IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0404

STATE OF WEST VIRGINIA EX REL. SCOTT R. SMITH,
Prosecuting Attorney, Ohio County,

Petitioner,

v.

THE HONORABLE MICHAEL J. OLEJASZ,
Judge, Circuit Court of Ohio County, and
CHANDIS WESLEY LINKINOGGER, Defendant,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

From the Circuit Court of Ohio County
Case No. 21-F-4

GAIL W. KAHLE, WVSB #6109
gkahle@wvocpa.org
Assistant Prosecuting Attorney for
Ohio County, West Virginia
1500 Chapline Street, 2nd Floor
Wheeling, WV 26003
T:(304) 234-3631
F:(304) 234-3870
Counsel for the Petitioner

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QUESTIONS PRESENTED

1. Whether the trial Court erred in dismissing with prejudice two counts of Sexual Assault in the Second Degree based upon the West Virginia State Police Forensic Laboratory's failure to timely conduct PCR DNA testing and urine toxicology, when 1) the PCR DNA results would have been irrelevant to any issue to be determined by the jury, and 2) the West Virginia State Police Forensic Laboratory does not conduct urine toxicology testing.

2. Whether the trial Court erred in dismissing with prejudice two counts of Sexual Assault in the Second Degree as a sanction for discovery violations, when the record is confusing at best as to the nature of any alleged violations, and Counsel for the accused was less than forthright in requesting a dismissal.

STATEMENT OF THE CASE

Chandis Linkinogger was indicted by an Ohio County Grand Jury on January 11, 2021, for the crimes of Strangulation, Burglary and Two Counts of Sexual Assault in the Second Degree, for acts alleged to have occurred on September 11, 2020. (A.R. at 3). Linkinogger was arraigned on January 21, 2021, and at the arraignment the State tendered it's Discovery Disclosure (A.R. at 263), and the Court entered a Scheduling Order, setting the matter down for trial on April 12, 2021. (A.R. at 7).

Included within the State's discovery disclosures were the identity of two treating physicians of the alleged victim of Defendant, Dr. Shawn Stern and Dr. Kevin Clarke, both identified as expert witnesses. (A.R. at 265). Among other items disclosed were notes taken by Nurse Lacy Conley at Wheeling Hospital on September 11, 2020, when a Sex Crime Kit was collected. (A.R. at 309), and the results of a urine toxicology screen performed at Wheeling Hospital showing positive results for cocaine, THC and benzodiazapines in the blood system of the alleged victim. (A.R. at 329). Significantly, there was not at that time, nor at any time prior to the commencement of trial, any witnesses, lay or expert, identified by the State from the West

Virginia State Police Forensic Laboratory. This was due in large part upon the fact that on September 11, 2020, the day of the alleged assault and arrest of Defendant, after being advised of his *Miranda* rights Defendant gave and extended interview to Detective Andrew Adams in which he admitted to sexual relations with the alleged victim, claiming the same to be consensual. (A.R. at 468-476).

On February 23, 2021, Defendant filed a Motion to Compel, seeking various categories of evidence, most of which were ruled by the Circuit Court as not being subject to discovery. (A.R. at 377). A hearing was held on this motion on March 12, 2021. Among the items of evidence discussed was testing of materials collected by Nurse Conley by the West Virginia State Police Forensic Laboratory. (A.R. at 98-99). At first, counsel for the State was unsure if the kit had even been sent to the Lab for testing due to the fact there was no intention of utilizing any of the results at trial. Afer a brief discussion about the kit, the Court Ordered "that the evidence be rushed by the West Virginia State Police Crime Lab . . .." (A.R. at 105).

After a brief recess in the hearing of March 12, it was learned that the Wheeling Police had indeed sent the subject Sex Crimes Kit to the West Virginia State Police, and that they had performed testing and authored a report dated February 22, 2021. (A.R. at 166). A true copy of the laboratory report was provided to counsel for Linkinogger in open Court. (A.R. at 167 and 380). The testing, performed at the lab by technician Joel B. Harvey found trace amounts of male DNA on two samples submitted. There was no PCR DNA analysis performed, and the report suggested "DNA testing results will be the subject of a separate report." Significantly, there was no known samples of Defendant Linkinogger or of any other person with which to compare the PCR DNA results. (A.R. at 357).

Thereafter, on March 17, 2021, at 10:29 a.m., counsel for the State received via email a "Motion for Order to Rush Toxicology / Lab Reports" and proposed order granting the requested relief. (A.R.. at 31). The email suggested that Defense counsel was seeking a "toxicology result" from blood submitted with the Sex Crime kit ("Attached is a motion and order to rush toxicology results.") Id. Thereafter, at 11:00 a.m. the same date, the Court's Assistant, Ms. Hedinger, emailed counsel for the State making inquiry as to whether there was any objection to the requested relief. (A.R.. at 33). This was followed eighteen minutes later, at 11:18 a.m. by an email to Ms. Hedinger advising that the State could not yet take a position, advising that counsel for the State had placed a call to the West Virginia State Police Forensics Lab to make inquiry of their ability to comply with the proposed order, moreover counsel for the State suggested the toxicology screen was not needed due to an existing toxicology screen already in Defendant's possession. (A.R. at 34). Thirty-one minutes later, at 11:49 a.m. and prior to being able to discuss the matter with Erin Feazell of the Forensic Laboratory, counsel for the State received the proposed Order which had been entered by the Court.

