

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	No. 64012-7-1
v.	)	
	)	STATEMENT OF ADDITIONAL
SERGIO REYES-BROOKS	)	GROUNDS FOR REVIEW
	)	
	)	
Appellant.	)	

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I, Sergio Reyes-Brooks, have received and reviewed the opening brief prepared by my attorney. Summarized below are the grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

DID THE TRIAL COURT ERR IN DENYING SEVERAL  
MOTIONS DEFENSE COUNSEL FILED REQUESTING  
THE COURT FOR CONTINUACE IN ALLOWING  
SUFFICIENT TIME TO PREPARE FOR TRIAL AND  
DID THE TRIAL COURTS ERROR DENY THE  
DEFENDANT HIS 6TH AND 14TH AMENDMENT  
RIGHTS TO A FAIR TRIAL?

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On February 17, 2009, Defense 8.3 Motion To Dismiss was denied after counsel declared 10 facts that were relevant to defendant Sergio Reyes-Brooks right to confrontation; 6th Amendment and right to due process; 14th Amendment. Defendants constitutional rights were denied and counsels motion states facts on the record that counsel would not be prepared to go to trial. Please See Exhibit 1.

On February 23, 2009, Defense Supplemental 8.3 And 4.7 Motion To Dismiss was also denied stating the following facts:

Declaration of Counsels efforts to interview Ms. Moore states 14 factual reasons why defendant Brooks was not adequately presented sufficient evidence to be properly prepared to go to trial. Timing of the trial and the complexity of the case clearly states 4 facts why counsel requested the trial date be continued to properly evaluate evidence that continued to trickle in as the day of trial was set to be heard in court.

The pattern of late discovery by the state on the record supports 36 facts why the courts should have looked at the sequence of events that occurred during all the courts proceedings supporting counsels reasons why she would not be effective without having all the proper discovery to adequately be prepared for trial.

Ms. Moor's interview made it much more difficult for defense to obtain information from the states star witness that was relevant to defendant Reyes-Brooks innocence. 15 facts support the sequence that followed in the order of what happened up and during the date of trial.

Law and Argument are provided in the following 8.3 and 4.7 motion that counsel provided for the trial court to review. Remedy was requested that dismissal be provided or in the alternative a continuance to move back the trial date or mistrial. Both motions were denied. Please See Exhibit 2.

On March 2, 2009, Declaration Of Counsel In Support Of Motion To Continue Trial To Afford Due Process & Effective Assistance Of Counsel supports 47 facts supplying the court reasons why the trial date should have been pushed back to a date that accommodated defendant Reyes-Brooks effective assistance of counsel and a right to due process of law with a fair trial. Motion was denied. Please See Exhibit 3.

On March 2, 2009, Defense Motion To Reconsider Denial Of Continuance provides law and argument stating reasons defendant Reyes-Brooks 6th amendment rights to compulsory process would be violated. Motion was denied. Please See Exhibit 3.

The standard of review for a defendant claiming ineffective assistance of counsel is Strickland v. Washington, 446 U.S. 668, 687-91, 694 (1984). Establishing ineffective assistance of counsel a party must demonstrate (1) That counsels performance was unreasonable under prevailing professional standards and (2) That there is a reasonable probability that but for counsels unprofessional errors, the result would have been different.

The reasons stated above shows proof of facts and evidence the courts have access to submitted along with defendant Reyes-Brooks SAG. Counsel clearly provides the courts with several facts through the record and proceedings leading up to and during trial that counsel was not properly prepared to have this case set for trial; prong (1). Counsel not having adequate time to examine all the evidence and the states continuance of late discovery past court dead lines provides enough reason that the outcome of defendant Reyes-Brooks trial would have been different; prong (2).

## Additional Ground 2

Jury Tampering-After a recess during trial as both parties were coming in the courtroom. The court reporter/assistant told all parties that a relative of the victim was seen talking to a jury member. The Trial Judge Catherine Shaffer got angry and said, " How can this happen? Keep the jury locked away from everyone, this is grounds for automatic mistrial." "Lets make sure this doesn't happen again?" No follow up questioning of what occurred or what was said? The court just proceeded on with no further investigation. Appellant ask this court to review the decision that the trial court decided on with the proceedings and if this continuation prejudice defendant Reyes-Brooks a fair trial and ask for a new trial base on that ground?

## Additional Ground 3

Right To A Duress Defense-There are 3 elements to a Duress Defense. Defendant Reyes-Brooks on the record stated that he was under direct threat of bodily harm or death; element (1). The direct threat would be carried out by defendant Reyes-Brooks testimony. Witness Aaron Smith's testimony of seeing 2 pistols in question pressed against defendant's head being threatened with force to take a couple of Extacy Pills. Witness Dr. White testified that defendant Reyes-Brooks suffered severe mental trauma and the diagnostic of his mental evaluation proved he suffered post traumatic stress disorder. Defendant felt that he couldn't speak to law enforcement because co-defendant Porter was always on him as he was hearing his voice. Dr. White read jail records of defendant Reyes-Brooks when he was committed to the psychiatric floor. Records show upon receiving defendant Reyes-Brooks records that he was very incompetent and on meds yelling things like, " Hes still here, no I can't eat, he says I can't eat!" Defendant wouldn't eat, peeing on himself at times, taking off his clothes under Porter's voice command in his head. Attorney for defendant in closing argument compared him to Elizabeth Smart of why he didn't run away when he had the chance to. Unlike Elizabeth Smart defendant and his familys life were threatened and the captor knew where he lived and the defendant played along under fear of his life. Defendant ask this court to review the standard of his right to a duress defense and recommend the necessary remedy to cure this error.

#### Additional Ground 4

Insufficient Evidence For Murder-Attorney for defendant did a half time challenge because it was clear by all the facts of the case that co-defendant Porter shot the victim a couple of times in the head and neck. The question still remained how does one know if the victim wasn't already dead. You can't be killed twice? The Trial Court leaned on the Prosecutor's witness Dr. White's opinion saying that it was the last shot to the head that killed the victim believing so because of the higher caliber of the gun. No actual test were ran to prove this theory; none were ever done. The doctor's testimony was so short on the matter no reference in the record supports this claim. The state's star witness and only witness Ms. Moore, Porter's girlfriend testifies, "I don't know, I didn't actually see. I had my head down putting clothes in the bag and I saw Porter get back in the car and Reyes-Brooks asked him, "Is he dead?" Porter's response, "yes he's dead." Reyes-Brooks asking, "Are you sure? Porter, "yea, he's gone." Reyes-Brooks says, "the human body is a mothafucka." Defendant gets out the car and Ms. Moore heard a shot and seen the defendant Reyes-Brooks get back in the car. The prosecutor ask Ms. Moore if she didn't actually see defendant Reyes-Brooks, then how does she know that he took the last shot? She states because Porter was in the car. Defendant ask this court was there enough evidence beyond a reasonable doubt of defendant Reyes-Brooks guilt of murder? The evidence doesn't state whether the victim was already dead or may-even alive? The defendant ask this court to review this matter and ask that a new trial be granted based on facts mentioned on this ground.

