

No. 36171-0-II (Consolidated)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Appellant,

vs.

Natalie Brooks and Jason Brooks,

Respondent.

Lewis County Superior Court

Cause Nos. 06-1-00846-9 and 06-1-00846-9

The Honorable Judge Nelson Hunt

Response Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Natalie and Jason Brooks¹ were charged on January 2, 2007 with Burglary in the first Degree, Robbery in the First Degree, and Theft of a Firearm, for an incident said to have occurred on December 27, 2006. CP (JB) 57-59; CP (NB) 70-72.² Both had been arrested on the 27th, and were held in jail pending trial. RP (12/28/06) 2-13. The court appointed attorneys for both of them. RP (12/28/07) 3-5, 10

Ms. Brooks' Omnibus Hearing was set for January 25, 2007. At that hearing, the state had not yet provided any discovery to the defense.³ The hearing was set over one week. RP (1/25/07) 5. The hearing the next week was again set over to complete discovery. RP (2/1/07) 7-9.

An Omnibus Hearing on both cases was finally heard on February 8, 2007. Both defense attorneys complained that they had only recently

¹ Natalie Brooks was charged under the name of Natalie Pitts, but since her married name was Brooks, she will be referred to as Ms. Brooks in this brief.

² Their cases were not joined for trial, though the charges were identical and from the same incident. Most of the hearings related to discovery violations took place together. Clerk's Papers, and the Verbatim Report of Proceedings where necessary, will be cited with each Respondent's initials to clarify the source of the documents.

³ Apparently, the alleged victim had shot and killed another person during the incident. The police department's focus was understandably on the homicide, rather than the allegations against Mr. and Ms. Brooks. RP (3/1/07) 30-32.

received discovery. RP (2/8/07 - NB) 12-14; RP (2/8/07 - JB) 5-6. The court entered an order that included the following language:

4. MUTUAL DISCOVERY DEADLINE: 7 days prior to trial.

Both parties shall complete discovery, including names, and all required information pertaining to witnesses (including conviction data), by this deadline date.

CP (JB) 61; CP (NB) 61.

The state did not object to this provision, and signed the orders. CP (JB) 61; CP (NB) 61; RP (2/8/07 - NB) 12-14; RP (2/8/07 - JB) 5-6. At the time, Ms. Brooks' trial was set to start the week of February 12th; the court changed that date to the week of February 19th. RP (2/8/07 - NB) 12-14. Mr. Brooks' trial remained as set for the week of February 19th. RP (2/8/07 - JB) 5-6.

Both cases came before the court on February 15th for separate trial confirmation hearings. RP (2/15/07 - JB) 9-10; RP (2/15/07 - NB) 17-18. Both cases were confirmed for trial, to begin the week of February 19th. RP (2/15/07 - JB) 10; RP (2/15/07 - NB) 18.

On February 20, 2007, ostensibly the day the cases were set for trials, defense counsel moved to dismiss for ongoing discovery violations. Mr. Brooks' attorney told the court he had received approximately 125 pages of discovery that morning; the new materials included his client's statement, additional reports that mentioned (for the first time) two additional taped statements of Mr. Brooks (without providing the

transcriptions), and additional statements of neighbors (which was apparently in the neighborhood of 10 people) regarding what they heard and saw of the events. RP (2/20/07) 2-3, 21. Mr. Brooks' attorney informed the court that he had yet to receive an hour-long taped statement that the alleged victim had given. RP (2/20/07) 3.

Ms. Brooks' attorney had not yet received the additional discovery (which turned out to total 138 pages) but assumed it was waiting for him at the prosecutor's office to pick up. RP (2/20/07) 25; RP (3/1/07) 8. He indicated that he had not received any of the items listed by Mr. Brooks' attorney, and that he had counted references to a total of 11 taped statements that had not been given to defense. RP (2/20/07) 25-26, 32.