The Order, drafted by counsel for the defendant, to which counsel for the State objected, is unclear at best. It states verbatim "On this 17th day of March, 2021, comes the Counsel, Herman D. Lantz, Esq., for the Defendant, Chandis Linkinogger, who moves the Court for an Order directing the to rush the Toxicology and any remaining lab results in the matter. Whereupon the Court does ORDER that the West Virginia State Police Laboratory produce the results as soon as possible but no later than April 3, 2021." (A.R. at 385).

A fair reading of the Order can be argued to order the laboratory to conduct further testing on toxicology (which had not been done) but is clear as mud as to any additional testing, if any,

was being sought or ordered.

The next day, March 18, 2021, counsel for the State had conversations and email communication with Erin Feazell of the Forensic Laboratory, the thrust of which was the laboratory's inability to comply with the ex parte Order of March 17, 2021. (J.A. at 36). Based upon defense counsel's prior allegations of evidence hiding and Brady violations against the counsel for the State, as contained in his Motion to Compel, coupled with the total lack of clarity in the Order written by defense counsel, counsel for the State sought and was granted an emergency hearing on March 18, 2021, which was sought for prophylactic pruposes to avoid allegations of impropriety and Brady violations. There was no written order prepared subsequent to said hearing.

A review of the transcript from the hearing evidences the fact that counsel for the State requested the hearing due the inability of the Laboratory to comply with the order, and counsel's belief that counsel for Defendant was attempting to set a trap for the State from which defense counsel could later claim"gotcha!" (J.A. at 190).

Two things became ultimately clear at the hearing 1) that the State Police Laboratory could not run a toxicology screen on the subject urine submitted with the Rape Kit, and that the urine sample would be returned to the Wheeling Police for testing at a laboratory of Defendant's choosing; and 2) that issues of PCR testing (referred to as "profiles" at the hearing) would be deferred pending defense counsel consulting with Defendant and then reporting his desires to counsel for the State. For purposes of this Petition, a close examination of this second issue, from the the March 18, 2021, emergency hearing transcript at J.A. pages 195 to 200 and 201 though 203 is enlightening. At page 195, counsel for the State makes it clear he is seeking

guidance as to the necessity of further DNA testing and for direction from the Court to ensure he would not run afoul of the Courts Order:

> Mr. Kahle: The Order submitted by Mr. Linkinogger's counsel, was - - cut pretty broad. I thought it - - I thought it was really aimed toward the tox screening, and I may be mistaken in that regard. If I am, I would ask Mr. Lantz to comment. So I don't want to get caught up in running afoul of Court orders.
>
> Mr. Lantz: Your Honor, my understanding - - I spoke to Joel, who - - um - - who did the prior testing that has been returned, and he indicated that they found some male DNA on the panties, and that they were - - I believe he described it as a panel - - they were establishing a panel protocol from the male DNA, and that that had not been completed yet, and that they requested a sample from Mr. Linkinogger, which has not been sent. So I guess - - um - - I don't know what that - - that panel's going to ultimately show. I don't know if - - um - - um - - I don't know enough about that to tell the Court what that testing is going to show.

Absent a DNA profile with which to compare PCR DNA results, this testing is rather meaningless and gibberish. This was discussed at said hearing on March 18:

> The Court: Has there been any previous agreement, between the parties, for the submission of a sample from the Defendant?
>
> Mr. Lantz: There has not.
>
> Mr. Kahle: No.
>
> The Court: Is that something that either the defendant is willing to provide or that the State is trying to seek?
>
> Mr. Kahle: Judge we had [not] sought the same - - um - - because of statements made by the defendant, and our perceived impression of the defense in this matter - - um - - not being one of it didn't happen, but rather consent and, really, my understanding of DNA is that this panel protocol would be for the purpose of aligning the male DNA, found on the panties, to an individual or family member - - that kind of stuff.
>
> You know, if Mr. Lantz wants to submit and wants such analysis done, I can ask , I can ask the lab to do that. You'd have to, you know, provide - - we could go down there, send the police to get buccal swabs. I really didn't perceive it to be an issue, and the way this case has come about, in my conversations with counsel.

The Court: All right. Mr Lantz?

Mr. Lantz: Your Honor, I'm more interested in the toxicology results than I am with those DNA results, particularly considering that they were the clothing taken at Wheeling Hospital, from my understanding, and according to the alleged victim's statement - - although we believe it to be false - - she wasn't wearing that clothing at the time of - - of the alleged assault. So I'm not even sure why it was sent, or the relevance of it in the first place, but that's - - that's a matter for cross examination.

(J.A. at 195-197).

Later the Court pinned down defense counsel on his exact desires on whether he was seeking further DNA testing:

The Court: All right, then. What is your position with regard to this DNA profile? Have you had a chance to speak with Mr. Linkinogger? Is he willing to go ahead and have the swabs taken, and for those to be analyzed against the profile that's already with the lab?

Mr Lantz: Well that's - - the issue, your Honor, is, I need to discuss all of this with Mr. Linkinogger because, quite frankly, to allow them to continue to keep the kit - - let me underst - - let me say this: it went down as a sex kit, and then on the documentation it says, "Sexual Assault Kit, Number 1. Toxicology Kit, Number 2."

