Well, I started sipping on a cold beer that the Defendant had brought me a cold beer and I told him I didn't want it but it was cold so I started sipping on that instead of the warm beer.
> Q: Did you finish that beer Mr. Wakefield, the Defendant, brought you?
> A: I do not remember finishing that beer, ma'am.

[3] During the trial the Vista was also referred to as the Cliffside, the Vista Lounge being the name of the bar located inside the Cliffside Hotel. A.R. 429:21 – 24; 572:14 – 573:2.

A.R. 543:19 – 544: 12; 576:4 – 9; 338:2 – 16. Mr. Carper testified that the victim did not appear to be intoxicated close to the time they left Doc's. A.R. 338:21 – 339:8. The victim herself testified that she did not feel intoxicated that night, was not slurring her words, had no trouble with balance or walking, and was never slumped over the bar or table. A.R. 545:9 – 21. The three left Doc's around 1:00 a.m. A.R. 548:7 – 9. The victim testified that she recalled the Petitioner asking her and Mr. Carper if they were ready to leave, that she grabbed her phone, keys and purse, "and I remember walking out the door, and that is the last thing I remember." A.R. 548:10 – 20. She testified that her next memory was, "I woke up and the Defendant was attempting to have sex with me." A.R. 549:10 – 12. The victim further testified that she could clearly see the Petitioner because there was a light on in another room which provided sufficient illumination that "I knew exactly who it was."

The victim further testified that before the Petitioner inserted his penis into her vagina he performed oral sex on her. A.R. 551:3 – 11. Then he inserted his penis into her vagina. A.R. 551:14 – 16. The victim testified that throughout this period that she "tried very hard to make myself move and I couldn't." A.R. 552: 7 – 8. Nor could she speak or verbally communicate. A.R. 552:9 – 11. She testified that she felt helpless and described her experience, "imagine trying so hard to force yourself to move and you can't do it no matter what force to move, trying so hard to make yourself stop, to say stop, and you can't even make yourself say stop." A.R. 552: 22 – 553:2. P.L. further described her physical symptoms during the Petitioner's sexual assault of her, "It was like being outside your body watching everything happen, but you can feel everything, you can feel every little touch, but at the same time not being able to do anything to make it stop." A.R. 553:14 – 17.

At some point in the night while the Petitioner was present the victim testified she was "throwing up violently and uncontrollably not from nausea just violently, violently throwing up feeling like your stomach was being ripped out," however, she was unsure whether she was sick before or after the sexual assault. A.R. 554:7 – 14; 582:11 - 13.

When the victim awoke in the morning she was disoriented and wearing different clothing than she wore out the night before, including a pair of men's athletic shorts. A.R. 555:11 – 21. She testified that she felt extremely different than a hangover, "Well, normally when somebody is sick with alcohol, you're nauseous or have a headache, you know, when you're becoming intoxicated, you can feel that, I didn't have anything like that." A.R. 567:20 - 23. She walked downstairs from the bedroom where she woke up and sought out Mr. Carper, with whom she stayed intermittently crying and sleeping for several hours. A.R. 556:15- 557:17; 346: 3 – 347:16. After several hours she informed Mr. Carper that the Petitioner had sexually assaulted her during the night in the upstairs bedroom. A.R. 349:17 – 19.

The two confronted the Petitioner about the sexual assault. Initially Mr. Carper asked the Petitioner if "anything happened" upstairs during the night. The Petitioner responded, "not that I know of." A.R. 351: 22 – 352:1. He did not deny that he sexually assaulted P.L., but instead repeatedly stated he was sorry and that he did not remember what happened. A.R. 558:7 – 21; 590: 23 – 591:7. Upon further questioning by Mr. Carper, the Petitioner gave a detailed description of being with the victim in the guest room "up until the point that she got sick and he was rubbing her back, then it seemed, he blacked out, then he woke up and walked downstairs, so it looks like there was some sort of gap there that he was not recalling." A.R. 359:22 – 360:3. Mr. Carper confronted the Petitioner a second time later on June 11, 2012 and during this second conversation the Petitioner said, "I don't know how this could have happened," and "I might as

well eat my gun." A.R. 368:4 – 369: 22. The Petitioner also twice said to Mr. Carper, "I don't know why you don't just take me out right now." A.R. 377:23 – 378: 5. Throughout this period the Petitioner was shaking violently. A.R. 370: 19. At one point the Petitioner also stated he needed to call his wife and tell her "what happened." A.R. 375: 3 – 4.

