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.

(Ohio County Case No. 21-F-4)

RESPONDENTS' RESPONSE TO THE WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. The trial court did not err when dismissing with prejudice Counts Three and Four of a four count indictment when the State violated at least two orders and the West Virginia Rules of Criminal Procedure by neglecting to facilitate the production of lab results for over seven months.
2. Moreover, the State is not entitled to a Writ of Prohibition in this matter because the court's order was not so flagrant that it has deprived the State's right to prosecute the case or deprived of a valid conviction and to grant the Writ of Prohibition would offend Double Jeopardy jurisprudence.

STATEMENT OF THE CASE

The defendant was arrested via criminal complaint on September 11, 2020 and charged with Strangulation, Domestic Battery 3rd Offense and Sexual Assault in the 2nd Degree. On October 13, 2020, after hearing testimony during the preliminary hearing, the magistrate court bounded over the sexual assault in the second degree and found no probable cause on the strangulation charge. (AR at 489). The defendant was not indicted by the September 2020 term of the Ohio County Grand Jury, but instead remained incarcerated pending indictment by the January 2021 term of the Ohio County Grand Jury. The defendant was indicted for one count each of Strangulation (Count One), Burglary(Count Two) , Sexual Assault 2nd Degree(vaginal) (Count Three) and Sexual Assault 2nd Degree(oral) (Count Four). (AR at 3-5).

The defendant was incarcerated until on or about April 26, 2021, when he was able to post his reconfigured bond of $20,000 in the form of real property with the Court with Home Confinement. The bond modification happened only after the Trial Court declared a mistrial

regarding Counts One and Two of the indictment and dismissed with prejudice Counts Three and Four during the second day of the jury trial. (AR at 1-2).

During the second day of trial the defendant informed the trial court that the State did not comply with previous court orders and its duties under the Rules of Criminal Procedure to provide laboratory results. AR at 216. The State had multiple opportunities to provide the laboratory results. (AR 1-2& 11-13). The laboratory testing at issue is regarding the complaining witnesses' toxicology and PCR DNA Laboratory test. This evidence was collected, controlled and stored by the State since September 11, 2020, received by the West Virginia Crime Laboratory on September 16, 2020. (AR at 13, 257 and 357). The trial Court dismissed Counts 3 and 4 because the State violated two Court Orders by not producing evidence crucial to the resolution of this case and declared a mistrial regarding the two remaining counts. (AR at pages 1 & 2). This is the Order the State is appealing from.

On April 15, 2021, the State filed a Motion to Reconsider Dismissing Counts Three and Four. (AR at 15-30), which mirrors the Writ of Prohibition filed herein. Defendant filed a response objecting to the Motion to Consider. (AR 57). On April 23, 2021, the trial court entered an Order Denying the State's Motion to Consider and further explains its basis for dismissing two of the four counts of the indictment and declaring a mistrial on the other two counts during the second day of the jury trial. (AR at 11-14). The State is not appealing that Order.

On January 21, 2021, the Defendant entered a plea of not guilty and requested discovery pursuant to the rules. (AR at 8). The State tendered their initial discovery response in open court. (AR at 8). In their initial response the State indicated in response to mandatory discovery, T. Ct. R. 32.02 Exculpatory Evidence, that "none is known to exist." (AR at 263). The State's assertion that no known exculpatory evidence is to exist in not consistent with the other evidence initially

provided. Specifically, they provided Wheeling Hospital Toxicology Results showing the complaining witness had tested positive for Cocaine, Benzodiazepines and THC on the day of said alleged assault. (AR at 265 & 329). The Wheeling Hospital Toxicology Results occurred because the complaining witness had a Sexual Assault Examination on September 11, 2020, at Wheeling Hospital. (AR at 309). In response to West Virginia Rules of Criminal Procedure 16(a)(1)(D) reports of examination and tests, the State refers the defendant to the attached medical reports. (AR at 264). Nothing is mentioned about results of the Sexual Assault Kit or Toxicology Kit that has been sitting at the West Virginia State Police Lab since September 2020. (AR at 59 & 263).

During the pendency of this matter, including during the preliminary hearing (AR at 477), the laboratory results of the complaining witness's Sexual Assault Examination were at issue. A review of the Appendix Record shows that State's lack of providing complete results is the basis for the dismissal and mistrial. (AR at 1-2 & 11-14). Throughout the pendency of this case, the defendant asked for the complete results, including but not limited to, via email and a Motion to Compel. (AR at 40 & 44). However, the State failed to do so prior to the jury trial that started on April 12, 2021. (AR at 1-2 & 11-14).

