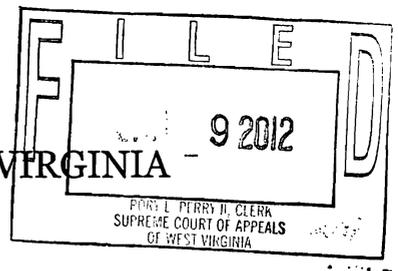


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Docket No. 11-1386

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

MICHAEL J. McGILL,

Defendant below, Petitioner.

COPY

BRIEF OF PETITIONER

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

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III. ASSIGNMENT OF ERROR

The Circuit Court of Marshall County erred and thereby violated Petitioner's Fourth Amendment right to be free from unreasonable searches and seizures when it signed an *ex parte* pre-indictment, pre-criminal charge "order" out of thin air that emanated off of make-up, fake case, that was neither a Rule 17, W. Va. R. Crim. P. subpoena *duces tecum* nor a search warrant supported by any averment whatsoever that a crime had been committed or any oath or affirmation that was offered in support of issuing the same.

IV. STATEMENT OF THE CASE

The instant petition for appeal arises by virtue of Michael J. McGill's (hereinafter "Petitioner") conviction of March 11, 2011, for the offense of battery following a multi-day jury trial and the related one (1) year sentence imposed by the Circuit Court of Marshall County on June 27, 2011.

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. Specifically, Petitioner maintains that the Circuit Court of Marshall County erred by entering an "Order" that was neither a search warrant nor a subpoena emanating off of a non-existent case prior to Petitioner's arrest, which Order permitted the State and its agents to secure Petitioner's medical records; in turn, these records were used as a basis for Petitioner's arrest and indictment and were introduced at trial by the State over Petitioner's objection to assist the State in procuring Petitioner's conviction. As the following recitation of the facts and procedural

history of this matter make clear, the Circuit Court committed error, thus warranting a reversal of Petitioner's conviction.

In June, 2009, Michael J. McGill became the target of an investigation by the Marshall County Sheriff's Department concerning an "incident" in which he was alleged to have been involved and which allegedly necessitated his receipt of medical care at Reynolds Memorial Hospital between June 12, 2009, and June 14, 2009. Because the Sheriff's Department maintained that review of any records generated from such medical treatment was "important" to its investigation of the so-called "incident," the Marshall County Prosecuting Attorney, on behalf of the Sheriff's Department, prepared a document styled "State of West Virginia, plaintiff, v. Criminal Investigation (Michael J. McGill) and entitled "Motion to Compel Surrender of Medical Records;" the same was thereafter submitted on an *ex parte* basis to the circuit court on June 15, 2009. Joint Appendix ("JA") at p. 1.

The document, which purports to be some form of motion but which bears no case number save an internal Sheriff's Department investigation number (01-09-6968), did not emanate off of any existing indictment or case. *Id.* It had no accompanying affidavit, oath, or affirmation. *Id.* Otherwise, the "Motion to Compel" failed to indicate in any manner that a crime was even committed or that it was more likely than not that Petitioner was involved in any such crime.

Despite the utter, complete, and total absence of: (1) an existing criminal or civil case; (2) any suggestion whatsoever that a crime had even been committed; (3) any suggestion whatsoever that Petitioner had committed a crime; (4) any averment by a witness to support a finding of probable cause; (5) any written oath or affirmation; and (6) any particularized description of the evidence to be seized or how such evidence

constituted the fruits of a crime or would lead to the discovery of a crime, the Marshall County Circuit Court thereafter issued an “Order” granting the “Motion to Compel,” which Order was completely bereft of any finding that facts sufficient to establish probable cause had been placed before the Court. JA at p. 3.

Petitioner’s confidential medical records were thereafter disgorged to the prosecutor’s investigator. *Id.* These records reflected that Petitioner had apparently sustained injuries to his right hand and left foot. JA at pp. 5-13. Petitioner was thereafter arrested and eventually indicted by the November, 2009, term of the Marshall County grand jury for the felony offenses of domestic battery, third offense, in violation of W. Va. Code § 61-2-28(d) and malicious assault in contravention of W. Va. Code § 61-2-9(a). JA at pp. 14-15.

Specifically, the State alleged that Petitioner had battered Sheila McGill (his cousin) on June 13, 2009, *id.* at JA 14 and 15, and that he had also maliciously assaulted Jeffrey Yoho on that same date. *Id.* at 14A. In discovery, the State disclosed Petitioner’s medical records seized pursuant to the Order emanating off the so-called “Motion to Compel.”