In the afternoon before leaving Mr. Carper's residence with his belongings, the Petitioner, at the victim's request, went out and purchased a morning after emergency contraceptive pill for her. A.R. 375:16 – 376: 4; 559:6 – 13.

The victim testified that she hesitated to immediately report the sexual assault because the Petitioner was a police officer. A.R. 561:6 – 20. Further, the victim testified that she was concerned that reporting the sexual assault could affect her own employment. A.R. 561:21 – 562:9. Nonetheless, the victim did go to City Hospital and was examined by a forensic nurse examiner approximately 16 to 20 hours after the sexual assault occurred.

## SUMMARY OF THE ARGUMENT

The Circuit Court did not abuse its discretion in its evidentiary rulings, including its decision to admit permit the testimony of the State's expert witness and to limit the testimony of one of the State's factual witnesses based upon the rape shield motion filed by the State. The Court properly instructed the jury according to correct statements of law and properly permitted the jury to consider all four counts of the indictment in its deliberations. Even if the court erred in that decision to allow the jury to consider all four counts of the indictment, the error was harmless as the Petitioner's effective sentence was the same as if he had been convicted of a single count of second degree sexual assault. Further, the court acted properly in sharing with

the parties a conversation initiated by a juror with the court's bailiff. Moreover, the Petitioner failed to preserve any alleged error regarding that conversation, although even if he had preserved such an alleged error, the acts complained of do not constitute a violation of the Confrontation Clause as alleged by the Petitioner.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent affirmatively states that oral argument is not necessary unless the Court, in its discretion and pursuant to Rule 19, determines that oral argument is necessary and shall be held.

## ARGUMENT

### I. The Circuit Court Did Not Abuse Its Discretion In Making Evidentiary Rulings.

Circuit Courts in West Virginia are subject to review by this court for an abuse of discretion in relation to evidentiary rulings. The Circuit Court here did not abuse its discretion in making evidentiary rulings, thus, those rulings should not be disturbed on appeal.

In Syllabus Point 5 of State v. Davis, 232 W.Va. 398, 752 S.E.2d 429 (2013), this Court reiterated its prior holding regarding a trial court's discretion to admit evidence:

> " ' " 'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)' Syl. Pt. 1, *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003)." Syl. Pt. 1 *State v. Kaufman*, 227 W.Va. 537, 711 S.E.2d 607 (2011).

In Syllabus Point 1 of State v. Parsons, 214 W.Va. 342, 589 S.E.2d 226 (2003) this Court held that:

> 'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus point 10, *State v. Huffman,* 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds, State ex rel. R.L. v. Bedell,* 192 W.Va. 435, 452 S.E.2d 893 (1994)." Syl. pt. 1, *State v. Calloway,* 207 W.Va. 43, 528 S.E.2d 490 (1999).

Further, this court has held that, "On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determination upon which these legal conclusions are based are reviewed under the clearly erroneous standard." *Syllabus Point 3*, State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994).

### A. The Circuit Court properly admitted the testimony of the State's expert witness.

"The decision to admit or reject expert evidence is committed to the sound discretion of a trial court, and the court's determinations are reviewable only for an abuse of discretion." State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996). *See* Board of Education of McDowell County v. Zando, Martin & Milstead, Inc., 182 W.Va. 597. 612, 390 S.E.2d 796, 811 (1990); Rozas v. Rozas, 176 W.Va. 235, 240, 342 S.E.2d 201, 206 (1986). The Circuit Court here did not abuse its discretion in admitting the testimony of Trinka Porrata regarding drug facilitated sexual assault, and her opinion that P.L. was the victim of such a drug facilitated sexual assault. Because the trial court exercised its sound discretion in admitting Ms. Porrata's testimony, and did not abuse its discretion, this court should not disturb that decision.

