

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1386

**STATE OF WEST VIRGINIA,**

**Plaintiff below, Respondent,**

**v.**

**MICHAEL J. McGILL,**

**Defendant below, Petitioner.**

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**PETITIONER'S SUPPLEMENTAL REPLY TO RESPONDENT'S  
SUPPLEMENTAL RESPONSE TO PETITION FOR APPEAL**

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On Appeal from the Circuit Court of Marshall County  
Honorable Mark A. Karl  
Circuit Court Case No. 09-F-71

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Robert G. McCoid, Esq.  
West Virginia Bar I.D. No. 6714  
**McCAMIC, SACCO  
& McCOID, P.L.L.C.**  
56-58 Fourteenth Street  
Post Office Box 151  
Wheeling, WV 26003  
(304) 232-6750  
(304) 232-3548 (telefax)  
[rmccoid@mspmlaw.com](mailto:rmccoid@mspmlaw.com)  
*Of counsel to Michael J. McGill*

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### **III. SUPPLEMENTAL REPLY**

#### **A. Introduction**

Petitioner, Michael J. McGill, filed the instant Petition on January 9, 2011, challenging the Marshall County Circuit Court's Order of August 27, 2010, permitting and authorizing the State of West Virginia to introduce into evidence at the trial of this matter Petitioner's medical records on the basis that the "Order" was improvidently issued and was illegal. The State filed a summary response on March 26, 2012, which, frankly, virtually ignored Petitioner's arguments. On October 18, 2012, this Court issued an Order setting this matter for Rule 20, W. Va. Rev. R. App. P., oral argument on January 16, 2013.

Apparently agreeing with Petitioner that the State's response was, in fact, not very responsive, this Court directed the State to file a supplemental Respondent's brief on or before November 21, 2012, and authorized Petitioner to file a supplemental reply brief within twenty (20) days of receipt of respondent's brief. Petitioner's counsel hereby files his supplemental reply.

#### **B. Supplemental Reply**

Once, again the State has missed the boat. Its response is predicated on the assumption, found at page 5 of its Supplemental Brief, that the motion proffered by the State that resulted in the issuance of the subject Order, was "wholly appropriate." The State suggests that, unless Petitioner can prove that the circuit court acted out of "prejudicial animus" in signing the Order, his argument "falls apart." *Id.* The State is somehow fixated on the issue of "judicial bias" and cites a Rhode Island case that addressed the sale of real estate and child support. *Id.* Again, Petitioner is baffled by

how poorly the State discerns his argument. As Petitioner noted in his initial brief, “The thrust of the instant appeal is predicated on Petitioner’s sole contention that the trial court erred by sanctioning, and, indeed, facilitating the State’s violation of Petitioner’s Fourth Amendment right to privacy.” Brief of Petitioner at p. 1. **This matter involves only a Fourth Amendment issue and the circuit’s signing of an “Order” that emanated off of a fake, made-up, non-existent case.**

The State concedes that citizens have a privacy expectation in their medical records. Supplemental Brief of Respondent, State of West Virginia at p. 8, 13. However, the State proceeds to suggest that the Fourth Amendment may not require the police to obtain a search warrant to conduct an investigatory search of a patient’s records and cites as support for this proposition *Douglas v. Dobbs*, 419 F.3d 1097, 1103 (10th Cir. 2005), a federal civil matter involving a damages claim asserted pursuant to 42 U.S.C. § 1983.1 However, after concluding that a patient has a constitutional privacy interest in pharmacy records, all the *Dobbs* Court actually held was merely that, for purposes of determining whether an assistant district attorney enjoyed qualified immunity for a civil claim, the plaintiff was required to establish that such privacy right was clearly established yet had failed to do so. 419 F.3d at 1102-1103.

The State then prattles on about the distinction between search warrants and subpoenas and cites to a Fourth Circuit case, *In re Subpoena Duces Tecum*, 228 F.3d 341 (4th Cir. 2000), in which the court there upheld the enforcement of a federal subpoena duces tecum issued under the federal rule against a challenge that no probable

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<sup>1</sup> The State appears to concede the applicability of the exclusionary rule to Fourteenth Amendment claims and that there exists a Fourteenth Amendment privacy right in medical record information. Supplemental Brief of Respondent, State of West Virginia at pp. 6, 8 (citations omitted).

