{Names of complainant and brother redacted by BA.org as in media coverage}

IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA:

STATE OF WEST VIRGINIA,

Plaintiff,

Vs.

Case No. 10-F-22
(Judge David W. Nibert)

ROBERT FRANK POANDL,

Defendant.

ORDER DISMISSING CASE WITH PREJUDICE

On August 24, 2010 this matter was before the Court for additional pre-trial hearing, and specifically considering the defendant's Renewed Motion for Dismissal and/or Sanctions. At the hearings, the State of West Virginia was present by Joshua W. Downey, Prosecuting Attorney, and the defendant, Robert Frank Poandl, appeared in person and by his attorneys, Anita Harold Ashley and Dennis H. Curry.

The Court considered the arguments of counsel and noted the receipt of certain medical records of the accuser, and FOUND as follows:

1) When the records were presented by the Prosecuting Attorney, and represented as having been received from the accuser, there were but 52 pages of records. The accuser and the State did

not follow the process clearly outlined by the Court for receipt of records.

2) When the same source produced records directly to the Court, approximately 82 pages were produced.

The Court ORDERED that the hearing on this issue be rescheduled for Friday, August 27, 2010, so that witnesses could be available for testimony.

The Prosecuting Attorney advised the Court with respect to the remaining outstanding discovery issues as follows:

1) He has no list of media outlets to which press releases are normally sent. Press releases, such as the one recently disclosed in this case, are generally sent to every daily and weekly newspaper in West Virginia and to the Associated Press. Sgt. Swiger, the investigating officer, "may" have responded to out-of-state media outlets, including a newspaper from Dayton, Ohio.

2) There are no e-mails from Sgt. Swiger to Maj. Chambers responsive to the initial e-mail from Maj. Chambers which indicated that Sgt. Swiger was requested to investigate a report of an

incident from this accuser "that occurred in 1992" in the "Beckley area (possibly)," which resulted in this case being brought in Roane County Circuit Court, alleging illegal conduct in August 1991 in Spencer, West Virginia. While the State Police maintains a monthly update on numerous cases, any response to Maj. Chambers would have been contained in internal documents of the State Police, which have never been disclosed in this past in any case. The Prosecuting Attorney was unable to identify the source of the information provided to Maj. Chambers, as previously ordered.

3) The accuser has provided only a list of his employers, with contact information, as well as public information available from the Ohio Board of Pharmacy website, in response to the Court's order related to discovery of those records.

The State of West Virginia called Sgt. D. B. Swiger as a witness, who was subject to cross-examination. At the conclusion of which, the Court ORDERED that the issue of the source of the information related to the original complaint made to Maj. Chambers is required to be disclosed to the defense, and further evidence on this issue, as well as other outstanding issues, shall be the subject of the hearing on August 27, 2010, at 9:30 a.m., to which this case, is ORDERED continued.

The Court also took under advisement the State's motion to limit evidence related to the accuser's substance abuse.

On August 27, 2010, the Court again convened the hearing on the motion to dismiss made by the defendant. At the hearing, the State of West Virginia was present by Joshua W. Downey, Prosecuting Attorney, and the defendant, Robert Frank Poandl, appeared in person and by his attorneys, Anita Harold Ashley and Dennis H. Curry.

At the onset of the hearing, the Prosecuting Attorney advised the Court that he had failed to provide a copy of this Court's Order from the June 7, 2010 hearing to {Complainant's brother}, the accuser's brother, as required by subsequent Orders, until August 26, 2010, but that both {Complainant's brother} and the accuser were each informed as to the Court's Order related to discovery by e-mail and telephone and both had indicated that they understood.

The State called the following witnesses to testify by telephone: {Complainant's brother} Maj. Jack Chambers of the West Virginia State Police; and {Complainant}. {Complainant's brother} and Maj. Chambers each testified from their respective offices. {Complainant} testified, by agreement, from the law office of Steve Wenke, defendant's attorney in Cincinnati, Ohio. All witnesses were subject to cross-

examination. In addition, at the Court's direction, the State attempted to reach witness Virginia Lanham, but she was unavailable until after the evidence was concluded. The defendant offered no evidence, except Exhibit No. 1, being a compilation of medical records not received in the first submission to the Court.

At the conclusion of the evidence, the parties were each afforded the opportunity to argue the motion to dismiss and/or sanctions filed by the defense. The Prosecuting Attorney argued against the motion, and suggested, alternatively, that the Court could continue the trial or dismiss the case, without prejudice, both of which were resisted by the defendant. The Court recessed to consider the evidence, and then called the parties and counsel back to the hearing room for announcement.