#### CONCLUSION

Appellant's right to confrontation; 6th amendment and right to due process; 14th amendment to a fair trial were highly prejudicial on all grounds for review in this statement. Appellant ask this court grant the errors in this statement of additional grounds in order to correct a manifest in justice by remanding for a new trial and whatever else this court deems necessary.

AFFIDAVIT OF APPELLANT

STATE OF WASHINGTON

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COUNTY OF CLALLAM

ss:

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I, Sergio Reyes-Brooks, declare under the penalty of perjury under the law of the State of Washington that the Statement of Additional Grounds I have filed with the Court of Appeals is true and correct to the best of my knowledge and have been sworn to below on this day:

Dated This 8th day of December 2010.

Sergio Reyes Brooks

Signature of Appellant

Notary for the State of Washington  
Commission expires: \_\_\_\_\_

EXHIBIT 1

DEFENSE 8.3 MOTION TO DISMISS

FEB 17 2009

SUPERIOR COURT CLERK  
EILEEN L. MCLEOD  
DEPUTY

IN THE SUPERIOR COURT OF KING COUNTY  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO REYES-BROOKS,

Defendant.

Cause No. 06-1-10584-9 SEA

DEFENSE 8.3 MOTION TO DISMISS

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I. DECLARATION OF COUNSEL

1. The defense made its first written request to interview Crystal Moore on April 11, 2007.
2. The defense recently learned, during a defense interview with Detective Sue Peters, that King County Sheriffs had contact with Ms. Moore in the summer of 2007.
3. Moore was apparently discovered in Chicago in association with another murder suspect.
4. No reports have been provided to the defense regarding this contact.
5. The State did not begin to facilitate contact between this witness and her attorney until very recently.
6. The witness has not returned to the State of Washington and has not been interviewed by the defense.
7. Trial was formally begun on this case last week.
8. New discovery has been provided by the State nearly every week for the past several weeks.

8.3 motion to dismiss

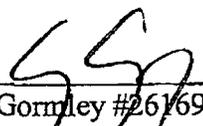
Law Offices of Cathy Gormley  
600 First Avenue Suite 106  
Seattle, WA 98104  
(206) 624-0508  
Fax (206) 622-98.

- 1           9. This discovery has come in the hands of its witnesses who prepared the reports in  
2           2006 but who did not provide those reports to the prosecutor until 2009.  
3           10. The defense has not and cannot prepare for trial on a Murder 1 case where the  
4           State's key witness is unavailable for questioning.

5           The Court may dismiss any criminal prosecution due to arbitrary action or governmental  
6           misconduct where there has been prejudice to the rights of the accused which materially affect  
7           his right to a fair trial. CrR 8.3 Simple mismanagement may be sufficient under the rule; the  
8           defense need not make a showing that the misconduct was intentional. State v. Michielli, 132  
9           Wn.2d 229, 243, 937 P.2d 587 (1997).

10           In this case, discovery continues to trickle in while the State's key witness has effectively  
11           refused to grant a defense interview. While the State is not responsible for the willingness of its  
12           witnesses to testify, it is imputed with the knowledge known to its agents. That imputed  
13           knowledge was that Crystal was at a particular location in Chicago and could be contacted for  
14           defense interviews well prior to trial. This was not done. The defendant's rights to confrontation  
15           and to due process will be violated if he is forced to go to trial unprepared in this significant way.  
16           Dismissal is the appropriate remedy.

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20           Signed and sworn this 17<sup>th</sup> day of February, 2009

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24             
25           Cathy Gormley #26169  
26           Counsel for Mr. Reyes-Brooks

27  
28  
29           8.3 motion to dismiss

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600 First Avenue Suite 106  
Seattle, WA 98104  
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EXHIBIT 2

DEFENSE SUPPLEMENTAL 8.3 AND  
4.7 MOTION TO DISMISS

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KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

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IN THE SUPERIOR COURT OF KING COUNTY  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO REYES-BROOKS,

Defendant.

Cause No. 06-1-10584-9 SEA

DEFENSE SUPPLEMENTAL 8.3 AND  
4.7 MOTION TO DISMISS

COMES NOW THE DEFEDANT, by and through his attorneys of records, and moves  
the court to dismiss under CrR 4.7 and 8.3. This motion supplements and incorporates by  
reference the 8.3 brief and declaration of counsel previously filed.

I. DECLARATION OF COUNSEL

a. Defense efforts to interview Ms. Moore.

1. Defense counsel Gormley was appointed to this case in December, 2006.
2. The discovery indicated that Crystal Moore was the State's key witness and a potential co-defendant who was present at McRay's murder.

- 1 3. On January 16, 2007, defense counsel subpoenaed the names and DOB's of Crystal  
2 Moore's cell mates for December, 2006.
- 3 4. On January 22, 2007, defense counsel moved to compel production of Crystal Moore's  
4 criminal history.
- 5 5. That same date, Defense also moved the State to disclose any inducements or immunity  
6 agreements made with Moore or in the alternative, to produce her for a witness  
7 interview before February 14, 2007.
- 8 6. On April 11, 2007, defense counsel e-mailed the prosecutor again asking for an  
9 interview with Ms. Moore.
- 10 7. Defense counsel subsequently learned that Ms. Moore was represented by David  
11 Treiweiler.
- 12 8. Mr. Treiweiler indicated that Ms. Moore had no immunity agreement and thus would  
13 not be available for interviews.
- 14 9. On December 15, 2008, the defense brought a motion to compel production of Brady  
15 material, including reports on the State's efforts to find Ms. Moore, evidence of any  
16 immunity agreement between Moore and the State, and a motion to produce her for  
17 interviews well in advance of trial (see attached motion).
- 18 10. The judge ruled on the motion and ordered the State to produce notes of efforts to  
19 contact Ms. Moore.
- 20 11. The motion also sought to compel production of Ms. Moore's Harborview records from  
21 the night of the murder.
- 22 12. The Court ruled that this evidence would not be produced until Ms. Moore had a chance  
23 to object.
- 24 13. On February 9, 2009, the prosecutor and Moore's attorney reached a proposed  
25 agreement granting Moore transactional immunity for the murder of Dominique  
26 McRay, Deputy Cox, and other crimes she may have committed on December 1<sup>st</sup> and  
27 2<sup>nd</sup>, 2006.
- 28 14. On February 19, Ms. Moore signed the agreement and the defense spoke to her for the  
29 first time.

b. Timing of the trial.