According to counsel, they had both reminded the state of the missing discovery, and the state had acknowledged that it still had information that needed to be turned over. RP (2/20/07) 4, 26, 30; RP (3/1/07) 17. The defense urged the court to dismiss the cases, indicating that their defenses were compromised since they could not prepare to meet the allegations of the state, could not interview the victim effectively without his statement, could not prepare for the CrR 3.5 hearing without knowing the statements alleged to have been made, could not interview the neighbors or decide whether or not to call them as defense witnesses, and could not formulate a trial strategy or make decisions on state offers

without this information. RP (2/20/07) 5-7, 22. Both attorneys also argued that their clients were being forced to choose between the right to a speedy trial and the right to the effective assistance of counsel. RP (2/20/07) 33.

The state's attorney responded that he had just started reading the file the Thursday before, and that the defendants' and victim's statements were referred to within the police reports, so the defense could not be surprised by their contents. RP (2/20/07) 8-9.

Defense counsel responded that the state was not acting diligently in these very serious charges if the prosecutor had just started reviewing the case and had not contacted law enforcement to get the missing information. RP (2/20/07) 11. Defense counsel also informed the court that the transcribed statement that they did have from the alleged victim was inconsistent with the officer's summary of it, proving the summaries (for other statements) were inadequate. RP (2/20/07) 12. In addition, the state had not provided either defense attorney with its witness list. RP (3/1/07) 9.

When the court asked the prosecutor to explain the discovery problems, he did not have an explanation and did not know what the problem was. RP (2/20/07) 13-14. He said that he had read a report the day before, noticed a statement was missing, and contacted the

investigating officer, who produced the missing statement. RP (2/20/07)

14. The court pointed out that the alleged victim's statement at issue had been recorded before probable cause was found by the court, on December 28, 2006, and wondered how the state could have failed to provide it to the defense. RP (2/20/07) 14-15. The prosecutor did not refute any of defense counsel's allegations. RP (2/20/07) 4-30.

The court continued the trials two weeks at the state's request, setting a new trial date on the last day of speedy trial. RP (2/20/07) 23, 27.

In the meantime, Mr. Brooks' attorney met with the state to review the discovery that was still needed. RP (3/1/07) 7. The state provided the defense transcripts of two taped statements from Ms. Brooks at that meeting; defense counsel already had copies of those transcripts. RP (3/1/07) 7.

According to all the attorneys, the prosecutor had a policy of requiring defense counsel to go through the prosecutor's office when seeking to interview alleged victims of crimes. RP (3/1/07) 64-68. The state set up a defense interview with the alleged victim to take place at the prosecutor's office on February 26, 2007. RP (3/1/08) 3. The meeting was to start at 11:30 am. The alleged victim called at some point and said that he was running late. RP (3/1/07) 3. Mr. Brooks' attorney waited at

the prosecutor's office until 1:40 pm, and, having heard nothing further from the alleged victim, left. RP (3/1/07) 3. Apparently, the alleged victim arrived at 2 pm. RP (3/1/07) 4. The state contacted Ms. Brooks' attorney, who was no longer available to do the interview, and did not attempt to contact Mr. Brooks' attorney. RP (3/1/07) 4. On February 28, 2008, the prosecutor called Ms. Brooks' attorney at 4:55 pm and indicated that the alleged victim could be present the next day at noon. The attorney (and his investigator) were not available at noon, and the interview did not take place. RP (3/1/07) 4.

The court heard a defense motion to dismiss on March 1, 2007, one day before speedy trial expired. CP (JB) 38-46; CP (NB) 40-48. Both defendants moved to dismiss the case due to governmental mismanagement and discovery violations. RP (3/1/07) 2, 33-34. Arguing that they could not be prepared for trial and that the missing and late discovery prejudiced their clients, each attorney told the court they would still need to interview the victim (now that they had received a transcript of his December 28th recorded statement), meet with other witnesses revealed in the recently received discovery, interview Deputy English, and interview lead investigator Chief Deputy Smith. RP (3/1/07) 4-5, 12. The defense urged the court not to allow the prosecutor to turn a blind eye to

missing or late discovery by claiming the discovery was not within the prosecutor's control. RP (3/1/07) 51.

