

NO. 49584-8

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WAHSINGTON,

Appellant,

v.

MARK T. HENSLEY,

Respondent.

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Appeal from Clark County  
Superior Court No. 15-1-01021-2

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

III. STATEMENT OF CASE ..... 2

IV. ARGUMENT..... 7

    A. APPELLANT IMPROPERLY ASSIGNS ERROR TO THE TRIAL COURT’S ORAL FINDINGS; AN APPELLATE COURT WILL ONLY REVIEW WRITTEN FINDINGS..... 7

    B. THE TRIAL COURT PROPERLY DISMISSED THE CHARGES AGAINST DEFENDANT PURSUANT TO CrR 8.3. .... 9

        1. LAW ..... 9

            a) Standard of Review: “Manifestly unreasonable”..... 9

            b) Government Misconduct and Prejudice to Defendant: Brady..... 10

        2. ANALYSIS..... 11

    C. THE TRIAL COURT CORRECTLY RECOGNIZED THAT DEFENDANT WAS FORCED TO CHOOSE BETWEEN HIS SPEEDY TRIAL RIGHT AND ADEQUATELY PREPARED COUNSEL ..... 12

    D. THE TRIAL COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING..... 13

    E. THE TRIAL COURT WAS NOT REQUIRED TO EXERCISE OTHER DISCOVERY REMEDIES; IT HAD FULL AUTHORITY TO SIMPLY DISMISS THE ACTION..... 14

    F. THE TRIAL COURT CORRECTLY RECOGNIZED PREJUDICE TO DEFENDANT BECAUSE OF THE DEFENSE’S INABILITY TO INVESTIGATE IF FURTHER EXCULPATORY EVIDENCE EXISTED..... 15

G.	APPELLANT WAIVED ANY RIGHT TO APPEAL THE ISSUE OF NOTICE BY FAILING TO OBJECT AT TRIAL LEVEL .....	16
V.	CONCLUSION.....	17

## TABLE OF AUTHORITIES

### Cases

<i>Brady v. Maryland</i> , 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).....	10, 11, 14
<i>Clifford v. State</i> , 20 Wn.2d 527, 148 P.2d 302 (1944) .....	8
<i>Diel v. Beekman</i> , 7 Wn.App. 139, 499 P.2d 37 (1972).....	8
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 567, 383 P.2d 900 (1963). .....	8
<i>In re Personal Restraint of Benn</i> , 134 Wn.2d 868, 916, 952 P.2d 116 (1998).....	10
<i>In re Personal Restraint of Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (1999).....	11
<i>Kyles v. Whitley</i> , 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....	10
<i>Seidler v. Hansen</i> , 14 Wn.App. 915, 547 P.2d 917 (1976).....	8
<i>State v. Blackwell</i> , 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) .....	9, 14
<i>State v. Head</i> , 136 Wn.2d 619, 624, 964 P.2d 1187, 1190 (1998) .....	8
<i>State v. Lewis</i> , 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990).....	10
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	9
<i>State v. Robinson</i> , 120 Wn.App. 294, 299–300, 85 P.3d 376 (2004) .....	16
<i>State v. Rundquist</i> , 79 Wn.App. 786, 793, 905 P.2d 922 (1995) .....	10
<i>United States v. Bagley</i> , 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).....	10, 16

### Statutes

RCW 26.27.121 .....	14
RCW 9.94A.530.....	14

### Other Authorities

WAC 67-35-520.....	14
--------------------	----

### Rules

CrR 4.7 .....	14, 15
---------------	--------

CrR 4.7(a)(4).....	14
CrR 8.3.....	1, 2, 7, 13
CrR 8.3(b).....	9, 16

## **I. INTRODUCTION**

Defendant Mark Hensley responds to the State's appeal of the trial court's dismissal of charges against him pursuant to CrR 8.3 and *Brady* violations. Defendant was charged with felony harassment against a Police Officer at the Ridgefield Police Department. After the second day of a jury trial, the defense was suddenly provided a large Internal Affairs document from that police department, wherein the harassed officer stated the defendant's therapist described defendant as "very dangerous" three days before the alleged harassment occurred. In a rushed investigation between trial days, defense counsel contacted the therapist who said the officer "completely distorted" his description of defendant. Therefore, on the second day of trial, defense counsel made a motion to dismiss the case for these *Brady* violations and in furtherance of justice pursuant to CrR 8.3. Defense counsel stated it was impossible for him to know if further investigation would yield further such exculpatory or impeachment evidence. The State did not object to notice and thus failed to preserve that issue for appeal. The trial court was dismayed at the late discovery, agreed with defense counsel, and properly dismissed the case.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether Appellant improperly assigns error to the trial court's oral findings, as an appellate court will only review written findings.
2. Whether the trial court properly dismissed the charges against Defendant pursuant to CrR 8.3.