So I'm assuming that they could send the urine back, and we would like that sent back as soon as possible okay? And then I need to discuss with Mr. Linkinogger whether or not he desires to have the remaining testing done, and I - - and I think what we're going to be faced with is, "Mr. Linkinogger, do you want to stay in jail while we give you your right to a fair trial and have all of these tests done, or do you want to, like, go forward with a trial without having this stuff, because you don't want to be in jail any longer and feel that we have sufficient evidence to beat back this case?" That's a conversation I need to have with him.

(A.R. at 198-199).

The Court then issued its rulings, generally directed towards the future handling of the urine specimen, but directed counsel as follows regarding further DNA testing:

The Court: . . .

> Also, Mr. Lantz, after you've been able to have a meaningful conversation with your client regarding these - - these issues, please inform Mr. Kahle as to your position with regard to possible DNA sampling from your client and - - um - - the Court will, again, execute any necessary orders.

(A.R..at 201).

Finally, defense counsel commented on the potential of further DNA testing as follows:

> Mr. Lantz: The only issue that I can see is - - um - - the likelihood that this is going to - - if he wants this tested, is going to create a continuance. So, if that's the case, we will be renewing a Motion for Bond.

(J.A. at 203).

Subsequent to the hearing the urine was handled in accordance with the Court's directive. The State Police Laboratory overnighted the same for Saturday delivery to the Wheeling Police where it was received on March 20, 2021. By email of March 22, 2021, at 7:52 pm, defense counsel requested the urine be tested at NMS Labs of Horsham Pennsylvania. On Tuesday, March 23, 2021, a check for payment of the lab fees ($502) was requested which was dropped off to the undersigned at the Prosecutor's office at approximately 6:30 pm. Given the late hour of the evening it was too late to have the sample overnighted to NMS Labs, and accordingly it was placed in FedEx overnight priority delivery on March 24, and was delivered to NMS Labs of Horsham Pennsylvania, the laboratory of defendant's choosing on March 25. It is unknown as of the writing of this motion and memorandum the status of the urine sample.[1]

Subsequent to the hearing of March 18, 2021, counsel for defendant never once in any fashion indicated any desire for any further DNA testing. There was exactly zero (0) emails, texts, phone calls, faxes, letters, motions or personal conversations in any form regarding any

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[1]NMS Labs, the laboratory chosen by Defense counsel Lantz has refused to release the results to the State, and former Defense counsel Lantz has likewise not disclosed the same.

further DNA testing.

On April 13, 2021, the parties appeared before the Court for purposes of conducting a trial. A jury was seated and the court adjourned with directions to return on the next day for further proceedings.

At hearing in chambers on April 14, 2021, counsel for defendant made an oral motion for complete dismissal of charges against defendant. (J.A. at 238-241). This motion was based upon alleged violations of *Brady v. Maryland* and in support of his motion he argued that counsel for the State had either acted in bad faith or was grossly negligent in failing to ensure the West Virginia State Police Laboratory had completed the PCR, or "panel" analysis that was the subject of the March 18 emergency hearing. Counsel argued that the 20 day delay between the time the State Police Crime Lab Report was authored and its delivery to him at the March 12, 2021, hearing on the previously filed Motion to Compel evidenced bad faith and misrepresentation on the part of counsel for the State, and that DNA PCR analysis of the swabs taken from Alleged victim on September 11, 2020, might somehow expose evidence tending to exculpate defendant. (J.A. 235-238).

Further under questioning by the Court counsel for defendant represented that had the West Virginia State Police Forensic Lab conducted toxicology analysis on the urine collected at the Wheeling Hospital, it would have yielded results enabling testimony of potential levels of intoxication of alleged victim on September 11, 2021, thus assisting in his defense of pain threshold and/or lowered inhibitions consistant with the defense theory of "consent." (J.A. at 241).

Counsel for the State argued that further DNA testing was never pressed by Defendant,

that PCR analysis without a known to compare the same with would be irrelevant and tend to prove or disprove nothing, and that the proper remedy if the defendant felt that such evidence was needed for the defense was a continuance to allow for such testing. (J.A. at 238-239).

The Court ruled that the West Virginia State Police Forensic Laboratory was in blatant violation of the ex parte Order of March 17, which had been the subject of the March 18 hearing, and as a result thereof dismissed with prejudice counts Three and Four of the indictment, declared a mistrial, and made a ruling that at any rescheduled trial, no mention could be had of the acts alleged in Counts Three and Four. In making its rulings the Court found there was no bad faith on the part of counsel for the State, but there was "bad faith" and "gross negligence" on the part of the West Virginia State Police Lab. (J.A. at 242).

In its written Order dismissing the counts the Court found that the State had violated "multiple" court orders, those being the Court's scheduling Order of January 21, 2021, and the *ex parte* Order of March 17, 2021, and as such dismissal was proper. (J.A. at 1-2).

Because there was no violations of any order of Court, and further because the harsh remedy imposed has no relation to the alleged wrongs, the State requests this Court enter an Order prohibiting enforcement of the Order of the Circuit Court of Ohio County.

SUMMARY OF THE ARGUMENT.

The Circuit Court erred when it ruled that the State had violated two Court orders and as a result dismissal of two felony counts of Sexual Assault in the Second Degree was the proper remedy. First, examining the record as a whole, it is not clear at all whether there was any violation of any order of Court by the State. Even if the State was less than diligent in securing the PCR DNA results, the remedy of complete dismissal of the felony counts prior to the

reception of any evidence whatsoever was far too harsh a remedy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

The error committed by the Circuit Court was blatant and obvious and can be discerned by simply reading the Order of April 22, 2021; accordingly a writ could be granted based soley upon a review of the order and the pleadings on file. However, based upon the facts in the record counsel believes oral argument in this matter under Rule 19 will aid this Court in its decisional process; particularly in view of alleged violations of well settled law. Because this case involes applications of well settled law, a memorandum opinion may be appropriate pursuant to Rule 19(g)(1).