- 1 1. The complexity of the case mandated several joint motions to continue case setting
- 2 hearings.
- 3 2. On August 8<sup>th</sup>, 2008, the parties set this case for trial on January 12<sup>th</sup> with an omnibus
- 4 hearing set for December 19<sup>th</sup>, 2008.
- 5 3. The case was then assigned to Judge Catherine Shaffer who continued the trial date to
- 6 February 23<sup>rd</sup> on the motion of defense counsel.
- 7 4. The court then moved the trial up to February 13<sup>th</sup> over defense objection.

8  
9 c. The pattern of late discovery by the State.

- 10 1. On September 9<sup>th</sup> 2008, the defense interviewed Deputy David Keller.
- 11 2. Deputy Keller brought copies of his police reports to the interview.
- 12 3. Neither the State nor the defense had ever seen many of the reports previously.
- 13 4. The deputy prosecutor assured the defense that he would investigate how these reports
- 14 were overlooked and would comb through the police files to make sure that all
- 15 discovery was produced and turned over to the defense.
- 16 5. As a result of that effort, the prosecutor produced approximately 300 pages of "new"
- 17 discovery in late September, 2008.
- 18 6. Within the new discovery were revelations about how the second gun came to be found
- 19 in Sergio's car after three teams had searched it previously.
- 20 7. Also in the new discovery was information that Crystal Moore and Raymond Porter
- 21 were heard at Brewski's tavern threatening to "smoke Cox" the night of his murder.
- 22 8. In that same motion, the defense moved to compel the State to produce updated
- 23 criminal histories for its witnesses.
- 24 9. The Court granted the defense motion.
- 25 10. In that same motion, the defense moved to compel production of all outstanding
- 26 discovery.
- 27 11. The Court granted the defense motion on 12/15/2008.
- 28 12. On January 8, 2009 the defense interviewed Sargeant D.B. Gates who brought police
- 29 reports that neither the State nor the Defense had previously seen. Copies were made
- and provided to the defense.

- 1 13. On January 14, 2009, the defense interviewed Sargeant Sue Peters.
- 2 14. Peters disclosed that King County Sheriffs had had "incidental" contact with Ms.
- 3 Moore in the summer of 2007. No reports of this contact have ever been provided.
- 4 15. On January 29, 2009, the defense interviewed Deputy Belford.
- 5 16. Deputy Belford came to the interview carrying police reports that neither the State nor
- 6 the Defense had previously seen. Copies were made and provided to the defense.
- 7 17. In early February, the defense interviewed fingerprint examiner Cynthia Zeller.
- 8 18. Zeller was asked who searched the Honda where the revolver was found.
- 9 19. She indicated that three people whose names were hand-written on one of her reports
- 10 searched the vehicle.
- 11 20. The defense has no reports from those people related to the search of the vehicle.
- 12 21. The Honda was searched by upwards of five people without finding the revolver that
- 13 was sought.
- 14 22. Deputy Crenshaw later glanced under the Honda's driver's seat and found the revolver.
- 15 23. It is necessary to thoroughly investigate the question of how five trained officers from
- 16 the State missed a large revolver that according to Crenshaw's notes and photo, sat in
- 17 clear view of anyone glancing into the back seat of the car.
- 18 24. The defense sought to interview the people whose names were hand-written on Zeller's
- 19 report.
- 20 25. One of the people was in the building at the time that Zeller was interviewed.
- 21 26. The prosecutor did not make him available to the defense for an interview.
- 22 27. No interviews of those three searchers have yet been arranged.
- 23 28. In the second week of February, 2009, the prosecutor told defense that he believed
- 24 Deputy Pavlovich may have discovery that was not yet provided.
- 25 29. Shortly thereafter, the prosecutor provided new discovery from Deputy Pavlovich
- 26 including a 65-page interview transcript for one of the State's civilian witnesses.
- 27 30. That witness was Clayton Kadushin.
- 28 31. No updated criminal history for Mr. Kadushin had been provided.
- 29 32. On February 16, defense counsel Ann Danieli noticed a sentencing hearing schedule on
- the courtroom door for Judge Julie Spector.

1 33. That schedule indicated that on February 13, 2009, Clayton Kadushin had been  
2 sentenced for "Attempted Organized Retail Theft."

3 34. On February 9, 2009, Natasha Pranger was interviewed by the defense and brought  
4 notes from her examination of Sergio's vehicle that had never before been provided.

5 35. On February 17, 2009, the State provided an updated criminal history for Crystal  
6 Moore. That history showed a Chicago address for her and a new criminal charge  
7 dating from September of 2007.

8 36. Also on February 17, 2009, the State produced approximately three inches of cell phone  
9 records containing thousands of call records for various witnesses in this case.

10 d. Ms. Moore's interview.

11 1. Mr. Treiweiler arranged for Ms. Moore to come to Seattle for a defense interview on  
12 Saturday, February 14<sup>th</sup>.

13 2. Ms. Moore did not board her plane.

14 3. Mr. Treiweiler asked if defense counsel could interview her on the 15<sup>th</sup> or 16<sup>th</sup>.

15 4. Defense counsel agreed, but Ms. Moore did not arrive.

16 5. On Monday, February 16, the parties notified the Court that Ms. Moore was not  
17 interviewed.

18 6. Ms. Moore's interview was rescheduled for Thursday, February 19<sup>th</sup>.

19 7. Ms. Moore arrived on that date and was interviewed for 5 hours.

20 8. She is learning disabled, illiterate, and has trouble choosing and enunciating words.

21 9. Ms. Moore made new allegations concerning Sergio, provided new details regarding the  
22 timing of conduct, revealed that she was drugged at Harborview prior to being  
23 interviewed and denied making several material statements to police.

24 10. During the interview, defense counsel asked Ms. Moore about releasing her CPS,  
25 Harborview, and drug treatment records.

26 11. Ms. Moore's counsel indicated he would ask her outside our presence.

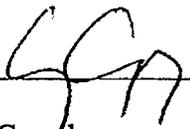
27 12. Ms. Moore's counsel later indicated that Ms. Moore objected to the release of her CPS  
28 records.  
29

1 13. Ms. Moore's interview was downloaded and provided to the defense transcriptionist on  
2 February 20<sup>th</sup>.