A mere five days after the State's initial disclosure, the defendant sent an email to the State to follow-up for discovery in this matter, specifically requesting any and all exculpatory material be specifically identified by the State and turned over. (AR at 76). The State responded that "if there is anything you deem "exculpatory" it is contained within the disclosures. (AR at 77). "I have never seen nor been made aware of any evidence which exculpates your client." (AR at 77). Additionally, the State represented that defendant possessed all 26.2 materials. (AR at 77).

Soon thereafter, the defendant realized that the State's representation that he had provided all 26.2 material was incorrect, because the State had not provided a copy of complaining witness's recorded statement. (AR at 79).

On February 9, 2021, the defendant sent a letter to Detective Adams and a copy to the assistant prosecuting attorney. (AR at 81). Said letter contained several requests, including an inquiry regarding the results from the sexual assault kit. (AR at 83). In the email to the State, copying said letter, defendant again requested *Brady* material and advised the State of their obligations as follows: 1) information that would exonerate the accused; 2) exculpatory information, 3) information that would lesson punishment; and 4) ALL MATERIAL THAT WOULD HELP IMPEACH THE STATE'S EVIDENCE OR WITNESSES; AND 5) any evidence that would support a viable defense. (AR at 85). The State's response on February 10, 2021, was, "The State has complied and will continue to comply with all statutory and constitutional discovery requirements. You should be aware that Det. Adams and the Wheeling Police Department, as far as I know, do not act as a personal private investigatory team for persons accused of criminal activity." (AR at 84).

Also on February 9, 2021, an email was sent to the assistant prosecuting attorney asking if he had the results of the sexual assault kit. (AR at 88). The response was "I do not". (AR at 87). Defense counsel then immediately followed up asking if they would find out the status, to which there was no written response known to the defendant. (AR at 87 &88). Therefore, on February 24, 2021, defendant filed Motion to Compel. (AR at 40).

The State filed their response to the motion to compel on March 9, 2021. (AR at 55). Focusing on the Sexual Assault Kit and Toxicology Results, the State's response indicates "The results of all examinations and tests performed have been provided to Defendant." (AR at 55). This statement is incorrect. At that time, the State had completed part of the testing for the sexual assault kit on February 22, 2021, and had failed to provide the same to the defendant for some 20 days. (AR at 166).

On March 12, 2021 the Court held a hearing regarding the defendant's Motion to Compel. At the compel / pretrial hearing on March 12, 2021, the State made another incorrect assertion regarding the sexual assault kit:

> **I don't believe it was even sent to Charleston**. It's probably down there. We – when this case – that was collected, as it generally is, by a S.A.N.E. nurse at Wheeling Hospital. I don't intend to -- if it was sent for testing, I don't intend to use said results. You'll see in the State's disclosure there are no lab technicians indicated or examiners. **I don't have any results.** If it – it's been sent to Charleston. I've not been on their rear-end to get it done because we aren't [are] in possession – what I believe – it's not been tested by the Court yet, but what I believe is a pretty rock solid statement of the defendant admitting that there was lots of sexual contact as between the defendant and [complaining witness] on September 11th.
>
> So it's true, there are certain examination test which have been disclosed, and, in particular, that'd be the hospital and treatment records. But there is no – we don't have it (AR 98).

Then the parties go off the record. (AR at 99). Thereafter, the State made further representations that he was unaware how this testing might be even relevant, that he did not see any need for the results to be rushed, yet he acknowledged that when it comes to the West Virginia State Crime Police Lab, you have got to get on their tales and tell them "I need this, I need this, I need this. I didn't do that in this case because of the admissions made on September 11, 2020." (AR at 100). The State further admits that the

evidence has been sent to the West Virginia State Crime Police Lab but he doesn't know about the results. (AR at 100).

