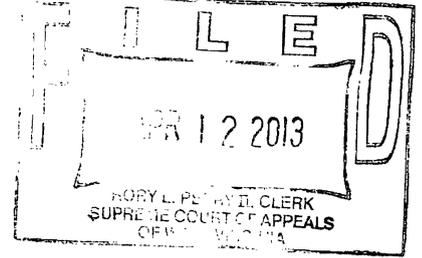


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1249



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

ORBAN HENRY SCHLATMAN, JR.,

*Defendant Below,
Petitioner.*

RESPONSE BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

LAURA YOUNG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 4173
E-mail: ljy@wvago.gov

Counsel for Respondent

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Comes now the Respondent, by counsel, Laura Young, Assistant Attorney General, and pursuant to Rule 10(d) of the Revised Rules of Appellate Procedure, and a Scheduling Order from this Court files the within brief in response to the petitioner's brief. As a preliminary note, counsel is constrained to comment that petitioner failed to perfect his appeal in a timely manner, failed to move for an extension of time to perfect his appeal, and finally perfected his appeal more than ten days after an Order from this Court threatened sanction if the appeal was not perfected within ten days. Further, based upon information and belief, the petitioner did not file a motion to perfect his appeal out of time, nor explain the previous failure to adhere to this Court's orders. Nonetheless, this response brief is filed within forty-five days of the date this appeal was finally perfected.

I.

STATEMENT OF THE CASE

The petitioner was indicted by the grand jury in Fayette County for the offense of second degree sexual assault, charging that he engaged in vaginal intercourse with A.L.M., without her consent, and the lack of consent was as the result of forcible compulsion. The incident occurred on or about April 10, 2009. (App vol. I at 6.)

The trial court, as regards any existent psychiatric, psychological or medical records of the victim, noted that the prosecuting attorney acknowledged his responsibility to provide exculpatory evidence. The trial court was concerned that irrelevant confidential information about the victim could be made public. Therefore, the judge ordered that the prosecutor review all “gathered documentation” and disclose only that information which was clearly exculpatory. Then, counsel for the defendant would review the information, and if she believed other information was necessary for the defense, and the prosecutor disagreed, the judge would conduct an in camera review of those documents. Further, unless formally disclosed by the State or ordered disclosed, the substance of those records would not be disclosed to any person not an attorney involved in the case. (*Id.* at 25.) That same order allowed the petitioner’s statements to be admitted at trial. (*Id.* at 23.)

The prosecuting attorney reviewed the records, found nothing exculpatory, and notified the judge and trial counsel. The judge reviewed the records for the time period April 2009, through March 2010, and found nothing exculpatory or impeachment evidence. (*Id.* at 29.) Of note, these records covered the time period from the sexual assault on April 10, 2009, through the date of the above-referenced order which was entered March 10, 2010.

The petitioner gave a statement to a member of the Fayette County Sheriff's Department. In that statement, he alleged that on an unspecified date, he saw the victim hitchhiking and picked her up. (*Id.* at 37.) It was before 7:00 a.m., and it was dark outside. (*Id.*) The petitioner stated he had never seen her before that day, and never met her. He took her to school and dropped her off. (*Id.* at 38.) The petitioner stated that they talked, and that the victim said she was 18. He denied taking her to the road that goes into Pizza Hut, stating that she wanted him to, but he didn't because he didn't know whether she was 18 or not. (*Id.* at 39.)