ARGUMENT.

1. Statement of jurisdiction and writ of prohibition standard.

The Supreme Court of Appeals has original jurisdiction to issue a writ of prohibition to restrain a circuit court from exceeding its legitimate powers. Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). It is well settled that the pursuit of a writ of prohibition is an available remedy to the State in criminal matters where the trial court abused its legitimate powers to the State's detriment, which is magnified by the State's inability to seek a direct appeal following the disposition of a criminal case. *See State ex rel State. v. Sims*, 239 W.Va. 764, 767, 806 S.E.2d 420, 423 (2017)(quoting Syl. Pt. 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992)). Syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) sets forth five factors for this Court to examine in determining whether to grant a writ:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower

> tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Factors one and two are clear in this matter. The dismissal of two very serious and violent sex offenses were with prejudice and this ruling is final unless this court takes action. The case additionally satisfies the third element as will be discussed in detail below. The State of West Virginia acted in good faith in the preparation for the prosecution of Defendant, and dismissal of serious felonies based on imagined violations of court orders, for failure to produce meaningless laboratory results does not serve the ends of justice.

2. Standard of review regarding the Circuit Court's erroneous dismissal of two felony counts.

There are very limited circumstances allowing for the State to seek review of Circuit Court Orders in Criminal cases, the instant factual scenario presents one of those circumstances. At Syllabus Point 5, *State v. Lewis*, 188 W.Va. 854, 22 S.E.2d 807 (1992) this Court held, in part "[t]he State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." In this circumstance, the Circuit Court, by dismissing Counts Three and Four of the indictment, wrongfully deprived the State if its right to prosecute Mr. Linkinogger for serious felony

allegations.

This petition for writ of prohibition arises from the Circuit Court erroneous dismissal of two felony counts of Sexual Assault in the Second Degree. The review of a ruling of a circuit court on the granting of a motion to dismiss an indictment is one of *de novo*, however if there was an evidentiary hearing attached to the consideration the standard is that of "clearly erroneous." Syl Pt. 1, *State v. Holden*, 243 W.Va. 275, 843 S.E.2d 527 (2020)(quoting Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009)).

However in the case of *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994), a case involving the dismissal of an indictment for alleged violations of Rule 16(2) of the West Virginia Rules of Criminal Procedure, Justice Cleckley suggests that the appropriate standard of judicial review is one of "abuse of discretion." Id. At 454 S.E.2d 434 ("The scope of appellate review must necessarily be an abuse of discretion standard.")

This abuse of discretion standard has been repeatedly followed by this Court in reviewing cases involving alleged discovery violations.

3. There existed no violations of discovery orders underpinning the Circuit Court's dismissal order.

In it's Order which is the subject of this petition for writ of prohibition, the Court states that the State had violated two (2) orders of Court - the January 21, 2021, scheduling order, and the March 17, 2021, *ex parte* order which became the subject of the March 18, 2021, emergency hearing. However a close examination of both reveals that there were no violations.

The January 21, 2021, Scheduling Order states "Production of Discovery shall be provided by the State to the defense by February 4, 2021." (J.A. at 7). The State provided its

discovery on January 21, 2021, more than two weeks before this deadline. This discovery disclosure contained all the Rule 16 discovery that existed at that time. The lab report authored by State Police Forensic Laboratory employee Joel B. Harvey was not in existence until he authored the same on February 22, 2021, and this report was provided to defense counsel in open Court on March 12, 2021, a full month before the scheduled trial date.

The report, produced to defense counsel on March 12, 2021, indicated that there was male DNA discovered on two swabs collected from the body of the alleged victim. It suggested that DNA tests would be completed at a later date - however there was never any known DNA samples with which to compare the DNA located by Mr. Harvey, thus rendering the DNA testing utterly useless for evidentiary purposes at trial.

The March 17, 2021, order is much more problematic. This order, entered without a hearing, and without the ability of the State to communicate with the State Police Forensic Laboratory appeared to seek out the results of forensic testing of the alleged victim's urine. Immediately upon receipt of the subject Order, Erin Feazell of the Forensic Laboratory sent an email advising that the State Police did not perform toxicology tests on urine. (A.R. at 36). This was brought to the attention of counsel and the Court at the Emergency Hearing held via Microsoft Teams on March 18, 2021.

As discussed in the statement of the case hereof, the only conclusion that could be reached regarding what needed further to be done with this evidence was for the urine to be returned to be tested at a laboratory of defendant's choosing (which was done), and if the defendant desired his DNA to be compared to that found on the body of the alleged victim all he needed to do was to notify the prosecutor - this was never done and the only logical conclusion

that could be reached was this was abandoned.

