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

**NO. 11-1386**

**STATE OF WEST VIRGINIA,**

*Respondent,*

v.

**MICHAEL J. McGILL,**

*Petitioner.*

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
STATE OF WEST VIRGINIA**

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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. THE PETITIONER HAS NOT PROVEN JUDICIAL BIAS BY THE MERE EXECUTION OF A COURT ORDER COMPELLING PRODUCTION OF HIS MEDICAL RECORDS .....	2
1. The Court Order Did Not Violate the Petitioner’s Right To Be Free From Unreasonable Search and Seizure Under the Federal or West Virginia Constitution .....	6
2. The State Did Not Violate the Petitioner’s Expectation of Privacy in His Medical Records .....	13
B. THE TRIAL COURT’S ORDER DID NOT VIOLATE HIPPA’S PRIVACY RULE .....	20
III. CONCLUSION .....	22

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>CASES:</b>	
<i>City of Muskego v. Godec</i> , 482 N.W.2d 79 (Wisc. 1992) .....	9, 16, 17, 18
<i>Doe v. Broderick</i> , 225 F.3d 440 (4th Cir. 2000) .....	19
<i>Doe v. Southeastern Pennsylvania Transp. Authority</i> , 72 F.2d 1133 (3d Cir. 1995) .....	13
<i>Douglas v. Dobbs</i> , 419 F.3d 1097 (10th Cir. 2005) .....	8
<i>Hale v. Henkel</i> , 201 U.S. 43 (1906) .....	10
<i>Katz v. United States</i> , 389 U.S. 347 (1967) .....	7
<i>Kerns v. Bader</i> , 663 N.E.2d 1173 (10th Cir. 2011) .....	8, 9
<i>King v. State</i> , 577 S.E.2d 764 (Ga. 2003) .....	8
<i>Krivitsky v. Krivitsky</i> , 43 A.3d 23, 32 (R. I. 2012) .....	5
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001) .....	7, 19
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961) .....	6
<i>Matter of Wharton</i> , 175 W. Va. 348, 332 S.E.2d 650 (1985) .....	4
<i>Mohr v. Mohr</i> , 119 W. Va. 253, 193 S.E. 121 (1937) .....	18
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 (1946) .....	11
<i>People v. Perlos</i> , 462 N.W.2d 310 (Mich. 1990) .....	8, 13, 14, 22
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978) .....	8
<i>Roe v. Wade</i> , 410 U.S. 113 (1973) .....	6
<i>State ex. rel. State Farm Mutual Automobile Insurance v. Bedell</i> , 228 W. Va. 252, 719 S.E.2d 722 (2011) .....	13
<i>State v. Legrand</i> , 20 A.3d 52 (Conn. App. 2011) .....	15

**TABLE OF AUTHORITIES (cont'd)**

**Page**

**CASES:**

<i>State v. Sugg</i> , 193 W. Va. 388, 456 S.E.2d 469 (1995) .....	4
<i>State v. Thompson</i> , 220 W. Va. 398, 647 S.E.2d 834 (2007) .....	4
<i>In re Subpoena Duces Tecum</i> , 228 F.3d 341 (4th Cir. 2000) .....	8, 9, 10, 11
<i>Tamminen v. State</i> , 644 S.W.2d 209 (Tex. App. 1982) .....	4
<i>United States v. Elliot</i> , 676 F. Supp. 2d 431 (D. Md. 2009) .....	22
<i>United States v. Irons</i> , 646 F. Supp. 2d 927 (E.D. Tenn. 2009) .....	18
<i>United States v. Jones</i> , 132 S. Ct. 945 (2012) .....	7
<i>United States v. Miller</i> , 425 U.S. 435 (1976) .....	19
<i>United States v. Zamora</i> , 408 F. Supp. 2d 295 (S. D. Tex. 2006) .....	22
<i>Weeks v. United States</i> , 232 U.S. 383 (1914) .....	6
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977) .....	6, 8, 11-12

**CONSTITUTIONAL PROVISIONS:**

U.S. Const. amend. IV .....	6
-----------------------------	---

**STATUTES:**

18 U.S.C. § 24 .....	9
18 U.S.C. § 3486(e)(1) .....	12
42 U.S.C. § 290dd-2 .....	20
Mich. Comp. Laws § 257.625a(9) .....	14
W. Va. Code § 16-5-3(a)(12) .....	18
W. Va. Code § 27-3-1(a) .....	18

**TABLE OF AUTHORITIES (cont'd)**

	<b>Page</b>
<b>STATUTES:</b>	
W. Va. Code § 27-3-1(b)(3) .....	13, 18
Wisc. Stat. § 146.82(l) .....	17
Wisc. Stat. § 885.01 .....	18
Wisc. Stat. § 905.04(f) .....	17
Wisc. Stat. § 908.03(6m)(b) .....	16
<b>OTHER:</b>	
45 C.F.R. § 160 .....	6
45 C.F.R. § 160.103 .....	20
45 C.F.R. § 164, Parts A & E .....	6
45 C.F.R. § 164.502(a)(1) .....	20
45 C.F.R. § 164.502(a)(1)(vi) .....	20
45 C.F.R. § 164.512(e) .....	20
45 C.F.R. § 164.512(f) .....	20
45 C.F.R. § 164.514(e), (f), (g) .....	20
45 C.F.R. § 164.514(e)(1)(I) .....	20
Fed. R. Crim. P. 17(c) .....	9
<i>Health Insurance Portability and Accountability Act</i> ("HIPPA"), P.L. 104-91 .....	5
<i>Standards for Privacy of Individually Identifiable Health Information,</i> 65 Fed. Reg. 82462, 82464 (Dec. 28, 2000) .....	6, 13
W. Va. Code R. § 19-9-4.2.d .....	18