Even with the emails and letters requesting the sex kit results prior to the hearing, at the March 12, 2021, compel / pretrial hearing, the State told the court "Judge, I've never been asked to have that tested until today." (AR at 102). The State further suggested that the previous defense attorney was merely trying to dictate his investigation, until the Court told him the previous defense attorney was simply trying to preserve what could be exculpatory evidence, to which the State finally agreed. (AR at 104 -105). The trial court expressly orders, "I'm going to order that that evidence be rushed by the West Virginia Police Crime Lab..." (AR at 105). Thereafter, the State indicated they will follow up with Detective Adams and the West Virginia State Police Crime Lab to get **whatever testing they do on it done**. (AR at 106). (**emphasis added**). Unfortunately, this was never done by the State, as the first documented contact from the Ohio County Prosecuting Attorney's Office to the lab occurred on March 17, 2021, the same resulting from defendant's motion to expedite said results. (AR at 36A).

At the March 12, 2021, compel / pretrial hearing the following exchange occurred:

The Court: "All right. Well, as to the West Virginia Rules of Evidence, Rule 412, exceptions, criminal cases: 'The Court may admit the following evidence in a criminal case: Subpart (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone else other than the defendant was the course of semen, injury, or other evidence.' (As read.)

Mr. Kahle, I do not believe that Mr. Lance [sic] is trying to dictate this investigation. He is simply trying to preserve what could be exculpatory evidence."

Mr. Kahle then stated, "**I agree**." (Emphasis added).

The Court then stated, "I'm going to order that that evidence be rushed by the West Virginia State Police Crime Lab, unless Mr. Lance [sic] would rather or somehow finds the need to have an independent expert employed to do the testing."

Mr. Lance [sic] then stated, "I'm fine with the West Virginia State Police Lab, Your Honor."

The Court then responded, "All right. Very well. **Then it's to be expedited**." (AR 104-105). (Emphasis added).

The order from the March 12, 2021, compel / pretrial hearing clearly orders the State to send a letter to the West Virginia State Police Forensic Laboratory requesting the rush of the remaining lab results. (AR at 380). However, the testing was not expedited hence the defendant filing a motion to expedite said results, which was granted as evidenced by the March 17, 2021 Order. (AR at 385).

After the State's failure to make any effort to rush any remaining lab results, which they were ordered to do, on March 17, 2021, defendant filed his own motion to rush the toxicology results and any remaining lab testing, along with a proposed order for the same. (AR at 37). Indeed, only after the defendant filed their own motion to rush the remaining lab results could the State be bothered to contact the lab on March 17, 2021, some six (6) months after the sexual assault kit was collected, two and a half (2 ½) months after the court's discovery deadline contained in the scheduling order, approximately five (5) weeks after the defendant requested the status of the kit and five (5) days after the motion to compel hearing. (AR at 185).

Furthermore, on March 18, 2021, an emergency hearing occurred at the State's request regarding the March 17, 2021, order. (AR at 188-89). At that hearing the State admits he was given an opportunity to object to the March 17, 2021, Order but the trial court overruled those objections. (AR at 189). More importantly, this is the first the defendant and the trial court learned the West Virginia State Police Lab does not test urine. (AR at 189).

In other words, after the State's complete and total failure to comply with their statutory, constitutional and court ordered discovery responsibilities, we learn that the West Virginia State Police Lab doesn't even test urine toxicology (although the same is on their form) and has not done so since February of 2020 or before and the Ohio County Prosecutor's office was made aware of the same on February 19, 2020 at approximately 2:40 p.m. (AR at 36A-D). According to the West Virginia State Police Forensic Laboratory, on February 19, 2020, at approximately 2:40 p.m. the Ohio County Prosecuting Attorney's Office was informed that the Lab was no longer testing urine. (AR 36 A-D). Moreover, the Lab states that the Toxicology Section Supervisor has no documented communication with Ohio County until a March 17, 2021, voicemail from the assistant prosecuting attorney. (AR 36-A).

The emergency teams meeting was held on March 18th 2021 at 3:15 and concluded on the same day at 3:44 p.m.(AR at 187). As the transcript indicates, there was an issue as to whether the toxicology kit could be sent back and the sex kit remain at the lab for testing. "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 unders- -- 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.'" (AR at 198).

There was then discussion that if the urine could be sent back without sending the whole Sexual Assault Kit back, we would do that. (AR at 199). Then the court stated "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." (AR at 201).

Immediately following said Microsoft Teams hearing, the State sent an email to Ms. Feazell (copying the defense attorney and the court's assistant) stating the following:

> Confirming our conversation today:1) **termination of the toxicology testing will have no effect upon the Biology / Processing testing by Joel Harvey**; and 2) the subject urine sample can be overnighted by FedEx on Friday for Saturday delivery to the Wheeling Police Department.