Petitioner thereafter filed a motion in limine seeking exclusion of Petitioner’s medical records at trial, arguing, *inter alia*, that the “Order” was a fugitive document materializing out of thin air, was neither a subpoena nor a search warrant, did not emanate from an existing case or indictment, functionally violated the terms of 42 U.S. Code § 1320d-2, *et seq.*, the Health Insurance Portability and Accountability Act, and amounted to nothing more than a sweeping judicial command directed to the hospital to do what the prosecutor wanted merely because the prosecutor wanted it. JA at pp. 16-19. Petitioner argued that the prosecutor’s efforts to term his so-called “motion” a case

or judicial proceeding was an *ipse dixit* and that the Order issued by the circuit court was naught more than judicial fiat. *Id.* at pp. 17-18.

On February 1, 2010, the circuit court ordered the State to respond to Petitioner's motion. JA at p. 23. On February 11, 2010, the State filed its response. JA at pp. 24-27. Apparently completely misapprehending the substance of Petitioner's argument, the State argued that the records were obtained lawfully, because they were procured via a court order. *Id.* As well, the State suggested the document was, in fact, the equivalent of a subpoena and fell within the ambit of W. Va. Code § 57-5-4b, yet the State neglected to address Petitioner's argument that a subpoena cannot issue out of thin air and must, instead, be derived off of a case. *Id.*

On February 11, 2010, the court entertained argument from counsel, and Petitioner's counsel argued that the Order was not a subpoena nor was it a search warrant, failing to include any averment of probable cause and expanded the basis for exclusion of Petitioner's medical records to include a constitutional dimension under the U.S. CONST. AMD. 4. JA at pp. 597-599. Petitioner termed the State's "motion" a "made up case." JA at p. 600. The State argued contra. JA at p. 599-600. The circuit court took the matter under advisement. At a hearing conducted on August 27, 2010, the circuit court denied Petitioner's motion, finding that the same was properly issued under Rules 17(a) and (c), W. Va. R. Crim. P., and W. Va. Code § 57-5-4b, and preserved Petitioner's objection to the court's ruling.¹ JA at p. 606.

¹ W. Va. Code § 57-5-4b addresses hospital records and furnishing copies of medical records in compliance with subpoenas. Specifically, the statute provides, in relevant part, that

when a subpoena duces tecum is served upon a custodian of records of any hospital . . . in an action or proceeding . . . and such subpoena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it shall be sufficient compliance therewith if the custodian or other officer of the

Petitioner's trial was scheduled on two (2) occasions following the court's ruling, but, due to the inordinate amount of gratuitous, adverse pretrial publicity generated around the time of his arrest by the Marshall County Sheriff and his underlings and despite the circuit court's granting (without objection by the State) of Petitioner's pre-indictment Motion to Limit Extrajudicial Pretrial Publicity, a change of venue was requested by Petitioner, granted by the Marshall County Circuit Court, and approved by this Court pursuant to the December 22, 2010, Administrative Order of Honorable Robin Jean David, Chief Justice, approving the appointment of Honorable Mark A. Karl to preside over the same in the Circuit Court of Monongalia County. JA at p. 31.

Petitioner's trial commenced on March 7, 2011. Following extensive voir dire, a jury was empanelled on March 8, 2011. JA at p. 62. At trial, the State sought to introduce Petitioner's subject medical records to demonstrate that Petitioner suffered injuries to his hand and foot in order to bolster the State's claims that Petitioner had maliciously assaulted Michael Yoho, but the State wished to be relieved of the burden of producing a Dr. John J. Templeton, the attending physician who ministered to Petitioner during his emergency room visit on June 14, 2009. Accordingly, the State and Petitioner stipulated to the admissibility of the medical records without the need for the State to call Dr. Templeton to authenticate the same, although Petitioner's counsel made it very clear on the record that Petitioner was not waiving his argument to their admissibility on constitutional and jurisdictional grounds; rather, the stipulation, which was read to the jury, was designed solely to streamline the trial by relieving the State of

hospital shall, on or before the time specified in the subpoena duces tecum, file with the court clerk or the officer, body or tribunal conducting the hearing, a true . . . copy . . . of all records described in such subpoena.

the burden to call a witness to merely authenticate the medical records. JA at pp. 259-267, 274-275.