**TABLE OF AUTHORITIES (cont'd)**

	<b>Page</b>
<b>OTHER:</b>	
W. Va. Code R. § 30-4-3.2.4 .....	18
W. Va. Code R. § 64-12-7.2 .....	19
W. Va. Code R. § 64-9-7.2.d .....	19
W. Va. Code R. § 64-9-7.2.g .....	19
W. Va. Code R. § 64-9-7.2h .....	19
W. Va. R. Civ. P. 45(b)(1) .....	16
W. Va. Rev. R. App. P. 20 .....	1

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SUPPLEMENTAL BRIEF OF RESPONDENT  
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I.

INTRODUCTION

By order entered October 18, 2012, this Court scheduled this matter for oral argument pursuant to Rule 20 of the Revised Rules of Appellate Procedure. The order did not set an argument date. In addition to scheduling the matter for oral argument, this Court commanded the Respondent to file a supplemental brief, “that more comprehensively addresses the assignments of error in this matter.” Respondent’s counsel had filed a summary response<sup>1</sup> arguing harmless error on March 26, 2012.<sup>2</sup>

The Petitioner has alleged the following assignments of error:

- A. The Circuit Court of Marshall County Abandoned its Role as Separate and Detached Judicial Officer and Effectively Became a Complicit Tool for Law

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<sup>1</sup>Counsel for the Respondent’s first and only summary response.

<sup>2</sup>Counsel for the Respondent incorporates by reference that response.

Enforcement 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 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.

- B. The Subject "Order" Issued by the Circuit Court Was Not a "Subpoena" Despite the *Post Hac* Efforts of Both the State and the Court to Characterize It as Such, Because the Same Did Not Emanate off an Existing Case and It Otherwise Failed to Comply with the Statutory Provisions Governing the Production of Hospital Records in Juvenile Proceedings.
- C. Petitioner's Remedy for the Illegal and Improvidently Issued "Order" Is Reversal of His Conviction.

## II.

### ARGUMENT

#### A. **THE PETITIONER HAS NOT PROVEN JUDICIAL BIAS BY THE MERE EXECUTION OF A COURT ORDER COMPELLING PRODUCTION OF HIS MEDICAL RECORDS.**

The Petitioner argues that the trial court abandoned its role as a neutral arbiter, and assumed a prosecutorial role when it granted the state's *ex parte* motion for a court order compelling the production of the Petitioner's medical records. (JA 1.) The court order authorized the release of Reynolds Memorial Hospital's<sup>3</sup> emergency room records documenting treatment to injuries to the Petitioner's right hand and left foot.<sup>4</sup> Counsel for the Petitioner summed up his position in one phrase, describing the trial court's order as, "nothing more than a sweeping judicial command

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<sup>3</sup>Reynolds Memorial Hospital is not run by the State. The Petitioner does not argue that the original treatment constituted a search under the Federal or State Constitutions.

<sup>4</sup>These records consist of an admission record, an emergency room order sheet, nursing notes, and an executed consent for treatment form. (JA 6-12.)

directed to the hospital to do what the prosecutor wanted merely because the prosecutor wanted it.”  
(Pet’r’s brief, 3.)

The treating emergency room physician, Dr. John Templeton, did not testify at trial. After conferring both sides reached a stipulation. (JA 482-83.) The State had intended to call Dr. Templeton to impeach the Petitioner’s explanation as to how he injured his hand and his foot. (JA 261.) The contours of the stipulation were explained to the trial court by defense counsel:

MR. McCOID: The State, as I understand, intends to call Dr. Templeton to testify as to representations Mr. McGill made at the emergency room concerning an injury he sustained to his hand.

The State wishes to impeach, if you will, Mr. McGill’s version, or impeach the suggestion that this was sustained in a way other than a fight. The concern that we have, the defense, is that if we agree to stipulate to these facts – in other words, the admissibility of the medical records without the custodian present to do so – that we are in a position where we are waiving or estopped on appeal from raising an[y] objection that we have on constitutional grounds and relevancy grounds of the – well, actually, not relevancy, jurisdictional grounds, about the order that produced the records. Am I making sense, your Honor?

THE COURT: That’s the objection that I previously ruled on, and I permitted those records to come in.

MR. McCOID: Yes, your Honor. We don’t want to be in a position where if we entered a stipulation concerning their admissibility, we’re somehow construed later on the record as having waived the admissibility. We still object to the admissibility. We don’t think that it’s proper to let them in. Recognizing the Court’s objection, we’re prepared to enter that stipulation.

(JA 484-85.)