3. Whether the trial court correctly recognized that Defendant was forced to choose between his speedy trial right and adequately prepared counsel.

4. Whether the trial court correctly recognized prejudice to Defendant because of the defense's inability to investigate if further exculpatory evidence existed.

5. Whether the trial court was required to hold an evidentiary hearing.

6. Whether Appellant waived any right to appeal the issue of notice by failing to object at trial level.

### **III. STATEMENT OF CASE**

[Respondent offers an abbreviated restatement of the case for ease of reference.]

The State appeals the trial court's dismissal of criminal charges against defendant pursuant to CrR 8.3. The court dismissed the case on October 4, 2016, which was the second day of a jury trial. Defendant was charged with two counts of felony harassment against local law enforcement, including threats to kill. CP 142-143.

The second day of trial was scheduled on October 4, 2016, a Tuesday. That morning, trial defense counsel made an oral motion to dismiss the charges due to the revelation of new information regarding contact between defendant, the defendant's counselor (Mr. Bender), the officer the defendant allegedly threatened (Officer Rhine), and the prosecuting attorney's office, *three days* before the alleged crimes took

place. VRP 351. Defense counsel informed the court that he received a substantial Internal Affairs file from the Ridgefield Police Department the previous Friday, September 30, 2016, as part of a records request made months earlier. *Id.* This was after the first day of trial had already concluded.

During the oral motion to dismiss, defense counsel, as an officer of the court, acknowledged that the State had not been given notice of the motion. *Id.* The State at no time objected to the motion, on the basis of timeliness or notice. Defense counsel proceeded to represent that the packet contained a memorandum wherein Officer Rhine summarized the conversation he had with Mr. Bender, defendant's counselor. Mr. Bender allegedly stated that defendant is a "very dangerous person." VRP 352. Defense counsel stated the he telephoned Mr. Bender the morning of October 4, 2016, and that Mr. Bender stated that the officer's representation of the contact was a "complete distortion" of what he said. VRP 353. Defense counsel further represented that the memorandum indicated the information was relayed by Officer Rhine to the prosecuting attorney's office. VRP 353. Defense counsel stated:

I have no notes, no -- nothing in any of the discovery that's been provided until yesterday indicating there was contact between Officer Rhine and the Clark County Prosecuting Attorneys Office. Had there been, we would have interviewed Ms. Duncan and probably Ms. Bryant -- Kristine Duncan and Jeannie Bryant, both of whom are indicated in the letter as being aware of these allegations.

*Id.*

[...]This is exactly the kind of material that I outlined as potentially being out there in my motion to compel production of discovery. The phone call in question -- the letter that the Court has wasn't dated until June 20th, 2016. It does concern a phone call that occurred June

1st, 2015 that resulted in communications from Lieutenant Rhine to the Clark County Prosecuting Attorneys Office. So this is a situation where at this point because the prosecution has not fulfilled its obligation -- its discovery obligations under both the Court rules because this material was in fact in the possession of the Clark County Prosecuting Attorneys Office, but also under the case law that I repeatedly cite, not just Brady but *Kyles v. Whitley*, the prosecution's affirmative duty to reach out and find this information if it exists, because the prosecution has not fulfilled their obligations, they have denied my ability to provide the effective assistance of counseling to Mr. Hensley at a point when trial's already going.

*See* VRP 355.

It is noteworthy that defense counsel had brought this issue of the Ridgefield Internal Affairs discovery to the attention of the Court one month earlier, during the September 1, 2016 motion to continue to the trial date. At that hearing, the State *admitted* that exculpatory information could be contained in the Internal Affairs (“IA”) report:

MR. ROBINSON: Your Honor, the State very much, as Mr. Hensley stated and Mr. Bogar stated, wants this case to go to trial. And we were prepared to go to trial. I had sent that information to Mr. Bogar stating I would not use any of the information contained in the email or the note that I sent him. But I don't know if there isn't -- or what is in the potential IA file with Ridgefield Police Department. I don't know what else Ridgefield Police Department has. If there is additional information up there, I can't say if it's inculpatory or exculpatory, or anything about it. So if Mr. Bogar thinks he may have additional information which could help his case, it's kind of a difficult position for the State to be in.