As of March 1, the defense had still not received the prosecutor's notes from their victim interviews, two of Mr. Brooks' taped statements, a diagram drawn by the alleged victim, and the report of the lead investigating officer.^{4, 5} RP (3/1/07) 5-6. Furthermore, the prosecutor had not even subpoenaed the alleged victim for trial. RP (3/1/07) 13.

The state responded with a chart outlining when reports were received and distributed. CP (NB) 27-33; CP (JB) 18-26. That chart confirmed that material received by the prosecutor was not always immediately provided to the defense. The state argued that any delays were not significant.⁶ RP (3/1/07) 6-7. The prosecutor argued that the sheriff's department did not have adequate staff to transcribe taped

⁴ The prosecutor, without speaking with the lead investigator (Chief Deputy Smith), claimed that Chief Deputy Smith had not prepared a report. Counsel for Ms. Brooks did speak with officer, and learned that Chief Deputy Smith had prepared a report, and was still working on it. RP (3/1/07) 6, 24. According to defense counsel, the prosecutor had never contacted Chief Deputy Smith with specific requests for any of the missing information, despite the fact that he was the state's lead investigator. RP (3/1/07) 14, 29.

⁵ The reports that had been previously provided by the state made clear that the police had additional information; the reports referred to taped statements and supplemental reports. RP (3/1/07) 26-28.

⁶ Ms. Brooks' attorney noted that one report was delayed 36 days from when it was written, which wasn't the longest delay made clear by the chart, and that there were some items for which the state did not know the date of receipt. RP (3/1/07) 49-50.

statements, that the 60-day timeline was restrictive, and that the police are generally hardworking and understaffed. RP (3/1/07) 36-39. When asked how the defense could be effective without transcripts of the statements themselves, the prosecutor responded that he was at the same disadvantage as defense counsel, but was prepared to go forward anyway. RP (3/1/07) 42, 47. The prosecutor urged the court to find that no prejudice had occurred since the defense had the statements now, and reiterated that he didn't have any more information than the defense. RP (3/1/07) 44-47.

The prosecutor acknowledged that he had not served a subpoena on the alleged victim, and had not subpoenaed any witnesses for the CrR 3.5 hearing. RP (3/1/07) 71-72. The prosecutor also admitted that statements made by the defendants had not been provided prior to the Omnibus Hearing. RP (3/1/07) 60.

After reviewing the pleadings and hearing lengthy argument, the court dismissed the cases. RP (3/1/07) 80. Judge Hunt spelled out his findings and the reasons for them on the record, and subsequently signed detailed Findings of Fact and Conclusions of Law. RP (3/1/07) 80-87, CP (NB) 9-15; CP (JB) 10-15.

The state appealed the decision. CP 1-8.

ARGUMENT

I. THE TRIAL COURT’S CAREFULLY-CONSIDERED AND WELL-REASONED DECISION SHOULD BE UPHELD ON APPEAL.

A trial court’s decision dismissing a case for state mismanagement is reviewed for abuse of discretion, and will be affirmed unless the decision is manifestly unreasonable or based on untenable⁷ grounds. *State v. Stein*, 140 Wn. App. 43 at 53, 165 P.3d 16 (2007). The trial judge’s decision dismissing these cases was not manifestly unreasonable or based on untenable grounds; accordingly, this court should affirm the dismissals. *Stein, supra*.