In LaRock, this court recognized that "[u]nder the West Virginia Rules of Evidence, expert testimony is admissible if a witness qualifies as an expert and the proffered testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" 196

W.Va. 306, 470 S.E.2d at 625. *Quoting* W.Va.R.Evid. 702. The LaRock decision further explained:

> In note 6 of *Gentry v. Mangum*, 195 W.Va. 512, 520, 466 S.E.2d 171, 179 (1995), we made clear that an abuse of discretion standard is not appellant friendly:
>
> > "We review these rulings only for an abuse of discretion. Only rarely and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect. Our review, however, must have some purpose and that is why we review under the abuse of discretion standard. In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them."

Petitioner argues that Ms. Porrata's testimony did not meet the standards articulated by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, the Circuit Court's ruling and this Court's jurisprudence support the Respondent, not the Petitioner, herein. After the Supreme Court issued its Daubert decision, in Syllabus Point 1 of In re Flood Litigation Coal River Watershed, 222 W.Va. 574, 668 S.E.2d 203 (2008), this Court reiterated its 1993 holding[4]:

> "In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review

[4] The case which Coal River Watershed quoted, Wilt v. Buracker, was decided on December 13, 1993, five months after the Supreme Court issued the Daubert decision on June 28, 1993. Moreover, Coal River Watershed was appealed to the Supreme Court which denied certiorari on May 31, 1994.

> and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community." Syllabus Point 2, *Wilt v. Buracker,* 191 W.Va. 39, 443 S.E.2d 196 (1993).

Petitioner here argues that because one of the State's experts, Trinka Porrata, has published non-peer reviewed articles that there was a lack of scientific methodology to support her testimony. However, Ms. Porrata has also published in peer reviewed articles. As Ms. Porrata testified, "Yes, I have published extensively in non-peer reviewed things because they're on the website Project GHB. But I have also been involved in peer-reviewed journal articles." A.R. 608: 15 – 18. During the Daubert hearing held in this case, counsel for the State listed Ms. Porrata's qualifications including several of her peer reviewed articles listed on her CV for the court's consideration:

> Ms. Porrata has worked in law enforcement for twenty-five years. She worked at the Los Angeles Police Department. She worked in sexual assault and also in narcotics. She's worked as a drug consultant. She's assisted in writing legislation in California and federal legislation about drugs especially drug facilitated sexual assault. She has a bachelor's of police administration and public safety from Michigan State. She also has a number of peer reviewed journal articles that are listed in her curriculum vitae those involving [Dr. Deborah] Zvosec. . . . One is called "Preventable Deaths Associated with Gamma Hydroxybutryrate," another is "Fatal Motor Vehicle Collisions While Gamma Hydroxybutyrate Intoxicated," a third "Preventable Deaths from Gamma Hydroxybutyrate Ingestion, a fourth, "Gamma Hydroxybutyrate Associated Fatalities Overlap of Post-mortem GHB Levels with Endogenous Therapeutic and Non-fatal GHB Toxicity Cases and Factors Supporting Exogenous Origin," all four of these are peer review articles related to GHB.

A.R. 44:8 – 45:2. Additionally, prior to asking that Ms. Porrata be recognized as an expert in the field of GHB and drug-facilitated sexual assault, counsel for the State also established that Ms. Porrata: is president of Project GHB; has worked with more than 3,500 GHB addicts in 20 different countries; interviewed hundreds of sexual assault victims and hundreds of voluntary

users of GHB; provides training to medical professionals, police officers and law enforcement regarding GHB administered doses in use with drug-facilitated sexual assault, which courses range from 15 minute roll call classes to 16-hour courses on drug facilitated sexual assault for the Regional Counterdrug Training Academy for eight southern states. A.R. 609:8 – 610:17. In ruling that Ms. Porrata's testimony was admissible, the Circuit Court articulated the reasons in support of its ruling:

> And so what we have is a report and conclusions reached as to the amount of certain substances in the urine and then an interpretation of that report by the witness Trinka Porrata and Trinka Porrata testified on direct to her expertise that she was twenty-five years as a police officer in Los Angeles, six years in drug enforcement, that she's been heavily involved in movements to make certain drugs which have a reputation for facilitating sexual assault to move them [t]o the category of being illegal and that she had worked with a number of doctors, that she has taught worldwide, that she held seminars both nurses and medical setting and police officer—training officers and that she has written articles that have been peer reviewed and that she is has for many years been active in what I guess she would describe as a phenomena of drug assisted sexual assaults.
>
> She testified to the testing of subjects that was a double blind testing with regard to the effects of these drugs in the system and it appeared to the Court that she had a level of detail and expertise with regard to these substances, that would rather easily exceed that of a lay person in fact she would appear to be one of the foremost experts in this field currently working. So it appears that a proposition as to the effect of these types of substances on a person and how they might be used and the effects that one might expect from them she would appear to be a comp[etent] expert in that area. It would appear that also that the study of them has been that it strikes the Court as being reasonable scientific and not as we've said at the outset, not junk science, but science with an actual basis and she would appear to be a person who would be qualified to give such opinion as to the effects of such a substance upon a human being and whether or not that would be consistent with an issue in this case where we have an alleged victim in the case who by proffer will testify that her own experiences of that evening are that she was sexually assaulted when she was physically incapacitated due to the administration of a substance which involuntarily left her physically incapacitated and . . . . I

> think it's relevant evidence that the state would be permitted and would not exclude it.

A.R. 98:1 – 99: 19. In its ruling the Circuit Court addressed the factors discussed in Coal River Watershed, *supra*. First the court addressed whether the scientific theory and its conclusion can be and have been tested, and found that double blind testing had been performed to support Ms. Porrata's testimony. Moreover, the scientific theories espoused by Ms. Porrata were subjected to peer review and publication, as evidenced by the number of peer reviewed articles cited in Ms. Porrata's CV and listed on the record by the prosecutor. Further, the court recognized that the scientific theory is generally accepted within the scientific community, and is taught to both medical and law enforcement professionals by Ms. Porrata herself, and that Ms. Porrata is one of the foremost authorities on the subject.

Ms. Porrata's testimony was used by the State to establish that although at the time the chemical testing of the victim's urine was performed, approximately 20 hours after the sexual assault, any GHB administered to her would have flushed through her system[5], but further, that GHB was likely the drug which intoxicated the victim based upon her descriptions of her pristine memory loss[6] which precisely coincided with her departure from Doc's bar, her awakening during the sexual assault with a complete inability to speak or move her limbs, her out of body sensations, and violent vomiting. Ms. Porrata testified that other drugs which are administered to facilitate a sexual assault and which cause similar symptoms as those described by the victim

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[5] Dr. Wendy Adams, a Ph.D. pharmacologist and toxicologist also testified that based upon its half-life, an administered dose of GHB would be undetectable after eight hours. A.R. 56:8 11.

[6] Ms. Porrata testified that "pristine memory loss" is a sudden onset of memory loss, sometimes described by victims "like they flipped a light switch. At that point the memory just stops." A.R. 612:16 – 613:1. Under cross examination Ms. Porrata clarified that term, "I said pristine memory loss refers to the onset. So it's like a sudden onset, like flipping a light switch. I didn't say total. I said it could be total or not. . . . Instead of just feeling, I'm so drunk I should stop drinking, or maybe I will have one more, and then at some point you forget things and have memory loss, you can feel no sense. Your last recall may be, boy, I feel funny, or boy, I feel sick, and, boom, their memory is gone. . . . The memory stops instead of fades." A.R. 628:13 – 24; 631:18 – 19.

would have left traces in the victim's body 20 hours after the sexual assault. Under direct examination Ms. Porrata testified, "Any other drugs that would have given somewhat similar symptoms and would be things to consider would have still been there and they would have tested positive." A.R. 622:14 – 17. However, based upon Dr. Wendy Adams' testimony that those other substances were absent from the victim's body, thus according to Ms. Porrata's testimony, by process of elimination, the only substance which would have caused those symptoms *and* been absent from the victim's body 20 hours later was GHB. Ms. Porrata further testified that:

> Q: So were you able to use the absence of those substances to determine what in your opinion was the drug administered to [the victim] prior to this drug-facilitated sexual assault?
> A: Yes.
> Q: Which was that?
> A: That while it was most consistent with GHB in the first place, even with other things that would have been potential, they were not there at this point and would have been, which reaffirms that it most likely was GHB.
> Q: Putting it another way, by process of elimination you are able to determine that it was GHB as well as the consistency with all of the reports that she made of her symptoms?
> A: Yes.

