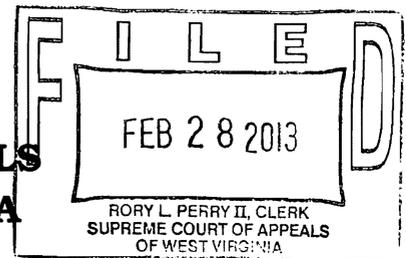


**IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA**



STATE OF WEST VIRGINIA,

v.

ORBAN HENRY SCHLATMAN, JR.,

**Defendant Below and
Petitioner Herein,**

**Docket No. 12-1249
(Fayette County Case No. 10-F-41)**

BRIEF OF THE PETITIONER

David S. Hart
HAYDEN & HART, PLLC
Counsel for the Petitioner
West Virginia State Bar ID # 7976
102 McCreery Street
Beckley, West Virginia 25801
Telephone: (304) 255-7700
Facsimile: (304) 255-7001
E-mail: hh.david.hart@gmail.com

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ASSIGNMENTS OF ERROR

1. The Circuit Court violated Mr. Schlattman's right to a fair trial, including the Compulsory Process Clause of the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, when it excluded a defense witness whose testimony would have shown that Mr. Schlattman's appearance and behavior were inconsistent with the alleged victim's allegations.

2. The Circuit Court violated the defendant's right to a fair trial when it refused to permit the defendant to inspect the medical records and psychological records of the alleged victim to determine if any matters disclosed in those records by the alleged victim would be exculpatory to the defendant or would assist the defendant in the preparation of his defense against the underlying criminal charge.

STATEMENT OF THE CASE

The defendant below and petitioner herein, Orban Henry Schlatman, Jr., appeals his conviction on the charge of first-degree robbery in the Circuit Court of Raleigh County on May 20, 2011. (See Order Accepting Jury Verdict, App. Vol. VII, p. 678.) Following his conviction and following his guilty plea to an information charging that Mr. Hammock had a prior felony conviction, Mr. Hammock was sentenced to ten years in the penitentiary for his first-degree robbery conviction with a consecutive five-year enhancement based upon his previous felony conviction, for a total determinate sentence of fifteen years. (See Order Sentencing Defendant, Vol. VII, p. 702.) Based upon various rulings by the Circuit Court that violated his right to a fair trial, Mr. Hammock seeks the reversal of his conviction and the remand of this matter for a new trial.

On July 16, 2009, a criminal complaint was filed against Mr. Hammock in the Magistrate Court of Fayette County, West Virginia, charging Mr. Hammock with sexual assault in the second degree. (See Warrant for Arrest, p. 1; Criminal Complaint, p. 2.) According to the criminal complaint, Detective G. A. Chapman of the Fayette County Sheriff's Department received a complaint from a woman named Edie Ellison, who claimed that her daughter, during a counseling session, had disclosed that she had been sexually assaulted by Mr. Schlatman. (See Criminal Complaint, p. 2.) The daughter, identified in the criminal complaint as ALM, claimed that Mr. Schlatman stopped by her bus stop on the morning of April 10, 2009. (See id.) Because it was raining, Mr.

Schlatman offered ALM a ride to school. (See id. at p. 3.) Once ALM got into the vehicle, Mr. Schlatman drove to an area where there were abandoned Broughton milk trailers. (See id.) Sensing something was wrong, ALM got out of the vehicle and ran into one of the abandoned milk trailers, which she was unable to lock after she entered. (See id.) According to the criminal complaint, Mr. Schlatman then pushed ALM to the floor, removed her pants and underwear and had vaginal intercourse with ALM. (See id.) After approximately five minutes, Mr. Schlatman finished having sexual intercourse with ALM and exited the trailer. (See id.) ALM then got dressed and exited the trailer after Mr. Schlatman, who instructed her to get back into his vehicle and drove ALM to school. (See id.) ALM indicated that she did not report the incident to anyone after it happened because she was afraid no one would believe her. (See id.) ALM further indicated that she did not see Mr. Schlatman after the incident. (See id.) On January 13, 2010, Mr. Schlatman was indicted for second-degree sexual assault by the Fayette County Grand Jury. (See Indictment, p. 6.)