Even more problematic is the representations made to the Court by defense counsel on April 14, 2021, regarding the toxicology testing that was not done at the West Virginia State Police Forensic Laboratory. Counsel for Linkinogger was directly asked by the Court as follows:

> THE COURT: Mr. Lantz, is it your contention, sir, that the testing that was done, the toxicology screen at Wheeling Hospital was a standard 7, 9 or 11-panel screen simply showing the presence of these drugs and that they may have been ingested as much as 72- or 96- hours prior to?
>
> MR. LANTZ: Correct your Honor. And that the - - the test from the West Virginia State Police Lab or the forensic test would show levels, which could be then demonstrate that they were in her system more present or at a higher level which would've affected her ability to determine what was happening at the time, her inhibitions and willingness to engage in activity that she may not otherwise be willing to engage in, and her recollection and memory of the event that she reported.
>
> . . .
>
> THE COURT: And sir, through no bad faith on your part, but there is bad faith and gross negligence on the part of the State Police Crime Lab. Because we are sitting here today with results that very well may show us the toxicology levels of this complaining witness, who was the sole witness as to whether or not the incident occurred, how the incident occurred and all the other corollaries, which may or may not impact her level of intoxication. Not just her memory of events and how they - - and how they occurred and the alleged sexual assaults, but also whether or not there were certain pain thresholds and other things that go to the defendant's theory of consensual, rough sex. And the mere fact that we sent an order on March 17, 2021, to rush the toxicology and any remaining lab results in this matter, were ignored because Mr. Harvey still has that kit, still has not completed testing, is unacceptable when we are sitting here on the second day of the trial. The fact that it was not produced runs afoul of this Court's scheduling order, runs afoul with the Court's specific order of March 17, 2021.
>
> Therefore, I am going to dismiss Count Three and Count Four of the Indictment.

(A.R. at 241-243).

First, and very problematic, is the defense counsel's representation to the Court that "the test from the West Virginia State Police Lab or the forensic test would show levels, which could

be then demonstrate that they were in her system more present or at a higher level which would've affected her ability to determine what was happening at the time, her inhibitions and willingness to engage in activity that she may not otherwise be willing to engage in." This statement was misleading, at best and most probably an outright misrepresentation to the Court. First, as previously discussed, the West Virginia State Police Forensic Laboratory does not test Sex Crimes Kit urine for toxicology. (A.R. at 36).

More to the point of the factual representations of counsel, in an email exchange between counsel for Linkinogger and Erin Feazell dated March 22, 2021, and directly on this point, Ms. Feazell advised defense counsel as follows:

> Would someone be able to testify to impairment based on level of drugs found in urine?
>
> If we tested the sample, we would not be able to testify to impairment. I am unsure whether or not a toxicologist from a private lab would be able to do this. Typically toxicologists can't testify to impairment just based on a number from a lab result. Generally, additional information needs to be provided in order to form these types of opinions. You would have to contact the lab directly to see if they would be able to provide this type of testimony. We have used NMS Labs in Willow Grove, Pennsylvania before which might be a good option to try to get information.

(A.R. at 36-A).

Thus, despite his representation to the Court on April 13, 2021, that had the West Virginia State Police done the testing there would have evidence in order to "determine what was happening at the time, her inhibitions and willingness to engage in activity that she may not otherwise be willing to engage in[,]" defense counsel was in possession from the Toxicology Director of the West Virginia State Police Forensics Laboratory information completely opposite to this statement. Rule 3.3(a)(1) of the West Virginia Rules of Professional Responsibility states

"[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

It is difficult, if not impossible to coordinate the information provided defense counsel on March 22, 2021, and the information represented to the Court on April 13, 2021, with the requirements of Rule 3.3(a)(1).

Finally, in making its rulings of April 13, 2021, the court seems to have ignored or forgotten the fact that the West Virginia State Police Laboratory does not perform toxicology screens on urine samples. This was made abundantly clear at the March 18, 2021, Emergency Microsoft Teams hearing, and the Court and Counsel:

> MR. KAHLE: - - on the tox kit, and get that back ASAP, and hold on to the other materials.
>
> Now you know, probably, as being a former law enforcement officer yourself, if a prosecutor asked you to do one thing, and it's against protocol of the agency, they're going to follow protocol of the agency, Judge. And if that presents a problem, I'm going to report it back immediately to everybody. But I'll - - it sounds like that would be all right with Mr. Lantz, and not objectionable, that I say, "get that urine sample into the FedEx box to Wheeling, to Mr. Adams, for delivery on Monday, we'll wait direction at the point in time, but hold onto the rape kit evidence, Your Honor - - um - - and Mr. Lantz is listening that would be acceptable sir?
>
> MR. LANTZ: **Yeah.** (Emphasis added).
>
> THE COURT: Very good. Then how we'll proceed then is Mr. Kahle, please contact Miss Feazell, or whoever - - "Fee-zell" - - request that they return Item 2, the toxicology sample to the sending agency - - the Wheeling Police Department - - because they can't test it. And then, once the Wheeling Police Department has it back and in their safe possession - - um - - if the parties want to put a draft Order to the Court, to release it to the defense for testing, we can do that.
>
> If there is an issue where they will not release it, for whatever reason, and the parties want to put another Order before the Court, I would be happy to - - . . ..

(A.R. 199-200).

This is exactly what occurred subsequent to the hearing. The urine was returned to the Wheeling Police, and then it was submitted to a laboratory of defense counsel's choosing, and the Court was made aware of this at the trial proceedings of April 13, 2021:

> THE COURT: Everyone was under the assumption that they were going to test the - - was it blood or urine?
>
> MR. LANTZ: Urine.
>
> THE COURT: Then we found out later the urine wasn't tested because they do not test urine?
>
> MR. LANTZ: Right.
>
> THE COURT: They transmitted back the urine for toxicology screen?
>
> MR. LANTZ: Correct.
>
> THE COURT: The parties agreed on NMS Labs to do the toxicology screen?
>
> MR. LANTZ: Correct.
>
> MR. KAHLE: That laboratory was selected by defense and there was no objection.
>
> THE COURT: And it has not been received as of today?
>
> MR. LANTZ: Correct.

