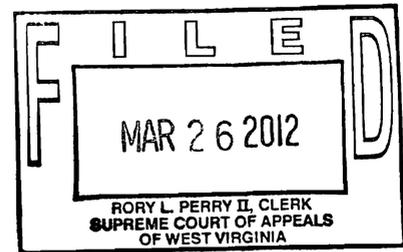

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1386



STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL J. McGILL,

Petitioner.

RESPONDENT'S SUMMARY RESPONSE
TO THE PETITION FOR APPEAL

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**RESPONDENT'S SUMMARY RESPONSE
TO THE PETITION FOR APPEAL**

Comes now the State of West Virginia, by counsel, Robert D. Goldberg, Assistant Attorney General, and files the within Summary Response to the Petition for Appeal.

I.

QUESTION PRESENTED

Whether the method by which law enforcement investigators obtained the Petitioner's medical records during the investigation of this case violated the Fourth Amendment to the United States Constitution.

II.

STATEMENT OF THE CASE

On November 10, 2009, the Petitioner was charged by a Marshall County Grand Jury with one count of felony third offense Domestic Battery against his cousin Sheila McGill (Count I), and one count of Malicious Wounding for the beating of Michael Yoho (Count II). (J.A., vol. I, 14.)

Following a three-day jury trial the Petitioner was found not guilty of felony third offense Domestic Battery as contained in Count I, and guilty of simple Battery, a lesser-included offense of Malicious Wounding as charged in Count II. (J.A., vol. I, 32, 38.) The trial court sentenced the Petitioner to the maximum one year in jail upon his conviction. (J.A., vol. I, 49.)

Although several aspects of the events leading up to the crimes were in dispute, certain facts were not. After a long day of fun in the sun along with heavy drinking at a campground where the Petitioner and his wife were staying with friends and family, a fight ensued between the Petitioner and Mike Yoho, (the victim in Count II), and Sheila McGill, (Petitioner's cousin and the victim in Count I), over alleged incidents involving the Petitioner's wife.

Witnesses, including the Petitioner, offered varying accounts of the events leading up to the fights, but all parties agreed that the Petitioner was involved in a physical altercation with both victims. A witness for the State testified that the Petitioner kicked and beat Mr. Yoho and also dragged him around by his hair. The Petitioner admitted to fighting Mr. Yoho, although he minimized his actions by saying he fought left handed, and only hit Mr. Yoho twice because he had injured his right hand in an unrelated event. (J.A., vol. II, 409, 430.)

During the fracas, Sheila McGill, Petitioner's cousin, tried to intervene. This caused the Petitioner to turn his attentions to her. Again, varying accounts of the fight between the Petitioner and Ms. McGill were offered at trial. The Petitioner claimed that he was attacked by Ms. McGill with a mop handle, but defended himself by taking the mop handle from Ms. McGill, which caused her to fall, and then threw the mop off the bannister. (J.A., vol. II, 434.)

After the altercation, Mr. Yoho left the scene riding his ATV and later wrecked and was killed as a result. Mr. Yoho's blood alcohol level was substantially beyond the legal limit,¹ and he was not wearing a helmet. (J.A., vol. I, 284-85.)

Both the prosecution and defense offered differing views of the altercations with each side claiming the other initiated and or provoked the attack. The defense medical expert testified that Mr. Yoho died from a crushed chest. The State introduced photos of Mr. Yoho's face showing what appeared to be injuries to his face that were not directly linked to the accident. (J.A., vol. I, 293-98.)

Eyewitness testimony and physical evidence at the scene proved the Petitioner severely beat Mr. Yoho. The investigating officers found fresh blood and bloody patches of hair at the scene and photographs of the same were introduced at trial.

The Petitioner is challenging medical records proving that he sought treatment for injuries to his right hand and foot after the fight. These injuries were consistent with the State's version of the events. However, these records were far from the only evidence introduced by the State to corroborate its case-in-chief.

III.

ARGUMENT

The Petitioner claims that the medical records introduced by the State at trial regarding injuries to his right hand and foot were illegally obtained by investigators in violation of the Fourth and the Fourteenth Amendments to the United States Constitution and were unfairly prejudicial.

The Petitioner claims that the investigating officers illegally seized his medical records by securing them pursuant to an illegally issued court order which did not comport with either West

¹A blood alcohol content of 0.08 grams of alcohol.

Virginia statute or court rules; the Fourth Amendment; article III, § 6 of the West Virginia Constitution; or the Health Insurance Portability and Accountability Act, 42 U.S.C §§ 1320d-2 *et seq.* (hereinafter “HIPPA”). The Petitioner also claims that these records were indispensable to the State’s case and, ultimately, resulted in his indictment and conviction. Therefore, the Petitioner argues his conviction was the fruit of an illegal search and should be reversed.