(AR at 186).

This indicates further testing will continue pursuant to the court's March 17th order and defense counsel would only need to inform the State if Mr. Linkinogger wanted his DNA tested. Defense counsel concedes that he did not ask the State to obtain a sample from the defendant; however, assumed, based upon the email, that any remaining testing would be completed in accordance with the court's March 17th order. However, it was the State who represented to the court that the PCR testing would be put into a system and compared to known samples. (AR at 227-228). Naturally, this could provide exculpatory evidence; which is exactly why the State had a duty to expedite this testing from the beginning.

SUMMARY OF THE ARGUMENT

The trial court did not err when dismissing with prejudice Counts Three and Four of a four count indictment when the State violated at least two orders and the West Virginia Rules of Criminal Procedure by neglecting to facilitate the production of lab results for over seven months. Moreover, the State is not entitled to a Writ of Prohibition in this matter because the court's order was not so flagrant that it deprived the State's right to prosecute the case or seek a valid conviction and to grant the Writ of Prohibition offends Double Jeopardy jurisprudence. Examining the record as a whole, it is clear the Trial Court acted within its discretion by

dismissing two of four counts and declaring a mistrial on the other two counts because of, at the very least, the State's violations in not following the Trial Court's orders.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Trial Court acted properly and within its discretion and the State is not entitled to a writ. Based upon the facts in the record counsel believes oral argument in this matter under Rule 19 will not aid this Court in its decisional process because a review of the record shows the trial court acted appropriately.

ARGUMENT

1. Statement of jurisdiction and writ of prohibition standard.

The State is not automatically entitled to seek review of the trial court orders in criminal cases and this case does not present a factual scenario that satisfies one of the exceptions to the rule. In the State's brief they cite Syllabus Point 5, *State v. Lewis,* 188 W. Va. 85, 422 S.E.2d 807 (1992) and argue that it is deprived of its right to prosecute their case because the Trial Court dismissed two of four counts of the indictment returned against the defendant. The State has not been deprived of its right to prosecute the defendant because there are still two counts remaining. Moreover, the State does not address the second part of Syllabus Point 5, *State v. Lewis,* namely, the fact that granting prohibition would offend the Double Jeopardy Clause.

This Court has previously analyzed a similar scenario. This Court stated in the Memorandum Decision of *State v Hubbs*,

[U]nless a circuit court has dismissed an indictment because it was either bad or insufficient, the State has no right to a direct appeal.

However, the inquiry does not end there. This Court has further acknowledged that "[a]lthough the State does not have the ability to appeal the dismissal of an indictment when it is not bad or insufficient, we recognize that the State is armed with another right of appellate

review in the form of prohibition." *Forbes*, 197 W. Va. at 42, 475 S.E.2d at 42. In Syllabus point 5 of *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992), superseded by statute on other grounds stated *in State v. Butler*, 239 W. Va. 168, 179 n.27, 799 S.E.2d 718, 729 n.27 (2017), we set forth the criteria necessary for the State to be awarded a writ of prohibition in a criminal case. Syllabus point 5 of *Lewis* states:

The 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 any event, the **prohibition proceeding must offend neither the Double Jeopardy Clause** nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

State v. Hubbs, No. Memorandum Opinion, 18-0438, at page 3-4, (W. Va. 2019) (Emphasis added).

Issuing a Writ of Prohibition would offend the Doble Jeopardy Clause. The defendant was subject to jeopardy because has was placed on trial on a valid indictment, before a court of competent jurisdiction, had been arraigned, had pleaded and a jury had been impaneled and sworn. These facts should be undisputed.

It is well settled law that, "Double Jeopardy Clause of the West Virginia Constitution provides, in part: 'No person shall ... be twice put in jeopardy of life or liberty for the same offence.' W.Va. Const. art. 3, §..." State v. Sears, 196 W.Va. 71, 468 S.E.2d 324 (W. Va. 1996). When the second day of trial commenced, the defendant herein was in jeopardy.

At Syllabus Point 1, *Adkins v. Leverette*, 264 S.E.2d 154, 164 W.Va. 377 (W. Va. 1980), this Court clearly states, "One is in jeopardy when he has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn." It is clear the defendant was placed before a jury trial by a valid indictment, before a court of competent jurisdiction, was arraigned, plead not guilty, and was appearing on the second day of trial before a jury that was impaneled and sworn. Therefore,

jeopardy attached when the Trial Court dismissed with prejudice two of the four courts of the indictment.