The State informed the court, on the record, that it agreed to the stipulation. These records were later introduced by the State, over the Petitioner's objection, without clarification or explanation from the emergency room physician. The records are virtually indecipherable.

It is axiomatic that the right to a fair trial before a neutral judge is a fundamental aspect of constitutional due process. *Cf. Tamminen v. State*, 644 S.W.2d 209, 217 (Tex. App. 1982) (trial court's reliance upon hearsay documentation provided by state describing defendant's motorcycle club without disclosing documentation to defense before pronouncing sentence violated defendant's right to confrontation, and right to public trial and created appearance of impropriety). *State v. Thompson*, 220 W. Va. 398, 411, 647 S.E.2d 834, 847 (2007) (trial court abandoned its role as neutral arbiter when it, *sua sponte*, cross-examined defense's witnesses); *State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995) (Judge who participates in plea negotiations, "is no longer a judicial officer or neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he suggests for the defendant."). Although these cases address a court's conduct at trial, it would be nonsensical to argue that a trial court judge has a duty to be fair and impartial at trial, but no duty to remain neutral and detached when asked to approve State conduct during the course of a pre-arrest investigation.<sup>5</sup> Because the trial court executed the order before the initiation of formal criminal proceedings, it cannot be accused of favoring one side over the other. There was only one side. But the court still had obligations to abide by the law and to remain neutral. *See Matter of Wharton*, 175 W. Va. 348, 332 S.E.2d 650 (1985) (a magistrate determining whether there

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<sup>5</sup>It would also be nonsensical to argue that a judicial officer abandons her role as a neutral arbiter when she executes *ex parte* documents prior to a formal arrest, such as properly prepared search warrants. Even if these warrants are executed prior to formal arrests. Indeed, judicial execution of these documents lies at the heart of this process.

is probable cause to issue an arrest warrant must be neutral, detached and independent of the office of prosecutor).

But the Petitioner's argument lacks adequate substance. This Court should not infer bias from the mere execution of a court order. Indeed, even if the order were executed incorrectly, which it was not, unless the Petitioner can prove that the trial court acted out of prejudicial animus against the Petitioner, his argument falls apart. There is no evidence of any such animus in this case. Nor is there any evidence that the trial court abdicated its role as a neutral arbiter or passively become an arm of the prosecution. Prior to the Petitioner's arrest, the State proffered a wholly appropriate motion for a court order. Upon reviewing the motion the court granted it. If this Court were to infer bias from this skeletal record, it would inappropriately restrict a trial court's discretion in every case in which it is asked to execute pre-arrest orders. "It is well established that 'a party alleging judicial bias carries a substantial burden of proof to show asserted prejudice impaired the fairness of the trial.'" *Krivitsky v. Krivitsky*, 43 A.3d 23, 32 (R. I. 2012) (quoting *In re Jermaine H.*, 9 A.3d 1227, 1230 (R. I. 2010)).<sup>6</sup>

The Petitioner's argument would appear to be threefold: (1) the trial court's order violated Petitioner's legitimate expectation of privacy in the emergency room treatment records thus constituting an unconstitutional search in violation of the search and seizure provisions of the Federal and/or State Constitutions; (2) the trial court's order violated state statutory law regarding the disclosure of medical records; or, (3) the trial court's order violated the Health Insurance

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<sup>6</sup>Given the Petitioner's assignments of error, this Court's inquiry should go no further. Whether the order is in conformity with the Fourth Amendment, State statutory law, or HIPPA is only marginally relevant to the issue of bias. It certainly does not prove it. As stated above, the Petitioner's burden of proof is substantial.

Portability and Accountability Act's<sup>7</sup> ("HIPAA") Standards for Privacy of Individual Identifiable Health Information<sup>8</sup> ("Privacy Rule").<sup>9</sup> The only evidence the Petitioner has produced to buttress his claim of judicial bias is the trial court's execution of this allegedly improper, *ex parte* order.

Counsel for the Respondent shall address each of these subparts individually.

1. **The Court Order Did Not Violate the Petitioner's Right To Be Free From Unreasonable Search and Seizure Under the Federal or West Virginia Constitution.**

The Fourth Amendment to the United States Constitution reads:

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 of things to be seized.

The Supreme Court long ago held that the Fourth Amendment barred the use of evidence secured through an illegal search and seizure conducted by federal authorities. *Weeks v. United States*, 232 U.S. 383 (1914). The Court did not incorporate the exclusionary into the Fourteenth Amendment until 1961. *Mapp v. Ohio*, 367 U.S. 643 (1961). This ruling required state and local police to comply with Fourth Amendment protections regarding searches and seizures and extended the exclusionary rule to trials in state courts.

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<sup>7</sup>See Public Law 104-91.

<sup>8</sup>45 C.F.R. § 160 and 45 C.F.R. § 164, Parts A & E.

