

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA **OCT 28 2011**

NO. 11-0282

STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

JONATHAN SCOTT BOURNE,

*Defendant Below,  
Petitioner.*

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**SUMMARY RESPONSE TO PETITION FOR APPEAL**

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**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**

**MICHELE DUNCAN BISHOP  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: 304-558-5830  
State Bar No. 7707  
E-mail: [mdb@wvago.gov](mailto:mdb@wvago.gov)  
*Counsel for Respondent***

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Comes now the respondent, the State of West Virginia, by Michele Duncan Bishop, assistant attorney general, pursuant to the West Virginia Revised Rule of Appellate Procedure 10(e) and according to orders of this Honorable Court dated March 28, 2011, and October 6, 2011, and responds to the petition for appeal as follows.

**I.**

**STATEMENT OF THE CASE**

**A. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.**

This is an appeal by Jonathan Scott Bourne (“the petitioner”) from the conviction and subsequent December 15, 2010, order of the Circuit Court of Mineral County (Jordan, J.), sentencing the petitioner to an indeterminate term of: ten to twenty-five years for the felony of second degree sexual assault; five to fifteen years for the felony of incest; three to ten years for the felony of

detaining with intent to defile; and one to five years for the felony of conspiracy. The sentences were set to run consecutively, resulting in a sentence of nineteen to fifty years. (App. 7-9.)<sup>1</sup>

**B. FACTS.**

When she was thirteen years old, Miranda B. was raped by her nineteen or twenty-year-old half brother—the petitioner—and his eighteen-year-old friend Kilton Kitchen<sup>2</sup>. (Trial Tr. vol. I at 137.) The rape occurred around July or August 2006, after the petitioner called his sister and invited her to come to the home he shared with their grandmother—he lived in a basement living area separate from the grandmother’s own upstairs—to “hang out”. (Trial T. Vol. I at 176-77.)

The men started drinking around 7 or 8 p.m., and left to purchase “pills and stuff” shortly afterward. (*Id.* at 178-179.) Miranda was not drinking or snorting the crushed pills like the petitioner and Kitchen were<sup>3</sup>, but she left her own non-alcoholic soda unattended when she went to the bathroom, and after she returned and resumed drinking it, she began to feel abnormal. (*Id.* at 180-81.) She then lay down on her brother’s bed and the two men left the room. (*Id.* at 183.)

Kitchen returned to the room first and began to tell Miranda she was beautiful. (*Id.* at 184.) The petitioner then came into the room and tried to remove her pants while Kitchen held Miranda’s arms. (*Id.* at 185.) The petitioner, her brother, began to rape her. (*Id.* at 185.) She fought and tried

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<sup>1</sup>The presentation of the appendix does not precisely follow the requirements of Revised Rule of Appellate Procedure<sup>7</sup>, and the respondent is unable to cite to the appendix by volume in every instance.

<sup>2</sup>Miranda and the petitioner share a father, but the petitioner was adopted by their paternal grandmother at a young age. (Trial Tr. vol. I at 170.) Miranda resided with her father, beginning around June or July 2006, and they lived only about a mile from Miranda’s grandmother’s house. (*Id.* at 170-71.) Miranda’s mother died soon after she moved in with her father. (*Id.* at 171.)

<sup>3</sup>The petitioner testified that he drank beer and snorted crushed pills when his sister was present, though he disputed that she was thirteen. (Trial Tr. vol. II at 326.)

to make noise, but the petitioner told Kitchen to turn the music louder. (Trial Tr. vol. I at 186.) When Kitchen left to do that, Miranda tried to get away, but Kitchen returned, pushed her back to the bed, and also raped her. (*Id.* at 185-86.) Kitchen then told her, in the petitioner's presence, that if she told anyone what had happened, they would kill her. (*Id.* at 188.)

When the two men finished, Miranda ran upstairs to the part of the house where her grandmother lived, took a shower, and went to "her" bed in a room she usually occupied when staying with her grandmother. (*Id.* at 187, 189.) She did not see her grandmother when she went upstairs, though her grandmother was in the house (*Id.* at 187.) However, it was approximately 2 a.m. when the physical part of the ordeal was finally over for Miranda. (*Id.* at 209.)