As the parties prepared for trial, Mr. Schlatman filed a motion to compel discovery of exculpatory evidence pursuant to Brady v. Maryland with the Circuit Court on February 8, 2010. (See Motion to Compel Discovery of Exculpatory Evidence, pp. 17-19.) In his motion, Mr. Schlatman stated that the State had produced, during discovery, treatment records from Camelot School in Tennessee for the alleged victim. (See id.) These records indicated

that the victim had been hospitalized on four or five different occasions prior to her treatment at Camelot School for psychiatric treatment. (See id.) These records further indicated that the alleged victim had medical testing or treatment that included HIV and Hepatitis B testing on or after April 10, 2008. (See id.) Mr. Schlatman sought the disclosure of records related to this treatment to assist in the preparation of his defense against the indictment. (See id.)

A hearing was held on all pending pre-trial motions on March 1, 2010. (See Order Resolving Pre-Trial Motions, p. 21.) After hearing argument on the motion to compel exculpatory evidence, the Circuit Court made the following rulings:

- “1. The State has acknowledged their obligation to provide exculpatory evidence which may be contained in the alleged victim’s psychiatric, psychological and medical records and toward that end have obtained the necessary releases to gather those documents.
2. However, this Court is concerned that irrelevant confidential information concerning the alleged victim could be provided through discovery to the defense, shared with the defendant, and broadcast to the public at large.
3. Therefore, the State shall review all gathered documentation and disclose only that information which clearly falls under the holdings of *Brady v. Maryland*, then, as an officer of the Court, counsel for the defendant will review the remaining information and if she believes that any of the remaining information is relevant and necessary to properly defend her client, and the State disagrees, then this Court will review such documents, *in camera*.
4. Unless formally disclosed by the State, or Ordered disclosed by this Court, the substance of such psychiatric, psychological

and/or medical records of the alleged victim will not be disclosed to any person not an attorney involved in this case.”

(Id. at p. 25 (emphasis in original).) On March 4, 2010, the attorney for the State wrote to the Court and provided the Court with records from Appalachian Psychiatric Services.¹ (See Letter from Prosecuting Attorney to Court, March 4, 2010, p. 28.) In the letter, the attorney for the State stated his belief that the records did not contain any exculpatory information. (See id.) Although the letter was copied to Mr. Schlatman’s counsel, the Appalachian Psychiatric Services records were not provided. (See id.) On March 10, 2010, the Circuit Court entered an Order in which it found that the Appalachian Psychiatric Services records did not contain any exculpatory information and would not be disclosed to Mr. Schlatman. (See Order, March 10, 2010, p. 29.) None of the other records identified in the motion to compel exculpatory evidence were ever provided to Mr. Schlatman.

Mr. Schlatman’s trial commenced on April 20, 2010. (See Trial Transcript, p. 109.) After a jury was impaneled, but before opening statements, the State moved to exclude a defense witness named Bryan Arrington:

¹ In his motion to compel discovery of exculpatory evidence pursuant to Brady v. Maryland, Mr. Schlatman sought records related to psychiatric hospitalizations of the alleged victim at Beckley Appalachian Regional Hospital (“BARH”). (See Motion to Compel Discovery of Exculpatory Evidence, pp. 17-19.) The motion never mentioned records from Appalachian Psychiatric Services. (See id.)

“Yes, Your Honor. If it please the Court, Your Honor, I have this morning taken a statement from one of the defense witnesses, a Mr. Bryan Arrington. And for the record, -- and I'll copy this for Ms. Fraley – this statement was taken at 8:57 this morning by Detective Chapman.

Your Honor, this witness, should he be allowed to testify, would alibi this man as to the time in question, it being 6:25 in the morning till 7:30 in the morning in the day in question. The victim would testify that this crime occurred around 6:15 that morning.