The Fourteenth Amendment to the U.S. Constitution prohibits the state from depriving an accused of liberty without due process of law. U.S. Const. Amend. XIV. Our state’s due process right is coextensive with the federal right. Wash. Const. Article I, Section 3; *see also Ongom v. Dep’t of Health*, 159 Wn.2d 132 at 152, 148 P.3d 1029 (2006). Due process requires that criminal proceedings comport with prevailing notions of fundamental fairness such that the accused is given a meaningful opportunity to present a complete defense. *State v. Greiff*, 141 Wn.2d 910

⁷ The word “untenable” in this context means “indefensible.” Garner, *A Dictionary of Modern Legal Usage*, Oxford Univ. Press, Inc. (1990).

at 920, 10 P. 3d 390 (2000). State mismanagement of discovery may infringe an accused's constitutional right to due process. *Greiff*, at 920.

An appellate court is not limited to the trial court's rationale for a particular decision, but may affirm "on any ground established by the law and the record." *State v. Motter*, 139 Wn. App. 797 at 802, n. 3, 162 P.3d 1190 (2007). There are three separate bases for dismissal in this case.

First, Under CrR 8.3(b), a trial court has discretion to dismiss "any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Misconduct and prejudice need only be shown by a preponderance of the evidence. *Stein*, at 53. Misconduct does not require evil or dishonest action; simple mismanagement is sufficient. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997).

Second, a court may also dismiss for governmental mismanagement under CrR 4.7, which permits dismissal whenever the prosecutor fails to comply with the discovery rule or an order of the court. CrR 4.7 (h)(7)(i). CrR 4.7 requires the prosecutor to disclose (no later than the omnibus hearing) the following items within the prosecutor's possession or control:

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

(ii) any written or recorded statements and the substance of any oral statements made by the defendant...

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial...

CrR 4.7 (a)(1).

CrR 4.7 is to be construed liberally, in order to

‘provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process...’

Copeland, at 497-498, *citation omitted*.

Third, in addition to the grounds provided by CrR 8.3(b) and CrR 4.7 (h)(7)(i), the court also has inherent authority to dismiss a case under appropriate circumstances. *See, e.g., State v. Chichester*, 141 Wn. App. 446 at 457, 70 P.3d 583 (2007); *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986); *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956).

Here, the government mismanaged its case, provided late discovery, and failed to provide certain information. The court’s findings and conclusions address the mismanagement, the discovery delays, and the nondisclosure in detail. CP (NB) 9-15; CP (JB) 10-15.

The trial court determined that the governmental mismanagement and late discovery prevented defense counsel from being prepared for trial

on the last day of speedy trial. Given the volume of late discovery and its nature (including the state's late witness list), this decision was not manifestly unreasonable; nor was it based on untenable grounds. Accordingly, the trial court should be affirmed. *Stein, supra*.

II. AT THE STATE'S REQUEST, THE TRIAL JUDGE GRANTED A CONTINUANCE AS AN ALTERNATIVE TO DISMISSAL.

On February 20th, after the parties were unable to proceed with trial because of discovery problems, defense counsel moved for dismissal because of government mismanagement.⁸ The trial court denied the motion, and, at the state's request, continued the trial until the last day of speedy trial, which the parties agreed was March 2, 2007. RP (2/20/07) 2-36. The judge admonished the state, set another hearing date on the motion to dismiss, and indicated that he would review his options under the speedy trial rule relating to cure periods. RP (2/20/07) 22-24, 27, 35.

On March 1, 2007, the day before speedy trial expired, the state had still not provided some of the missing discovery. At that point, having already continued the trial and considered the speedy trial rule (including the provisions relating to a cure period), the court was well within its

⁸ At that point, Ms. Brooks' trial had already been continued within the speedy trial period due to discovery problems. RP (2/8/07) 12-14.

discretion in deciding to dismiss the case.⁹ Accordingly, the record does not support appellant's claim that the trial court failed to consider alternatives to dismissal.¹⁰

Furthermore, on March 1, the prosecutor did not propose any alternatives other than a continuance beyond speedy trial; instead, the state's attorney provided reasons and excuses for the delay. The trial court is not required to consider options not suggested by the parties. *See, e.g., Chichester, supra* (“[W]here the trial court acts within its discretion to deny a continuance and the State fails to propose an alternative to dismissal, the court's ruling rests on tenable grounds.”). The state—having failed in the trial court to suggest release of the accused, suppression of the evidence, or issuance of subpoenas to recalcitrant officers—cannot complain for the first time on appeal that the court did not consider such motions. *Chichester, supra*. *See* Appellant's Opening Brief at pp. 28-29, 34-36.