About a month after the rape, Miranda told her father what had happened. (*Id.* at 190.) Her father said, "I really don't want them hurting you so let's just keep this between us."<sup>4</sup> (*Id.* at 191.) Miranda decided not to tell anyone else. (*Id.*) She attempted to continue to have "as normal of a life with [her] family as [possible]" and continued to have contact with her brother. (*Id.* at 193.)

At some point, possibly around mid-October of 2009, Miranda told her then-boyfriend, Jacob Rexrode, about the rape, and Rexrode encouraged her to report it to the police. (*Id.* at 108-110, 172, 194.) Miranda reported the crime on November 3, 2009, to Deputy Sheriff Paul Karalewitz, the prevention resource officer at Keyser High School, and wrote a statement at the behest of Deputy Karalewitz. (Trial Tr. vol. I at 111, 118-120, 173.) Deputy Karalewitz referred the report to the main office of the Mineral County Sheriff's Department. (*Id.* at 128.)

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<sup>4</sup>After Miranda reported the rape to the police years later, her father told her he did not remember her telling him about the rape when it occurred. (Trial Tr. vol. I at 191.) At the time, Miranda's father "was on like Oxycontin and Percocets and Morphine and stuff. . . . Like he was always out of it and everything." (*Id.* at 192-93.)

Deputy Eric Veach completed the investigation on behalf of the Sheriff's Department and, pursuant to a warrant, arrested the petitioner on May 1, 2010, in the basement living quarters of his grandmother's home, where he still resided. (*Id.* at 137-38.) When executing the arrest warrant, Deputy Veach saw a laptop computer in the petitioner's living quarters, and asked if he could take it. (*Id.* at 142.) The petitioner confirmed that it was his laptop and consented<sup>5</sup>. (*Id.* at 142-43.) When Deputy Veach reviewed the contents of the computer, he discovered eight files of pornography, last accessed or updated April 29, 2010.<sup>6</sup> (App. at 19; Trial Tr. vol. I at 158, 166.) The titles of at least five of those files suggested that incest was the subject. (App. at 19; Trial Tr. vol. I at 158, 166.)

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<sup>5</sup>Deputy Veach later testified that his experience and training taught him the computer might contain relevant information because "typically in cases that involve sexual stuff in the nature, people may have videos or stuff on their computer or may have looked up something on the Internet or downloaded videos of similar stuff." (Sept. 24, 2010, *In Camera* Hearing Tr. at 16.) After taking the laptop, Deputy Veach obtained, on August 3, 2010, a search warrant to look at the contents of the laptop. (App. at 17; Trial Tr. vol. I at 151.) As grounds for probable cause, Deputy Veach averred:

On November 6, 2009, Miranda [B.] stated she was raped by Jonathan S. Bourne and Kilton L. Kitchen around August 2006. A warrant was issued for both subjects, when deputies served the warrant on Jonathon Bourne, the computer was observed, Jonathan advised deputies could take the computer for investigative purposes.

(App. at 17.) The warrant permitted a search for "photographs, videos, or documentation related to incest, detain w/ intent, or sexual assault, that may be located on a Dell 1525 Inspiron computer that belongs to Jonathan Bourne." (App. at 17.)

<sup>6</sup>The names of those files were telling: xnxx-amateur\_babe\_N\_action\_-\_xnxx.com; xnxx.brother\_fucks\_younger\_sister\_-\_xnxx.com; xnxx.dani\_and\_pepper\_fucking\_the\_big\_cock\_of\_the\_family\_-\_xnxx.com; xnxx.horny\_girls\_gangbang\_-\_xnxx.com; xnxx.hot\_horny\_taboo\_-\_xnxx.com; xnxx.sibling\_rivalry\_-\_xnxx.com; xnxx.taboo\_2\_bro\_and\_sis\_-\_xnxx.com; and xnxx.wild\_kinky\_family\_sex\_-\_xnxx.com. (App. at 19; Trial Tr. vol. I at 158, 165-66.)