(A.R. at 217-218).

Thus, at the time that the Court declared a mistrial, finding that the West Virginia State Police Forensic Laboratory had acted in "bad faith" and with "gross negligence" for failing to deliver toxicology screening results from Alleged victim's urine, the Court knew: 1) that the West Virginia State Police Forensic Laboratory did not perform such testing; and 2) that the

subject urine had been returned from the West Virginia State Police Forensic Laboratory and sent to a laboratory totally of defendant's choosing.

And further, regarding the PCR DNA testing, which defense counsel never requested to be performed as discussed at the March 18, 2021, emergency hearing, defense counsel suggested that the State already had in its possession a DNA sample of Chandis Linkinogger:

> MR. LANTZ: I can answer. They have determined the presence of trace male DNA on the left side of the neck, and no DNA, on the right side of the neck. Some male DNA on the panties. However, I would like to point out that the State likely already has Mr. Linkinogger's DNA because he was incarcerated and I believe they have his DNA already.
>
> MR. KAHLE: I don't know how we got his DNA, Judge.
>
> MR. LANTZ: They swabbed his mouth.
>
> MR. KAHLE: Who swabbed?

(A.R. at 225-226).

To be completely accurate there is exactly zero evidence of any State actor ever taking a DNA sample of Chandis Linkinogger whatsoever, because this never happened. Despite the extended discussion held regarding whether or not Linkinogger desired his DNA to be collected and sampled on March 18, 2021, and despite the Court's directive to defense counsel[2] to advise counsel for the State his position on DNA testing, instead of following these directives, counsel rather made up a story out of whole cloth that the State already possessed his client's DNA, and had failed to compare it with the DNA found on the alleged victim. This again was simply a

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[2]"Also, Mr. Lantz, after you've been able to have a meaningful conversation with your client regarding these - - these issues, please inform Mr. Kahle as to your position with regard to possible DNA sampling from your client and - - um - - the Court will, again, execute any necessary orders." (A.R. at 201).

false assertion of a material fact by defense counsel, and further evidences his complete disregard for Rule 3.3(a)(1) of the Rules for Professional Responsibility.

Thus, examining the record as a whole, it is submitted not that the State had negligently or in bad faith violated orders of Court regarding the testing of evidence by the West Virginia State Police Forensic Laboratory; but rather shows the extra steps taken by the State in order to ensure its compliance with order of the Court, and lengths that defense counsel took to obfuscate, confuse, and avoid that which he had responsibility to do - a duty of candor to the tribunal.

4. Even if the State is found to have violated discovery orders, the remedy imposed of complete dismissal of charges is inappropriate.

The premiere authority in the State of West Virginia on *Brady v. Maryland* and its progeny is the opinion on remand from the United State Supreme Court by the West Virginia Supeme Court of Appeals in *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007).

Defendant Youngblood was convicted of two counts of sexual assault, two counts of brandishing a firearm, wanton endangerment involving firearm, and indecent exposure in the Circuit Court of Morgan County. Youngblood was accused in the matter, among other things, of forcing a female victim to perform oral sex on him. He was convicted of this offense.

Post-trial it was discovered that there existed a note, which was in the possession of investigating officers pre-trial, tending to suggest that the sex between Youngblood and the victim had been consensual - which was Youngblood's defense. Not only was this favorable note not turned over to counsel for Youngblood - it was intentionally suppressed and sought to be destroyed by State actors. *Id.*

Given this rather blatant set of circumstances and Mr. Youngblood's conviction in the

face of intentional suppression exculpatory evidence, the West Virginia Supreme Court of Appeals ruled that Mr. Youngblood's remedy was a new trial. This case can be directly differentiated to that in the instant case; as opposed to intentional hiding of exculpatory evidence there is at worst in this case non-compliance with confusing discovery orders regarding irrelvant and duplicative evidence.

The most salient case giving direction to Circuit Courts for appropriate remedies for discovery violations is *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994). In *Rusen*, the State sought a writ of prohibition against Judge George Hill, to prohibit enforcement of an order entered pursuant to Rule 16(2) of the West Virginia Rules of Criminal Procedure dismissing an indictment charging 12 counts of Embezzlement. *Id* at 425 S.E2d 430.

The history of actions and inactions of the State leading to this order of dismissal are essentially that the State had failed to provided certain documents relevant to the defendant's place of employment (Burger King) necessitating two rescheduled trial dates, and an eight month delay. *Id* at 435. The State made claim that Burger King was being less than cooperative with the State in producing the required documents, however it was noted that "the State at no time sought to avail itself of the protections provided under Rule 16(d)(1) nor did the State upon realizing that Burger King was not cooperating make any attempt to obtain a subpoena *duces tecum* pursuant to W.Va. Code 57-5-4 (1990)." *Id.*

Ultimately Justice Cleckley found that Judge Hill was within his discretion in entering an order dismissing the indictment. In rendering his decision, Justice Cleckley gave guidance to Circuit Courts with factors to consider when crafting a remedy for apparent discovery violations as follows:

(a) the importance and materiality of the information that was not disclosed;

(b) the ability of the party to try the case without the information or the nature of the prejudice claimed by the failure to comply with the discovery order;

(c) the extent to which a continuance or other lesser relief would delay the trial or otherwise impact adversely the administration of justice;

(d) the degree of negligence involved and the explanation of the party's failure to comply with a discovery request;

(e) the effort made by the party to comply with the discovery order;

(f) the number of times the circuit court ordered the party to comply with the discovery order; and

(g) in some cases, the severity of the offense.