“proceeding before the court.” No such proceeding was pending here – no criminal complaint had issued, no grand jury had been convened, and no indictment had been procured.

The balance of the State’s supplemental response, contained at pp. 20-22 of the same, addresses the Health Insurance Portability and Accountability Act, 42 U.S. Code § 1320d-2, *et seq.* (“HIPAA”). While Petitioner finds that discussion fascinating, he is perplexed over its inclusion in the State’s response. Although Petitioner raised a cursory HIPAA argument before the circuit court in his initial motion and while passing reference is made to the same in the procedural history in the initial Petition herein, Petitioner has not raised any argument pertaining to HIPAA in the Petition herein before this Court. HIPAA has no applicability here (except to the generic extent that it recognizes a privacy interest in medical records) nor has Petitioner argued as such.

Again, neither a search warrant nor a subpoena was used by the State to obtain Petitioner’s medical records in the instant matter. Indeed, the State, in filing its make-it-up “motion to compel” with the Marshall County Circuit Court didn’t even attempt to characterize whatever it was that it was offering to the Court as a “search warrant” or a “subpoena.” Recall that the State, in its initial Summary Response at p. 8, made the following implicit concession from which it now appears to backpedal: *“Arguably, the action taken by investigators to obtain Petitioner’s medical records could be vulnerable to challenge under a fact-based analysis where legitimately prejudicial evidence had been obtained.”* Petitioner is unaware of any authority that creates a “legitimately prejudicial evidence” exception to any Fourth Amendment or Fourteenth Amendment privacy interest otherwise recognized by this Court or any other.

acceptable, if not preferred means of obtaining medical records. Supplemental Brief of Respondent, State of West Virginia at pp. 13-20. The extrajurisdictional authorities cited lend no support to the State's position in the matter at Bar. *People v. Perlos*, 462 N.W.2d 310 (Mich. 1990), cited at pp. 13-14 of the State's brief, involved the disclosure of blood draw evidence in a driving-under-the-influence accident case made pursuant to an approved statutory procedure, and the Michigan Supreme Court found it persuasive that the applicable statute was part of a broader implied consent act. Similar facts are not implicated in the instant matter, and no implied consent analysis applies.

In *State v. Legrand*, 20 A.3d 52, 64 (Conn. App. 2011), cited by the State at pp. 15-16 of its brief, medical records were obtained pursuant to a subpoena duces tecum, and the defendant was afforded notice and an opportunity to object. Petitioner was afforded no such notice in the underlying matter and certainly was furnished no opportunity to object.

*City of Muskego v. Godec*, 482 N.W.2d 79 (Wisc. App. 1992), cited by Respondent at pp. 16-17 of its supplemental reply, has absolutely no bearing for or against any party to this matter, because the court's analysis there was driven by a particular Wisconsin statute with no analogue here. Petitioner is flummoxed by its inclusion in the State's argument.

The statutes the State cites as support for its position, Supplemental Brief of Respondent, State of West Virginia at pp. 18-19, generally apply to the duties of medical care providers in disclosing records. To the extent that they address the circumstances under which they may be ordered to be produced, they do not support the State at all. For example, W. Va. Code § 27-3-1(b)(3) provides that the circumstances under which a court may order the release of psychiatric records include those "relevant" to a

cause had been established prior to the acquisition of the records. However, the State fails to note that Rule 17, W. Va. R. Crim. P., plainly requires that a subpoena be issued by the Clerk of the Court and under the Court's seal. This requirement was simply not followed here, no case was pending from which to furnish a vehicle for the issuance of a subpoena, and despite whatever it was that the circuit court issued, it was not a subpoena duces tecum.