The petitioner stated that this schoolgirl, whom he never had met before, wanted to have sex with him, and "flashed" him when she got into the car. (*Id.* at 40.) He stated that on a different morning the victim gave him a blow job. (*Id.*) The petitioner then stated that he had seen the victim three or four days, and when asked whether there was sexual contact, he responded no, despite having just stated that the victim performed oral sex on him. (*Id.* at 40-41.) He then stated that one act was the only act of sexual contact. (*Id.* at 41.) He stated that the act of oral sex took place while he was standing outside his car and he ejaculated on the ground. This act supposedly took place in the parking lot of the Holiday Inn. (*Id.* at 41-42.) According to the petitioner's statement, despite the biologic impossibility, the victim gave the petitioner a blow job, while stating that she wanted to have a baby. (*Id.* at 43.) He continued to deny any acts of vaginal intercourse, or forcible assault. (*Id.* at 45.) Additionally, the officer told the petitioner a female had accused him of sexual assault. He wanted to know who, and the officer gave the petitioner the victim's name. The petitioner professed not to know the name, and the officer described the victim. The petitioner then responded "Yeah, I was with her, but I didn't rape her. She wanted it." (*Id.* at 96.)

After jury selection, but before opening statements, the prosecuting attorney made a motion to exclude the testimony of defense witness Bryan Arrington. Although Mr. Arrington was known to the State, not until 8:57 a.m. the day of trial did the State learn that Mr. Arrington had conveniently been able to remember that despite being interviewed “early on” by the defense, and being unable to remember anything about the date of the sexual assault, he (Arrington) now could clearly remember that on the date of the assault he was with the petitioner from 6:25 until 7:30 a.m. (App. vol. II at 150-51.) The prosecutor noted that because the victim’s statement was that she was picked up by the petitioner at approximately 6:15 a.m., that they drove for awhile, that she ran for safety, was trapped, pushed to the floor, had her jeans and underwear pulled off, engaged in a struggle, was vaginally sexually assaulted for approximately five minutes, that another interval of minutes elapsed, perhaps as many as 10 (*id.* at 154), and then was driven to school (narrative of victim’s statement at App. vol. I at 3), then Arrington would qualify as an alibi witness. (App. vol. II at 151.) The Rules of Criminal Procedure clearly require that the State be given notice of an alibi defense ten days before trial. (*Id.*)

The defense attorney agreed that upon first interview, Arrington had no memory of whether he rode with the petitioner in April, 2009, or not. (*Id.* at 153.) Although trial counsel attempted to distinguish Arrington’s statement as not an alibi, she did acknowledge that according to the victim’s statement “then the times would overlap.” (*Id.* at 153-54.)

The trial court ruled that Arrington’s testimony was not admissible because of the Rule of Criminal Procedure dealing with alibi. (*Id.* at 156.) Although petitioner’s trial counsel did request the opportunity to vouch the record with Arrington’s statement, she did not object to the court’s

ruling that Arrington would not be allowed to testify as to alibi, and further stated that she understood the court's ruling. (*Id.* at 156-57.)

Eddie E., the victim's mother testified. (*Id.* at 172.) She described that before April 10, Angel was a typical child, loving and sensitive and enjoyed playing with her 7 year old sister. (*Id.* at 173.) She was a passive girl. (*Id.*) Eddie described her daughter as an introvert, who, before the sexual assault was not yet interested in boys and dating. (*Id.* at 175.) Her entire concept of dating was to talk to someone at school, and maybe go to church with someone. (*Id.*)

Before the date of the sexual assault, Eddie stated that Angel had never received a phone call from the petitioner, nor placed one to him. No one in the family had a cell phone, and because of a fire, Eddie, her husband, Angel, the sister and two other adults were living in an efficiency apartment with one shared telephone. (*Id.* at 176-77.)

Immediately after spring break (the sexual assault), Angel became angry, withdrawn, wouldn't play her guitar, or attend church functions. (*Id.* at 177.) Eddie didn't know what the problem was, and took Angel for counseling about once a week until June. (*Id.* at 178.) The counselor told Eddie that he was very concerned about Angel, and about two weeks after that conversation, Eddie learned that her daughter had been sexually assaulted. (*Id.* at 179.) Angel wanted to press charges, and Eddie contacted the police. (*Id.*) Angel had seen that counselor before the assault. (*Id.* at 183.) Eddie stated that Angel usually left for the bus no later than 6:05 a.m., because the bus came between 6:20 and 6:30. (*Id.* at 184.)