An indictment was issued on September 8, 2010, charging the petitioner with one count of second degree sexual assault in violation of W. Va. Code § 61-8B-4(a)(1), one count of incest in violation of W. Va. Code § 61-8-12(b), one count of detaining with intent to defile in violation of W. Va. Code § 61-2-14(a), and one count of conspiracy in violation of W. Va. Code § 61-10-31. (App. at 1-3.) He was found guilty of each count subsequent to a jury trial conducted on November 15 and 16, 2010. (App. at 7-9.)

## II.

### ARGUMENT

#### **A. THE NAMES OF SEVERAL PORNOGRAPHIC FILES RECOVERED FROM THE PETITIONER'S PERSONAL COMPUTER WERE MORE PROBATIVE THAN PREJUDICIAL AS EVIDENCE OF THE PETITIONER'S LUSTFUL DISPOSITION TOWARD INCEST.**

##### **1. Standard of Review**

This Court has written:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the [evidence] on the basis of whether the [evidence] is probative as to the fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and trial court's discretion will not be overturned absent a showing of clear abuse.

Sly. Pt. 10, *State v. Derr*, 192 W. Va 165, 451 S.E.2d 731 (1994).

##### **2. Argument**

The petitioner was accused of raping his sister. Deputy Veach discovered a number of pornographic files on the petitioner's computer, the titles of which demonstrated an interest in

incest.<sup>7</sup> Defense trial counsel filed a motion *in limine* on November 10, 2010, asking the trial court to deny the admission into evidence of the names of the pornographic web sites discovered on the petitioner's computer. (App. at 10-11.) The trial court denied the motion, but gave a limiting instruction in its charge to the jury. (Trial Tr. vol. II at 376.) There was no disagreement or objection to the jury charge. (Dec. 13, 2010, Sentencing Hr'g Tr. at 7.)

The trial court evaluated the evidence taken in the September 24, 2010, hearing and the November 10, 2010, pretrial hearing and determined that the motion was governed by *In re: Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123(1990), rendering the evidence more probative than prejudicial, and thus admissible, because it showed a lustful disposition toward family members. (November 10, 2010 Pretrial Hr'g Tr. at 10.) The petitioner would distinguish *In re: Edward Charles L.*, suggesting that Miranda, a child victim, was not sufficiently young to enjoy or require the protections of *In re: Edward Charles L.*, and suggesting further because of Miranda was a child victim and the evidence depicted adult pornography, the evidence was not sufficiently related. (Pet'r's Br. at 11.)

Evidence of the petitioner's possession of incest pornography is directly related to the charge. The petitioner was charged with incest; he possessed incest pornography. "Lustful disposition" evidence is not restricted to molestation. In fact, *In re: Charles Edward L.* specifically states that West Virginia "follow[s] a number of the other jurisdictions which have such evidence

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<sup>7</sup>The prosecuting attorney, at a pretrial hearing, explained that he planned to enter the domain names into evidence through the property receipt, but indicated that he could bring the computer before the jury and pull up the domain names if that was preferred. (Nov. 10, 2010 Pretrial Hr'g Tr. at 12.) It appears that the court would have entertained a motion to limit the domain names shown to the jury to only those conveying incest as subject matter, but no such motion was made. (Id.)

admitted in sexual assault or abuse cases on the theory that such evidence shows the accuser's incestuous and lustful attitude." (Emphasis supplied.) See, also, *Simpson-v. The State*, 523 S.E.2d 320 (Ga. 1999)("In a prosecution for a sexual offense, evidence of sexual paraphernalia found in defendant's possession is inadmissible unless it shows defendant's lustful disposition toward the sexual activity for which he is charged or his bent of mind to engage in that activity.")