The State's request for the Writ of Prohibition would subject the defendant to prosecution for offenses that have already been resolved after he was placed in jeopardy. This Court has previously stated, "'The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.' Syllabus Point 1, Conner v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (1977). Moreover, [t]he Double Jeopardy Clause of the Fifth Amendment [to the United States Constitution] commands that "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense. *State v. Kent*, 678 S.E.2d 26, 223 W.Va. 520 (W. Va. 2009).

The Trial Court did not dismiss two of the four counts because the indictment was bad or insufficient. Moreover, in this case the State cannot demonstrate that the trial court's action was so flagrant that it was deprived of is right to prosecute the case or of a valid conviction because there are still two counts left to be tried. The trial court dismissed the two counts because the State violated at least two orders and the West Virginia Rules of Criminal Procedure by neglecting to facilitate the production of lab results for over seven months.

2. The Trial Court did not abuse its discretion for dismissal of two counts and mistrial of the two remaining counts for the State's violations.

The State states via citing *State ex rel. Rusen v. Hill, 193 W. Va. 133, 454 S.E.2d 427 (1994)*, that the abuse of discretion standard has been followed by this Court in reviewing cases involving discovery violations. *State ex rel. Rusen v. Hill* also provides support for the Trial Court's actions in this matter.

A circuit court may choose dismissal of an indictment for egregious and repeated discovery violations where lesser sanctions such as a continuance would be disruptive to the administration of justice or where lessor sanctions cannot provide the same degree of assurance that the prejudice to the defendant will be dissipated. *See Syl. Pt. 3. State ex. Rel. Rusen v. Hill*, 454 S.E. 2d 427, W.Va. 133 (1995). "Discovery is one of the most important tools of a criminal defendant. The purpose of Rule 16(a), our basic discovery rule in criminal cases, is to protect a defendant's right to a fair trial." *Id.* at 433.

At Syllabus Point 4, "In exercising discretion pursuant to Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure, a circuit court is not required to find actual prejudice to be justified in sanctioning a party for pretrial discovery violations. Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays". Syllabus Point 4, *State ex rel. Rusen v. Hill, 193 W. Va. 133, 454 S.E.2d 427 (1994).* Therefore, it is in the Trial Court's discretion to dismiss part of the alleged offenses against the defendant via sanction and there does not need to be a fining of actual prejudice because prejudice is presumed from the repeated discovery violations.

"While discovery has not been elevated to a constitutional dimension, it is clear that constitutional rights of a criminal defendant are implicated when a discovery system has been put in place and the prosecution fails to comply with court ordered discovery." *Id.*

> Rule 16(d)(2) provides that where there has been noncompliance with legitimate discovery requests, a circuit court, in addition to ordering immediate disclosure, granting a continuance, and excluding evidence, "may enter such other order as it deems just under the circumstances." This broad language justifies the adding of several other remedies or sanctions to the list such as (a) advising the jury to assume the existence of facts that might have been established by the missing information, (b) holding the violator in contempt of court, (c) granting a mistrial and (d) dismissing the charges. **We specifically hold that one of the permissible sanctions under Rule 16(d)(2) for a discovery violation is a dismissal with prejudice.**

See State ex rel. Rusen v. Hill, 193 W.Va. 133, 454 S.E.2d 427, 434, (1995). (**Emphasis added**).

"Which remedy is preferable is best left to the discretion of the circuit court." *Id.* Considering the state's multiple violations of discovery outlined herein, egregious handling of the Sexual Assault Kit and Toxicology Results and direct violation of discovery orders, the court would have certainly been justified in dismissing all four (4) counts of the indictment, but instead made its own graduated sanction, only dismissing the counts most directly related to the Sexual Assault Kit and Toxicology kit.

In *Rusen* the Court stated, "Although we believe that a continue is preferred response to a discovery violation where bad faith is not found, the circuit court must recognize there are some situations where a continuance is not an appropriate or satisfactory remedy." *State ex rel. Rusen v. Hill, 193 133, 454 S.E.2d 427 (1994).* Page 435. However, the Court further writes, "Concededly, the dismissal of an indictment is a severe sanction that should be used sparingly, but **we find it is a sanction that is within the circuit court's arsenal, and appropriately so, for it ensures that circuit courts have power to regulate congested trial dockets in many of**

the circuits in this State. *State ex rel.Rusen v. Hill, 193 W. Va. 133, 454 S.E.2d 427, 437 (1994)* (Emphasis added).