Angel testified. She was 17 at the time of trial and 16 on April 10, 2009. (*Id.* at 186.) In April, she was living with her mother, step-father, and sister Hope at her grandmother's residence. (*Id.* at 187.) She was a freshman at Oak Hill High School in April, 2009. (*Id.* at 187.) She typically

got to school by riding a bus. She usually left her home around 6:00, and the bus came around 6:30. (*Id.* at 188.) She was at that bus stop between January and April. (*Id.*)

About three days before the “incident”, a gentleman stopped at the bus stop to talk to her. He told her that his friends called him “Chubs”. She did not know his real name. (*Id.* at 189.) He made small talk about the weather, while he was in the car, and then stated that he had to go to work. (*Id.* at 190.) He asked her about school, and about home renovations, because she had told him about the fire at her house. (*Id.*)

Angel knew that the rule was she was to ride the school bus and “don’t get in any cars with strangers.” (*Id.* at 192.) She acknowledged that “Chubs” was a stranger and that she shouldn’t have gotten in the car with him. (*Id.*)

Angel specifically remembered the date that she was assaulted because April 10 was the date before a dance, and then the next week was spring break. (*Id.* at 193.) She left about 6:00 for the bus and was wearing a t-shirt and jeans. (*Id.*) The petitioner was the only person she saw at the bus stop. (*Id.* at 194.) He pulled up, started talking to her, and asked her if she needed a ride. (*Id.*) It was raining and sleeting. (*Id.*) Angel told him she didn’t need a ride, but he told her she would get sick because of the weather. (*Id.*) Angel had her school books with her. (*Id.*) She described his car as a small two door vehicle. (*Id.*)

Angel did not recall any conversation after she got in the car. (*Id.* at 195.) She believed he was taking her to school. He went down Main Street. (*Id.*) He then went on Oyler toward school. (*Id.* at 196.) When they came to the corner where the high school was, instead of going right toward school, he went left toward Pizza Hut. (*Id.*) At that point she knew something was wrong, and was afraid the petitioner was going to seriously hurt her or kill her. (*Id.*)

Angel did not have a cell phone. (*Id.* at 197.) The petitioner did not drive all the way to Pizza Hut, but went to a “side area”. This was not the Holiday Inn Parking Lot. (*Id.*) The victim described a white trailer in that area, with back doors open and stairs leading up to it. (*Id.*) At some point the petitioner stopped the car. (*Id.*)

When he stopped the car, she immediately got out and ran up into the back of the box truck, also referred to as a trailer. (*Id.* at 198.) Angel hoped the doors would lock, but they did not. (*Id.*) The petitioner pulled the door open, walked into the truck, pushed her down by her shoulders and got on top of her. (*Id.*)

She fell down, and he got on top of her. (*Id.* at 199.) The petitioner was kneeling on her, and with his hands “yanked” down her pants. (*Id.*) He pulled her underwear down at the same time. (*Id.*) Angel started crying. (*Id.*) The petitioner “pulled his pants down to his knees and he began to rape me.” (*Id.*) When asked exactly what that meant, the victim noted that “this is very embarrassing. He put his penis in my vagina.” (*Id.* at 200.)

Angel had never had an experience like that before. (*Id.*) He was having sex with her and she did not want him to. (*Id.*) He had his hands beside her ribs, and his legs were between her legs. (*Id.*)

She described that it hurt when he inserted his penis. (App. vol. III at 201.) The assault seemed to last forever. (*Id.*) When it first began, she hit him in the nose with her hand, but he only smiled at her. (*Id.*) He asked her “How do you like it now B(itch)?” (*Id.* at 202.) When Angel was interviewed by Detective Chapman, she did not know the meaning of the word ejaculate. (*Id.*) At trial, she described ejaculation, as “relieved himself” (*id.*), but did not know if the petitioner had or had not ejaculated. (*Id.* at 203.) She bled for a couple of hours afterwards. (*Id.*) After the assault

ended, Angel pulled her pants up. (*Id.*) She believed the only thing left that could happen was for the petitioner to murder her “and at that time, I wish he had of.” (*Id.*) She was humiliated and believed the assault was her fault. (*Id.*) Angel got back in the car and the petitioner dropped her off at school. (*Id.*) Angel did not tell anyone at school, or her mother, what had happened because she was embarrassed, didn’t think anyone would believe her, and thought the assault was her fault because she had disobeyed her mother’s admonition not to ride in cars with strangers. (*Id.* at 204.)