⁹ Appellant's repeated insinuations that the speedy trial rule is not binding suggest an unfortunate lack of respect for the rule. Delay beyond the expiration date is intended to result in dismissal; the rule does not contemplate that a cure period will be applied as the norm to routinely excuse prosecutorial mismanagement. CrR 3.3(g) and (h).

¹⁰ The state had filed written motions on February 23, 2007, asking the court to reset the trial date sometime prior to March 17, 2007. Although the court did not specifically deny these further motions to continue, an implicit denial inheres in the court's decision to dismiss rather than to continue the cases.

For these reasons, the orders dismissing these prosecutions should be affirmed.

III. THE PROSECUTING ATTORNEY'S OFFICE WAS DIRECTLY RESPONSIBLE FOR SOME OF THE MISSING AND LATE DISCOVERY.

The prosecuting attorney's office violated CrR 4.7. Appellant seeks to avoid responsibility for its discovery violations because some of the missing and tardy material was in the possession of law enforcement. Appellant's Opening Brief, pp. 38-41, *citing State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993). Appellant cannot hide behind this argument.

First, the missing and late discovery in this case relates directly to the alleged crimes with which the state charged Mr. and Ms. Brooks. The requested materials were not service records or other information with a more attenuated relationship to the case—they included recorded statements made by the alleged victim himself as well as the accused.

Second, the prosecutor directly violated CrR 4.7 by failing to turn over the attorney's notes from interviews with the state's own witnesses. RP (3/1/07) 5-6. In addition, the prosecutor did not provide a witness list until the morning trial was scheduled to begin. The prosecutor also received certain materials from law enforcement but did not timely provide these materials to defense counsel. When it did provide materials,

the state placed them in defense counsel's "box" at the prosecutor's office rather than serving defense counsel. In Mr. Brooks' case, the prosecutor did not even call to notify defense counsel that discovery had arrived.

Third, the prosecutor committed to provide certain materials missing from the discovery, yet never made a specific request to law enforcement for those materials. This was due, in part, to the inaction of the deputy prosecuting attorney initially assigned to the case, who apparently spent two weeks sitting at his desk without working, before departing the office for greener pastures.

Fourth, the prosecutor had a policy of requiring defense counsel to set up witness interviews through the prosecutor's office, in violation of CrR 4.7(h)(1). The prosecutor did not excuse defense counsel from following this protocol, and specifically agreed to produce the witnesses in this case. Having undertaken this responsibility, the state was charged with arranging the interviews in a timely fashion. This it did not do. *See, e.g., State v. Sherman*, 59 Wn. App. 763 at 769, 801 P.2d 274 (1990) ("The defense had no obligation to attempt to get the records from the State's complaining witness, because the State had agreed to provide them.")

Finally, a violation of CrR 4.7 is not required for a dismissal under CrR 8.3. Whether or not the prosecuting attorney's office ran afoul of

CrR 4.7, the government as a whole—including the prosecutor and the law enforcement agencies handling the investigation—mismanaged the case. This grievous neglect resulted in significant and unacceptable delays that prejudiced Mr. and Ms. Brooks. The trial court continued the omnibus hearings and reset the trial date (twice in the case of Ms. Brooks) to give the state an opportunity to get its act together. The prosecuting attorney's office did not avail itself of that opportunity.