I think this is close enough in time that, if the jury believes this individual, it would alibi this defendant. Pursuant to Rule 12.1 of the Rules of Criminal Procedure, the rules say that this type of witness and notice of alibi should be disclosed within ten days before trial. This was hardly ten minutes before trial when I got this fellow's name.

So I would move to exclude this gentleman. I would tell the Court that Detective Chapman tells me that – I don't think this is Ms. Fraley's fault. I think this individual was interviewed early on, I believe, by the defense. And when he was first interviewed by the investigator, he couldn't remember anything. Well, lo and behold, after having some time to ruminate and, I would argue consult with whoever, now he has an epiphany.

I learned of his existence on Thursday or Friday of last week. I made efforts to immediately get in touch with him. Was unsuccessful. Made efforts thereafter. Even last night Detective Chapman was searching for him and couldn't find him. And I informed Detective Chapman at about 9:00 last night that, if he shows up this morning, we'll get a statement from him so we'll have some idea of what he's going to say. I didn't know what he was going to say until this morning.

I did have an opportunity when the investigator for the defense was sitting with this gentleman to talk to the gentleman on the investigator's cell phone with him present. I declined that opportunity, obviously.

I think that, through no fault of Ms. Fraley's, the notice of alibi rule would be violated if Mr. Arrington testified, so I would move to exclude him as a witness. And I do at this point because I

don't want Ms. Fraley to indicate something on her opening statement that she can't do. So that's my motion, Your Honor."

(Id. at pp. 150-152.) In response, the defense argued that the witness in question was not really an alibi witness at al. (See id. at p. 153.) Instead, the witness would merely testify that Mr. Schlatman had picked the witness up to go to work on the morning in question as he did every day, which was consistent with Mr. Schlatman's statement that he had had a brief, consensual sexual encounter with the alleged victim. (See id.)

According to defense counsel, Mr. Arrington was interviewed in April 2009, but did not specifically remember the morning in question. (See Trial Transcript, p. 153.) When he was interviewed a second time in preparation for the looming trial, Mr. Arrington indicated that he did remember riding with Mr. Schlatman to work on the morning in question. (See id.) After defense counsel interviewed Arrington a second time, defense counsel immediately called the prosecuting attorney on the Thursday before the trial was scheduled to begin and informed him of the anticipated testimony.² (See id. at p. 153.) Defense counsel then had her investigator serve a trial subpoena on Mr. Arrington, instructing the call the prosecutor's office and place Arrington on the phone so that the prosecutor could speak with him. (See id. at pp. 153-154.) The prosecutor refused to speak to Mr. Arrington under those circumstances, but made an appointment for Mr. Arrington to come to the prosecutor's office the next day, Friday, to meet with the prosecutor. (See id. at p. 152-154.)

² The trial began on the following Tuesday. (See Trial Transcript, p. 109.)

Although Mr. Arrington was in Fayetteville for the meeting, the prosecutor was delayed at a hearing and did not get an opportunity to meet with Mr. Arrington. (See id.) Although no explanation was given as to why contact was made on the following Monday, Detective Chapman did interview Mr. Arrington on the morning of the trial and took a statement from him, which was vouched into the record by defense counsel. (See id. at p. 150-151.) After hearing representations from counsel, the Circuit Court excluded Mr. Arrington from testifying at trial. (See id. at p. 156.)

Following the commencement of the trial, the State called the alleged victim, her mother and the investigating officer. (See Trial Transcript, p. 111.) Detective Chapman's testimony included the publication of a statement taken from Mr. Schlatman in which he acknowledged that he had been with the alleged victim on the morning of April 10, 2009, but indicated that their sexual contact had been limited to consensual oral sex. (See State's Discovery Response, pp. 33-47.) Mr. Schlatman did not testify, but called two witnesses to support his defense. (See Trial Transcript, p. 111.) After deliberating for approximately forty-five minutes, the jury returned a guilty verdict against Mr. Schlatman on the single count of second-degree sexual assault contained in the indictment. (See Trial Transcript, p. 309; Jury Verdict Form, p. 342.) Following his conviction, Mr. Hammock was sentenced to an indeterminate prison sentence of ten-to-twenty-five years with thirty years of supervised release following his conviction pursuant to West Virginia Code § 62-12-26.