A copy of Arrington’s statement was tendered to the clerk for the purpose of vouching the record. (*Id.* at 218.) That statement says that as to “that day”, if records showed they both were at work he had a ride with the petitioner. The statement did not reference a specific date, and did not reference a specific time that he was picked up. Nor did the statement make any reference to the petitioner’s behavior, clothing, and physical condition being out of the ordinary, or as usual, at any time. In short, that statement really says nothing. (App. vol. I at 54.)

Detective Chapman testified. (App. vol. III at 222.) He became involved in the investigation of Angel’s sexual assault when her mother filed a complaint. This was on or about June 24, 2009. (*Id.* at 223.) After interviewing Angel, the only information he had was “Chubs”, which he determined was the nickname of the petitioner. (*Id.* at 224.) The police officer was able to determine that a box trailer had been at the site Angel described as the crime scene, before being moved in April, 2009. (*Id.* at 225-26.)

Detective Chapman stated for the jury that he had gone to the petitioner’s place of employment. After Chapman described Angel to the petitioner, the petitioner stated that he knew her, but that he hadn’t raped her, she had wanted it. (*Id.* at 227.) The previously described transcript and recorded statement was admitted to evidence.

Detective Chapman noted that the petitioner had described a consensual act of sexual intercourse, that is Angel performing oral sex on him in the parking lot of the Holiday Inn. That parking lot is bounded by a major roadway on each side. Further, not only does the parking lot lead to the Holiday Inn, there was a restaurant and fitness center open early in the morning. (*Id.* at 234-35.) The petitioner had described that act as taking place outside the car. (*Id.* at 236.)

Detective Chapman, who had investigated a number of cases of sexual assault noted without objection that often victims did not immediately report the assault based upon embarrassment, humiliation, blaming themselves, and being unsure and uncertain of what to do and to whom to turn. (*Id.* at 236-37.) Of the fifty investigations he remembered, only one had an immediate disclosure. (*Id.* at 237.)

Jessica Chandler testified that the petitioner's time card indicated he was at work starting at about 7:29 a.m. on April 10, 2009. (*Id.* at 260.)

The jury convicted the petitioner of second degree sexual assault. (App. vol. IV at 309.) He was sentenced to an indeterminate term of not less than ten nor more than twenty-five years incarceration. (*Id.* at 330.)

Orders re-sentencing the petitioner for the purpose of restarting the appeal clock were followed by the notice of appeal. The long delayed petitioner's brief and appendix then ensued.

II.

SUMMARY OF THE ARGUMENT

Despite the fact that the trial court very properly reviewed the victim's records and found nothing in them to be exculpatory to the petitioner, even of an impeaching nature, (App. vol. I at 29.), the petitioner asserts that the court committed reversible error by not letting petitioner's trial

counsel look at the records. However, the trial court adhered to the procedures regarding psychiatric and medical records pertaining to a victim. Although, under Rule 16 discovery, the petitioner is permitted to discover the results of examinations which are material to the defense, Syl. Pt. 1, *State v. Roy*, 194 W. Va. 276, 460 S.E.2d 277 (1995), the petitioner is not permitted unfettered fishing into the victim's confidential medical and psychiatric history. Public policy considerations prevent disclosure of confidential material. Syl. Pt. 2, *Roy*, in part. Before those records need be turned over to the defense, the defense must show

both relevancy and a legitimate need for access. . . . This preliminary showing is not met by bald and unilluminating allegations *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 that inspection of the communications is needed only for a possible attack on credibility is also rejected.