Petitioner's medical records were thereafter admitted. JA at p. 267. Prior to their admission into evidence, however, both the State and the Court confirmed on the records that Petitioner's objections to the admissibility of Petitioner's medical records for the reasons previously argued by Petitioner were adequately preserved and that, by consenting to their admission without authentication, Petitioner was not waiving his objections to their admissibility on constitutional and jurisdictional grounds. JA at pp. 262 and 267. Petitioner testified that he had injured his hand and foot during an ATV accident and that he thereafter sought medical attention for these injuries. JA at pp. 415-416, 441. The State argued in closing, however, that the injuries he sustained had been suffered during the altercation with Michael Yoho. JA at p. 547.

The jury returned a verdict of "not guilty" as to Count I of the Indictment charging Petitioner with domestic battery, third offense, and "guilty" of simple misdemeanor battery as a lesser included offense of malicious assault as charged in Count II of the Indictment. JA at pp. 37-38, 591-592. Petitioner thereafter timely filed a Motion for Judgment of Acquittal and Alternative Motion for New Trial, arguing, *inter alia*, that the circuit court erred in admitting Petitioner's medical records in abrogation of U.S. CONST. AMD. 4 and W. VA. CONST. ART. III, § 6. JA at pp. 40. On June 27, 2011, the circuit court denied Petitioner's motion and sentenced Petitioner to one (1) year in jail relative to the misdemeanor battery offense. JA at pp. 45-48. On October 23, 2011, Petitioner filed a notice of intent to appeal with this Court.

However, because the circuit court refused to credit Petitioner with the approximately eight and a half months of time he spent incarcerated while awaiting

trial. JA at p. 47, Petitioner filed an extraordinary write before this Court in *State ex rel. Michael J. McGill v. Honorable Mark A. Karl, et al.*, Case No. 11-1351, Supreme Court of Appeals of West Virginia, challenging the circuit court's denial of pretrial confinement credit against Petitioner's one (1) year sentence. The State thereafter essentially agreed with Petitioner's position, and, by Order dated November 10, 2011, this Court issued a rule to show cause returnable to the Marshall County Circuit Court directing that Petitioner be credited with the time he had spent incarcerated awaiting trial.

The Marshall County Circuit Court thereafter re-sentenced Petitioner by Order dated December 3, 2011, and granted him pretrial confinement credit consistent with this Court's Show Cause Order. JA at pp. 49-50. Petitioner now seeks to appeal his conviction, and, specifically, the circuit court's unlawful order authorizing the State to obtain his medical records and otherwise admitting Petitioner's medical records at trial.

V. SUMMARY OF ARGUMENT

Petitioner's sole argument raised in this Petition rests upon his contention that the Marshall County Circuit Court erred by entering an illegal Order, which was neither a search warrant nor a subpoena, authorizing the State and its agents to rummage around in his private medical records in the absence of: any pending case or proceeding from which a subpoena could be derived; any allegation that Petitioner had committed a crime; any allegation whatsoever that any crime had even been committed; or any oath or affirmation offered by the State in support of its request for an order granting it authority to obtain such records. Because Petitioner's enjoys a right to privacy in his medical records, because that right was violated by the circuit court in unlawfully permitting the prosecutor to obtain his medical records, because those records were

used against Petitioner at trial, and because the issuance of such orders is an error periodically committed by the Marshall County Circuit Court, reversal of Petitioner's conviction for battery is required.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that, upon an application of the criteria set forth in Rules 16(d)(6) and 18(a)(4), W. Va. Rev. R. App. P., although the facts and legal arguments are adequately presented in this brief and accompanying Joint Appendix, this Court's decisional process would be significantly aided by oral argument. Specifically, Petitioner maintains that a Rule 20, W. Va. Rev. R. App. P., is warranted, because the underlying issue involves an apparent question of first impression, the case implicates an issue of fundamental public importance, and it involves a constitutional question regarding the validity of a court ruling. Accordingly, Petitioner's counsel believes that oral argument is necessary to fully air out the issues raised herein and would aid this Court in correcting the underlying error.

VII. POINTS AND AUTHORITIES OF LAW AND ARGUMENT

A. Standard of Review.

In prescribing the standard of review for suppression motions,² this Court has held that:

² Although Petitioner's Motion in Limine No. 1: Exclusion from Evidence of Defendant's Medical Records was not initially characterized as a motion to suppress (because the State's "Motion to Compel" was evidently not a search warrant and the Court's Order granting the same was not termed a search warrant), it essentially amounted to such a motion when Petitioner's counsel moved to expand the bases upon which those records should be excluded to include constitutional grounds under the federal Fourth Amendment. JA at pp. 261, 599. This argument was reiterated by Petition in his motion for new trial. JA at p. 40.