3 14. The transcriptionist indicates that a "normal" interview takes 3-4 hours to transcribe for  
4 every hour of spoken tape.

5 15. She indicated that when speech is unclear, transcription of an interview would take  
6 much longer.

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8  
9 Signed and sworn this 21<sup>st</sup> day of February, 2009

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12 \_\_\_\_\_  
13 Cathy Gornley  
14 WSBA#26169

15 II. LAW AND ARGUMENT

16 1. The State has not provided complete or timely discovery in violation of CrR 4.7.

17 The rules of discovery are meant to protect the smooth functioning of the criminal trial  
18 court and the defendant's due process rights.

19  
20 It is the long settled policy in this state to construe the rules of criminal discovery  
21 liberally in order to the purposes underlying CrR 4.7, which are "to provide  
22 adequate information for informed pleas, expedite trial, minimize surprise, afford  
23 opportunities for effective cross-examination, and meet the requirements of due  
24 process..."

25 State v. Dunivin, 65 Wn. App. 728, 733 829 P.2d 799 (internal citations omitted); *rev.*  
26 *denied*, 120 Wn. 2d 1016 (1992). The State has special obligations under the discovery rules  
27 beyond those imposed on defendants. Criminal Rule 4.7(a) provides:  
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1 (1) Except as otherwise provided by protective orders or as to matters not subject to  
2 disclosure, the prosecuting attorney shall disclose to the defendant the following material and  
3 information within the prosecuting attorney's possession or control no later than the omnibus  
4 hearing:  
5

6 (i) the names and address of persons whom the prosecuting attorney intends to call as  
7 witnesses at the hearing or trial, together with any written or recorded statements and the  
8 substance of any oral statements of such witnesses...

9 (vi) any record or prior criminal convictions known to the prosecuting attorney of the  
10 defendant and of persons whom the prosecuting attorney intends to call as witnesses at  
11 the hearing or trial...

12 The discovery rules and the principles they serve would be meaningless without enforcement.  
13 CrR 4.7(h)(7)(i) provides the means for such enforcement:

14 If at any time during the course of proceedings it is brought to the attention of the  
15 court that a party has failed to comply with an applicable discovery rule or an  
16 order issued pursuant thereto, the court may order such party to permit the  
17 discovery of material and information not previously disclosed, grant a  
18 continuance, *dismiss the action* or enter such other order as it deems just under the  
19 circumstances. (Emphasis added).

20 2. Sergio is prejudiced by the late production of discovery and it is unclear how much  
21 discovery remains to be disclosed.

22 Here, the State breached its duty to timely produce discovery within its possession or  
23 control. Clearly, the prosecutor has control over the reports of its officers. Just as clearly,  
24 whatever efforts the prosecutor made to gather all those reports have not worked. In September  
25 2008, when it became clear that discovery was missing, the prosecutor promised to seek out any  
26 missing discovery and provide it. At the end of that month, the prosecutor provided  
27 approximately 300 pages of "new" discovery to the defense. This material was found after the  
28

1 prosecutor went through the officers' files. At that time, the prosecutor indicated that he had  
2 found and provided all remaining discovery.

3  
4 Since that time, approximately four inches of discovery, some of it extremely dense and  
5 complex (e.g. cell phone records) has been produced. It is wishful thinking to believe, when  
6 discovery continues to stream in at this rate and frequency, that discovery is complete from the  
7 State's side. Further, the ongoing production of discovery indicates that the prosecution did not  
8 comply with the court's order of 12/15/08 to seek and provide all outstanding discovery to the  
9 defense.  
10

11 Defense counsel should be able to stop processing new information and start preparing  
12 for trial. This should occur, in complex cases, a month or more prior to the start of trial. This is  
13 especially true in a murder case where the information is voluminous, the facts are complex, and  
14 the stakes are high. Defense counsel should not have to scramble to assimilate significant new  
15 information during the weeks and days leading up to trial, much less after trial has begun.  
16

17 The prosecutor here also inexplicably delayed production of its key witness, Crystal  
18 Moore, until after trial began. Its officers had contact with Ms. Moore in Chicago in mid-2007.  
19 A defense request for recent criminal history produced a Chicago address for her within 24 hours  
20 of the (repeated) request. This is simple mismanagement, so pervasive and detrimental to the  
21 effective of counsel that prejudice can be presumed. See, e.g. In re. Davis, 152 Wn.2d 647 at  
22 673, 101 P.3d 1 (2004) *citing* U.S. v. Cronin, 466 U.S. 648 at 656-657, 104 S.Ct. 2039 (1984).  
23  
24

25 The eleventh-hour production of Ms. Moore and of inches of new, complex discovery has  
26 forced the defense to devote hours to briefing discovery issues when it should have been working  
27 on trial preparation. Further, having to brief the discovery issues precluded counsel from  
28 analyzing the new discovery just provided.  
29

1                    3. The prosecutor's discovery violations warrant dismissal.

2                    Dismissal under CrR 4.7 is only one possibly remedy and is, of course, an extraordinary  
3 one. State v. Sherman, 59 Wn. App. At 767 citing State v. Baker, 78 Wn.2d 327, 332-333, 474  
4 P.2d 254 (1970). Simple mismanagement alone may establish sufficient evidence of state  
5 misconduct to justify dismissing a charge in the interests of justice. State v. Michielli, 132  
6 Wn.2d 229, 243, 937 P.2d 587 (1997); State v. Sherman, 59 Wn.App. 793, 801 P.2d 274 (1990).  
7 In considering whether the misconduct justifies dismissal, the court should take into account the  
8 cumulative impact of multiple instances of mismanagement. *Id*; State v. Dailey, 93 Wn.2d 454,  
9 610 P.2d 357 (1980). For example, in State v. Sherman, the Court of Appeals upheld the trial  
10 court's dismissal of charges for the prosecutor's mismanagement in failing to provide discovery,  
11 failing to provide a witness list, and endorsing new witnesses after the trial was originally  
12 scheduled to begin. In State v. Dailey, the appellate court upheld the dismissal based on late  
13 compliance with discovery orders, failure to disclose the witness list until one day before trial,  
14 dilatory compliance with the bill of particulars, and late dismissal of charges against a co-  
15 defendant.

16                    In Michielli, the Washington Supreme Court upheld a dismissal of charges when the state  
17 added four new charges several days before the trial forcing the defendant to waive his speedy  
18 trial rights or go to trial with unprepared counsel. Importantly, the court noted that CrR 8.3(b)  
19 exists 'to see that one charged with a crime is *fairly treated*.' *Id* at 132 Wn.2d at 245. (emphasis  
20 in original).