*See* VRP 253.

Returning to the October 4 oral motion to dismiss, the State then responded to defense counsel, stating that it did not now believe any of the information contained *Brady* material. VRP 356. The State continued:

I understand if counsel may think it's relevant to the case, and it's not up to the State to say whether it's relevant or not, we must provide it, but we don't even know what we have at this point to be

honest, Your Honor.

*See* VRP 358.

The court did not seem convinced, and was very concerned, stating:

COURT: And it's a critical time. A June 1 phone conversation is real critical. It's three days prior to these alleged activities that are a part of the charges.

*See* VRP 359.

The State proceeded to shift the burden to the defense for calling the case ready:

Well, the internal affairs documents were in the process of being provided as that interview occurred on September 26th, and then it sounds like counsel just got the complete internal affairs file. But counsel was willing to take the risk that there may not be or may be information pertinent to the case in that file and call the case ready rather than wait to see what the results of that are. So I agree it should be provided, but it takes time to get all that information to counsel. And counsel knew this was still pending. I'm not blaming him for not having the information, but he made a conscious decision to call the case ready rather than wait to see how long it takes to get this information and for him to be able to interview witnesses related to this information.

*See* VRP 360.

[...]

So there's always going to be information that still could be provided to Defense, or the Defense may still want to interview witnesses, but I think they take the risk by calling the case ready that they may not have their investigation complete at the time.

*See* VRP 363

Defense counsel responded, stating that he and the defendant called the case ready in part because they had no reason to believe, until the late discovery was provided, that Mr. Bender was even available as a witness with exculpatory information. VRP 361:

So certainly we made a conscious decision to call the case ready. This case has been pending for a long time. Mr. Hensley and I had the discussion about whether there could potentially be something in the internal affairs file, but I had no reason to go talk to Mr. Bender because Officer Rhine indicated in the September 26th interview -- and I'm trying to find it in the transcript, and it might not have shown up, but we can certainly play it. My recollection was, as indicated, it was November 24, 2015. So that's the issue. I had no reason to go talk to Mr. Bender.

After hearing both sides, the court made its decision:

THE COURT: Well, obviously the remedy sought is an extraordinary remedy, but there are times where it's appropriate. And sometimes it's not -- as we know from the case law, 8.3 isn't always on some evil intent or wrongdoing or intentional acts and the like. But does it rise to the level of -- this late of getting the materials of creating a prejudice to the Defense time -- and maybe, you know, had this all been -- happened some months ago, you got the letter in July, had a chance to look and investigate, maybe -- we don't know what fruit it would have bore. It may not have been something real favorable to the Defense or of much help. But we don't get to find that out. We're in the middle of trial. And this comes out at October 3rd between 4:00 and whatever time this was finalized. There was some material out there and some knowledge, and that's what I'm having some concern with, recognition that the Defense was aware of this before; however, it's not necessarily their duty to go and have to drag and pull out this material from the governmental agencies that are seeking to prosecute the individual who is presumptively innocent until the Court or a jury, if it's a jury trial, declare that he committed criminal acts. It's the duty on the State -- the governmental entities. Just as I've dismissed some cases because of western Washington's inappropriateness, misconduct, nothing at -- the fault of the prosecutor's office directly. And again even on those agencies, it's not necessarily saying wrongdoing or intentional bad acts. It's this combination of things in light of our due process and the presumption of innocence. I'm going to take a few minutes. I'll be back out, and we'll see where we're going.

[Recess]

THE COURT: Thank you. Please be seated. All right. We're under 8.3(B) here under the request by the Defense. One of the things that 8.3 starts out and says, in furtherance of justice. I mean, that's what we're attempting to do here. That's what the whole idea of disclosure and Brady material and all the progeny off of Brady talk about. As mentioned earlier, and I will specifically find, I do not find that there was any kind of evil intentional wrongdoing, act by the State, the

governmental agencies involved bringing their forces together to prosecute -- attempt to prosecute Mr. Hensley. Do I find -- I believe this is prejudicial to Mr. Hensley getting this material that should have been provided sooner. It is prejudicial to him, prejudicial in the possibility of the defense that he's able to put forward.