IV. POLICE REPORTS CONTAINING BRIEF SUMMARIES CANNOT SUBSTITUTE FOR TRANSCRIPTS OF LENGTHY RECORDED STATEMENTS.

A competent defense attorney will prepare carefully for a witness interview by reviewing in detail prior statements made by the witness and deciding (in advance of the interview) on the strategy to be pursued during the interview. This can include probing certain topics in depth, and intentionally avoiding other topics. By failing to turn over witness statements, the state prevented defense counsel from preparing for interviews with the witnesses in this case, including the alleged victim.

At trial and on appeal, the state displays its lack of understanding of the defense role, suggesting (1) that the parties were in the same position with respect to missing or late discovery (“I got up to speed in a few days reading all of this stuff”) and (2) that the prosecutor's decision not to call certain witnesses relieved defense counsel of the obligation to

interview those witnesses. RP (2/20/07) 9; Appellant's Opening Brief, p. 42. When a prosecutor receives discovery, all she or he has to do is prepare for trial. A defense attorney, by contrast, uses discovery as a starting point to launch an investigation; this necessarily requires time. Defense counsel is not in a position to prepare for trial until the defense investigation is complete.

Furthermore, while there is "no rule that says that the prosecutor has to go out and round up"¹¹ witnesses, the obligation to do so does apply when the prosecutor has a policy or rule requiring defense counsel not to interview victim witnesses without going through the prosecutor's office. By violating CrR 4.7(h)(1) (and the Rules of Professional Conduct) in this way, the prosecuting attorney committed the state to going out and rounding up the witnesses for the defense interviews. *See Sherman*, at 769.

Appellant attempts to shift responsibility for the state's discovery violations by arguing that the defense should have been more aggressive by seeking orders compelling disclosure. Appellant's Opening Brief, p. 44. While there such action would be appropriate in some cases, this is

¹¹ Appellant's Opening Brief, p. 42.

not one of them—the state agreed to provide all the requested materials.¹² Defense counsel should be able to rely on the agreements and commitments made by the prosecuting attorney without resorting to the weapons of litigation. Otherwise, the standard of practice for defense attorneys would have to include motions to compel even where there is no dispute. Needless to say, this would not be a good use of court time and scarce public resources.

V. THE MISSING AND LATE DISCOVERY INVOLVED FACTS CENTRAL TO THE PROSECUTION.

Dismissal under CrR 8.3(b) requires only a showing of mismanagement and prejudice. *Michielli, supra, at 239-240*. Evidence of both mismanagement and prejudice provides tenable grounds to affirm the trial court’s decision in this case. The missing and late materials involved in this case included a transcript of the recorded statement of the alleged victim, statements of the accused, and the report of the lead investigator, among many others. Information relating directly to the crimes charged is always material to the defense of a criminal case; no competent attorney would proceed to trial knowing that the prosecutor or the investigating

¹² Once again, the *Sherman* case provides appropriate guidance: “The defense had no obligation to attempt to get the records from the State’s complaining witness, because the State had agreed to provide them.” *Sherman, at 769*.

officers were privy to additional information not shared with the defense. Such information, if not disclosed, could come out unexpectedly at trial with disastrous results.

Appellant erroneously insists that dismissal is inappropriate absent the interjection of new facts. Appellant's Opening Brief, p. 45. While the interjection of new facts can establish prejudice, there are other forms of prejudice that arise from government mismanagement. For example, in *Sherman, supra*, the problem was not the interjection of new facts, but rather the failure to provide discovery. Similarly, in *Michielli, supra*, the state added charges just before trial; no new facts were implicated. *See also State v. Stephans*, 47 Wn. App. 600, 736 P.2d 302 (1987) (dismissal appropriate where state failed to provide a witness list and encouraged the custodian of a child witness to disobey a court order requiring an examination of the child).

The delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion. Even on March 1st, the day before the reset trial date and the expiration of speedy trial, discovery was incomplete, with no guarantee that it would be completed in the near future. The accused established prejudice caused by governmental mismanagement.

Furthermore, if the prosecution seeks to show harmless error, it must do so beyond a reasonable doubt. *Sherman, supra*, at 768. Given the fact that certain evidence was still not provided the day before trial, the state cannot prove that the government's mismanagement was harmless beyond a reasonable doubt.