Id.

An examination of each of these factors in the case at bar, all lend themselves to a conclusion that the ultimate remedy of complete dismissal with prejudice was made in error.

1. *The importance and materiality of the information that was not disclosed.* In this matter, the PCR DNA results were neither material nor important. There was no known samples of the defendant with which to compare the DNA profile, rendering the same meaningless. And as concerns the toxicology screen that was not performed by the West Virginia State Police Forensic Laboratory, the defendant controlled its destiny by sending the same to a lab of its choosing. Moreover, the defendant had in his possession, since January 21, 2021, a lab result from the Wheeling Hospital evidencing the alleged victim had on September 11, 2021, tested positive for cocaine, THC and benzodiazapines. (A.R. at 329).

2. *The ability of the party to try the case without the information or the nature of the prejudice claimed by the failure to comply with the discovery order.* The trial with the evidence vs. a trial of the case without the evidence would have been identical. As discussed, the PCR analysis is without meaning given the fact that the state did not seek, and the defendant never requested a known sample with which to compare; and moreover, had the defendant's chosen laboratory delivered the blood toxicology, at best it would have been duplicative to the results already provided defendant from the Wheeling Hospital.

3. *The extent to which a continuance or other lesser relief would delay the trial or otherwise impact adversely the administration of justice.* This would have been minimal at best. The final DNA results were returned to the Wheeling Police Department on or about the 12th of May, 2021, with a report authored by Nicole L. Johnson dated May 4, 2021. The first and only time this matter was set for trial was April 12, 2021.

4. *The degree of negligence involved and the explanation of the party's failure to comply with a discovery request.* As discussed above, counsel for the State verily believed that it actually had complied with what the Court had ordered it to do.

5. *The effort made by the party to comply with the discovery order.* This factor weighs heavily in favor of ruling the Circuit Court erred. The subject March 17, 2021, *ex parte* Order, upon which the Court based its dismissal was drafted horribly and it states verbatim

> On this 17th day of March, 2021, comes the Counsel, Herman D. Lantz, Esq., for the Defendant, Chandis Linkinogger, who moves the Court for an Order directing the to rush the Toxicology and any remaining lab results in the matter. Whereupon the Court does ORDER that the West Virginia State Police Laboratory produce the results as soon as possible but no later than April 3, 2021.

(A.R. at 385). It was based on this total lack of clarity in the Order, coupled with the inability of

the West Virginia State Police Forensics Laboratory to perform toxicology testing on urine which led to the State's Counsel requesting the emergency hearing of March 18, 2021. It is suggested that a fair reading of what occurred on March 18 at said hearing can lead to only one rational conclusion, that the Counsel for the State did all he could to follow what he was being directed to do by the Court.

6. *The number of times the circuit court ordered the party to comply with the discovery order.* Although Court in its Order dismissing the charges references two (2) discovery order violations, counsel submits at worst there is a singular violation, that being the *ex parte* order of March 17, 2021, as discussed above, as of February 4, 2021, the February 22, 2021, report of Joel B. Harvey was not in existence.

7. *In some cases, the severity of the offense.* In the instant case, as discussed above, the subject evidence has no bearing on the guilt or innocence of the defendant, and the evidence demonstrates, good faith on the part of the office of the counsel for the State, and at worst, confusion as to that which was required by the Court's Order of March 17, 2021.

In the instant matter, it was abundantly clear to defense counsel, prior to the jury selection commencing April 12, 2021, that the subject PCR DNA testing had not been returned by the Forensic Laboratory, and it is unclear as to whether or not defense counsel's chosen laboratory, NMS Labs had yet advised him of their review of the subject urine. The State did not intend to introduce or rely or either of these items of evidence, yet defense counsel did not bring these matters to the Court's attention until after the parties had spent an entire day of trial selecting a petit jury. These issues would have been much more suitable for written motion practice, pre-trial, as opposed to the ambush techniques displayed by defense counsel.

The law in West Virginia is clear - - the law prefers that discovery violations be dealt with by measures far short of complete dismissal. *Rusen*, 454 S.E.2d at 140 ("Our cases and the West Virginia Rules of Evidence have declared an implicit preference for a continuance when there has been a discovery violation"), *State ex rel. Plants v. Webster*, 232 W.Va. 700, 707, 753 S.E.2d 753, 760 (2012)(per curiam)('[w]hen faced with determining sanctions for discovery violations, our preference remains for trial courts to grant continuances in most cases" (citing *Rusen*)).

Although the Court's Order of April 22, 2021, which this Petition seeks to prohibit, is written in terms of dismissal as a sanction for violations of Rule 16 discovery orders, at the hearing of April 13, 2021, the oral motion of counsel for Linkinogger prompting dismissal of the criminal charges was couched in terms of *Brady* violations "I will make a motion to dismiss for failure to comply with the comports of Brady." (A.R. at 234).