(See Sentencing and Commitment Order, p. 359.) It is from this conviction and sentence that Mr. Schlatman now appeals.

SUMMARY OF ARGUMENT

The defendant below and petitioner herein, Orban Henry Schlatman, Jr., appeals his conviction on the charge of second-degree sexual assault in the Circuit Court of Fayette County on April 30, 2010. Mr. Schlatman seeks the reversal of his conviction and the remand of this matter to the Circuit Court for the conduct of a new trial with instructions that the Circuit Court must permit Mr. Schlatman to inspect and utilize medical records related to psychological, psychiatric and medical treatment of alleged victim prior to the conduct of the underlying trial. In his appeal, Mr. Schlatman asserts two assignment of errors. First, Mr. Schlatman alleges that the Circuit Court violated the Compulsory Process Clause of the United States and West Virginia Constitutions by excluding a trial witness that Mr. Schlatman attempted to call at the time of his trial based upon the fact that Mr. Schlatman did not disclose the witness until five days before the trial. Second, Mr. Schlatman alleges that the Circuit Court denied him due process and the right to a fair trial by refusing to permit him to inspect and utilize medical records of psychological, psychiatric and medical treatment and testing that would have presumptively undercut the claims made by the State during the underlying trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioner hereby requests that this matter be presented for oral argument in accordance with the provisions of Rule 19 of the West Virginia Rules of Appellate Procedure. The petitioner asserts that the resolution of this matter by memorandum decision of this Court is appropriate.

ARGUMENT

1. The Circuit Court violated Mr. Schlatman's right to a fair trial, including the Compulsory Process Clause of the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, when it excluded a defense witness whose testimony would have shown that Mr. Schlatman's appearance and behavior were inconsistent with the alleged victim's allegations.

As previously discussed, prior to the start of Mr. Hammock's trial, the Circuit Court granted a motion by the State to exclude Bryan Arrington, who was disclosed as a trial witness shortly before the start of the trial. According to the State, the witness, if permitted to testify, would have essentially testified to facts that constituted an alibi defense for the defendant. Because the witness had not been disclosed in accordance with Rules 12.1 and 16 of the West Virginia Rules of Criminal Procedure, the State argued that the disclosure of the witness was untimely and that Mr. Schlatman should not be permitted to offer the witness's testimony. After hearing argument regarding the motion, the Circuit Court excluded the witness.

According to the statement given by Mr. Arrington to Detective Chapman on the morning of the trial, which was made a part of the record during an offer of proof made by Mr. Schlatman during the trial, Mr. Arrington had known Mr. Schlatman for three years. (See Defendant's Trial Exhibits, p. 54; Trial Transcript, p. 108.) Between June 2007 and November 2009, the two men worked together, and Mr. Arrington rode to work with Mr. Schlatman. (See Defendant's Trial Exhibits, p. 54.) Although Mr. Arrington stated that he didn't

remember the specific day in question, Mr. Arrington said that Mr. Schlatman was his only ride to work. (See id.) Thus, if time records showed that he worked on April 10, 2009, Mr. Arrington would have ridden with Mr. Schlatman. (See id.) Mr. Arrington stated that Mr. Schlatman normally picked him up between 6:25 a.m. and 6:30 a.m. each day. (See id.) The two were normally the first employees at their job to clock in, normally around 7:30 a.m. (See id.) Although the offer of proof was limited, it is clear from Mr. Arrington's statement that his failure to remember the day of the alleged sexual assault specifically would suggest that he didn't notice any difference in Mr. Schlatman's appearance or demeanor, blood on Mr. Schlatman's clothing or injuries to Mr. Schlatman's face.³ Such testimony would have undercut the credibility of the alleged victim.