Based on the evidence presented, the argument of counsel, and the record herein, the Court made the following Findings of Fact and Conclusions of Law:

1. In June 2009, {Complainant's brother} [redacted], the brother of the alleged victim, made a complaint to the West Virginia State Police, alleging that {Complainant} [redacted] had been sexually assaulted by the defendant. According to the State Police e-mail, it was initially reported that the incident occurred in Beckley in 1992.

2. The defendant's employer, upon learning of the allegations, removed the defendant from the parish where he had been assigned and from all priestly duties, and he has been in a form of "protective custody" since that time, under a protection plan imposed by the employer.

3. The State of West Virginia did not seek a warrant, but investigated the case. Sgt. Swiger met with the alleged victim and interviewed him, received records from the Glenmary Society (primarily the defendant's employment record), traveled to North Carolina to interview a former nun and former priest and secured journal notes from the former nun. The case was presented to the January 2010 term of the grand jury and an indictment was returned.

4. The defendant was arraigned on February 12, 2010, and the case was originally set for trial in June 2010. A second trial date was continued and the case was rescheduled for trial to commence on August 30, 2010.

5. At a status hearing on April 19, 2010, certain discovery was granted and the Court took under advisement the defendant's motion for discovery of certain medical and employment records. The Court initially denied the motion, but after reconsideration, granted the defendant's request for discovery. The defendant's

argument, which was adopted by the Court, was that the alleged crime dealt with a sexual assault involving penetration when the accuser was ten (10) years old, and medical records would either be relevant, as showing that penetration occurred, or exculpatory, if no penetration was noted. The defendant also convinced the Court that discovery of records related to the accuser's therapy because of suicidal and homicidal thoughts and drug addiction related to the alleged abuse and his employment and licensing records were also relevant for purposes of cross-examination.

6. The Court, on June 7, 2010, granted the defendant's reconsideration motion and Ordered the release of these records, establishing a protocol for the records to be released from the provider directly to the Court, for an *in camera* inspection. On that date, the Court also Ordered that the accuser's employment records and his records from the Ohio Board of Pharmacy be disclosed to the defense.

7. To date, the employment records have not been furnished. The only discovery related to the Ohio Board of Pharmacy was a citation to the website, which provides public information about whether the accuser's license is under sanction. This disclosure was not responsive to the Court's Orders of June 7, 2010 and July 15, 2010.

8. The evidence is clear that the accuser obtained records from the Family Medical Group, which provided his primary care for a number of years, and these records eventually were given to his brother, who provided them to the Prosecuting Attorney, who copied them for the Court. The Court reviewed those records, deemed them relevant to the case, and Ordered their disclosure to the defense.

9. On July 15, 2010, at a hearing, the Court made clear that the protocol for receipt of records had not been followed, and that the alleged victim was not to be involved in the chain of custody of the records. In order to clarify and to protect the integrity of the process, the accuser was Ordered to identify the name, address, and telephone number of every medical, psychiatric, and psychological provider which had provided care to him from August 4, 1991 and through and including the date of trial, and the Prosecuting Attorney was to disclose this information to the defense forthwith. The accuser was also Ordered to sign such releases as may be necessary to obtain all of these records of evaluation and treatment for review by this Court. The original releases, being no less than one for each health care provider identified, were to be forwarded to the Prosecuting Attorney, who was to, in turn, submit the originals of such releases to Anita Harold Ashley, defense counsel, who was to forthwith communicate to each treating health care provider, seeking the release of records,

to be sent directly and forthwith to: Judge David W. Nibert, 200 Sixth Street, Point Pleasant, West Virginia 25550. The accuser signed only two releases, one for the Family Medical Group and one for Dr. James Carroll.

10. It was apparent to the Court, after receipt of a second set of records from the Family Medical Group, obtained after the release was presented to the provider and the records were sent directly to the Court, that there were approximately thirty (30) additional pages of records not received when the records were obtained by the accuser and sent to the Court from the Prosecuting Attorney and there was one (1) page, purporting to be a "Continuity of Care" record in the first set which did not appear when the second set of records was received. The accuser testified that he did nothing to delete any records, and that he simply retrieved the records and forwarded them. [redacted] [Complainant's brother] testified that he did nothing to add or delete records, and was unclear how it occurred that fewer records were received the first time.

11. The Court's review, aided by Defendant's Exhibit No. 1, a more detailed analysis of the records not received, clearly shows that there were many other medical providers whose records were not disclosed, as Ordered, and it was simply not an error in copying. Further, the accuser testified that he provided only his primary

care records and his treating psychologist records because he believed that those were the only "relevant" records.