A.R. 622:18 – 623:9.

Because the Circuit Court properly exercised and did not abuse its discretion in admitting the testimony of Ms. Porrata consistent with the requirements of Coal River Watershed and Wilt v. Buracker, *supra*, this court should not now disturb that determination upon appeal.

**B. The Circuit Court properly limited the examination of a witness based on the State's previously filed rape shield motion.**

In Syllabus Point 8 of State v. Robert Scott R., Jr., 233 W.Va. 12, 754 S.E.2d 588 (2014), this court recently reiterated its holding regarding the standard for evaluating the exclusion of evidence pursuant to the rape shield law[7] codified at West Virginia Code § 61-8B-11 and in West Virginia Rule of Evidence 404(a)(3):

> "The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion." Syllabus Point 6, *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999).

As argued by the State during trial, this Court in State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979), wrote:

> We would suggest that evidence of consensual sexual activities with others, not specifically and directly related to the act of which a victim complains, should never be admissible; and that such evidence that is specifically, directly related to the act for which a defendant stands charged, must be of a quality that its admission is necessary to prevent manifest injustice and therefor outweigh the State's interest in protecting persons who have been sexually abused from attempts at besmirchment of their character by ones who have trespassed upon their bodies.

Because pursuant to State v. Davis, and State v. Guthrie, *supra*, rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion, and because there was no abuse of

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[7] State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997), notes that West Virginia's statute and rule considered *in pari materia* constitute the state's "rape shield law." 200 W.Va. 436, 490 S.E.2d at 38.

discretion here, this court should not disturb the trial court's exercise of sound discretion in making this evidentiary ruling.

## II. The Circuit Court properly permitted the jury to consider all four counts of the Indictment.

This Court has previously held that whether a jury was properly instructed is a question of law to be reviewed de novo.

> As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo.*

*Syllabus Point 1*, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996). This Court has also held if a trial court's instructions to the jury are a correct statement of law, then deference shall be given to the trial court whose ruling shall be disturbed only for an abuse of discretion.

> 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 misled 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.

*Syllabus Point 4*, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

As this court noted in Guthrie, supra:

> the United States Supreme Court has acknowledged that given "the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *U.S. v. Hasting,* 461 U.S. at 508–09, 103 S.Ct. at 1980, 76 L.Ed.2d at 106. Thus, the Supreme Court

> has held that an appellate court should not exercise its "[s]upervisory power to reverse a conviction ... when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Hasting,* 461 U.S. at 506, 103 S.Ct. at 1979, 76 L.Ed.2d at 104.
>
> The harmless error doctrine requires this Court to consider the error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or nonconstitutional. It is also necessary for us to distinguish between an error resulting from the admission of evidence and other trial error. As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment.

194 W.Va. at 684, 461 S.E.2d at 190.

Here, the State argued and the Court relied upon a case which permitted the jury to consider and return a verdict on both second degree sexual assault and third degree sexual assault for the same actions. Syllabus Point 4 of State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990), holds that:

> " 'Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.' Syl. pt. 8,*State v. Zaccagnini,* 172 W.Va. 491, 308 S.E.2d 131 (1983), quoting *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)." Syllabus point 1, *State v. Peyatt,* 173 W.Va. 317, 315 S.E.2d 574 (1983).

In Sayre the court affirmed the conviction of the defendant for both third degree sexual assault based upon the age difference between Sayre and the victim and second degree sexual assault by forcible compulsion. Based upon the court's ruling in Sayre, and the Supreme Court ruling in Blockburger, the Circuit Court here permitted the jury to deliberate on both second degree and third degree sexual assault on the basis that the victim here was both physically helpless and involuntarily intoxicated.