Counsel could not locate any West Virginia authority specifically guiding the Court the ability to dismiss charges on account of *Brady* violations, nor any West Virginia case law suggesting the parameters of when such a dismissal would be appropriate. Recently, the Fourth Circuit discussed dismissals for *Brady* violations suggesting that the behaviors underlying such violations should be extremely outrageous, and such an extreme remedy should be utilized in only the rarest situations:

> The Supreme Court has recognized that, in an extreme case, governmental misconduct may be so outrageous as to require dismissal of charges against a defendant under the Due Process Clause of the Fifth Amendment. *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Such claims, however, are difficult to support and rarely successful. *United States v. Hasan*, 718 F.3d 338, 342-43 (4th Cir. 2013). In fact, we have "never held in a specific case that the government has violated the defendant's due process rights through

> outrageous conduct." Id. at 343. "In order to constitute a due process violation, the government's conduct must be so outrageous as to shock the conscience of the court" or "offensive to traditional notions of fundamental fairness." *United States v. Osborne*, 935 F.2d 32, 36-37 (4th Cir. 1991) (internal quotation marks omitted).

United States v. Reed, 788 F. App'x 903, 906 (4th Cir. 2019) (not reported in F.3d).

In the case at hand there was no finding of so much as "bad faith" on the part of the Ohio County Prosecutor's Office, let alone such outrageous behaviors that would shock the conscience. The Court *did* find that West Virginia State Police Forensic Laboratory had acted in bad faith in failing to conduct PCR DNA testing, but there was no suggestion of any outrageous behaviors on its part which would shock the conscience.

An earlier Forth Circuit opinion gives guidance on appropriate *Giglio* and *Brady* violation, and disregard of Court orders as follows:

> In fashioning a remedy for a *Giglio* violation, the district court must consider several factors: the reason for the government's delay, and whether the government acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice to the defendant and deter future wrongdoing by the government. *Hammoud*, 381 F.3d at 336 (citing *United States v. Hastings*, 126 F.3d 310, 317 (4th Cir.1997)); *Gonzales*, 164 F.3d at 1292. "When a court sanctions the government in a criminal case for its failure to obey court orders, it must use the least severe sanction which will adequately punish the government and secure future compliance." *Hastings*, 126 F.3d at 317; see also United States v. Ivy, 83 F.3d 1266, 1280 (10th Cir.1996). Indeed, it " 'would be a rare case where, absent bad faith, a district court should exclude evidence.' " *Hammoud*, 381 F.3d at 336 (quoting *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir.2002)).

United States v. Sterling, 724 F.3d 482, 512 (4th Cir. 2013).

Quite simply put, the remedy imposed - the ultimate remedy of complete dismissal of two counts of one of the most serious violent felonies as determined by the West Virginia Legislature, did not comport with the alleged violation. The appropriate remedy for the alleged violations

should have been continuance of the matter, or something far less severe than complete dismissal.

CONCLUSION

For the reasons as set forth herein, this petition for writ of prohibition should be granted; a writ should issue directing the Circuit Court to vacate its order of April 22, 2021, dismissing with prejudice Counts Three and Four of theIndictment returned against him by the January 2021 Ohio County Grand Jury, and further re-instating said charges, and for such other relief to which Petitioner shows himself justly entitled.

Respectfully submitted,

STATE OF WEST VIRGINIA
EX REL. SCOTT R. SMITH,

By: 

Gail W. Kahle, WVSB #6109
Assistant Prosecuting Attorney
For Ohio County, West Virginia
gkahle@wvocpa.org
1500 Chapline Street, Second Floor
Wheeling, WV 26003
T: (304) 234-3631
F: (304) 234-3870

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-_____

STATE OF WEST VIRGINIA EX REL. SCOTT R. SMITH,
Prosecuting Attorney, Ohio County,

Petitioner,

v.

THE HONORABLE MICHAEL J. OLEJASZ,
Judge, Circuit Court of Ohio County, and
CHANDIS WESLEY LINKINOGGER, Defendant,

Respondents.

VERIFICATION.

I, Scott R. Smith, after first being duly sworn upon oath, respectfully state that I am the Prosecuting Attorney of Ohio County, West Virginia, and the Petitioner named in the foregoing Petition for Writ of Prohibition; that I have read the Petition, that I am familiar with the contents of the related Appendix Record; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.

Scott R. Smith
Prosecuting Attorney for Ohio County,
West Virginia

Taken sworn to and subscribed before me, this 18th day of May, 2021.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Donna E. Vance
Ohio County Prosecutor's Office
1500 Chapline Street
Suite 216
Wheeling, WV 26003
My Commission Expires May 28, 2025

Notary Public

My Commission Expires 5/28/25

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CERTIFICATE OF SERVICE

I, Gail W. Kahle, certify that service of the foregoing Petition for Writ of Prohibition, together with te accompanying Appendix Record, was had this 18th day of May, 2021, upon the following parties via the methods listed below:

The Honorable Michael J. Olejasz
Judge, Circuit Court of Ohio County
1500 Chapline Street
Wheeling, WV 26003
Hand Delivery

Sklavounakis Law Office
80 - 12th Street
Wheeling WV 26003
(Counsel for Chandis Linkinogger)
Hand Delivery

Attorney General of the State of West Virginia
State Capitol, Room E-26
1900 Kanawha Blvd., East
Charleston, WV 25305
FedEx Overnight Delivery

Gail W.Kahle