<sup>9</sup>The inquiry into whether an individual has a reasonable expectation of privacy in her medical records under the Fourth Amendment is distinct and separate from whether a defendant has a Fourteenth Amendment privacy right under the due process clause against compelled disclosure of medical information. See *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1977). The Petitioner does not argue that the trial court's order invaded his right to privacy under the substantive Due Process Clause of the Fourteenth Amendment; thus, counsel for the Respondent shall not address it. Cf. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

The Fourth Amendment, among other things, protects citizens from unreasonable searches. *United States v. Jones*, 132 S. Ct. 945 (2012). Thus, the threshold question in the case-at-bar is whether the State conducted an unreasonable search of the Petitioner's medical records. The Supreme Court has held that government intrusions which violate a citizen's reasonable expectation of privacy constitute a search under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). In *Katz* the Court formulated a two-pronged test to define what it meant: (1) the defendant must have a subjective expectation of privacy; and, (2) that expectation must be one that society is prepared to recognize as objectively reasonable. *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

In *Jones*, the Court held that the *Katz* test was meant to supplement, but not replace the "trespassory" test employed by courts before *Katz*. In *Jones*, the state installed a GPS tracking device on the bottom of a suspect's car without his consent, or a search warrant. The state argued that a defendant had no legitimate expectation of privacy in his movements on public thoroughfares. *See Jones*, 132 S. Ct. at 951 (citing *United States v. Karo*, 468 U.S. 705, 712 (1984) (installation of beeper in barrel of ether before given to defendant not a search as the defendant had no expectation of privacy in his public movements)). The Court rejected the state's argument holding that although a citizen may not have a reasonable expectation of privacy in his public movements, the state may not violate that citizen's possessory interests in his personal property, or his right to exclude whomever he chooses from entrance onto that property. In *Jones* the officers broke the close when they placed the device on the defendant's truck. It was the trespassory nature of this action that rendered it a search subject to the warrant requirement under the Fourth Amendment.

To determine whether an individual has a privacy expectation that society is prepared to label reasonable, courts will look to “some source outside the Fourth Amendment.” *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). Statutory enactments, rules of criminal procedure, and the presence or absence of a physician-patient privilege are some of the factors used by courts to determine if the warrantless seizure of medical records prior to formal criminal proceedings constitutes a search or seizure under the Fourth Amendment. Other courts have held that a defendant has no standing, or possessory interest in medical records owned by a third party. See *Kerns v. Bader*, 663 N.E.2d 1173, 1183 (10th Cir. 2011) (defendants do not own their medical records); *In re Subpoena Duces Tecum*, 228 F.3d 341 (4th Cir. 2000) (executive agency’s statutory authority to subpoena records for administrative purposes); *People v. Perlos*, 462 N.W.2d 310 (Mich. 1990) (statute authorizing state to obtain, without the use of a subpoena or warrant, results of blood alcohol test done for medicinal purposes does not violate defendant’s reasonable expectation of privacy under Fourth Amendment); *King v. State*, 577 S.E.2d 764 (Ga. 2003) (state constitutional provision affording right to privacy in medical records required state to obtain records by subpoena with advance notice and opportunity to object but records obtained by search warrant did not require the same procedure).

No one can deny that most patients have a subjective expectation of privacy in their medical records. *Whalen v. Roe*, 429 U.S. at 598 (medical records protected by zone of privacy originating in the Fourteenth Amendment not the Fourth). Nor would anyone deny that the State has a compelling interest in law enforcement and is afforded broad police powers to effectuate that interest. Whether the Fourth Amendment requires the State to obtain a search warrant upon a showing of probable cause to conduct an investigatory search of a patient’s medical records held by

a third party “is an issue that has not been settled.” *Douglas v. Dobbs*, 419 F.3d 1097, 1103 (10th Cir. 2005); *Kerns v. Bader*, 663 N.E.2d at 1183.

Although the State obtained the Petitioner’s medical records by court order, the interplay between the Fourth Amendment and the compulsory production of private papers by means of investigative subpoena duces tecum<sup>10</sup> provides this Court with a persuasive framework. In *In re Subpoena Duces Tecum, supra*, the United States Attorney for the Western District of Virginia issued and served four administrative subpoenas compelling Dr. Dwight L. Bailey and Family Health Care Associates of South West Virginia, P.C., (“subjects”), to produce documents in aid of the Sstate’s investigation of federal health care offenses under 18 U.S.C. § 24.<sup>11</sup> One of the subpoenas compelled production of:

All patient records and documentation concerning patients whose services are billed to Medicare, Medicaid, UMWA, Trigon, Blue Cross, Blue Shield, U.S. Department of Labor Black Lung Program and CHAMPUS, including complete medical files, patient appointment books, patient billing records, office sign in sheets, and telephone messages in any form.

*Subpoena Duces Tecum*, 228 F.3d at 344.

The subjects moved to quash the subpoenas in federal district court pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. Among the targets many objections, they claimed that compliance would violate their patient’s right of privacy in matters governed by the physician-patient privilege. The targets also objected that the government had no probable cause

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<sup>10</sup>Some cases have used the terms “court order” and “subpoena” interchangeably. *See City of Muskego v. Godec*, 482 N.W. 2d 79 (Wisc. 1992) (circuit court’s issuance of ex parte court order for defendant’s medical records justified by reference to its subpoena power).

<sup>11</sup>There was no formal judicial proceeding pending at the time. The subpoenas were strictly for investigative purposes. *Subpoena Duces Tecum*, 228 F.3d at 346.

to issue the subpoenas and compliance would violate the Fourth Amendment's prohibition against unreasonable seizures.