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under [U.S. CONST. AMD 4] . . . and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

Syl. Pts. 1 and 2, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Concerning other motions to exclude evidence, this Court has also held that

‘[a]lthough most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard, . . . an appellate court reviews *de novo* the legal analysis underlying a trial court's decision.’ *State v. Guthrie*, 194 W. Va. 657, 680, 461 S.E.2d 163, 186 (1995) (citations omitted).

State v. Wade, 200 W. Va. 637, 652, 490 S.E.2d 724, 739, *cert. denied*, 522 U.S. 1003, 118 S.Ct. 576, 139 L.Ed.2d 415 (1997).

B. The Circuit Court of Marshall County Abandoned Its Role as a Separate and Detached Judicial Officer and Effectively Became a Complicit Tool for Law Enforcement by Issuing A *De Facto*, *Ex Parte* Search Warrant Commanding the Surrender of Petitioner’s Medical Records to the State in the Complete and Total Absence of: (1) Any Allegation whatsoever that A Crime Had Even Been Committed; (2) Any Allegation that Petitioner Had Committed Any Crime; and (3) Any Oath or Affirmation or Affidavit Offered to Support the Issuance of Such A *De Facto* Search Warrant.

Petitioner’s argument is fairly straightforward: the Marshall County prosecuting attorney suspected that Petitioner may have had involved in an “incident,” *see* JA at p. 1, prepared a so-called “Motion to Compel Surrender of Medical Records” and styled the

same as some form of pleading despite the fact that no case existed, approached the circuit court on an *ex parte* basis with the make-up motion emanating from a fake case, and the circuit court willingly obliged the prosecutor, signing an “Order” under the rubric of the fake case commanding a third party (Reynolds Memorial Hospital) to disgorge Petitioner’s medical records. JA at p. 3. The gracious cooperation extended by the court to the State in facilitating its investigation was offered despite the fact that the prosecutor’s make-up “Motion to Compel Surrender of Medical Records” failed utterly to describe any form of crime or how Petitioner was associated with one and was otherwise unsupported by any oath or affirmation. Stated otherwise, the circuit court evidently signed the order with no critical eye toward what it was. In turn, those records were used at trial to procure Petitioner’s conviction for misdemeanor battery.

The Fourth Amendment to the federal Constitution provides in relevant part that “The right of the people to be secure in their . . . papers, and effects, against unreasonable searches and seizures, shall not be violated.” This safeguard has been made binding on the States. *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782, 1785 (1949), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).³

Fairly stated, even if the Order could be viewed as some form of search warrant (despite the fact that it does not even remotely resemble a search warrant), it is so substantively and structurally deficient that it must be deemed void. Indeed, even the

³ Certainly, Petitioner harbors a strong privacy expectation in his medical records, which are afforded statutory confidentiality by virtue of, *inter alia*, 42 U.S. Code § 1320d-2, *et seq.* Moreover, this Court has recently recognized that “[a] person’s medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected.” *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, --- S.E.2d ----, 2011 WL 1486100 at p. 16 (W.Va. 2011), *quoting Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 633 (S.D. Cal. 1999) (internal quotations and citations omitted).

State did not go through the charade of seeking to characterize it as one in its papers or argument. JA at pp. 24-30, and 599.

In order for a search warrant to be valid, it must, *inter alia*, include a showing of probable cause and be supported by an oath or affirmation. W. Va. Code § 62-1A-3. The form is not critical, but the contents are. *See* F. Cleckley, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE at p. I-355 (1993 ed.), *citing State v. Wotring*, 167 W. Va. 104, 111, 279 S.E.2d 182, 188 (1981) (probable cause goes to substance and not to form). Inarguably, the State's application does not even mention that a crime was committed. No mention is made of any victim and nor is any effort put forth to define what the so-called "incident" was. JA at p. 1. While probable cause is evaluated under a totality-of-the-circumstances test, *see State v. Lilly*, 194 W. Va. 595, 601, 461 S.E.2d 101, 108 (1995), the State's "motion" and the "Order" issuing in response fail to even approach the necessity for such analysis. West Virginia Code § 62-1A-3 requires that the court issuing the warrant describe the grounds or probable cause for its issuance. No such averment is contained within the circuit court's "Order," which simply grants the State's wish.

Moreover, if the "Order is to be viewed as a search warrant, this Court has held that "[b]oth the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation. There is virtual unanimity that a warrant may not issue on unsworn testimony." Syl. pt. 3, *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986); Syl. Pt. 2, *State v. Hlavacek*, 185 W. Va. 371, 407 S.E.2d 375 (1991).