*In Re: Charles Edward L.*, as the petitioner correctly states, did find Justice McHugh's dissent in the *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208(1986) stating that "a sexual propensity exception allows the finder of the facts to weigh the credibility of the victim's unabridged testimony" to be "particularly applicable in cases involving child victims." *In re: Edward Charles L.* 183 W. Va. at 650, 398 S.E.2d at 132. But *Charles Edward L.* did not limit itself to especially young children. Because the stated purpose is to even the playing field in cases "pit[ting] the child's credibility against . . . an adult family member's credibility", and the Court has not suggested that the credibility of a 13-year-old victim is no less in danger than that of, say, a 7-year-old victim, there is no reason to disregard *In Re: Charles Edward L.* The petitioner also argues that the evidence was not shown to have occurred so close in time to the rape to come within the parameters of *In re: Edward Charles L.* The Court in *State v. Rash*, 226 W. Va. 35, 697 S.E.2d 71 (2010), recognized that temporal proximity goes to the weight of the evidence rather than admissibility, and that the admissibility is determined on a case-by-case basis. Remoteness in time does not in and of itself justify exclusion of the evidence. (*Id.* at 45, 697 S.E.2d at 81 (2010)).

**B. THE TRIAL COURT PROPERLY APPLIED THE RAPE SHIELD STATUTE TO EXCLUDE EVIDENCE THAT THE VICTIM MAY HAVE BEEN THE VICTIM OF A SEPARATE, STATUTORY RAPE, BECAUSE THE VICTIM MADE NO OTHER STATEMENTS ABOUT HER SEXUAL HISTORY.**

**1. Standard of Review**

This Court has written:

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 the 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.

Syl. pt. 6, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999).

**2. Argument**

At the November 10, 2010, pretrial hearing, defense trial counsel represented that he had in his possession a notebook, a diary of a sort (*see* Nov. 10, 2010 Pretrial Hrg Tr. at 21) kept by Miranda and a friend of hers, which he wished to use "solely for impeachment purposes". (*Id.* at 18.) The petitioner represented that, though Miranda had indicated in her statement prepared for the Mineral County Sheriff's Department that the rape by her brother was her "first sexual experience", pages in the notebook reflect an earlier sexual encounter. (*Id.* at 8.) The trial court excluded the evidence under the rape shield law. (*Id.* at 18-20.) Defense trial counsel preserved his objection. (*Id.* at 20.)

Importantly, defense trial counsel's representation was incorrect. There is no evidence anywhere in this record that Miranda ever, in her statement or otherwise, made assertions about her sexual history. Miranda is precisely the victim that W. Va. Code § 61-8B-11(b), West Virginia's rape shield statute, was designed to protect. W. Va. Code § 61-8B-11(b) provides:

In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous conduct an issue *in the trial* by introducing evidence with respect thereto.

(Emphasis supplied.)

This Court has addressed the statute, holding that, "As a general matter, [West Virginia's rape shield statute] bars the introduction of evidence, in a sexual assault prosecution, concerning (1) specific instances of the victim's sexual conduct with persons other than the defendant, (2) opinion evidence of the victim's sexual conduct, and (3) reputation evidence of the victim's sexual conduct." Syl. pt. 1, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999). *Guthrie* further held, however, that there is an exception and the evidence "can be introduced solely for the purpose of impeaching the credibility of the victim only if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto." Syl. pt. 2, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999). In *Guthrie*, that the victim "did not make her previous sexual conduct an issue at trial because she did not testify about her prior sexual conduct. Therefore, the evidence was properly excluded under [the rape shield statute]." *State v. Guthrie*, 205 W. Va. 326, 333, 518 S.E.2d 83, 90 (1999). As with *Guthrie*, there is no question that Miranda did not introduce evidence of past sexual encounters.

The petitioner persists, arguing that the first prong of the *Guthrie* test is met because the diary was "highly relevant for exculpatory purposes and probative in the context of his defense that he did not commit the rape and that [Miranda] was not telling the truth." (Pet'r's Brief at 13.) But the petitioner does not elaborate to explain how the possibility that Miranda was the victim of a statutory rape—because, as the diary explains, she was around 13 years old and her partner was more than 18

years old—that may or may not have occurred prior to the rape by her brother and Kitchen, had any tendency to disprove that the petitioner held Miranda down and forcibly raped her in their grandmother’s basement. This Court has written that “[a] rape victim’s previous sexual conduct with other persons has very little probative value about her consent to intercourse with a particular person at a particular time. . . .” *State v. Green*, 163 W. Va. 681, 687, 260 S.E.2d 257, 261 (1979). As for the second prong of Guthrie, the petitioner fails to explain, in the three brief sentences he uses to address the question, how the diary was probative at all, much less more probative than prejudicial. (Pet’r’s Br. at 14.) And the third prong fails just as quickly as the first two, because there is simply no indication that the defendant’s ability to present his defense was affected in any way, adversely or otherwise.