Yesterday we had by the Defense a motion to dismiss under similar grounds, different issue with the 911 call. I denied that. And I think that was the appropriate ruling because there's case law that supports if you can as opposed to dismissing suppress the evidence, that's what you should do. And that's what we did -- I did in this case. I suppressed that evidence. Here this is different. This isn't suppressing this evidence, this information, this letter. It's denying the right to have further investigation, look into. Yes, they made the decision to call the case ready for trial, but there are cases that talk about when they get stuck in that position of waiving speedy trial rights versus doing that further investigation, it's not a fair place to put the defendant in to make those choices and options. This case was called ready. We're now in the middle of trial. This coming up last night -- kind of the nexus of it coming up last night at a follow-up interview -- this could have been provided before. I believe it should have been provided before. We've been talking about all this information throughout this case of wanting to get all the reports and contacts and information. Coming in mid-trial is not acceptable. I think the cumulation effect of both yesterday's I denied and this one -- but this is probably enough standing alone, but the cumulative effect, I'm dismissing this matter.

#### IV. ARGUMENT

##### A. APPELLANT IMPROPERLY ASSIGNS ERROR TO THE TRIAL COURT'S ORAL FINDINGS; AN APPELLATE COURT WILL ONLY REVIEW WRITTEN FINDINGS.

Appellant makes twenty-four "assignments of error" (VII-XXXI) to multiple "findings" by the trial court. Appellant's Brief (AB), pp. 2-4. In fact, these findings were uttered orally by the court during its decision to dismiss the charges against the defendant. VRP 366-372. The only written, and therefore appealable finding was the court's order that "Defense motion to dismiss is granted, without prejudice under CrR 8.3." CP 186. Caselaw

requires remand for entry of written findings when a trial court fails to make them. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187, 1190 (1998):

An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction. *Id.*

A trial court’s oral statements are “no more than a verbal expression of [its] informal opinion at that time ... necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Even a trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment. *Ferree v. Doric Co.*, *supra* at 567; *Clifford v. State*, 20 Wn.2d 527, 148 P.2d 302 (1944); *Seidler v. Hansen*, 14 Wn.App. 915, 547 P.2d 917 (1976). The written decision of a trial court is considered the court's “ultimate understanding” of the issue presented. *Diel v. Beekman*, 7 Wn.App. 139, 499 P.2d 37 (1972).

Here, there was no error in either the trial court’s oral or written findings. Assuming without conceding that there was, the proper remedy would be remand for entry of written findings, not twenty-four “assignments of error” gleaned from a transcript.

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**B. THE TRIAL COURT PROPERLY DISMISSED THE CHARGES AGAINST DEFENDANT PURSUANT TO CrR 8.3.**

1. LAW

a) *Standard of Review: “Manifestly unreasonable”*

CrR 8.3(b) grants the trial court authority to dismiss criminal charges:

On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may 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. The court shall set forth its reasons in a written order.

The Supreme Court of Washington has clarified CrR 8.3(b), stating “a trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows by a preponderance of the evidence (1) “arbitrary action or governmental misconduct” and (2) “prejudice affecting the defendant's right to a fair trial.” *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997).

Appellate courts must ask whether the trial court's conclusion that both of these elements were satisfied was a “manifest abuse of discretion.” *Michielli*, at 240. The reviewing court will find an abuse of discretion “when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *State v. Michielli*, 132 Wn.2d at 240, 937 P.2d 587 (1997). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*,

79 Wn.App. 786, 793, 905 P.2d 922 (1995). A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take” (*State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990)), and arrives at a decision “outside the range of acceptable choices.” *Rundquist*, at 793.

b) *Government Misconduct and Prejudice to Defendant: Brady*

“Due process requires the State to disclose “evidence that is both favorable to the accused and ‘material either to guilt or to punishment.’” *United States v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). There is no *Brady* violation, however, “if the defendant, using reasonable diligence, could have obtained the information” at issue. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

Moreover, evidence is “material” and therefore must be disclosed under *Brady* “only if ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Bagley* at 682; *Benn* at 916. In applying this “reasonable probability” standard, the “question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Benn* at 916. “A ‘reasonable

probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of trial.’ ” Id. (quoting Bagley, 473 U.S. at 678, 105 S.Ct. 3375). *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 972 P.2d 1250 (1999).