Id. at Syl. Pt. 3.

In the case at bar, no preliminary showing was made by petitioner's trial counsel that there was any exculpatory or material information in the victim's counseling records. Nonetheless, those records were obtained by the prosecution, and the circuit judge reviewed them. The circuit judge found nothing exculpatory. Petitioner's brief asserts, without any foundation, that disclosure of the records would have assisted the petitioner. However, the judge determined that disclosure of the records would not assist the petitioner, and petitioner's rampant speculation does not rebut the simple fact that the records were not helpful, and therefore not subject to disclosure. The State obtained the records, reviewed the records, turned them over to the circuit court, which also reviewed the records and determined they were to remain confidential. The circuit court, even in the absence of the showing referred to in *Roy, supra*, followed the approved procedure. This not only was not trial error, it was scrupulous, even beyond what was required, protection of the petitioner's rights.

As to the exclusion of the witness, it is not altogether clear that the objection to that exclusion was every really made to the trial court. As noted, petitioner's trial counsel stated that she did not believe Mr. Arrington fit the definition of an alibi witness, while conceding that according to the victim's time line of events, the times did overlap. Therefore, Mr. Arrington would appear to fit the definition of an alibi witness. However, she never specifically objected to the court's ruling, although she did vouch the record with his purported statement.

Assuming without conceding that a valid objection was lodged to the exclusion of Arrington, the exclusion was proper. Although Arrington's statement contained in the Appendix is completely unilluminating, it appears as if trial counsel expected that Arrington would recall that on the date of the assault he was with the petitioner from 6:25 until 7:30 a.m., being driven to work. (App. vol II at 150-51.) However, the prosecutor pointed out that because the victim's testimony would be that she was picked up at approximately 6:15 a.m., driven around, was vaginally sexually assaulted for at least five minutes, that another ten or minutes passed before she was then finally driven to school, (*id.* at 154.), then Arrington would qualify as an alibi witness because he would apparently be testifying that he was with the petitioner at a time when the victim alleged she was being sexually assaulted. Trial counsel acknowledged that according to the victim's statement, "the times would overlap." (*Id.* at 153-54.) Further, after the witness was excluded by the court stating "the motion of the State will be granted. The witness will not be allowed to testify as to alibi in this matter." (*id.* at 156.), trial counsel asked to vouch the record, but did not object to the court's ruling. Further, the statement vouched into the record indicated that Arrington had known the petitioner for three years, that he had ridden with him to work for a period of approximately two and one-half years from June, 2007 until November, 2009, and that he would be picked up between 6:25 and 6:30 a.m. However,

Arrington had no specific recollection of that date in question, stating merely that if he were at work that day, he rode with Schlatman. (App. vol. I at 54.)

Therefore, it is clear that exclusion of the witness was not error. Arrington's purported testimony would have been that he was with the petitioner from 6:25 (or so) until getting to work and clocking in at around 7:30. (*Id.*) The victim's testimony was that she left her house around 6:00 a.m. and was sexually assaulted thereafter. The purpose of his testimony was to demonstrate that the petitioner was with the witness at the time when he was allegedly sexually assaulting the victim. If, as speculated in petitioner's brief, the import of his testimony was that he would testify he didn't notice anything different about the petitioner on the date of the assault (Pet'r's Br. at 15.), such is not supported by the vouching of the record which indicated that Arrington could not remember the date of the assault at all. So, the exclusion was not error because Arrington was a purported alibi witness who was not disclosed to the State. Trial counsel waived any objection to the exclusion of Arrington by failing to object, specifically to his exclusion. Additionally, the petitioner asserts in his brief that Arrington would have proffered exculpatory evidence, but such is simply not true. Arrington would have proffered no evidence because he had no specific recollection of the date of the assault. Speculation that Arrington would have stated he noticed nothing unusual about Schlatman the date of the assault is simply that, speculation. That is not what Arrington says in his very vague statement. As there is no indication that Arrington would have provided relevant information, and the indications were that as to specific times, the time overlapped, Arrington was properly excluded.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for a memorandum decision. Further, the respondent does not believe that oral argument is necessary in this matter. The dispositive issues have been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and appendix. The decisional process would not be significantly aided by oral argument.