The United States Supreme Court has held that the right of a criminal defendant to call witnesses in the presentation of his defense is a right firmly grounded in the Compulsory Process Clause of the Sixth Amendment to the United States Constitution:

"The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:

³ The alleged victim testified during the trial that she struck Mr. Schlatman in the face when he allegedly sexually assaulted her and that she bled for a couple of hours after the assault. (See Trial Transcript, pp. 201-203.)

'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.' Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

The right of the defendant to present evidence 'stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.' Id., at 18, 87 S.Ct. at 1923. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness."

Taylor v. Illinois, 484 U.S. 400, 409, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988). In considering the exclusion of a defense witness who would otherwise provide exculpatory evidence for the defendant, but who was disclosed in an untimely manner to the State, this Court has similarly recognized that the West Virginia Constitution, at Article III, Section 14, protects the right of a criminal defendant to present witnesses in his defense, and held that the underlying inquiry should be whether the defendant intentionally failed to make a timely disclosure of the witness to gain a tactical advantage over the State and whether the State is prejudiced by the late disclosure:

"Thus in following the United States Supreme Court in Taylor, we hold that where a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure

to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and Article III, § 14 of the West Virginia Constitution to preclude the witness from testifying.

...

Generally, we would hesitate to uphold the exclusion of a defense witness who could offer evidence in a defendant's behalf on the basis of nondisclosure alone. But what moves this case into the posture of justifying such exclusion is the nondisclosure coupled with violation of the sequestration order.”

State v. Ward, 188 W. Va. 380, 387, 424 S.E.2d 725, 732 (1991).

A review of the record made regarding the exclusion of Mr. Arrington's testimony by the Circuit Court in this case makes it clear that there was no willful failure to disclose the testimony. According to defense counsel, Mr. Arrington was interviewed shortly after the time that Mr. Schlatman was formally charged, but that he had a vague recollection of the events of that day on the day of the initial interview. As a result, Mr. Arrington was not disclosed as a trial witness. As the case was prepared for trial, Mr. Arrington was interviewed a second time and was able to provide more detailed information that would have been helpful to Mr. Schlatman. As soon as the second interview was completed, defense counsel made the State aware of Mr. Arrington's testimony and Mr. Schlatman's intention to call him as a trial

witness. The prosecutor stated several times during argument on the motion to exclude Mr. Arrington's testimony that he did not believe that the non-disclosure by defense counsel was a willful attempt to gain an advantage during the trial through the non-disclosure of Mr. Arrington as a trial witness.

In addition to disclosing the identity of the witness as early as possible, a full five calendar days before trial, defense counsel made efforts to have Mr. Arrington speak directly with the prosecutor by telephone. The prosecutor declined this offer. Defense counsel assisted in scheduling an appointment so that Mr. Arrington so that the prosecutor could discuss Mr. Arrington's testimony privately with the prosecutor. The prosecutor was unable to keep this appointment because of a scheduling conflict. Defense counsel even made sure that the prosecutor had directions to Mr. Arrington's home so he could be interviewed by one of the Fayette County Sheriff's Deputies.

In light of this record, it is apparent that the late disclosure of Mr. Arrington's testimony should have been handled under the general rule, stated above, in Ward and that the Circuit Court erred in excluding Mr. Arrington's testimony. The fact that the Circuit Court's exclusion of the witness prevented Mr. Schlatman from calling witnesses to present his defense at trial causes the Circuit Court's error to rise to a constitutional dimension. Mr. Arrington's testimony would have established for the jury that there was a very tight window of time during which Mr. Schlatman could have committed the alleged sexual assault. Mr. Arrington's testimony could have further shed light on Mr.

Schlatman's behavior on the morning that the underlying crime was allegedly committed, if only just to testify that there was nothing about Mr. Schlatman's behavior on the morning in question that made that ride to work stand out in Mr. Arrington's mind. Mr. Arrington's testimony could further have shown that there was nothing unusual about Mr. Schlatman's work appearance on the morning in question that would have been consistent with a violent sexual assault. To the extent that Mr. Arrington had given a prior inconsistent statement, this inconsistency was made known to the State, which would have allowed for appropriate impeachment. By completely excluding the testimony, the Circuit Court denied Mr. Schlatman a fair trial and violated Mr. Schlatman's right to Compulsory Process under the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution. Accordingly, the underlying Conviction Order should be reversed on that basis.