The instructions given by the Circuit Court when looked at as a whole, A.R. 835 - 847, contain a correct statement of law, as required by Guthrie. Moreover, the Circuit Court did not abuse its discretion in formulating those jury instructions, and permitting the jury to consider all of the counts of the indictment, as authorized by the Court's holding in Sayre.

Moreover, if the court did err in permitting the jury to deliberate and return a verdict on all four counts of the indictment such an error was harmless, in that the court later exercised its discretion and sentenced the Petitioner to the same sentence which would have been imposed had he been convicted of only one count of second degree sexual assault.

"The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." *Syllabus Point 1*, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). Further, "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review. Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d (1982)." Syllabus Point 6, State v. Slater, 222 W.Va. 499, 665 S.E.2d 674 (2008). Clearly, the circuit court exercised its discretion in sentencing the Petitioner to concurrent ten-to-twenty-five year sentences for second degree sexual assault, and consecutive one-to-five-year sentences for third degree sexual assault, with those consecutive sentences to be served concurrently with the concurrent ten-to-twenty-five year sentences, for a single effective sentence of not less than ten nor more than twenty-five years. Those sentences were within statutory limits, were not based on some impermissible factor and are thus, not subject to appellate review.

Because there was no abuse of discretion by the court in formulating the instructions, which contained a correct statement of law, and any error which may have been committed by

the court was harmless based upon the circuit court's proper use of discretion in sentencing, such a decision to permit the jury to deliberate and return a verdict on all four counts of the indictment should not be disturbed on appeal.

## III. The Circuit Court Did Not Err When a Juror Initiated a Conversation With the Bailiff, and Further, the Petitioner Did Not Preserve Any Potential Error.

The Petitioner now alleges that his constitutional rights under the Confrontation clause were violated by a conversation between a juror and the bailiff regarding the juror's passing knowledge of the identity of a person who did not appear as a witness. However, as the Petitioner concedes, he "did not object at the time". Petitioner's Brief, Assignment of Error D. What occurred on the record was this:

> THE COURT: The bailiff informed me that one of the jurors informed him that when the last witness was speaking of people, police officers involved in the chain of investigation, Officer Sell's name came up. This juror on our break immediately after that witness, informed the bailiff that she was aware of an Officer Sell because she works at the Sheetz store and an officer by that name apparently comes in the store from time to time.
>
> She apparently indicated to the bailiff she had no independent sort of acquaintance or relationship with him, but she was aware of an officer by that name who came to the store where she was employed.
>
> I made that known to counsel for both sides. The Prosecutor told me that it wasn't the State's intention to have that officer as a witness.
>
> Does anybody want to further make up the record? Feel free both sides.
>
> MR. KRATOVIL: We don't intend to call Sergeant Sell as a witness in our case.
>
> THE COURT: Is that still your intention not to call him?
>
> MS. SIMS: Correct.
>
> THE COURT: He wouldn't be a witness.
>
> MS. SIMS: We don't intend to call him. I can't see how we could call him in rebuttal to be honest.
>
> THE COURT: Is there general agreement that it is really not an issue?

MR. KRATOVIL: I think that it is not an issue.
THE COURT: Okay. All right.

A.R. 596:21 – 598:4. Because the Petitioner did not timely object to the alleged Confrontation Clause violation, or move for a mistrial, he waived his ability to raise this issue on appeal.

Recently this Court reiterated that the failure to preserve error constitutes a waiver of that alleged error:

> This Court has recognized that "[w]hen there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined." Syl. pt. 8, in part, *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995). *Accord* Syl. pt. 4, in part, *State v. Lightner,* 205 W.Va. 657, 520 S.E.2d 654 (1999). Similarly, we have stated that "[g]enerally ***the failure to object constitutes a waiver of the right to raise the matter on appeal.***" *State v. Asbury,* 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992) (per curiam).