IV.

ARGUMENT

A. The trial court did not err in excluding prospective defense witness Arrington.

Initially, it must be noted that the Appendix is unclear as to whether trial counsel actually preserved this allegation of error. After argument on the State's motion to preclude the witness testimony because the State viewed Arrington as an alibi witness (a view, with which trial counsel agreed, at least in part, by her acknowledgment that "If the statement of Ms. M. is to be believed, that she waited inside this trailer for five or ten minutes before she decided to get back in my client's car, then the times would overlap.") (App. vol. II at 154), the court determined that "The witness will not be allowed to testify as to alibi in this matter." (*Id.* at 156.) Trial counsel did not object, but did request to submit Arrington's statement to "protect the record." (*Id.*) Further, while the court's ruling excluded Arrington as to alibi, trial counsel did not attempt to call Arrington for the purpose enunciated in petitioner's brief, i.e., to state that he saw nothing out of the ordinary from Schlatman, no matter what time of the day he saw him. Therefore, it is the respondent's view that the failure of defense counsel to object to the court's ruling, coupled with the utterly incomplete statement inserted into the Appendix constitutes waiver of this asserted error.

This Court cogently noted in *State v. Miller*, 194 W. Va. 3 at 17, 459 S.E.2d 114 at 128 (1995), that “the failure of a litigant to assert a right in the trial court likely will result in a procedural bar to an appeal of that issue.” The *Miller* Court, in accord with the United States Supreme Court, distinguished “waiver” and “forfeiture.” Waiver is the intentional relinquishment of a known right, and when there is a knowing waiver, there is no error. However, forfeiture of a right—the failure to assert such right in a timely fashion—does not extinguish the error. Plain error may be corrected in circumstances where a miscarriage of justice would otherwise result. The error must indeed be plain, which means obvious. If there is “plain” error, to which no timely objection was raised, a determination must be made as to whether that error actually affected substantial rights of the defendant. That means that the error must have been prejudicial and affected the outcome of the proceedings. Further, the defendant bears the burden of persuasion with respect to prejudice. *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129.

The Court noted in Syllabus Point 4 of *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988), that the plain error doctrine

enables this Court to take notice of error . . . occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Additionally, this Court stated in Syllabus Point. 7, in part, of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996):

In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

“One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue.” Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. . . . When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial . . . he or she ordinarily must object then and there or forfeit any right to complain at a later time.

Id. at 316, 470 S.E.2d 613 at 635. (Citations omitted.)

LaRock continues that the justification for the “raise or waive” rule is to allow the trial court to correct the problem before harm, and that it prevents a party from tactically refraining from objecting and assigning error (or planting error) if there is an unfavorable result. The raise or waive rule is not absolute. Under the plain error doctrine, “appellate courts will notice unpreserved errors in the most egregious circumstances. Even then, errors not seasonably brought to the attention of the trial court will justify appellate court intervention only where substantial rights are affected.”

(Id.)

To satisfy the plain error standard, there must be error which was plain or obvious, and that error must affect substantial rights, in that the error must be prejudicial and not harmless. Upon such a showing a court may correct the error if it affects the fairness of the underlying proceedings. (*Id.* at 316-17, 470 S.E.2d at 635-636.) The plain error rule should be exercised only to avoid a miscarriage of justice, that is conviction of an innocent person. “Aside from preventing such miscarriages of justice, the standard to apply is whether the error ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” (*Id.* at 317, 470 S.E.2d at 636.)