The United States Court of Appeals for the Fourth Circuit initially held, "The subpoena power-the authority to command persons to appear and testify or to produce documents or things-is a longstanding and necessary adjunct to the governmental power of investigation and inquisition." *Id.* at 344 (citing *United States v. Morton Salt*, 338 U.S. 632, 642-43 (1950)). As a subpoena duces tecum compels production of private papers a person served with such a subpoena is entitled to Fourth Amendment protection against unreasonableness. *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

The Court rejected the target's argument that the government's statutory authority to issue administrative subpoenas was analogous to the Fourth Amendment's mandate that warrants only issue upon a finding of probable cause by a neutral and detached judicial officer. Absent this independent finding of probable cause, the subjects argued, the subpoenas violated their Fourth Amendment rights. The Court made short work of this argument. It pointed out that the Fourth Amendment protects persons against, "unreasonable searches and seizures," but explicitly limits its probable cause requirement to warrants. *Subpoena Duces Tecum*, 228 F.3d at 347-48. Since subpoenas are not warrants they are not limited by the Fourth Amendment's probable cause requirement.<sup>12</sup>

The Court went on to distinguish the procedural requirements necessary to obtain a warrant from those necessary to obtain a subpoena. A warrant, the Court held, is issued without prior notice and is often executed by force, with an unannounced and unanticipated physical intrusion.

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<sup>12</sup>In this case, the Petitioner has conceded several times that the trial court's order was not a search warrant.

*Subpoena Duces Tecum*, 228 F.3d at 348. It is an immediate and substantial invasion which requires the intervention of a neutral and detached judicial officer to determine if the State has complied with the rules.

A subpoena is not executed prior to notification. Upon service, the party may institute a legal proceeding before complying with its terms. An administrative agency has no inherent power to enforce a subpoena, it must institute an action to enforce in the district court. Common sense dictates that if a government agency could not issue a subpoena except upon a showing of probable cause the investigative power of executive agencies would be substantially impaired. It is the use of this investigative tool that leads to probable cause for a warrant. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946) (the very purpose of a subpoena is to discover and procure evidence not to prove a pending charge).

This does not mean that an administrative agency's administrative subpoena power is unfettered. To be reasonable under the Fourth Amendment an administrative subpoena must be: (1) authorized for a legitimate purpose; (2) limited in scope; (3) sufficiently specific, and (4) not overly broad.

The Court rejected the target's claim that compelled disclosure of these documents would compromise their patients' privacy interests, and that these interests outweighed the government's need for the information. The Court described the government's interest in preventing future misconduct "compelling." *Subpoena Duces Tecum*, 228 F.3d at 351. The Court then held that disclosure of this evidence was not, "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." quoting *Whalen v. Roe*,

429 U.S. at 602. Given the statutory limitations imposed on the use of this information, the government's interest clearly outweighed the patient's privacy rights.<sup>13</sup>

Thus, even if this Court were to accept the Petitioner's claim that the State lacked probable cause, and failed to include a particularized description of the items to be seized<sup>14</sup>, seizure of a hospital's medical records does not mandate the use of a search warrant. The Fourth Circuit held that administrative subpoenas pass Fourth Amendment muster because they afford an affected party the right to contest them before compliance. But administrative subpoenas are subject to an executive agency's statutory authority and may be issued without judicial intervention.

In the case-at-bar the State obtained a court order from a circuit court judge before obtaining the necessary records. The West Virginia Legislature has previously approved such means for far

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<sup>13</sup>Information may only be used except as, "directly related to receipt of health care or payment for health care, or action involving a fraudulent claim for health care." *See* 18 U.S.C. § 3486(e)(1).

<sup>14</sup>The Petitioner is simply wrong about this. The State's motion requested medical records from Reynolds Memorial Hospital relating strictly to medical treatment of the Petitioner between the dates of June 12-14, 2009. It explicitly restricted its request to, "records generated by that treatment." (JA 1.) The motion also stated that there was an ongoing investigation of an incident involving the Petitioner and that the records were sought solely for an investigative purpose.

Nor is the Petitioner's contention that the State obtained these records before obtaining any evidence that the Petitioner had committed a criminal offense. The victim's family filed a missing persons report with the Marshall County Sheriff's Office the date of the incident. The investigating officer, Detective Lockhart, became involved when the victim's body was found the next day. (JA 198.) The officer found several contusions on Mr. Yoho's face which had not been caused by the four-wheeler accident. (JA 204.) The officer arrested the Petitioner the day after they found Mr. Yoho's body. (JA 211.) According to witnesses the Petitioner went to the emergency room due to injuries inflicted during the course of the fight with Mr. Yoho. He had told these witnesses to say that he was injured in a four wheeler accident. (JA 100.) The officers took witness statements the Sunday evening after the incident between the Petitioner and Mr. Yoho. (JA 119-20, 389, 460, 464-65, 469-70, 479.) That day the trial court executed the order compelling production of the medical records. (JA 4.)

more personal records. West Virginia § 27-3-1(b)(3) (confidential records of mental health treatment may be released pursuant to a court order).