While the United States Supreme Court created a good faith exception to the warrant requirement such that a police officer acting in good faith may nevertheless rely upon a defectively or improvidently issued search warrant, *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the *Leon* Court also noted that “reviewing courts will not defer to a warrant based on an affidavit that does not ‘provide the magistrate with a substantial basis for determining the existence of probable cause.’ ‘Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.’ *Leon*, 468 U.S. at 915, 104 S.Ct. at 3416 (citations omitted).

This Court, too, has noted that the scope of that good faith is not without limitation. Specifically, this Court has held that

Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.

Syllabus Point 4, *Adkins*, 176 W. Va. 613, 346 S.E. 2d 762.

In the matter at Bar, there exists absolutely no suggestion whatsoever that any sworn statement was offered by anyone in order to trigger the issuance of the circuit court’s order, and, accordingly, no “substantial basis” existed to procure the issuance of the “order.” Rather, it appears only that the prosecutor waltzed down the hall, asked the court for an order because of some suspicion that Petitioner had been involved in an incident, and the circuit court helpfully gave him one.

This Court has held that both the Fourth Amendment and Article III, § 6 of the West Virginia Constitution “*prohibit[] the issuance of general warrants allowing*

officials to burrow through a persons possessions looking for any evidence of a crime.” *Lacy*, 196 W. Va. at 110, 468 S.E.2d at 725. (Emphasis added). Yet, if the subject Order is to be characterized as a search warrant, it must be viewed as just the type of general warrant authorizing the State to burrow through Petitioner’s medical records that this Court has rejected.⁴

C. The Subject “Order” Issued by the Circuit Court Was Not a “Subpoena” Despite the *Post Hoc* Efforts of Both the State and the Court to Characterize It as Such, Because the Same Did Not Emanate off of an Existing Case and It Otherwise Failed to Comply with the Statutory Provisions Governing the Production of Hospital Records in Judicial Proceedings.

Although the “Motion to Compel Surrender of Medical Records” and the subject “Order” issued by the Marshall County Circuit Court in response to the same contain absolutely no reference whatsoever to the term “subpoena,” fail to refer in any manner to Rule 17, W. Va. R. Crim. P., and neglect to mention at all W. Va. Code § 57-5-4, which provides a statutory framework for the issuance of subpoenas *duces tecum*, both the State and the circuit court thereafter sought to characterize the same as such relying upon that Rule of Court and that statutory provision. JA at pp. 24-26, 606.

Rule 17(a) and (c), W. Va. R. Crim. P., provide, in pertinent part, that the clerk shall issue a subpoena upon request of a “party” that directs that the production of any

⁴ This Court has previously considered instances where, on a pre-arrest, pre-charge basis, law enforcement obtained a search warrant for medical records, *which, Petitioner suggests, is the proper manner of obtaining such evidence if the requirements of a search warrant are otherwise satisfied.* *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (evidence of a DUI obtained pursuant to a search warrant issued before filing of criminal complaint). For an example of a validly issued search warrant issued to search medical records on a post-arrest basis, see *In re C.T.*, 999 A.2d 210 (N.H. 2010) (post-arrest search warrant to obtain medical records to discover evidence of various DUI offenses).

documentary evidence requested therein may be inspected by the “*parties and their attorneys.*” (Emphasis added). Likewise, W. Va. Code § 57-5-4 provides, in material part, that when a writing or document is in the possession of any person “not a *party* to the matter in controversy,” the trial court may issue a subpoena duces tecum. (Emphasis added). This Court has generally discussed subpoenas *duces tecum* as being available against “*third parties*” in both civil and criminal cases, *i.e.*, individuals *not* party to the case. Syl. Pt. 4, *State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980).

Necessarily, because words in a statute are to be given in their ordinary and familiar significance and meaning, *see, e.g.*, Syl. Pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959), the use of the term “party” in the context of both Rule 17’s and § 57-5-4’s references to a “subpoena” presupposes the existence of an active case, not a mere investigation. “Parties” participate in the case and are constituted of, “in the larger legal sense, . . . all persons having a right to control the proceedings to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies.’ 1 Greenl. Ev. § 535.” *Green v. Bogue*, 158 U.S. 478, 503, 15 S.Ct. 975, 985 (1895). In other words, an active case must be underway before “parties” within the meaning of Rule 17, W. Va. R. Crim. P., exist.