Miranda’s prior status as a victim had absolutely no relevance to the determination of whether the petitioner held her down and forcibly raped her, and the introduction of the young, vulnerable victim’s diary would have had precisely the chilling effect the rape shield law is designed to prevent. It would show future victims that their sexual histories are fair game, whether relevant or not. The rape shield law, designed to give “rape victims heightened protection against harassment, and unnecessary invasions of privacy” (*State v. Guthrie*, 205 W. Va. 326, 339, 518 S.E.2d 83, 96 (1999) quoting *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 1746, 114 L.Ed.2d 205, 212 (1991)), must be left to serve the purposes for which it was designed.

**C. EVIDENCE THAT THE PETITIONER WAS ENGAGING IN THE USE OF ALCOHOL AND NARCOTICS THROUGHOUT THE EVENING WHEN HE RAPED HIS SISTER WAS ADMISSIBLE WITHOUT THE NECESSITY OF *IN CAMERA* REVIEW BECAUSE THE EVIDENCE WAS *RES GESTAE* AND NOT SUBJECT TO EXCLUSION UNDER RULE 404(B) OF THE WEST VIRGINIA RULES OF EVIDENCE.**

**1. Standard of Review**

Rule 404(b) does not apply to the evidence in question, and the standard of review is described as follows:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the [evidence] on the basis of whether the [evidence] is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Syl. Pt. 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

**2. Argument**

The trial court's ruling on this matter is not contained in the appendix, because the page on which the ruling would have appeared was not copied into the transcript. (Nov. 10, 2010 Pretrial Hr'g Tr. at 13-15.) The petitioner argues that the court should have conducted an *in camera* hearing, pursuant to *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994) to evaluate the State's proffer of evidence of the illegal use of alcohol and narcotics by the petitioner before he was 21 years old.

The petitioner incorrectly characterizes the testimony about the petitioner's drug and alcohol use on the night of the crime as evidence covered by Rule 404(b) of the West Virginia Rules of Evidence. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Instead, “the acts complained of were so temporally close in time” as to be “considered admissible independently of Rule 404(b) analysis.” *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 1996). The Court has explained, in footnote, the evaluation of whether to apply Rule 404(b):

In determining whether the admissibility of evidence of “other bad acts” is governed by Rule 404(b), we must first determine if the evidence is “intrinsic” or “extrinsic”. See *United States v. Williams*, 900 F.2d 823, 825 (5<sup>th</sup> Cir. 1990): “‘Other act’ evidence is ‘intrinsic when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.” (Citations omitted.) If the proffer fits in to the “intrinsic” category, evidence of other crimes should not be suppressed when those facts come in as *res gestae* - as part and parcel of the proof charged in the indictment. See *United States v. Masters*, 622 F.2d 83, 86 (4<sup>th</sup> Cir. 1980)(stating evidence is admissible when it provides the context of the crime, “is necessary to a ‘full presentation’ of the case, or is . . . appropriate in order ‘to complete the story of the crime on trial by proving its immediate context or the *res gestae*”). (Citations omitted.)

n.29, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613, 1996).

No *in camera* hearing was required because the proffered evidence was *res gestae*. The petitioner called his sister to ask if she wanted to come to their grandmother’s house to “hang out” and when she arrived, he and Kitchen already had begun drinking. The men left the house to get pills, which they promptly “snorted” upon return. Moreover, the victim testified that she began to feel strange after taking a drink of her own unattended non-alcoholic beverage, raising the possibility that she was surreptitiously given substances, so it was important in the presentation of evidence that those substances were on the premises. The petitioner and Kitchen took a brief break from their

indulgence just long enough to assault the victim. “Rule 403 was not intended to prohibit a prosecutor from presenting a full picture of a crime . . . . Nor does Rule 403 force a prosecutor to eliminate details. . .” *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996). The evidence at issue was admissible without the necessity of a hearing because it was “not unrelated but integrally connected to the criminal activity charged in the indictment.” *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996).