2. **The State Did Not Violate the Petitioner's Expectation of Privacy in His Medical Records.**

Health care information is among the most sensitive of the different sorts of personal information. *Cf. State ex. rel. State Farm Mut. Auto Ins. v. Bedell*, 228 W. Va. 252, 263, 719 S.E.2d 722, 733 (2011). *See Doe v. Southeastern Pennsylvania Transp. Authority*, 72 F.3d 1133, 1137 (3d Cir. 1995) (disclosure of medical records interferes with a substantive due process right to privacy fundamental or implicit in the concept of ordered liberty). It is not the same as telephone numbers or bank records. Certain conditions such as HIV, depression, or the contraction of a sexually transmitted disease may result in unfair stigma or discrimination. Release of records reflecting treatment for these, or any other similar maladies has the potential, not just to embarrass, but to destroy a person's professional and personal lives. Nor are medical records always limited to rote recitations of symptomology and diagnoses. Often medical records will contain potentially embarrassing information regarding the patient's person life, such as problem relationships, drug or alcohol addiction, family difficulties, or sexual dysfunction. The key to the physician-patient relationship is a frank and open exchange of information. The lack of such an exchange may be life threatening. The most effective way of ensuring this exchange is confidentiality. *See Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82462, 82464 (Dec. 28, 2000).

The majority of cases addressing a criminal defendant's Fourth Amendment right to prevent disclosure of medical records involves intoxicated drivers. In *People v. Perlos*, 462 N.W. 2d 310 (Mich. 1990), the defendant (this case was consolidated with five other cases) was involved in a single car accident. The treating hospital withdrew a sample of the defendant's blood to determine

the level of alcohol in his blood stream. This was not done at the behest of the state, but for diagnostic purposes. Without obtaining a search warrant, the State requested copies of the defendant's medical records as evidence that he was driving under the influence: the hospital complied pursuant to Mich. Comp. Laws § 257.625a(9).<sup>15</sup>

The defendant claimed that 257.625a(9) violated the Fourth Amendment. The court rejected the defendant's argument. By enacting 257.625a(9) the people of Michigan announced that they were not prepared to recognize a subjective expectation of privacy in the results of blood tests as reasonable. But the court's holding was narrow. After reviewing similar cases in other states it held, "We find subsection 9 to be a carefully tailored statute which only allows chemical test results to be turned over to the state under narrowly defined circumstances, if the state requests them . . . Thus within minor parameters, the Legislature has created a minor exception to the physician-patient privilege." The court also held that it was unreasonable, under the Third-party Doctrine, for the defendant to expect that the results of his tests would be kept confidential. *Perlos*, 462 N.W.2d at 329.

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If after an accident the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for the purpose of medical treatment, the results of a chemical analysis of that sample shall be admissible in a criminal prosecution for a crime described in subsection (1) to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subsection. A medical facility or person disclosing information in compliance with this subsection shall not be civilly or criminally liable for making the disclosure.

In *State v. Legrand*, 20 A.3d 52, (Conn. App. 2011), the defendant was convicted of operating a motor vehicle under the influence of drugs, and failure to keep a narcotic drug in its original container. *Id.* at 56. Before trial, the state subpoenaed defendant's treating physician seeking both his presence and all medical records from four months before the incident to over a year after it.<sup>16</sup> The defendant argued that the state was obligated to obtain a warrant before seizing these records. Since the defendant intended to argue that he had built up a tolerance to the medications found in his blood, and that they had not affected his ability to drive, he had placed his medical condition at issue. *Id.* at 60.

The Connecticut Court of Appeals first ruled that the state had searched the petitioner's medical records under the Fourth Amendment. The dispositive issue was whether they had unreasonably seized them by using a subpoena as opposed to a search warrant. *Legrand*, 20 A.3d at 61. The court recognized that seizure of personal property without a warrant is *per se* unreasonable under the Fourth Amendment, but noted that there are some exceptions. *Legrand*, 20 A.3d at 61. For instance, executive agencies have a statutory authority to issue administrative subpoenas for corporate records or papers. *Id.* (citing *Oklahoma Press Publishing v. Walling*, 327 U.S. at 208).

Additionally, the defendant was afforded an opportunity to object to the state's subpoena before it was executed. The court characterized this fact as "crucial" to its Fourth Amendment analysis. *Legrand*, 20 A.3d at 64 (quoting *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)). The mere fact that the state had obtained the records by subpoena as opposed to using a warrant was

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<sup>16</sup>As the defendant was charged with driving under the influence of a narcotic drug the issue was whether the levels in his blood stream had stabilized over this time period.

wholly appropriate. *Cf.* W. Va. R. Civ. P. 45(b)(1) (all parties to civil action must be notified of subpoenas requesting documents to afford full and fair opportunity to object).

In *City of Muskego v. Godec*, 482 N.W.2d 79 (Wisc. 1992), the defendant was involved in a single car accident. Although law enforcement was present and the defendant received medical care at the scene, the officers did not determine whether the defendant was under the influence of drugs or alcohol. Nor did they order the medical responders to extract bodily fluids for law enforcement purposes. Upon further investigation, the officers determined that the defendant had been drinking just prior to the accident and issued him a citation for driving under the influence of alcohol. After they had issued the citation the officers also discovered that the hospital had drawn the defendant's blood and determined its alcohol concentration for diagnostic purposes.