Moreover, to further undermine the analytical backfilling of both the circuit court and the State in advancing such an untenable argument that their respective “order” and “motion” were really just a subpoena, reference to other provisions of Chapter 5 of Article 3 of the Code proves very instructive. Had the State’s *ex parte* “motion” and the court’s “order” granting the same genuinely related to a subpoena duces tecum for Petitioner’s medical “records” (as that term is defined in W. Va. Code § 57-5-4a), then the clerk would have issued the same and the hospital would have furnished the records

under seal as required by W. Va. Code § 57-5-4c. Of course, the clerk did not issue the “order” (the circuit court did) and the records were not furnished under seal until the time of trial, deposition or hearing in conformity with W. Va. Code § 57-5-4d.

Compliance with W. Va. Code § 57-5-4d’s terms mandating that records are to be furnished under seal is not discretionary, and, indeed, this Court has approvingly noted the procedural guidelines for furnishing them as giving effect to the qualified privilege created by the statute. *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 35, 454 S.E.2d 77, 80 (1994). Of course, Reynolds Memorial Hospital in no manner sought to comply with the terms of W. Va. Code § 57-5-4c, because there was nothing contained within the “order” indicating that it was a subpoena.

D. Petitioner’s Remedy for the Illegal and Improvidently Issued “Order” Is Reversal of His Conviction.

Beyond question, the so-called “Order” requiring Reynolds Memorial Hospital to turn over Petitioner’s medical records acted to Petitioner’s prejudice. There were introduced over Petitioner’s timely lodged objection on constitutional grounds, and the prosecuting attorney argued that that proved that Petitioner beat Michael Yoho savagely. Although the petit jury returned a guilty verdict to only the misdemeanor offense of battery, the introduction of such illegally obtained evidence must have diminished the likelihood that the petit jury would have returned a “not guilty” verdict inasmuch as juror’s compromise their verdict, particularly where lesser included offenses are offered (a fact of which this Court has taken note). *See State v. Demastus*, 165 W. Va. 572, 584, 270 S.E.2d 649, 657 (1980). Accordingly, this Court should reverse Petitioner’s conviction based upon the admission of illegally seized evidence.

However, assuming, *arguendo*, that this Court would deem such error to harmless, this Court should, nevertheless, make a clear pronouncement to the Marshall County Circuit Court that the warrant requirement under the Fourth Amendment means something and that the judicial branch of government should not sully itself by abandoning its independence and permitting itself to be used as an investigative tool for law enforcement to fish for evidence in the absence of any rules or constitutional standards. Undersigned counsel, as an officer of this Court, represents that the practice of the prosecuting attorney in Marshall County approaching the circuit court with “investigatory motions” is not unheard of, and, if the prosecutor asks for it, the circuit court tends to oblige despite the existence of any active cases or any oath or affirmation furnished by the State. This practice is antithetical to a neutral judiciary in which public confidence may comfortably rest and should be halted by this Court.

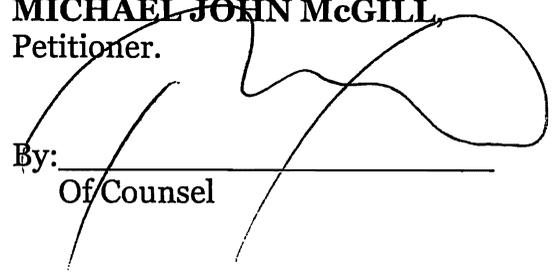
VIII. CONCLUSION AND RELIEF REQUESTED

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, admit him to the Rule 20 argument docket for the reasons herein stated, and, following argument in this matter, thereafter reverse the Circuit Court and vacate his conviction and grant him such other relief to which he may be entitled.

Respectfully submitted,

MICHAEL JOHN MCGILL,
Petitioner.

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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.

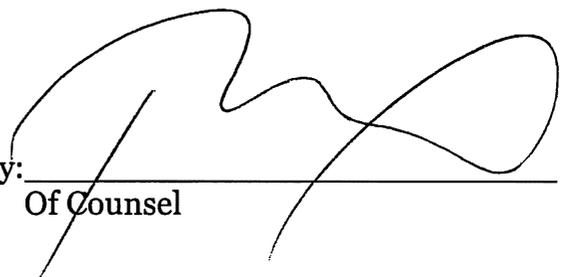
IX. CERTIFICATE OF SERVICE

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

Service of the foregoing **Brief of Petitioner** and accompanying **Joint Appendix** (Vols. I and II) 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 9th day of January, 2011.

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