A. THERE WAS NO FOURTH AMENDMENT OR ARTICLE III, SECTION 6 VIOLATION.

Article III, Section 6 of the Constitution of West Virginia.

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

U.S.C.A. Const. Amend. 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * *

The Fourth Amendment applies to the states through application of the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081, 1090 (1961). Article 3, Section 6 of the West Virginia Constitution is generally construed in harmony with the Fourth Amendment of the United States Constitution. *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973). But see *State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (2007).

Ullom v. Miller 227 W. Va. 1, 25 n.4, 705 S.E.2d 111, 125 n.4 (2010).

The Petitioner discusses several state and federal statutes and administrative rules that control the release of certain medical records in a variety of situations. However, nowhere does the

Petitioner cite to controlling state or federal authority holding that HIPPA implicates a Fourth Amendment right to privacy or that HIPPA provides for suppression of any records obtained in violation thereof.

Although courts in several state and federal jurisdictions have applied the Fourth Amendment to medical records within a fact-based analysis *only*, neither this Court nor the Supreme Court of the United States have held that medical records are entitled to blanket protection under the Fourth Amendment irrespective of the underlying facts of the case.

This Court discussed the requirements for demonstrating that evidence is protected by the Fourth Amendment in *Marano v. Holland* 179 W. Va. 156, 366 S.E.2d 117 (1988).

The Fourth Amendment provides protection against “unreasonable searches and seizures” by the government. *U.S. Const. amend. IV*. It has been stated that “the principal object of the Fourth Amendment is the protection of privacy[.]” *Warden v. Hayden*, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782, 790 (1967). We adopted this same position in Syllabus Point 7 of *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981):

“The Fourth Amendment of the United States Constitution, and Article III, Section 6, of the West Virginia Constitution protect an individual's reasonable expectation of privacy.”

At the threshold, then, one who asserts a Fourth Amendment violation must demonstrate a “reasonable expectation of privacy” in the subject of the seizure. That expectation is to be measured both subjectively and by an objective standard of reasonableness. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). See also, *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1974); 1 W. LaFave, *Search and Seizure* § 2.1(c) (2d ed. 1987).

Marano, 179 W. Va. at 163, 366 S.E.2d at 124, citing Syl. pt. 7, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981).

In *Marano*, this Court held that work papers discussing the defendant's defense strategy which included psychiatric records, were entitled to protection under the Fourth Amendment as part

of attorney-client privilege. In finding that the seizure of the defendant's records was illegal, this Court further found there was no probable cause to seize the records.

In *Doe v. Broderick*, 255 F.3d 440 (4th Cir. 2000), the Fourth Circuit, within the context of a 42 U.S.C. § 1983 claim filed by patients in a methadone clinic alleging an unlawful search by the State of medical records, stated the following regarding the interplay of the Fourth Amendment and the seizure of medical records:

The protections of the Fourth Amendment are triggered when an individual seeking refuge under the Fourth Amendment "has a legitimate expectation of privacy in the invaded place" or the item seized. *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); see *United States v. Rusher*, 966 F.2d 868, 873-74 (4th Cir.1992). Thus, searches and seizures conducted in the absence of probable cause and a warrant are impermissible only if the officer encroaches upon a legitimate expectation of privacy. See *California v. Greenwood*, 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). A legitimate expectation of privacy exists when the individual seeking Fourth Amendment protection maintains a "subjective expectation of privacy" in the area searched that "society [is] willing to recognize ... as reasonable." *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); see *Oliver v. United States*, 466 U.S. 170, 177-78, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (explaining that the legitimacy of a reasonable expectation of privacy under the Fourth Amendment is determined by "our societal understanding").

Doe v. Broderick, 255 F.3d at 450.

In *Doe*, a law enforcement officer rifled through the clinic's medical records without a warrant looking for evidence on a string of robberies. The court in *Doe* found that the officer illegally seized the challenged records in violation of the Fourth Amendment and intentionally violated the civil rights of the patients whose records were seized.

The courts have also yet to hold that a HIPPA creates a Fourth Amendment protection of medical records nor a suppression remedy when records are obtained in violation thereof. The exceptions to HIPPA are set forth in 45 C.F.R. § 164.512 (f) and allow for law enforcement officers

to obtain protected information with a court order and without notification or consent of the subject of the investigation.²

² (f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

With regard to West Virginia, this Court has never applied the Fourth Amendment to statutes authorizing the release of medical records pursuant to West Virginia Code § 57-5-4.³

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. However, under the law as it stands, both state and federal, there was no *per se* violation of HIPPA or the Fourth Amendment present under the circumstances present in the instant case.