Counsel for the state requested the trial court issue an *ex parte* order to release the defendant's medical records. The trial court granted the motion. The records revealed that the defendant's BAC was .28. Consequently, the state issued a second citation charging him with driving with a BAC over .10. The petitioner was convicted of both charges in municipal court, but the county circuit court suppressed the test results and dismissed the second citation.

The state had requested the order under Wisc. Stat. § 908.03(6m)(b) (patient health care records fall under the business records exception of the hearsay rule if the proponent serves a copy of the records on all parties at least forty days before trial or maintains a legible certified copy of records which is available for inspection and copying during normal business hours). *Godec*, 482 N.W.2d at 81. Because the records satisfied the statutory definition of patient health care records,

they could not be released without the patient's consent. Thus the circuit court reversed the municipal court's convictions.<sup>17</sup>

The Supreme Court of Wisconsin reversed the circuit court's decision. It noted that the results of blood alcohol tests were specifically exempted from Wisconsin's physician-patient statutory privilege. *Godec*, 482 N.W.2d at 82.; *see also* Wisc. Stat. § 905.04(f). It also noted that the specific language of 905.04(f) trumped the general language of 146.82.

The court also held that the circuit court's *ex parte* order was a wholly proper exercise of its discretion:

*Godec* raises another issue which concerns the propriety of Judge Gempeler's *ex parte* order for the production of *Godec*'s alcohol test results. An appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 320 N.W.2d 175 (1982). We hold that the circuit court *ex parte* order was proper for obtaining *Godec*'s health care records.

*Godec*, 482 N.W.2d at 83.

What is most interesting about *Godec* is what the court did not address. Neither the defense nor the state raised a Fourth Amendment issue. The decision is strictly one of statutory interpretation; statutes which do not exist in West Virginia. Nor did the court find the trial court's execution of a pre-indictment, *ex parte*, order requiring production of the defendant's medical records improper. It based its decision on the trial court's statutory authority to subpoena the

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<sup>17</sup>Wisc. Stat. § 146.82(1), "[a]All patient health care records shall remain confidential." The statute continues by stating: "Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient . . . ." *Godec*, 482 N.W.2d at 81. There is no similar statute in West Virginia.

production of documents even if the court did not have jurisdiction over the matter prior to ordering the subpoena if the order was executed within the trial court's jurisdiction. Wisc. Stat. § 885.01.<sup>18</sup>

This Court has never interpreted the State Constitution in a way that establishes a reasonable expectation of privacy in situations where a third-party recipient of medical information provides the information to the government during a criminal investigation. West Virginia does not recognize a general physician-patient privilege. *See Mohr v. Mohr*, 119 W. Va. 253, 254, 193 S.E. 121, 122 (1937).<sup>19</sup> Additionally, under certain circumstances disclosure of medical records may be effectuated by court order. *See* W. Va. Code § 27-3-1(a) (information regarding psychological and/or psychiatric treatment confidential). *But see* W. Va. Code § 27-3-1(b)(3) (such information may be released pursuant to a court order). *See also* W. Va. Code § 16-5-3(a)(12) (authorizing DHHR Secretary to promulgate regulations regarding the release of confidential information for administrative, statistical, or research purposes). Certain state boards are authorized to review a patient's medical records during the course of investigations. *See* W. Va. Code R. § 19-9-4.2.d (Board of Registered Nurses authorized to review patient medical records but must remove patient identifiers before introducing them in disciplinary hearing); W. Va. Code R. § 30-4-3.2.4 (West

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<sup>18</sup>Before referring to the trial court's statutory authority under its subpoena power, the *Godec* Court referred to the document as an ex parte order. *Godec*, 482 N.W.2d at 80, 81. Thus, the trial court's power to issue the order was based upon its statutory subpoena authority.

<sup>19</sup>Even if West Virginia maintained such a privilege, whether any communications are inadmissible at trial under the law privilege does not necessarily mean that the fruits of the communication must be suppressed by the Fourth Amendment. *See, e.g., United States v. Irons*, 646 F. Supp. 2d 927, 957 (E.D. Tenn. 2009) (husband-wife communications privilege is product of federal common law and does not arise from Fourth Amendment protections, not does it have any federal constitutional underpinnings).

Virginia Board of Respiratory Care authorized to review pertinent medical records during investigations).

Pursuant to West Virginia Code R. § 64-12-7.2 all hospitals must establish and maintain a medical records department and information system. Under § 7.2d the hospital is required to maintain a medical record for every patient evaluated and treated on an inpatient or outpatient basis and must preserve those records for five years.<sup>20</sup> Under § 7.2.g the hospital is mandated to implement procedures to ensure confidentiality of these records and to limit their disclosure to authorized persons. The hospital may only release these records pursuant to state and federal law. Pursuant to § 7.2.h a hospital is *mandated* to provide copies of medical records upon receipt of a court order from a court of competent jurisdiction.