In direct contradiction of the State's representations in their response to the motion to compel, and their representations on the record at the March 12, 2021, hearing, they had indeed, received part of the lab testing for the Sexual Assault Kit and provided the same to the defendant by hand on March 12, 2021. (AR at 166). The State argued on the record that he had not even bothered to inquire as to whether the Sexual Assault Kit had been sent or was received at the time he filed his response to the Motion to Compel on March 9, 2021 nor prior to his representations to the court on March 12, 2021, but he made those representations just the same.

So to be clear, the State made no inquiry as to the results of the Sexual Assault Kit testing or Toxicology kit prior to filing his mandatory discovery pleading, no inquiry in response to defense counsel's inquiry of the sexual assault kit, no inquiry after the defendant filed a motion to compel, no inquiry prior to filing a responsive pleading to motion to compel stating the defendant had been provided all reports of examination and testing that had been performed (false) and no inquiry prior to making oral representation to the court regarding the testing of the sexual assault kit, which were also incorrect.

It is clear from the record and supported by the applicable law that the trial court acted appropriately and within its discretion when it dismissed with prejudice two counts of the indictment and declared a mistrial for the two remaining counts. The trial court clearly states, in its Order Denying the State's Motion to Reconsider Dismissing Counts Three and Four:

> "...this Court did not base its ruling on representation of either counselor, rather, the rulings based on the March 17, 2021 Order requiring the State to produce the lab results by April 3, 2021. Moreover, an additional factor, but unnecessary to support this Court's dismissal of Counts Three and Four, is the State's violation of the Court's scheduling Order and its violation of the West Virginia Rules of

Criminal Procedure by neglecting to facilitate the productions of lab results for over seven (7) months. It is extremely difficult for this Court to comprehend how the State does not see the folly of its actions in handling the lab results in this case. (AR at 12-13). **The State violated W. Va. R. Crim. P. 16(a)(1)(D)&(E) and multiple Court Orders by not taking whatever steps were necessary to produce potentially exculpatory evidence that was "within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become know, to the attorney for the State, and which are material to the preparation of the defense ...".** *Id.* **It is not germane what the State's opinion is on the relevance of the lab results, or the exculpatory nature of the same. It is completely unacceptable that these results were sent to the West Virginia State Crime Lab on September 11, 2020 and by the second day of trial, April 13, 2021, they had not yet been produced.**

Finally, the Court will note that it in no way believes that the State intentionally withheld these lab results from the Defendant or this Court. However, it is axiomatic that part of the burden of being a Prosecuting Attorney is that he/she is the representative of the State; and thus, no matter which arm of the State is at fault, it is ultimately the responsibility of the Prosecuting Attorney to ensure that any and all relevant discovery is produced in a timely manner. The fact is, in this case, that did not happen. Moreover, it is the Court's determination that these lab results are directly relevant to Defense Counsel's primary theory of defense, that the complaining witness consented to the sexual acts she alleges to have been subjected to illegally. Thus, these test results needed to be produced, but never were. Consequently, in accordance with *State ex rel. Rusen v. Hill*, 454 S.E.2d 427, 434, 193 W. Va. 133, 140 (1995), it is well within this Court's discretion to dismiss the two counts of sexual assault under W. Va. R. Crim. P. 16(d)(2), for the State's discovery violations. Accordingly, the Motion is hereby DENIED. (AR at 11-14). (Emphasis added).

During the second day of trial, it became clear that the State's argument that the PCR testing is not possible or meaningless without the defendant's DNA to compare to the sample found on the complaining witness was a red herring argument. Specifically,

> THE COURT: Mr. Lantz, do you contend that there's anything else outstanding from the laboratory other than comparison DNA testing?
>
> MR. LANTZ: Not that I'm aware of, Your Honor. I'm not aware of -- this PCR testing, they're going -- from what I understand, they're going to go this DNA testing with or without a sample from

Mr. F and that -- that is not here. It's not done. It's not been even started.