21                    Here, the discovery violations have been significant and ongoing. And since November,  
22 the prosecutor has produced new discovery repeatedly requiring the defense to adjust its  
23 preparation, analysis, and focus. Sergio now must choose whether to go forward with counsel  
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1 that is unprepared or waive his speedy trials rights. Dismissal is an appropriate remedy in such a  
2 case.

3  
4 4. The defendant's Sixth Amendment right to compulsory process has been  
5 violated by the late production of the State's key witness, Crystal Moore.

6 A counsel is denied his right to counsel under the U.S. and Washington Constitutions if  
7 the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial.  
8 State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976). Such preparation includes the right to make  
9 a full investigation of the facts and law applicable to the case. *Id* at 180 citing State v. Hartwig,  
10 36 Wn.2d 598, 601, 219 P.2d 564 (1950). It also includes the right to interview a witness in  
11 advance of trial. Burri, *supra*, at 181 citing State v. Papa, 32 R.I. 453, 459, 80 A.12 (1911):

12  
13 The attorney for the defendant not only had the right, but it was his plain duty  
14 towards his client, to fully investigate the case and to interview and examine as  
15 many as possible of the eye-witnesses to the assault in question, together with any  
16 other persons who might be able to assist him in ascertaining the truth concerning  
17 the event in controversy...

18 The Burris court upheld an 8.3 dismissal where the prosecutor's conduct violated his rights to  
19 counsel and to compulsory process of witnesses. There, the State conducted a special inquiry  
20 proceeding and called the defendant's alibi witnesses. The State then ordered those witnesses not  
21 to speak to the defense. The court held as follows:

22  
23 The violation of defendant's constitutional right to counsel and the right to compulsory  
24 process is presumed to be prejudicial. It is nonetheless prejudicial even if the prosecutor  
25 believed his conduct lawful...it was the State's burden to show its error was harmless, i.e.  
26 that defendant was not deprived of an opportunity to adequately prepare for trial.

27 Burris at 181-182 (internal citations omitted). Here, the State did not offer Crystal Moore  
28 immunity until four days before trial was begun. Moore could not be interviewed immediately  
29

1 because she lives in Chicago. The first opportunity the defense had to interview and prepare to  
2 investigate the statements and background of Ms. Moore was on February 19<sup>th</sup> 2009.

3  
4 Moreover, as the State's key witness, the defendant has a right—and his counsels a duty—to  
5 fully investigate Moore's bias, motive, background and credibility. This must be done prior to  
6 trial, not during it. Moreover, this is not a case where the information sought could be procured  
7 by the defendant prior to Ms. Moore's belated appearance. Her family moved and no numbers  
8 for them work. We could not contact her directly because she has counsel. Defense efforts to  
9 compel even her medical records on the night of the murder were denied by the court which  
10 indicated it wanted her to have the opportunity to be heard on the issue. The defense was at the  
11 State's mercy and could only hope and urge that the State's key witness be produced in time to  
12 put the (just recently acquired) information to work.  
13  
14

15 During her interview, Ms. Moore revealed that she received SSI for a learning disability. She  
16 revealed that she cannot read or write. She acknowledged that she used and sold drugs. She  
17 acknowledged that she was ordered to do drug treatment. When questioned about her children  
18 and the two that are in State custody, she denied any wrongdoing and said that she was a good  
19 mother. She refuses to make her CPS records available.  
20

21 Defense counsel has the right and the duty to explore Moore's claims and to investigate how  
22 profound her mental disabilities are. Certain mental disorders are, of course, highly probative on  
23 the issue of credibility. United States v. Lindstrom, 698 F.2d 1154 (11<sup>th</sup> Cir. 1983). As that  
24 court noted, many types of "emotional or mental defect[s] may materially affect the accuracy of  
25 testimony including...mental deficiency, alcoholism, and drug addiction." *Id.* These are not  
26 issues the defense can explore and investigate mid-trial.  
27  
28  
29

1           5. The defendant's Sixth Amendment right to confrontation has been violated by the late  
2           production of Ms. Moore.

3  
4           The accused has a Sixth Amendment right to confront witnesses. Pointer v. Texas, 380  
5           U.S. 400, 85 S.Ct. 1065 (1965). This right includes the opportunity for effective cross  
6           examination and is one of the minimum essentials for a fair trial. Chambers v. Mississippi, 410  
7           U.S. 284, 93 S.Ct. 1038 (1948). Where the defense seeks to cross-examine the State's "star"  
8           witness, the importance of full cross-examination to explore bias, motive, and credibility is  
9           necessarily increased. U.S. v. Summers, 598 F.2d 450, 460 (5<sup>th</sup> Cir. 1979).

10  
11           The case file indicates, and the trial court knows, that the defense has been seeking to  
12           interview Ms. Moore for more than two years. With no real explanation as to why, the State  
13           failed to produce Ms. Moore for a defense interview until six days after trial began.

14  
15           The State's decision not to give Moore immunity prior to February 9<sup>th</sup>, 2009 prevented  
16           defense counsel from interviewing her in advance of trial. Because defense counsel could not  
17           interview her in advance of trial, the defendant is forced to make the classic Hobson's choice  
18           between moving forward with unprepared counsel or waiving his right to a speedy trial.

19  
20           The State should have known that someone of Ms. Moore's background would not readily  
21           comply with attempts to interview her, regardless of her immunity status. The State created the  
22           situation wherein its key witness was interviewed six days after trial began. The defendant  
23           should not bear the burden of that mismanagement.

24  
25  
26           III.     CONCLUSION

27  
28           Trying a murder case is a difficult task under the best of circumstances. That task is made  
29           even more difficult when basic, material facts are provided piecemeal during the days leading up

1 to trial and during trial itself. Although no one gets a perfect trial and some discovery can arise  
2 late in a case, at some point discovery delays and problems created by the government's  
3 mismanagement make a trial unfair. Here, the late production of discovery is inexplicable. None  
4 of the material that has trickled in recently was new; most had been produced and finalized in  
5 December of 2006.

7 As to the late production of Crystal Moore, that too is inexplicable. The effect of  
8 withholding an immunity agreement from this witness until trial had begun is to force the defense  
9 to either go forward unprepared or to waive speedy trial rights. This situation was not brought on  
10 by any action or inaction by the defense, and Sergio should not be forced to decide between two  
11 constitutional rights in order to ensure a fair trial.

14 While dealing with the flood of late discovery and fighting to obtain missing information  
15 from the government, defense counsel was also forced to make time consuming motions to  
16 respond to the discovery violations themselves. The State's mismanagement and numerous  
17 discovery violations have prejudiced Sergio's right to a fair trial and to effective representation.