Even if this Court were to find that the Petitioner possessed a legitimate expectation of privacy which the community would find reasonable, the Petitioner had not reason to believe that the scope of that expectation spread as far as he now contends. West Virginia's regulation labeling medical records confidential contains an explicit provision authorizing the release of those records pursuant to a court order. There are no statutes, evidentiary rules, or administrative regulations prohibiting a circuit court from executing such an order. Therefore, the Petitioner has failed to demonstrate how the State violated his reasonable expectation of privacy under the *Katz* test. See *Kyllo v. United States*, 533 U.S. at 33.

Additionally, the third-party doctrine weighs against any reasonable expectation of privacy. See *United States v. Miller*, 425 U.S. 435, 443 (1976) (bank customer does not have reasonable expectation of privacy with respect to bank records). *But see Doe v. Broderick*, 225 F.3d 440 (4th

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<sup>20</sup>This includes patients seen in the emergency room.

Cir. 2000) (defendant had reasonable expectation of privacy in medical records kept at a methadone clinic given the existence of federal statute that prohibited records created in federally funded substance abuse treatment without court order). *See* 42 U.S.C. § 290dd-2.

The Petitioner also claims that The Health Insurance Portability and Accountability Act of 1996, (“HIPPA”), creates a reasonable expectation of privacy. The Petitioner is simply wrong. HIPPA does not create a reasonable expectation of privacy under the Fourth Amendment, nor does its text prohibit the production of Petitioner’s medical records.

**B. THE TRIAL COURT’S ORDER DID NOT VIOLATE HIPPA’S PRIVACY RULE.**

The HIPPA Privacy Rule prohibits a covered entity from disclosing protected health information<sup>21</sup> except as permitted by subpart 45 C.F.R. § 164.502(a)(1). Subsection § 164.502(a)(1)(vi) permits disclosure pursuant to § 164.514 (e), (f), or (g). A health care provider may disclose protected health information without the patient’s authorization if a law enforcement official seeks such information for a law enforcement purpose, “in compliance with and as limited by the relevant requirements of a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer.” 45 C.F.R. § 164.512(f)(1)(ii)(A).<sup>22</sup> Violations of this provision do

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<sup>21</sup>Protected Health Information is defined as health information that is individually identifiable. 45 C.F.R. § 160.103.

<sup>22</sup>In his Motion in Limine the Petitioner argued that the circuit court lacked jurisdiction to issue the court order. His objection appears to be based upon the fact that the State had not initiated a formal criminal proceeding against him before obtaining the court order. The Petitioner is mixing two subsections of HIPPA.

Part 45 C.F.R. § 164.512(e) sets forth the standards for disclosure of private health information for judicial and administrative proceedings. *See* 45 C.F.R. § 164.512(e)(1)(I). Such information may be disclosed by court order or subpoena. Subsection § 164.512(f) is limited to disclosures for law enforcement purposes. This subsection contemplates the release of medical

not give rise to a right of suppression. If a health care provider discloses confidential medical information to the government without a court order, the health care provider is liable to the patient

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information prior to a formal arrest, such as information regarding gunshot wounds, or investigations by grand jury or administrative subpoena. This subsection also provides for the release of protected health information in compliance with a court order:

45 C.F.R. § 164.512(f)(1)(ii)(A):

(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 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 laws subject to paragraph (b)(1)(ii) or (c)(1)

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.

A law enforcement official is defined as an officer or employee of any agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, or an Indian tribe who is empowered by law to: (I) investigate or conduct an official inquiry into potential violation of the law, or (ii) prosecute or otherwise conduct a criminal, civil or administrative proceeding arising from an alleged violation of law. 45 C.F.R. § 164.501.

In [164.512(f)(1)(ii)(A)], we specify that covered entities may disclose protected health information pursuant to this provision in compliance with and as limited by the relevant requirements of legal process or other law. In the NPRM, for the purposes of this portion of the law enforcement paragraph, we proposed to define “law enforcement inquiry or proceeding” as an investigation or official proceeding arising from a violation of or failure to comply with the law. In the final rule, we do not include this definition because it is redundant with the definition of “law enforcement official” in § 164.501.

for civil damages. Thus a “covered entity” may refuse to provide medical records or may move to quash any court order. *See, e.g., United States v. Zamora*, 408 F. Supp. 2d 295, 298 (S. D. Tex. 2006). A patient has no recourse against the government because it is not a “covered entity.” *United States v. Elliot*, 676 F. Supp. 2d 431, 439-40 (D. Md. 2009).

Thus, HIPPA does not prevent the government from using information received from a third-party even if the patient believed such information was confidential. *See Perlos*, 462 N.W. 2d at 329 (applying third-party doctrine to hold, “once hospitals obtained the results for medical purposes, it would have been unreasonable for defendants to assume that the results would necessarily remain private”).

### III.

#### CONCLUSION

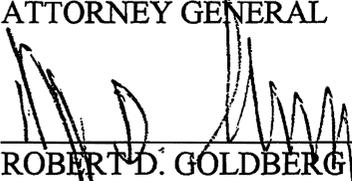
For the foregoing reasons, the judgment of the Circuit Court of Marshall County should be affirmed by this Honorable Court.

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 "Supplemental Brief of Respondent State of West Virginia" was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 21st day of November, 2012, addressed as follows:

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