Manor Care, Inc. v. Douglas, 234 W.Va. 57, 763 S.E.2d 73 (2014)(emphasis added). Petitioner here neither objected, nor moved for a mistrial. Rather, he conceded at trial that the conversation between the juror and bailiff—the same conversation which he now complains was a violation of the confrontation clause—was not an issue. Based upon the Petitioner's failure to preserve this alleged error there are no grounds for this court to now consider the matter.

However, even if the Petitioner had timely objected, the Confrontation Clause would not have supported any relief for the Petitioner. As the Supreme Court recognized in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause:

> applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects

> an especially acute concern with a specific type of out-of-court statement.

541 U.S. at 51, 124 S.Ct. at 1364, *internal citations omitted.*

In this case, the parties listed a number of potential witnesses in voir dire, however, no juror indicated knowing any of the potential witnesses. Specifically, during voir dire the court asked the parties to list "any witnesses that might appear. . . and also names that might signify even if they don't appear as witnesses." A.R. 150:11 – 14. Counsel for the State advised that Sergeant Sell might appear, among other potential witnesses. A.R. 150:18. No jurors indicated at that time that they knew Sergeant Sell. A.R. 150:21 – 23. However, during the second day of trial one juror initiated a conversation with the court's bailiff to inform the court that she did in fact know the identity of Sergeant Sell, whose name was mentioned by a witness, but who did not himself appear as a witness. It is unclear how a juror's act of scrupulously disclosing to the court's bailiff her belated realization that she knew by name an individual mentioned in trial testimony but which person did not testify at trial violated the Confrontation Clause. Moreover, no statements of Sergeant Sell were introduced or attempted to be introduced through other witnesses. Instead, a witness referenced Sergeant Sell as being present for certain events, however, Sergeant Sell himself did not testify to his involvement in the matter. Accordingly, because there is nothing testimonial about the ***presence*** of Sergeant Sell during some of the events testified about, the Confrontation Clause and the Constitutional rights it confers are not implicated herein.

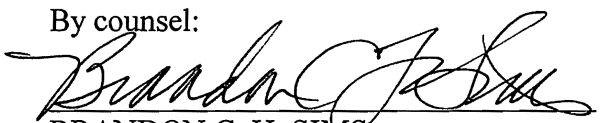
For all these reasons, the Circuit Court did not err and its actions should not be disturbed upon appeal.

## CONCLUSION

WHEREFORE, for the foregoing reasons, the Respondent requests that this Court deny the Petition for Appeal.

Respectfully submitted,
STATE OF WEST VIRGINIA

By counsel:



BRANDON C. H. SIMS
ASSISTANT PROSECUTOR
West Virginia State Bar Number 7224
Office of the Prosecuting Attorney
201 North George Street
Post Office Box 729
Charles Town, West Virginia 25414
304-728-3243 Telephone
304-728-3293 Facsimile

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**
**CHARLESTON, WEST VIRGINIA**

**STATE OF WEST VIRGINIA, Plaintiff Below,**
**Respondent,**

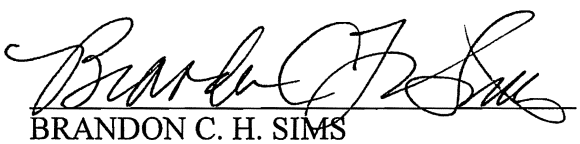
**v.** **Supreme Court Docket No.: 14-0968**

**RICHARD WAKEFIELD, Defendant Below,**
**Petitioner.**

## CERTIFICATE OF SERVICE

I, Brandon C. H. Sims, Assistant Prosecuting Attorney for Jefferson County, West Virginia and counsel for the Respondent do hereby certify that on this 30th day of January, 2015, I have served a true copy of the foregoing, "State of West Virginia's Response to Petition for Appeal" by electronic mail and hand deliver upon:

James T. Kratovil, Esq.
211 West Washington Street
Charles Town, West Virginia 25414



BRANDON C. H. SIMS
ASSISTANT PROSECUTOR
West Virginia State Bar Number 7224
Office of the Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414
304-728-3243 Telephone
304-728-3293 Facsimile