20 IV. REQUEST FOR REMEDY

21 The defense moves for a dismissal under CrR 4.7 and 8.3(b). In the alternative, the  
22 defense moves for a continuance or mistrial.

24 Signed and sworn this 22<sup>nd</sup> day of February, 2009

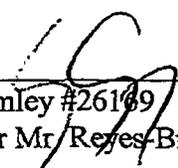
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29 \_\_\_\_\_  
Cathy Gormley #26169  
Counsel for Mr. Reyes Brooks

EXHIBIT 3

DECLARATION OF COUNSEL IN  
SUPPORT OF MOTION TO CONTINUE  
TRIAL TO AFFORD DUE PROCESS &  
EFFECTIVE ASSISTENCE OF COUNSEL

**FILED**  
KING COUNTY, WASHINGTON

MAR 02 2009

SUPERIOR COURT CLERK  
EILEEN L. MCLEOD  
DEPUTY

IN THE SUPERIOR COURT OF KING COUNTY  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO REYES-BROOKS,

Defendant.

Cause No. 06-1-10584-9 SEA

DECLARATION OF COUNSEL IN  
SUPPORT OF MOTION TO CONTINUE  
TRIAL TO AFFORD DUE PROCESS &  
EFFECTIVE ASSISTENCE OF COUNSEL

COME NOW COUNSEL FOR the Defendant, Cathy Gormley, and Ann Danieli and  
declare under penalty of perjury that the following is true and correct:

1. We represent Sergio Reyes-Brooks.
2. Mr. Reyes-Brooks is currently charged with Murder in the First Degree and VUFA in the First Degree.
3. On December 15, 2008, defense counsel moved the court for Crystal Moore's Harborview records from the night of the murder.
4. The court denied or deferred the motion.
5. The court started trial on February 13, 2009, ten days ahead of the scheduled date for trial.
6. Six days later (February 19, 2009) the State produced its star witness, Crystal Moore.
7. She was interviewed on that date and signed a release for her Harborview Medical Records.
8. She stated that she was on SSI for a "learning disability"—information that was unknown to the defense prior to her interview.

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DECLARATION

- 1 9. At 4:00 PM on Thursday February 26, 2009 the defense received the Harborview records
- 2 from Moore's ER visit on the night of the murder.
- 3 10. The hospital records are thirteen pages long and are written in "medical code." Defense
- 4 counsels are not medically trained and cannot fully interpret all the information in the
- 5 records.
- 6 11. Defense counsel was able to determine that Moore tested positive for Methamphetamines,
- 7 cocaine, and Marijuana and had a blood alcohol level of .10 four hours after her last
- 8 possible ingestion of alcohol.
- 9 12. At the time of her examination, Ms. Moore expressed worry that her children were in her
- 10 sister's care (they were actually in State custody at the time), she did not know where she
- 11 was, and she thought the date was April, 2003 (it was December, 2006).
- 12 13. It is necessary to locate, interview and compel the testimony of the medical personnel
- 13 who treated Moore because it appears that her level of intoxication was so extreme that
- 14 she was not oriented to time or place—two indicators of clinical delerium.
- 15 14. We also need to subpoena a witness to testify to the drug tests and results, a witness to
- 16 testify to the blood alcohol level and to burn-off rates and to opine as to what her blood
- 17 alcohol level would have been at the time of the McCray shooting.
- 18 15. This requires securing funds for such a witness, finding one who is available for trial, and
- 19 giving him or her time and records to prepare to testify.
- 20 16. These witnesses are necessary to explain to a jury the effect of Ms. Moore's neurological,
- 21 toxicology and cognitive state at the time of the murder, and whether she is able to
- 22 accurately recall events from that night.
- 23 17. These are issues outside the common experience of jurors that require expert testimony.
- 24 18. It is also necessary to obtain Ms. Moore's cognitive tests to provide to the defense experts
- 25 because they bear on the impact the drugs she ingested would have on her perceptions
- 26 and ability to recall.
- 27 19. On February 24, the judge granted a defense motion to compel Ms. Moore's DSHS/CPS
- 28 records.
- 29 20. On Friday February 27, 2009 the defense received more than two thousand pages of
- Moore's CPS files. The records fill five large binders.
- 21 21. Defense has only been able to do a cursory review of these records which contain
- 22 exculpatory information that bears upon Moore's credibility, competency, and bias as a
- 23 witness against the defendant.
- 24 22. The records indicate that a full psychological and cognitive examination of Moore was
- 25 done but the exam and results are not included in the records.
- 26 23. The records indicate that the State of Washington knew where Moore lived and had
- 27 phone numbers for Ms. Moore and her relatives in Chicago throughout 2007.
- 28 24. The Dependency pleadings indicate that Moore was in "Protective Custody" by the King
- 29 County police.
25. The existence of a protective custody agreement is Brady material that bears on Ms.
- Moore's motivation for testifying for the state.
26. The State has not provided the defense with evidence of the protective custody agreement
- defense despite an express motion to produce Brady material filed on December 15, 2008.

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DECLARATION

- 1 27. The DSHS records include a report that Moore attempted to deceive the State of  
2 Washington into sending her two children to a sister in Chicago, pretending that she did  
3 not live with that sister when in fact she did.
- 4 28. The DSHS records indicate that Ms. Moore routinely denies culpability for any of the  
5 crimes she commits, blames her crimes on other people, and consistently lies to police  
6 officers and others in authority.
- 7 29. The records further indicate that Ms. Moore is consistently and routinely violent and  
8 disruptive.
- 9 30. Based upon our time-limited review of the incomplete DSHS records, the defense needs  
10 time to thoroughly review them and track down potential witnesses, interview those  
11 witness and subpoena them for trial.
- 12 31. It appears that some potential witnesses live out of state and interviewing them will entail  
13 significant time and effort.
- 14 32. The defense has been working all weekend reviewing the records just received.
- 15 33. Simultaneously, defense counsel are preparing for jury selection, writing trial briefs and  
16 working diligently to prepare this complex case and the defense witnesses for trial.
- 17 34. Ms. Gormley is a sole practitioner with no support staff; Ms. Danieli has been available  
18 only since January 17, 2009.
- 19 35. The defense needs to complete its investigation of Ms. Moore before it picks a jury and  
20 before it argues pretrial motions.
- 21 36. The newly provided Harborview records which clinically document Ms. Moore's extreme  
22 state of delirium just hours before she implicated Sergio have a direct bearing on the  
23 Franks motions and whether the statements of such a witness should have been relayed to  
24 a magistrate without any indication that she was impaired.
- 25 37. Without this evidence beforehand, defense counsel cannot competently represent Mr.  
26 Reyes-Brooks on the Franks hearings.
- 27 38. Effective assistance or counsel during opening statements requires that counsel know  
28 what evidence will be admitted beforehand.
- 29 39. Under the Court's current ruling, the defense will not know what the evidence will be  
until all of the State's witnesses except Crystal Moore have been examined.
40. Defense counsel has a duty to effectively cross examine the State's witnesses.
41. Defense counsel will be ineffective in cross examining those witnesses they are made to  
examine those witnesses before the investigation of the State's key witness is done.
42. Even if it were possible to identify, locate, fund, interview and subpoena the above  
witnesses during a Murder trial, defense needs time to consider the information gathered  
and weave it into a coherent theory of defense.
43. It is impossible to do so while simultaneously conducting a murder trial.
44. Defense counsels have been diligent in preparing this case for trial.
45. Every week there has been new discovery.
46. Every weekend finds defense counsel hard at work preparing for trial and digesting new  
discovery.
47. Despite best efforts, the defense is simply unable to prepare to confront Crystal Moore in  
time for trial because she was produced six days after trial began and her mental,