Therefore, it is the position of the respondent that any objection to Arrington’s exclusion was waived, and fails to rise to the level of plain error. As is apparent from the statement used to “protect the record”, Arrington’s testimony was meaningless. He did not know if he worked that day. If a

time card said he worked, then he saw Schlatman for a ride. That is all that statement reveals. Arrington had no independent memory of the day in question, the ride in question, or even, really whether he saw the petitioner or noted anything about him on that particular day. As such, it was not even relevant to the issues at bar. No one disagreed that Schlatman worked that day—the timekeeper testified. Therefore, since the alleged error was not preserved, and does not rise to the level of plain error such that the exclusion of the testimony contributed to a miscarriage of justice, or affected the fairness, integrity or public reputation of judicial proceedings, the court should decline to review this error and decline to reverse this conviction.

Assuming for the purposes of argument only that the vague statement of inserting Arrington’s statement for the purposes of protecting the record served as a timely and specific objection to the judge’s ruling that Arrington could not be called as an alibi witness, the judge’s ruling was not mistaken.

To the apparent surprise of some members of the defense bar, the Rules of Criminal Procedure are designed to apply not only to the State but also to the defendant. Rule 12.1(a) provides that upon demand of the attorney for the state, the defendant shall serve within 10 days of trial a written notice of the defendant’s intention to offer an alibi defense. That notice shall state the place at which the defendant claims to have been, and the names and addresses of all witnesses who will support that alibi. Although the state’s written demand is not included in the Appendix, trial counsel did not object to providing notice under Rule 12.1 (a). She proffered, as noted above, that Arrington was not an alibi witness while conceding that, as stated previously, the time overlapped. (App. vol. II at 153-54.)

The defense clearly did not comply with that Rule. Syllabus Point 5 of *State v. Hall*, 172 W. Va. 183, 304 S.E.2d 43, (1983), states that the rule “which requires criminal defendants to respond to a prosecutor’s request for notice of intent to offer an alibi defense, is not unconstitutional.” Further, Rule of Criminal Procedure 12.1(d) provides specifically that “upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of an undisclosed witness offered by such party as to the defendant’s absence from . . . the scene of the alleged offense.” The defense failed to comply with the Rule, and Arrington was properly excluded.

However, even if Arrington is regarded as an “ordinary” witness who was not required to be specifically disclosed under Rule 12.1, or is regarded as an alibi witness whom the court should have permitted to testify, it is clear that his exclusion was harmless under the facts and circumstances of this case.

The petitioner’s brief speculates that Arrington’s statement about 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.” There is further speculation that such testimony would have undercut the credibility of the alleged victim.

Such information is not contained in the statement submitted for review by this Court. Mr. Arrington does not remember whether he worked that day or not. Therefore, he does not remember whether he actually saw the petitioner that day or not. Therefore, he cannot possibly testify that he did or did not notice anything out of the ordinary about the petitioner, either his demeanor, clothing, or physical injuries.

Further, such testimony would not have undermined the credibility of the victim. Again, Arrington could not have testified that he remembered anything about the petitioner, as he had no independent recollection of the day in question. The petitioner himself stated that he engaged in an act of consensual sexual activity with the victim. Angel testified that she hit the petitioner in the nose. She did not testify that she caused the petitioner any injury whatsoever. (App. vol III at 201.) The bleeding referred to (*id.* at 203) while not specific, is clearly Angel bleeding, and not the petitioner. Further, based upon the sequence of questioning the inference is that she was suffering from vaginal bleeding, and not from any injury to her hand.

Angel did not testify that she caused injury to the petitioner. She did not testify that his clothes were in disarray after he finished raping her. She did not testify that his demeanor was any different after he assaulted her than when he picked her up. Therefore, Arrington's testimony was in no way contradictory to the victim's. It simply might have demonstrated that both of them were at work in the morning. The evidence that Schlatman clocked in at work was admitted through Jessica Chandler who indicated that the time card revealed that Schlatman clocked in at 7:29 a.m. on April 10, 2009. (App. vol. III at 260.)