THE COURT: According to Mr. Harvey, they are going to conduct this PSR --

MR. KAHLE: PCR.

THE COURT: -- PCR DNA testing. How does Mr. Harvey think he's going to do that without a known sample?

MR. KAHLE: Well, **they can get it out of a profile**. We've caught suspects in the past where PCR -- for example, I forgot the guy's name that raped a little girl in North Wheeling. They got DNA. They developed a PCR chain. Said person was arrested in Missouri. His know DNA was taken. The PCR was sent to a central laboratory and there was a match.

THE COURT: So then, hypothetically speaking, if Mr. Harvey completes the testing that he intends to complete, the PCR testing, develops the -- what was the technical term? The --

MR. KAHLE: PCR. It's a fingerprint.

THE COURT: Okay.

MR. KAHLE: That's the way I think of it, Judge.

THE COURT: You just used it, Mr. Kahle. The --

MR. LANTZ: A profile.

THE COURT: You **develop a profile**?

MR. KAHLE: **Yes, sir**.

THE COURT: And then -- then he would plug this profile into a central database system?

MR. KAHLE: That's my understanding.

AR at 227-228 (Emphasis added).

The above hearing transcript clearly shows it was the State who represented to the trial court that the PCR testing would be put into a system and compared to known samples. (AR at 227-228). Naturally, this could provide exculpatory evidence; which is exactly why the State had a duty to expedite this testing from the beginning. The State's numerous assertions that without the defendant's DNA being provided to the West Virginia State Crime Lab for comparison, is an argument that they finally acknowledge to be without merit. As the State admits above, the Crime Lab could use the DNA that has been in its possession for months to create a profile that can then be compared to other profiles in the State's central database system. According to the May 4, 2021, report from the West Virginia State Police Forensic Laboratory that is exactly what could occur. (AR at 257). However, the DNA that the State had control and custody over since September 11, 2020, and that the defendant repeatedly requested to be tested was not suitable for entry into CODIS. (AR at 258).

The State should have tested the DNA months ago. Instead, this case has had a mistrial, dismissal of two of the four counts and this Writ of Prohibition, which all would not have occurred for reasons developed in the record. This is a perfect example of why the trial court did not err and should be a wake-up call to the State to see the folly of its ways. All the State had to do was comply with the Criminal Rules and the Trial Court's orders. If the State would have complied with the Criminal Rules and the Trial Court's orders, then the parties would have learned the DNA was not sufficient for entry into CODIS prior to a jury being impaneled and sworn in. (AR at 258).

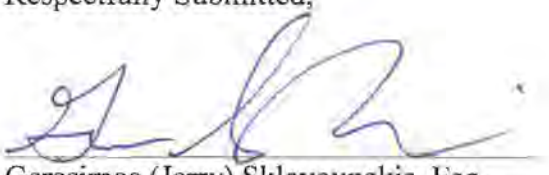
The sanction complained of by the State was appropriately used by the Trial Court to regulate its trial docket. The defendant's numerous attempts to resolve discovery issues were

either ignored or flippantly responded to by the State precipitating the defendant's motion to compel and motion to dismiss, and therefore the Trial Court acted appropriately.

CONCLUSION

As the Trial Court states during the second day of trial, the State is appealing black and white violations of proper court orders, scheduling orders and specific orders. (AR at 245). The State cannot sit on evidence for months while ignoring defendants' pleas to finish testing then force defendant to trial without the finished testing. The Trial Court appropriately sanctioned the State by dismissing counts Three and Four, with prejudice, and declaring a mistrial for the remaining counts instead of the most drastic sanction of dismissing with prejudice all four counts. For the reasons set forth herein, granting the Writ of Prohibition should be Denied, and for such other relief which the Respondent shows himself justly entitled.

Respectfully Submitted,



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COUNSEL FOR DEFENDANT

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.

(Ohio County Case No. 21-F-4)

CERTIFICATE OF SERVICE

I, Gerasimos (Jerry) Sklavounakis, certify that service of the foregoing Respondent's Response to Petition for Writ of Prohibition was had this 29th day of June, 2021, upon the following parties via the methods listed below:

Gail W. Kahle, Esq.
Ohio County Prosecuting Attorney
1500 Chapline Street
Wheeling, WV 26003
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The Honorable Michael J. Olejasz
Ohio County Circuit Court Judge
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Gerasimos (Jerry) Sklavounakis