2. The Circuit Court violated the defendant's right to a fair trial when it refused to permit the defendant to inspect the medical records and psychological records of the alleged victim to determine if any matters disclosed in those records by the alleged victim would be exculpatory to the defendant.

Prior to the conduct of the trial in this action, Mr. Schlatman sought the disclosure of the medical and psychological records of the alleged victim so that a determination could be made by Mr. Schlatman as to whether exculpatory information was disclosed during the alleged victim's medical treatment that would tend to demonstrate the innocence of the defendant or that would

otherwise assist Mr. Schlatman in defending against the underlying indictment. Although it had an opportunity to review these records, the State objected to the disclosure of these records. On March 4, 2010, the State provided the circuit court with “certain confidential medical records relating to the care and treatment” of the alleged victim at Appalachian Psychiatric Services. These records covered a period of time from April 2009 to March 2010. The crime detailed in the indictment allegedly occurred on April 10, 2009. According the criminal complaint, the initial disclosure of the alleged sexual assault was made during this counseling. Mr. Schlatman never had an opportunity to review these records and they were not available for use at trial.

In addition to being unable to review or utilize the counseling records that covered the period of time during which disclosure was made, Mr. Schlatman was unable to review or to utilize any of the other records related to the alleged victim’s history of psychiatric hospitalization or counseling. As indicated, the limited records turned over by the State during discovery indicated that the alleged victim had undergone four or five separate psychiatric hospitalizations at Beckley Appalachian Regional Hospital. There was no explanation given as to the reason for these hospitalizations. Moreover, the alleged victim’s mother testified during the trial that the alleged victim had been receiving counseling at Appalachian Psychiatric Services for approximately two years prior to the time of the alleged crime. (See Trial Transcript, p. 183.) Although the nondisclosure of these records makes it

impossible to point to specific items within the records that would have been exculpatory, the existing record would certainly seem to suggest that the disclosure of these records would have assisted Mr. Schlatman in his defense. To the extent the Circuit Court was concerned about public disclosure of these records, it could have put some sort of protective order in place to prevent such dissemination.

The prejudice caused by the non-disclosure of the alleged victim's medical records becomes even more pronounced when one considers the manner in which the State presented its case to the jury. From the State's opening statement, the State indicated that this was a case about the "end of the innocence" of the victim. (See Trial Transcript, pp. 161-162.) The State then buttressed this claim with testimony from the alleged victim's mother and the alleged victim which suggested that the child was, prior to the alleged sexual assault, very carefree, shy and innocent. (See id. at p. 173.) This picture of the alleged victim was then contrasted with the post-incident description of the victim, withdrawn and requiring counseling, to give credibility to the alleged victim's claims that she was sexually assaulted in April 2009. (See id. at p. 183.) The State went so far as to suggest that the alleged victim was a virgin at the time of the sexual assault based upon a claim that she bled extensively afterwards. (See id. at p. 203.) Mr. Schlatman was never given an opportunity to inspect or use records that might have undercut the State's claims in this regard, even though the limited discovery available to Mr.

Schlatman indicated a significant history of psychological counseling, psychiatric hospitalization and medical testing that was consistent with prior sexual activity.