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1 cognitive, drug, violent, and criminal history is voluminous, complex, and cannot be  
2 presented to a jury without the assistance of her treating physicians and other experts.

3  
4 DATED this 2nd day of March, 2009

5  
6   
Cathy Gormley,  
7 WSBA #26169  
8 Attorney for Defendant

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10   
Ann E. Danieli  
11 WSBA # 12921  
12 Attorney for Defendant

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DECLARATION

EXHIBIT 4

DEFENSE MOTION TO RECONSIDER  
DENIAL OF CONTINUACE

work copy  
Eileen L. McLeod  
**FILED**  
KING COUNTY, WASHINGTON

MAR 02 2009

SUPERIOR COURT CLERK  
EILEEN L. MCLEOD  
DEPUTY

IN THE SUPERIOR COURT OF KING COUNTY  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO REYES-BROOKS,

Defendant.

Cause No. 06-1-10584-9 SEA

DEFENSE MOTION TO RECONSIDER  
DENIAL OF CONTINUANCE

COMES NOW THE DEFENDANT, by and through his attorneys of records, Ann Danieli and Cathy Gormley, and moves this court to reconsider his motion to continue. This motion is supported by the attached declaration of counsel.

I. LAW AND ARGUMENT

*a. Sergio's 6<sup>th</sup> amendment rights to compulsory process will be violated if he is made to proceed with trial without the time to secure newly discovered witnesses.*

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MOTION TO RECONSIDER

1 The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the  
2 right...to have compulsory process for obtaining witnesses in his favor." Article 1, Sec. 22 of the  
3 Washington Constitution provides the analogous right. The guarantee of compulsory process is a  
4 fundamental right and one "which the courts should safeguard with meticulous care." State v.  
5 Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996).

7 Moreover, the right to the compulsory attendance of material witnesses is a fundamental right  
8 of due process and goes directly to the right to present a defense. State v. Burri, 87 Wn.2d 175,  
9 180-181 (citing Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920 (1967)).

11 In Washington, the constitutional right to compulsory process is statutorily implemented by  
12 RCW 10.46.080. State v. Watson, 69 Wn.2d 645, 419 P.2d (1966). RCW 10.46.080 provides:

14 A continuance may be granted in any case on the ground of absence of evidence on the  
15 motion of the defendant supported by affidavit showing the materiality of the evidence  
16 expected to be obtained and that due diligence has been used to procure it...

17 Where a witness is unavailable because she has invoked the 5<sup>th</sup> Amendment, the  
18 defendant is uniquely precluded from ascertaining the contents of her proposed testimony. The  
19 D.C. Court of Appeals recognized.

21 As the defense counsel was barred from conferring with Foster...he was obviously in no  
22 position to represent what [he] would say on the witness stand. Only the latter's  
23 testimony, compelled after removal of his Fifth Amendment Rights, holds the answer to  
24 the riddle.

25 Tucker v. United States, 571 A.2d 797, 800 (D.C. 1990).

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MOTION TO RECONSIDER

1 Here, defense counsel was uniquely precluded from obtaining exculpatory information  
2 from the State's key witness because the State made her unavailable to the defense until February  
3 19<sup>th</sup>. This was the first point at which the defense could begin to explore her bias, motives, and  
4 collateral witnesses for the defense.  
5

6  
7 b. *Sergio's 6<sup>th</sup> amendment right to cross examination witnesses will be violated if the*  
8 *court does not grant a continuance.*

9 The right of a criminal defendant to cross-examine witnesses against him is guaranteed by the  
10 Sixth Amendment to the United States Constitution. One method of cross examination is to  
11 introduce prior criminal convictions. ER 609. A more particular, and a more effective attack on  
12 a witness' credibility requires the exposure of bias, prejudice or the ulterior motives of the  
13 witness. 3A J. Wigmore, Evidence at 940, p. 775 (Chadbourn rev. 1970). The U.S. Supreme  
14 Court has held that "the exposure of a witness' motivation in testifying is an important function  
15 of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. 308  
16 (1974).  
17  
18

19 Before the defense interviewed Ms. Moore, defense counsel could prepare only the most  
20 basic strategies for her cross examination because we had no idea what she might say. Prior to  
21 the interview, the only potential avenues of cross-examination were the obvious ones—ER 609  
22 evidence of her priors and her admitted, but unspecified, intoxication. Her potential bias,  
23 prejudice and motives could not be probed until she was interviewed and her records produced.  
24  
25 The defense had no ability to immunize her and make her available. Only the State had that  
26  
27  
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MOTION TO RECONSIDER

1 power, and by withholding that immunity until February 19, 2009, the defense was prevented  
2 from investigating this critically important witness.

3  
4 Additionally, Moore was hospitalized the night of the murder and the defense sought those  
5 records on December 15, 2008. The trial court denied or deferred the motion until Ms. Moore  
6 could be heard. The effect of that ruling, however well intentioned, is that the defense is left  
7 scrambling to make use of the critical information contained in those records.