## 2. ANALYSIS

Here, it is extremely difficult to see how the court’s dismissal of charges against defendant was so “manifestly unreasonable” or based on such “untenable grounds” that no reasonable person (or judge) would have ordered the same. Defense counsel was given, for the first time and without apparent justification, a massive Internal Affairs file from the very police department charging defendant with harassment; and this disclosure came *after* the first day of trial for that harassment. In less than a day of investigation, defense counsel discovered that the defendant’s therapist basically said the police lied about his contact with them. Not only did this late disclosure prevent defendant’s counsel from considering investigating and responding to the issue, it also raises serious questions about what other impeachment or exculpatory evidence the report might reveal.

Confidence in the fairness of this trial was shaken. As the trial court correctly noted, this contact between the therapist and police occurred just three days before the alleged crimes occurred. The court’s decision was careful, articulated, made after a long recess, addressed all the issues Appellant raises, and in fact had been a long time coming- defense had been raising *Brady* concerns for weeks. In fact, the State admitted the possible

existence of exculpatory information one month earlier in the September 1<sup>st</sup> motion to continue:

MR. ROBINSON: Your Honor, the State very much, as Mr. Hensley stated and Mr. Bogar stated, wants this case to go to trial. And we were prepared to go to trial. I had sent that information to Mr. Bogar stating I would not use any of the information contained in the email or the note that I sent him. But I don't know if there isn't -- or what is in the potential IA file with Ridgefield Police Department. I don't know what else Ridgefield Police Department has. If there is additional information up there, I can't say if it's inculpatory or exculpatory, or anything about it. So if Mr. Bogar thinks he may have additional information which could help his case, it's kind of a difficult position for the State to be in.

*See* VRP 253.

The reasonableness of the court's dismissal will be further addressed *infra* in approximate order of the Appellant's assignments of error.

**C. THE TRIAL COURT CORRECTLY RECOGNIZED THAT DEFENDANT WAS FORCED TO CHOOSE BETWEEN HIS SPEEDY TRIAL RIGHT AND ADEQUATELY PREPARED COUNSEL**

The State argues “[f]urthermore, the trial court never considered whether the State’s actions had compelled Hensley to choose between his right to a speedy trial and the right to be represented by adequately prepared counsel.”

This is demonstrably false. The court directly stated when it was making its ruling:

There are cases that talk about when they get stuck in that position of waiving speedy trial rights versus doing that further investigation, it's not a fair place to put the defendant in to make those choices and options.

*See* VRP 368.

The State's argument fails. Not only did the court specifically and carefully consider this catch-22 at this hearing, but it had been considering it for weeks beforehand. Defense counsel had argued repeatedly throughout this case that this was precisely the dilemma his client was facing:

MR. BOGAR: I would not be able to provide the effective assistance of counsel without investigating this.

THE COURT: Is your client unwilling to sign a waiver?

MR. BOGAR: I believe he is, Your Honor. He wants to get this done.

THE COURT: He's willing to sign it?

MR. BOGAR: No, I believe he's unwilling to sign a waiver of speedy trial. I couldn't provide the effective assistance. I couldn't have had this information before I got it.

*See* VRP 253.

Defense counsel made the same argument *again* in his brief. CP 135. The State's argument fails.

**D. THE TRIAL COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING**

The State argues without citation to authority that the trial court erred by not holding an evidentiary hearing (with testimony, exhibits, etc.) on the motion to dismiss. CP 145. This argument clearly fails because evidentiary hearings are not required under CrR 8.3; nowhere does the rule state as such nor is requirement of testimony, exhibits, etc., dictated. The State cites to no authority whatsoever for their assertion. The rule easily could have provided for an evidentiary hearing if that had been the intent, as it does in numerous other parts of Washington's laws. See *e.g.* RCW

9.94A.530, RCW 26.27.121, WAC 67-35-520, etc. In fact, the language of “in furtherance of justice” in 8.3(b) clearly supports the notion that justice, fairness, discretion, and authority lie with the presiding judge. Defense counsel is an officer of the court (RPC Preamble [1]) and the court has discretion to consider his representations to the court. The court properly considered his reported contact with Mr. Bender and in light of the urgent *Brady* concerns before the court, properly made a decision thereon.