With that in mind, it is well settled that, "[m]ost errors, including constitutional ones are subject to harmless error analysis." *Sullivan v. Louisiana*, 508 U.S. 275 at 278 (1993). "In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), we explained that, '[a]s to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment.' (Citations omitted)." *State v. Reed*, 218 W. Va. 586, 590, 625 S.E.2d 348, 352 (2005).

Assuming but not agreeing that Arrington's exclusion was error, such was harmless. According to the information available for review by this Court, that is the statement which was proffered to protect the record, Arrington remembered nothing about the date of the sexual assault. Anything else is sheer speculation, which neither the Petitioner nor the respondent may engage in. In this case, Arrington's utter failure of memory does not contribute to the petitioner's defense. Therefore, the exclusion of his testimony, if error at all was harmless.

B. The court followed the proper procedure as regards the victim's counseling records. Defense counsel at trial was not entitled to review the records.

Petitioner's brief alleges that the petitioner was entitled to review the victim's psychological records, and that the failure to permit such review was prejudicial error. However, the petitioner conveniently is ignoring that the trial court followed precisely the procedure enunciated in *State v. Roy*, 194 W. Va. 276, 460 S.E. 2d 277 (1995.)

In fact, the petitioner's brief on pages 22-23 quotes from *Roy* as follows:

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.

However, the petitioner's brief then conveniently ignores the fact that the judge at trial followed the precise procedure outlined above. First of all, although the petitioner at trial did request information about the victim's psychiatric and psychological records, (App. vol. I at 17-19), that motion simply stated that such communications might be relevant and/or exculpatory. That falls far short of establishing by credible evidence that the protected communications were likely to be useful to his defense. Further, that motion states specifically that the State had already provided a significant amount of discovery from a treatment facility where the victim apparently spent time. (*Id.* at 17.)

An order was entered regarding the defense request. It noted that the State had obtained the necessary medical releases to obtain the information. However, the court was concerned that irrelevant information could be made public, and ordered the State to inspect all the gathered information and disclose only clearly *Brady* material. The assistant prosecutor was charged with that responsibility as an officer of the court. (*Id.* at 25.)

Further, after records regarding the time period April 2009 through March 2010 were obtained by the State, such were turned over to the trial judge, who made an *in camera* review of those records despite the petitioner's failure to meet the threshold of requiring such review. The judge found specifically that "having reviewed such records, finds that nothing contained in such records is favorable to the defendant by way of exculpatory evidence or impeachment evidence." (*Id.* at 29.)

It is clear that the trial judge comported with the review suggested by *Roy*, and also by *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003), which states in part in Syllabus Point 7, "When the mental health records of a prospective witness are sought for the purpose of impeaching the

witness' credibility, the circuit court should first examine the records *ex parte* to determine if the request is frivolous.”

The trial judge reviewed the records *ex parte* and *in camera* and determined that there was nothing in those records helpful to the petitioner's defense. The trial court, having scrupulously followed the procedure outlined in *Roy* and *Parsons*, despite the fact that both in the motion below and in the petitioner's brief, the basis for disclosure of those records are 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 or that inspection of the communications is needed only for a possible attack on credibility is also rejected, properly kept confidential the irrelevant records pertaining to the victim's health.

V.

CONCLUSION

Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests that this Court affirm the jury verdict of guilty and penitentiary sentence rendered in the Circuit Court of Fayette County upon the petitioner's conviction of sexual assault in the second degree.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



LAURA YOUNG

ASSISTANT ATTORNEY GENERAL

812 Quarrier Street, 6th Floor

Charleston, West Virginia 25301

Telephone: (304) 558-5830

State Bar No. 4173

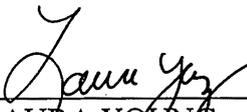
E-mail: lgy@wvago.gov

Counsel for Respondent

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *RESPONSE BRIEF* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of April, 2013, addressed as follows:

To: David S. Hart, Esquire
Hayden & Hart, PLLC
102 McCreery Street
Beckley, WV 25801



LAURA YOUNG