B. IN LIGHT OF THE EVIDENCE OF GUILT ADMITTED AT TRIAL, AS WELL AS OTHER EVIDENCE CONTRADICTING THE PETITIONER'S TESTIMONY, THE EFFECT OF THE CHALLENGED EVIDENCE WAS INDISCERNIBLE.

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

³§ 57-5-4. Production of writings--By person other than party.

When it appears by affidavit or otherwise that a writing or document in the possession of any person not a party to the matter in controversy is material and proper to be produced before the court, or any person appointed by it or acting under its process or authority, or any such person as is named in section one of this article, such court, family law master, judge or president thereof may order the clerk of the said court to issue a subpoena duces tecum to compel such production at a time and place to be specified in the order.

The first prong of the harmless error analysis requires the removal of the challenged evidence to determine if there was sufficient remaining evidence to sustain the conviction.

In this case there was eyewitness testimony and physical evidence was both sufficient to sustain the jury's guilty verdict and initial charge in the indictment. A witness testified that the Petitioner kicked Mr. Yoho and beat him with his fists. The eyewitness also testified that the Petitioner dragged Mr. Yoho around by his hair during the beating. (J.A., vol. I, 93.) This testimony was corroborated by the blood and "tufts" of bloody hair found at the scene, which were photographed by investigators and entered into evidence by the State. (J.A., vol. I, 210.) The Petitioner's concessions that were vulnerable to impeachment by conflicting evidence and testimony from all of the State's witnesses, as well as testimony offered by the defense's medical expert. Specifically, the State published a photograph of the victim's head and face to the jury while cross-examining the defense's medical expert, showing injuries consistent with the State's eyewitness testimony.

In light of the overwhelming remaining evidence of guilt after removing the challenged evidence, there is no doubt the jury had sufficient evidence to find the Petitioner guilty of Battery. Indeed, there was overwhelming evidence to demonstrate guilt of the crime as charged in the indictment.

With regard to the prejudice prong of the harmless error analysis, the Petitioner argues that the medical records contradicted his testimony. However, there was far more significant evidence introduced that was sufficient to impeach the Petitioner's credibility.

The blood found at the scene and the patches of bloody hair contradicted the Petitioner's testimony that he only slightly hit Mr. Yoho twice, and it confirmed the testimony of the State's

eyewitness. Also, the Petitioner claimed to have suffered a puffy lip after being beaten about the face by Mr. Yoho, but the officer who arrested the Petitioner the day after the crimes said he saw no signs of injury on Petitioner's face. (J.A., vol. I, 212; J.A., vol. II, 468.) The aforementioned photographs, (published to the jury), of the facial injuries of Mr. Yoho also contradicted the Petitioner's claims that he only inflicted two minor blows to Mr. Yoho.

The jury was not too disturbed by any inconsistency between the Petitioner's statements and the medical records, given that they found him guilty of the lesser-included offense of Battery despite evidence that he savagely beat Mr. Yoho and had a history of violence as demonstrated by the charges in Count II of the indictment. It is ludicrous to suggest that the challenged evidence had any significant impact on the jury's verdict and the evidence of guilt presented by the State at trial.

With regard to the Petitioner's assertions that investigators premised their investigation and the indictment on the challenged evidence, this too is controverted by the record. Investigators went straight to the crime scene where the Petitioner and the other witnesses were still staying the day after the crimes and almost immediately after finding Mr. Yoho's body. (J.A., vol. I, 207-08.) Investigators arrived soon enough to find fresh blood and gobs of bloody hair still in the grass. The body of Mr. Yoho was found on June 14 and the Petitioner was arrested on June 15. (J.A., vol. I, 211.)

The challenged evidence fails to even remotely satisfy any single prong of the harmless error analysis and most of the Petitioner's claims about the significance of the challenged evidence are controverted by the record.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary in this case. The petitions submitted and the Joint Appendix are sufficient for this Court to arrive at a determination of the issues presented herein. W. Va. Rev. R. App. P. 18(a)(1).

V.

CONCLUSION AND RELIEF SOUGHT

For the reasons herein stated, the State respectfully requests that the Court affirm the conviction of Petitioner on the misdemeanor charge of Battery.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

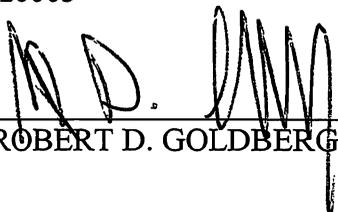


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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing Respondent's Summary Response to the Petition for Appeal was mailed to counsel for the Petitioner by depositing it in the United States mail, with first-class postage prepaid, on this 26th day of March, 2012, addressed as follows:

To: Robert G. McCoid, Esq.
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