VI. RESPONDENTS' RIGHTS WERE MATERIALLY INFRINGED, REGARDLESS OF WHETHER OR NOT THE LATE AND MISSING INFORMATION WAS "MATERIAL" TO THE CASE.

The state failed to provide complete discovery, even after the trial court had granted the state's February 20th request for a continuance. Because of late and missing discovery, the defense team was unable to prepare for trial. Appellant attempts to minimize this problem by arguing that a standard of "materiality" should be applied to the late and missing discovery. But late disclosure of material evidence is only one basis for dismissal due to discovery violations. The actual test (as outlined above) requires a showing of mismanagement and prejudice. *Michielli, supra*.

For example, in *Sherman*, the missing discovery was never provided, and the trial court did not have a chance to assess its materiality. If dismissal were only permitted upon a showing of materiality, as suggested by the prosecution, then dismissal would never be appropriate

in cases where the state refused to provide certain information, because the court would be unable to assess its materiality.¹³

Furthermore, production of all the missing material at the last minute would not necessarily have solved the problem, even if it turned out to be wholly immaterial under the test outlined by the appellant. Defense counsel, upon receiving the late discovery (described by the trial court as 130), was obligated to read through it, to plan and implement an investigation strategy, and possibly to locate and subpoena additional witnesses for trial. Even the first step (reading) might be impossible prior to trial, given a large enough volume of information and a late enough disclosure.

The trial judge was in the best position to judge the prejudice to the accused, having seen some of the late discovery change hands in his courtroom. The trial court was well within its discretion in determining that the late disclosure prejudiced the accused in this case.

¹³ The materiality standard has a greater application where an accused is convicted after late disclosure of certain evidence, or where information was withheld until after trial. Such was the case in the authorities cited by Appellant. Appellant's Opening Brief, p. 48-49.

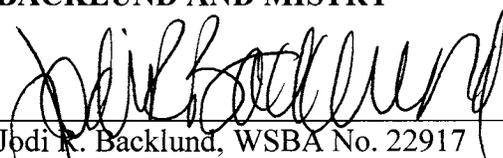
CONCLUSION

The trial judge did not act precipitously in dismissing this case. He continued the case rather than dismissing it, and admonished the state to provide the missing materials expeditiously. When the state did not do so by the time of the reset trial date (one day before the expiration of speedy trial), the trial judge exercised his discretion by rejecting the state's request for another continuance, and entered orders of dismissal.

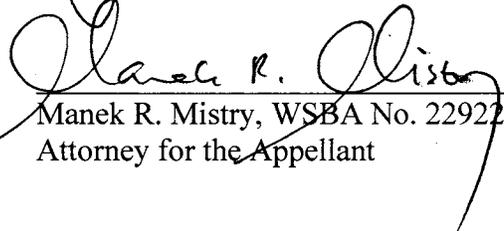
Because the trial judge's decision was not manifestly unreasonable, this court should affirm his orders dismissing these cases.

Respectfully submitted on April 11, 2008.

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Manek R. Mistry, WSBA No. 22922
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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Response Brief to:

Jason Brooks
Natalie Brooks
4525 E. Flamingo Rd
Las Vegas, NV 89102

and to:

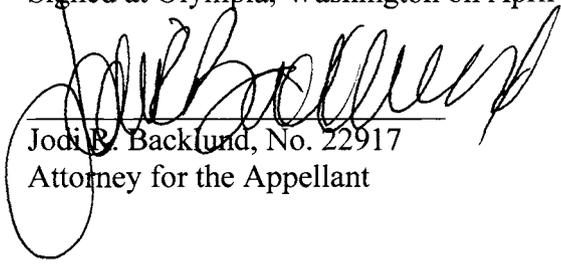
Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 11, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 11, 2008.



Jodi B. Backlund, No. 22917
Attorney for the Appellant

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