12. The Court is of the opinion, and FINDS, that {Complainant} went through the records and deleted that which he did not wish to disclose. This is consistent with the Court's own analysis of the records which were provided. The Court cannot accept his testimony that he simply picked up the records and forwarded them. Somebody in the chain of custody deleted records, and the Court FINDS that it was {Complainant}, the accuser. Moreover, whether he deleted the records or not, by his own testimony, he has deliberately failed and refused to furnish all records, from all sources, as the Court had repeatedly ordered.

13. Among the records which have not been disclosed are records (referred to only in history portions of the second set of records) which show that the accuser received treatment for a "severely broken right arm" in 1991, just a few weeks after the alleged incident. As the defense asserted, those records might reveal a physical examination which would confirm or deny whether he, as a 10 year old child, would have suffered injuries, if he was abused, as he has alleged.

14. There are other deficiencies in the discovery process, including information about dissemination of the press release, which was provided on Tuesday, August 24, 2010, and the issue with Maj. Chambers regarding the source of the initial report as to the date and location of the alleged crime, which he only was asked about by the State for the first time in the week preceding trial. While these deficiencies may be attributable to the Prosecuting Attorney, they were matters which, while relevant, the late disclosure of which does not operate as substantial prejudice to the defense.

15. However, the failure of the State to provide information regarding medical providers and care offered to the accuser does amount to substantial prejudice. The failure to provide information for analysis by defense counsel denies the defendant the opportunity to have a fair trial and to present information to the jury which might be exculpatory.

16. State ex rel Rusen vs. Hon. George W. Hill, 193 W. Va. 133, 454 S.E.2d 427 (1994) provides guidance to this Court in determining whether dismissal is appropriate. The rule enunciated by the Supreme Court in determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-prong analysis: i) Did the non-disclosure

surprise the defendant on a material fact? and ii) Did it hamper preparation and presentation of the defendant's case? A circuit court may choose dismissal for egregious and repeated violations where lesser sanctions such as a continuance would be disruptive to the administration of justice or where lesser sanctions cannot provide the same degree of assurance that the prejudice to the defendant will be dissipated.

17. Applying the facts of this case to the standard set forth above, it is clear that the non-disclosure operates as a surprise to the defendant. The Court notes that the defendant still does not have the records to which reference was made in the medical records which came in the second set sent directly to the Court. Obviously, this hampers the defendant's ability to prepare and present the case at trial.

18. The Court has considered the available options. The defense seeks a dismissal with prejudice or an order prohibiting {Complainant}, the accuser, from testifying. If {Complainant} is prohibited from testifying, the State has no case. If a continuance is granted, there is no assurance that the records will even then be furnished. Given the history of {Complainant}, the Court cannot trust that he will cooperate. Only {Complainant} [redacted]

possesses the information the Court needs to assure that the defense has what is needed, and he has not been forthcoming.

19. In this case, the alleged crime was reported eighteen (18) years after it is alleged to have occurred. It is not the first case of this nature to have gone unreported for decades. Because of the substantial time delay, however, it is important to go back to the original alleged date to try to put together evidence to either prove the case for the State or give the defense evidence necessary to successfully defend the allegations. It is imperative that medical records be secured, to see what evidence there is.

20. The Court specifically FINDS that {Complainant} [redacted] has manipulated the process, and the Court cannot trust that he will make a fair and honest disclosure. In his statement and his testimony, he indicated that this priest has destroyed his life and he is seeking justice. It seems to the Court that one who has strong feeling regarding the circumstances as he has alleged them to occur, to the point of saying that this crime "ruined his life" and that he was contemplating both suicide and homicide, would be obliged and eager,to be forthright in order to get the truth the Court seeks. In this case, he has fallen well short of that obligation.

21. The most appropriate and only sanction available to the Court is the dismissal of this case, with prejudice.

22. The dismissal of this case should be stayed for a period of ninety (90) days, in order to allow the State to consider whether to file a writ of prohibition.

Accordingly, it is the JUDGMENT and ORDER of this Court that the indictment in this case is DISMISSED, WITH PREJUDICE. The trial scheduled for August 30, 2010, is canceled and the Clerk is directed to notify the jurors that they need not appear.

Further, this Dismissal Order is STAYED for a period of ninety (90) days following entry of this Order to allow the State of West Virginia to pursue relief in the Supreme Court of Appeals of West Virginia, if it should so choose.

The Clerk shall provide attested copies of this Order to counsel of record.

The Court notes that objections to adverse rulings are preserved.

ENTER this 3rd day of September, 2010.

DAVID W. NIBERT
Judge

Prepared by:

ANITA HAROLD ASHLEY, ESQ.
WV State Bar #176
Co-counsel for defendant

TRUE COPY TESTE:
Beverly Gearhart
CLERK of CIRCUIT COURT of
ROANE COUNTY, WEST VIRGINIA
BY _____ DEPUTY

Approved as to form, by:

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