Bizarrely, the State asserts Petitioner is incorrect in contending that the State lacked probable cause and failed to contain a particularized description of the items to be seized. Supplemental Brief of Respondent, State of West Virginia at p. 12. While one might fairly argue the point of whether a "particularized description" was contained in the State's *ex parte* "motion to compel," which sought generic medical records, what is beyond any dispute is that there existed absolutely facts constituting probable cause in the subject motion. ***Whatever facts may have been contained in the subject "motion to compel," not included among them was even a mere allegation that a crime had been committed.***

Relative to the State's recitation of all of the facts purportedly in the State's possession at the time that offered its *ex parte* "motion to compel" (contained at n. 14 of its Supplemental Brief), none are mentioned in any manner in the motion. Those facts may have been adduced at trial and even may have been in the State's possession at the time that it filed its "motion to compel," but the State never bothered to share them with the circuit court, who granted the "motion to compel" based upon an allegation that Petitioner had been involved in an "incident."

The balance of the State's supplemental response addresses the discoverability of medical records associated with potential crimes, noting that a subpoena may be an

Summarily, Petitioner respectfully requests that this Court find the following:

(1) West Virginians have a strong interest in the privacy of their medical records; (2) the privacy of those records are constitutionally protected from unreasonable governmental intrusion by W. Va. Const. Art. III, § 6 and the Fourth and/or Fourteenth Amendments to the federal Constitution; (3) that law enforcement is not permitted either unfettered access to a citizen's medical records or permission to rummage around in a citizen's medical records under the rubric of some specious court order founded upon a mere hunch that the citizen was involved in an "incident;" (4) that acquisition of such records for law enforcement and criminal investigatory purposes is not foreclosed to the State provided that some objective standard for obtaining the same is followed as in the case of a validly issued search warrant or a subpoena duces tecum issued off of an existing case and in conformity with Rule 17, W. Va. R. Crim. P.; (5) that the subject order was improvidently issued by the Marshall County Circuit Court in violation of W. Va. Const. Art. III, § 6 and U.S. Const. Amd. 4 and 14; (6) that it was error for the circuit court to permit the State to admit Petitioner's medical records at the trial of this matter; and (7) that Petitioner is entitled to a new trial.

#### **IV. CONCLUSION AND RELIEF REQUESTED**

For the foregoing reasons, and any others that may be apparent to this Court, your Petitioner, Michael J. McGill, respectfully prays that this Court grant his Petition, reverse the Circuit Court's order admitting his records, vacate his conviction, and grant him such other relief to which he may be entitled.

Respectfully submitted,

**MICHAEL JOHN McGILL,**  
Petitioner.

By: \_\_\_\_\_  
Of Counsel

Robert G. McCoid, Esq.  
West Virginia Bar I.D. No. 6714  
**McCAMIC, SACCO  
& McCOID, P.L.L.C.**  
56-58 Fourteenth Street  
Post Office Box 151  
Wheeling, WV 26003  
(304) 232-6750  
(304) 232-3548 (telefax)  
[rmccoid@mbspmlaw.com](mailto:rmccoid@mbspmlaw.com)  
*Of counsel to Michael J. McGill*

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**V. CERTIFICATE OF SERVICE**

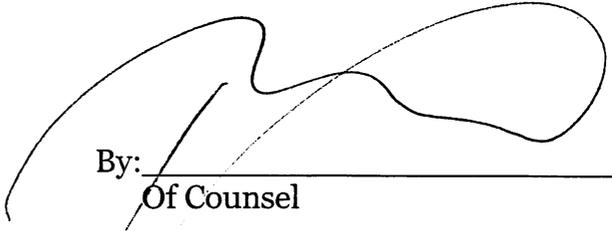
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Service of the foregoing **Petitioner's Supplemental Reply to Respondent's Supplemental Response to the Petition for Appeal** was had by delivering true and correct copies thereof to the following persons via First Class U.S. Mail, postage prepaid, to their last known address this 14th day of December, 2012.

Honorable Darrel V. McGraw  
Robert D. Goldberg, Esq., Assistant Attorney General  
**OFFICE OF THE ATTORNEY GENERAL**  
State Capitol – Room E-26  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

By:   
\_\_\_\_\_  
Of Counsel

Robert G. McCoid, Esq.  
West Virginia Bar I.D. No. 6714  
**McCAMIC, SACCO,  
& McCOID, P.L.L.C.**  
Post Office Box 151  
56-58 Fourteenth Street  
Wheeling, WV 26003  
(304) 232-6750  
(304) 232-3852 (telefax)  
[rmccoid@mspmllaw.com](mailto:rmccoid@mspmllaw.com)