Rule 16(a)(1)(D) allows discovery of all results or reports of physical or mental examinations which are material to the defense or are to be used as evidence in the prosecution's case-in-chief. State v. Roy, 194 W. Va. 276, 282, 460 S.E.2d 277, 283 (1995). Although this Court refused to permit the use or inspection of the relevant medical records in Roy, its consideration of this issue in that case makes it clear that the defendant was entitled to review and, if appropriate, utilize the relevant records in his defense at trial. During the trial in Roy, the defendant sought to utilize records that discussed sexual activity by the victim with another individual, evidence that would have clearly been admissible. The defendant in Roy further sought to utilize those records to show that the defendant's mental stability should affect her credibility. This Court found that neither of these were proper purposes and upheld the trial court's refusal to permit inspection of the records. To provide guidance to future trial courts faced with a similar issue, this Court provided the following guidance in Roy:

“Although we refuse to adopt a blanket rule denying a criminal defendant access to all information protected by statute, we believe the defendant has the initial burden to demonstrate a need for an *in camera* inspection. We hold that before any *in camera* inspection of statutorily protected communications can be justified, the defendant must show both the relevancy, as stated in Allman, and a legitimate need for access to the communications. See McCormick, Evidence § 74.2 at 179 (3rd ed. 1984). This

preliminary showing is not met by bald and unilluminating allegations that the protected communications *could* be relevant or that the very circumstances of the communications indicate they are *likely* to be relevant or material to the case. Similarly, an assertion that inspection of the communications is needed only for a possible attack on credibility is also rejected. Such a broad right of discovery would substantially destroy the statutory protections. On the other hand, if the defendant can establish by credible evidence that the protected communications are likely to be useful to his defense, the judge should review the communications *in camera*. In reviewing the protected communications to determine whether they should be released to the defendant, the trial judge should look for evidence such as a witness's motive to lie against the defendant and for such information that might indicate misidentification or the inability to identify or describe the assailant.

Roy, 194 W. Va. at 285, 460 S.E.2d at 286 (footnotes omitted).

Although Mr. Schlatman's ability to state the importance of the medical records in this case is inherently limited by the fact that he has never seen the records, the records in this case are clearly relevant to Mr. Schlatman's guilt or innocence. This fact is especially apparent when the manner in which the State presented its case to the jury is considered. The State was essentially permitted to present the jury with its argument that the alleged victim's life had been changed in a way that required significant psychological and psychiatric treatment as the result of a violent sexual assault by Mr. Schlatman. Mr. Schlatman was then denied the opportunity to inspect or utilize records that would have allowed him to undercut the credibility of these claims. This denial violates his right to due process and his right to a fair trial under the United States Constitution and the West Virginia Constitution. For this reason, Mr. Schlatman's underlying conviction for sexual assault in the second degree

should be reversed, and this matter should be remanded to the Circuit Court with instructions for the disclosure of the alleged victim's medical records to Mr. Schlatman prior to the conduct of a new trial.

CONCLUSION

A thorough review of the record in this case makes it plain that the Circuit Court restricted, prior to the petitioner's underlying trial, the ability of the petitioner to make an adequate investigation of this matter to allow the petitioner to prevent a proper defense against the charge contained in the indictment. Further, this review makes it plain that the Circuit Court restricted the petitioner's ability during the underlying trial to present witnesses necessary for his defense. Each of these errors is constitutional in nature. Each of these errors ensured that the petitioner did not receive a fair trial below. For these reasons, the Circuit Court's judgment of conviction should be reversed, and this matter should be remanded to the Circuit Court to conduct a new trial on the underlying indictment following disclosure to the defendant of the appropriate records of medical treatment by the alleged victim.

ORBAN HENRY SCHLATMAN, JR.
By Counsel

HAYDEN & HART, PLLC

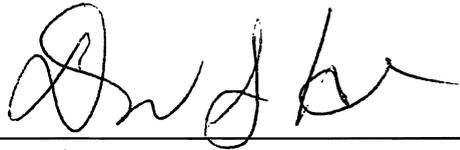


David S. Hart
Counsel for the Petitioner
West Virginia State Bar ID # 7976
102 McCreery Street
Beckley, West Virginia 25801

CERTIFICATE OF SERVICE

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Brief of the Petitioner and Appendix upon each of the following parties or their counsel by United States mail, first-class, postage prepaid, on February 27, 2013, addressed as follows:

Laura Young, Esquire
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301

A handwritten signature in black ink, appearing to read 'D. S. Hart', written over a horizontal line.

David S. Hart