**E. THE TRIAL COURT WAS NOT REQUIRED TO EXERCISE OTHER DISCOVERY REMEDIES; IT HAD FULL AUTHORITY TO SIMPLY DISMISS THE ACTION.**

The State argues the trial court should have exercised less “extreme” remedies rather than dismissal; such as the remedies provided for in CrR 4.7’s delineation of discovery violations. CP 149.

The State argues that as discovery material, the Ridgefield Internal Affairs document was not “within the State’s possession or control” pursuant to CrR 4.7(a)(4) and therefore as in *Blackwell*, the State did not violate its duty in failing to provide that material to defense. This argument fails because the *Blackwell* court did not reverse a dismissal because the evidence in that case was not in the State’s control, but rather because the defense did not make a showing that it was material. There can be no dispute that the Ridgefield Police Department’s Internal Affairs documentation belongs to the State and is in the State’s control. While the prosecuting attorney’s office cannot be blamed for the police department’s failure to give the documentation to the prosecution, it does not obviate the

fact that the documentation was, in one way or another, untimely withheld from the defense by the State as an entity. Under *Blackwell*, the question is whether the documentation was material to the defense, which is clearly shown in the record.

The State then argues that the court failed to apply the *Hutchinson* factors to this case. AB at p. 23. The *Hutchinson* factors however are irrelevant because they dictate when *suppression* of evidence is appropriate, not *dismissal* of an entire action. There was no suppression in the present case, just a dismissal.

Therefore Appellant is incorrect that the trial court was required to conduct a CrR 4.7 discovery inquiry.

**F. THE TRIAL COURT CORRECTLY RECOGNIZED PREJUDICE TO DEFENDANT BECAUSE OF THE DEFENSE'S INABILITY TO INVESTIGATE IF FURTHER EXCULPATORY EVIDENCE EXISTED**

The State argues that “the evidence was not favorable to Hensley” because the Internal Affairs documents stated Lt. Rhine said Mr. Bender said Hensley was “dangerous,” supporting his guilt. AB p. 28. At most, according to the State, Lt. Rhine could be impeached if Mr. Bender appeared and stated that he did not say that about Hensley. *Id.* The State defends itself, saying it has no “duty to search for exculpatory evidence.” *Id.*

This is not the appropriate analysis of the issue. The prejudice complained of by the defense was not that the State failed to “search” for exculpatory information. The prejudice was that some exculpatory or

impeachment information could have been found if disclosure had been timely. That investigation never occurred because the defense was deprived of an ability to conduct it. The State is not in a position to declare whether it was favorable or not. As in *Bagley*, a fair trial was clearly withheld from defendant because his counsel was incapable of investigating if other evidence existed.

**G. APPELLANT WAIVED ANY RIGHT TO APPEAL THE ISSUE OF NOTICE BY FAILING TO OBJECT AT TRIAL LEVEL**

Appellant argues that the trial court failed to hold a “proper hearing” and that because notice was not given to the State, they did not have an opportunity to properly respond. AB p.39.

The State nowhere objected on the basis of notice during the motion hearing. Defense counsel admitted that the State had no notice. VRP 351. Yet the State stood by and allowed, without objection, defense counsel to proceed with the motion, and replied in turn. Washington law contains numerous examples of rights, even constitutional rights like due process, as being waived if counsel fails to timely object at trial level. *See e.g. State v. Robinson*, 120 Wn.App. 294, 299–300, 85 P.3d 376 (2004) (citing *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985) stating that the offender cannot sit by, without objection, and then raise for the first time on appeal a due process violation)). CrR 8.3(b) merely states that there shall be “notice” before a dismissal hearing, without any explanation. Even if there was a court rule violation, such a violation would neither be preserved on appeal

nor would it be reversible error because the State failed to object and acquiesced to the commencement of the hearing.

#### V. CONCLUSION

The trial court should be affirmed. In the alternative the matter should be remanded for written findings.

Respectfully submitted this 10th day of October, 2017.

*/s/ Edward Penoyar*

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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DATED this 10th day of October, 2017, South Bend, Washington.

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# PENYOYAR LAW OFFICES

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## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49584-8  
**Appellate Court Case Title:** State of Washington, Appellant v. Mark T. Hensley, Respondent  
**Superior Court Case Number:** 15-1-01021-2

### The following documents have been uploaded:

- 1-495848\_Briefs\_20171010155335D2525560\_9850.pdf  
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