8  
9 Further, it was the State's duty to produce the Harborview materials years ago, as they  
10 contained Brady material on the State's key witness. The State is obligated by the requirements  
11 of due process to disclose material exculpatory evidence on its own motion, without request.  
12 Kyles v. Whitley, 115 St. Ct. 1555 (1995). Material evidence required to be disclosed includes  
13 evidence bearing on the credibility of the State's witness. U.S. v. Bagley, 473 U.S. 667, 676  
14 (1985). This need is particularly acute where the State presents witnesses who are immunized in  
15 exchange for their testimony. Carriger v. Stewart, 95 F.3d 755 (9<sup>th</sup> Cir.1996).  
16  
17  
18

19 *c. The reasons for Ms. Moore's late production are irrelevant to the prejudice to Mr. Reyes-*  
20 *Brooks.*

21 In response to the late production of Ms. Moore, and the critical nature of her testimony, the  
22 defense has moved to dismiss or to continue the case in order to properly prepare for her cross  
23 examination. In response, the court has repeated that the State has been diligent in its discovery  
24 duties despite the fact that the State knew of Ms. Moore's whereabouts for two years but only  
25 produced her after trial began.  
26  
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MOTION TO RECONSIDER

1 The court has also cited its own efforts to secure Crystal Moore for a defense interview in  
2 support of its denial of the defense motions to continue. But it does not matter why the State  
3 delayed in producing its witness, and it does not matter that the court tried to speed the process  
4 along: The end result is that defense counsel on a Murder 1 trial are unprepared because the  
5 State's key witness was produced so late.  
6

7 a. Defense counsels are unable to simultaneously investigate Ms. Moore and conduct a  
8 Murder 1 trial.  
9

10 During the belated interview of Ms. Moore, she revealed that she was illiterate, had PTSD,  
11 struggled with drug addiction and had been tested and found eligible for SSI disability due to her  
12 "learning disorder." The defense moved the court for a subpoena for her DSHS records and the  
13 court compelled their production.  
14

15 On Friday, February 27<sup>th</sup>, DSHS produced more than two thousand pages of records on Ms.  
16 Moore. Defense counsels spent Friday and much of the weekend going through them. The  
17 records revealed numerous potential witnesses and fruitful areas for investigation. But unless the  
18 court grants a continuance, the defense has no time to investigate these leads.  
19

20 Additionally, Ms. Moore's DSHS records did not contain any of the psychological, drug  
21 treatment, or cognitive studies done on Ms. Moore and referred to in the records. Those records  
22 must still be obtained and reviewed. Then expert funding must be sought and granted, and an  
23 appropriate expert retained. Then the expert must review the records, confer with counsel, write  
24 a report and prepare to testify at trial.  
25

26 b. The court's denial of the defense motion to continue denies Sergio due process of law.  
27  
28

29  
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MOTION TO RECONSIDER

1 In a recent parental termination case, the parent-respondent was provided DSHS records on  
2 the day of the termination hearing. In Re. Dependency of Ramsey v. DSHS, 134 Wash.App. 573,  
3 141 P.3d 85 (2006). The respondent moved to continue, arguing that he needed to time to review  
4 the records and investigate and interview the witnesses. The trial court's denial of his  
5 continuance motion was reversed because the respondent had no opportunity to review the DSHS  
6 records and no opportunity to investigate or interview the witnesses listed therein.  
7

8  
9 Although Ramsey involved the termination of parental rights, the liberty interests in a  
10 criminal trial are even more important. Mr. Reyes-Brooks has a fundamental constitutional right  
11 to effective, prepared counsel, to meaningfully confront and cross examine the key witness  
12 against him, and to due process of law. In contrast, the State's competing interest is in  
13 expediting the process. But the State's own conduct in producing the key witness so late created  
14 the crisis to begin with.  
15

16 Reviewing courts have recognized the heightened scrutiny that must be given to continuance  
17 decisions when they have the effect of denying due process and the right to effective assistance of  
18 counsel. When the defense is prejudiced and the trial court's reason for denial lacks merit,  
19 reversal is required. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950) (the right to  
20 assistance of counsel "carries with it a reasonable time for consultation and preparation, and a  
21 denial is more than a mere abuse of discretion; it is a denial of due process of law in  
22 contravention of Art. 1 Sec. 3 of our Constitution."); United States v. Rivera-Guerrero, 426 F.3d  
23 1130, 1136 (9<sup>th</sup> Cir. 2005) (When fundamental rights are at stake, "we must be diligent in our  
24 review of procedural rulings that deny the defendant an opportunity to challenge the  
25  
26  
27

28  
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MOTION TO RECONSIDER

1 government's case.") The trial court may not deny a continuance simply because it would be  
2 expeditious to do so. State v. Cadena, 74 Wn.2d 185, 189, 443 P.2d 826 (1968), *overruled in*  
3 *part on other grounds*, State v. Grosby, 85 Wn.2d 758, 539 P.2d 680 (1975) "[A] myopic  
4 insistence upon expeditiousness in the face of a justifiable request for delay can render the right  
5 to defend with counsel an empty formality" and thus violate due process. Cadena, 74 Wn.2d at  
6 189.  
7

8  
9 The prejudice to the defense here is clear. Counsels cannot simultaneously conduct a Murder  
10 trial and investigate the key witness in this case. Ms. Moore's DSHS history is remarkable in  
11 its sheer volume. The potential is clear for ripe avenues of cross examination, but the defense  
12 still lacks the materials with which to do so. Once the materials are finally produced, expert  
13 funding must be sought, it must be granted, witnesses must be interviewed and prepared for trial.  
14 These tasks cannot be performed while counsels are conducting the trial itself. This is why the  
15 discovery rules require that important witnesses and materials be produced *prior* to trial.  
16

17  
18 Additionally, what counsels learn about Ms. Moore's disabilities and how they relate to her  
19 proposed testimony will affect the defense opening statement and the preparation and cross  
20 examination for every witness it calls. It will also be relevant to whether the defense calls or  
21 excuses some of its witnesses and whether Mr. Reyes-Brooks testifies or not.  
22

## 23 24 II. CONCLUSION

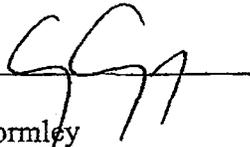
25 Defense counsels are unprepared to go forward with trial. Through no fault of the defense,  
26 the State produced its key witness after trial began. That witness has a staggering array of issues  
27

28  
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MOTION TO RECONSIDER

1 and disabilities that need to be properly explored through expert witnesses. Securing and  
2 preparing those witnesses takes time. Defense counsel does not have time while conducting a  
3 Murder 1 trial. Moreover, what counsels learn about Ms. Moore will affect decision-making  
4 throughout the trial and will affect the cross-examination of many other witnesses. The defense  
5 respectfully moves this court to reconsider its earlier denial of the defense motion to continue.  
6

7  
8  
9 Respectfully Submitted this 1<sup>st</sup> day of March, 2009

10  
11   
12 \_\_\_\_\_  
13 Cathy Gormley  
14 WSBA #26169  
15 Counsel for Mr. Reyes-Brooks  
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MOTION TO RECONSIDER