**D. A SEARCH WARRANT WAS NOT REQUIRED TO SEARCH THE CONTENTS OF THE PETITIONER’S LAPTOP COMPUTER BECAUSE THE PETITIONER CONSENTED WHEN DEPUTY VEACH ASKED IF HE COULD TAKE THE LAPTOP. UNDER WEST VIRGINIA LAW, WHEN EVIDENCE IS LAWFULLY ACQUIRED, A SEARCH WARRANT IS NOT NECESSARY FOR THE SEARCH OF THE CONTENTS OF THAT EVIDENCE.**

**1. Standard of Review**

The standard of review of a circuit court’s ruling on a motion to suppress is described by this Court:

The standard of review of a circuit court’s ruling on a motion to suppress is now well defined in this State. *See State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994) (discussing at length the standard of review in a suppression determination). By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. *See State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886, 891 (1994). When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

*State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995) (footnotes omitted). The Court later added that, “[b]ecause of the highly fact-specific nature of a motion to suppress, particular deference

is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues.” *State v. Lacy*, 196 W. Va. 104, 109, 468 S.E.2d 719, 724 (1996).

## 2. Argument

On the day that Deputy Veach arrested the petitioner, he saw a laptop in the petitioner’s living space and asked the petitioner’s permission to take it. The petitioner consented. He now argues that the trial court erred when it ruled that the search of the computer was permissible. (Sept. 24, 2010, *In Camera* Hr’g Tr. at 20-21.) The petitioner argues that there was not sufficient probable cause to support the search warrant that Deputy Veach later obtained, on August 3, 2010, to search the contents of the computer.

The petitioner does not argue that the initial seizure of the laptop computer was improper, nor could he; he unequivocally consented when Deputy Veach asked to take it. A search warrant then, was not needed. *State v. Buzzard*, 194 W. Va. 544, 461 S.E.2d. 50 (1995). Once the computer was lawfully obtained by the police officer, Deputy Veach did not need an additional warrant to search the contents. The petitioner had a reasonable expectation that the contents would be viewed, particularly since the petitioner did not explicitly limit the scope of the search. *See Florida V. Jimeno*, 500 U.S. 248 (1991); *See also Trulock V. French*, 275 F.3d 391 (4th Cir 2001). This Court recently noted that “it has been observed generally that an additional warrant is not required to examine seized objects.” *State v. White*, 227 W. Va. at \_\_\_, 707 S.E.2d at 858 (2011) *citing* 2 Wayne R. LaFave, *Search and Seizure*, § 4.10(e) at 771. *See also State v. Gregory*, 147 P.3d 1201, 1236 (Wash. 2006)(“once a suspect’s property is lawfully in the State’s control, the State may perform forensic tests and use the resulting information to further unrelated criminal investigations,

without violating the owner's Fourth Amendment rights" (citing *State v. Cheatham*, 150 Wash. 2d 626, 638, 81 P.3d 830 (2003)). The *White* Court expressly held that, "When searching a vehicle pursuant to a valid search warrant, no additional search warrant is required to examine the contents of items that are properly seized in the execution of the warrant, including, but not limited to, cellular telephones." Syl. pt. 14, *State v. White*.

VI.

**CONCLUSION**

For all the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Mineral County.

*Respectfully submitted,*

State of West Virginia,  
*Plaintiff Below, Respondent,*

By counsel,

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



MICHELE DUNCAN BISHOP  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
State Bar No. 7707  
Telephone: 304-558-5830  
E-mail: [mdb@wvago.gov](mailto:mdb@wvago.gov)

*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, MICHELE DUNCAN BISHOP, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE TO PETITION FOR APPEAL* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this <sup>28<sup>th</sup></sup> day of October, 2011, addressed as follows:

To: Nicholas T. James, Esq.  
65 N. Main Street  
Keyser, WV 26726

James Courier, Esq.  
Prosecuting Attorney, Mineral County  
P.O. Drawer 458  
Keyser, WV 26726

  
MICHELE DUNCAN BISHOP