

FILED

FEB 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 297519
consolidated with 297985

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOEL MATTHEW GROVES

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY
The Honorable Michael E. Cooper

AMENDED APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

FILED

FEB 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 297519
consolidated with 297985

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOEL MATTHEW GROVES

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY
The Honorable Michael E. Cooper

AMENDED APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

TABLE OF CONTENTS

A. <u>ASSIGNMENTS OF ERROR</u>	1
B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>ARGUMENT</u>	4
1. BECAUSE THE RECORD DOES NOT CONTAIN A COMPLETE TRANSCRIPTION OF THE <u>BRADY</u> MOTION HEARING, THIS COURT MUST DETERMINE WHETHER THE TRIAL COURT’S CONCLUSIONS OF LAW ARE SUPPORTED BY THE FINDINGS OF FACT	4
2. WHEN LAW ENFORCEMENT DESTROYED EVIDENCE THAT WAS MATERIAL TO MR. GROVES’ DEFENSE, THEY DENIED HIM DUE PROCESS PROTECTIONS	6
a. <u>The trial court erred when it determined Mr. Groves failed to demonstrate that the video or videos were materially exculpatory or contained material exculpatory evidence of any kind.</u>	6, 7
i. <u>The exculpatory value of the videos was apparent before they were destroyed</u>	8
ii. <u>The nature of the evidence leaves Mr. Groves unable to obtain comparable evidence by other reasonable means</u>	12
b. <u>The videotape was materially exculpatory to Mr. Groves’ defense</u>	12
c. <u>Mr. Groves’ conviction must be reversed and the charges dismissed</u>	13
E. <u>CONCLUSION</u>	13, 14

TABLE OF AUTHORITIES

United States Constitution

<u>U.S. Const. amend XIV</u>	7
------------------------------------	---

Washington State Constitution

<u>Const. art. 1 § 3</u>	7
--------------------------------	---

United States Supreme Court Cases

<u>Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)</u>	13
--	----

<u>Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)</u>	3, 6, 7, 8, 13
---	----------------

<u>California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)</u>	7, 8
---	------

<u>Draper v. Washington, 372 U.S. 487, 495, 83 S.Ct. 774, 9 L.Ed.2d 899 (1962)</u>	5
--	---

<u>Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)</u>	10
---	----

<u>Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct 1555, 131 L.Ed.2d 490 (1995)</u>	7
---	---

<u>United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 413 (1984)</u>	8, 13
--	-------

<u>United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)</u>	8
--	---

Washington State Supreme Court Decisions

<u>Apostle v. Lillions, 8 Wn.2d 118, 121, 111 P.2d 789 (1941)</u>	5
---	---

<u>Deller v. Long, 96 Wn. 372, 373, 165 P. 98 (1917)</u>	6
--	---

<u>In re Pers. Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999)</u>	8
--	---

<u>In re Pers. Restraint of Woods, 154 Wn.2d 400, 428, 114 P.3d 607 (2005)</u>	9
<u>State v. Jackson, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976)</u>	5
<u>State v. Lord, 161 Wn.2d 276, 291-292, 165 P.3d 1251 (2007)</u>	7
<u>State v. Larson, 62 Wn.2d 64, 67, 381 P.2d 120 (1963)</u>	4
<u>State v. Stannard, 109 Wn.2d 29, 37, 742 P.2d 1244 (1987)</u>	7
<u>State v. Straka, 116 Wn.2d 859, 884, 810 P.2d 888 (1991)</u>	9
<u>State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994)</u>	7, 8, 13

Washington State Court of Appeals Decisions

<u>Gaupholm v. Aurora Office Bldgs., Inc., 2 Wn.App. 256, 257, 467 P.2d 628 (1970)</u>	5
<u>Happy Brunch, LLC v. Grandview N., LLC, 142 Wn.App. 81, 88 n.1, 173 P.3d 959 (2007)</u>	5
<u>Hillaire v. Food Servs. of Am., Inc., 82 Wn.App. 343, 351-52, 917 P.2d 1114 (1996)</u>	5
<u>In re Parentage & Custody of A.F.J., 161 Wn.App. 803, 806 n.2, 260 P.3d 889, review granted in part, denied in part, 172 Wn.2d 1017, 262 P.3d 64 (2011)</u>	5
<u>Seattle v. Fetting, 10 Wn.App. 773, 776, 519 P.2d 1002 (1974)</u>	9, 11, 13
<u>State v. Boyd, 29 Wn.App. 584, 587, 629 P.2d 930 (1981)</u>	13
<u>State v. Burden, 104 Wn.App. 507, 512, 17 P.3d 1211 (2001)</u>	7
<u>State v. Canaday, 90 Wn.2d 808, 815, 585 P.2d 1185 (1978)</u>	12
<u>State v. Galluher, 21 Wn.App. 437, 439, 587 P.2d 549 (1978)</u>	7
<u>State v. Gilchrist, 91 Wn.2d 603, 609, 590 P.2d 809 (1979)</u>	12

<u>State v. Hall, 22 Wn.App. 862, 867, 593 P.2d 554 (1979)</u>	8
<u>State ex rel. Henderson v. Woods, 72 Wn.App. 544, 550-52, 865 P.2d (1994)</u>	4
<u>Rekhi v. Olason, 28 Wn.App. 751, 753, 626 P.2d 513 (1981)</u>	5

Other Authorities

<u>Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964)</u>	10
<u>Evans v. Kropp, 254 F.Supp. 218, 222 (E.D. Mich. 1966)</u>	11
<u>Imbler v. Craven, 298 F.Supp. 795, 806 (C.D.Cal. 1969)</u>	10
<u>State v. Turrubiates, 25 Ariz.App. 234, 542 P.2d 427 (1975)</u>	8
<u>Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965)</u>	11

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Groves' Brady motion.

2. The trial court erroneously concluded that the defense had not demonstrated that the video or videos could be materially exculpatory or contain material exculpatory evidence of any kind. The court went on to conclude that even if it accepted Mr. Groves' version of what happened at the scene, at best he described the officer testifying as to what was seen in open view where the officers had a lawful right to view into the vehicle to see what was to be seen. Conclusion of Law No. 3; CP 472-476.

3. The trial court erroneously concluded that since Deputy Vraves testified he was not in the vehicle and had to move the seat forward in order to retrieve a wallet at defendant's request, and that he saw the pipe before he reached in for the wallet, the alleged drug pipe was properly viewed from outside the car and was legitimately the basis for a search warrant of the car. Conclusion of Law No. 4; CP 472-476.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Groves received due process of law when the State failed to reveal potentially exculpatory evidence to the defense and when law enforcement failed to preserve it? (Assignments of Error 1, 2, & 3; Conclusions of Law Nos. 3 & 4); CP 472-476.

2. Whether the facts support the trial court's conclusions of law?

C. STATEMENT OF THE CASE

Joel Matthew Groves' (Mr. Groves') ex-girlfriend, Kathy, gave him permission to drive her car. 2/3/10 RP 112; 2/4/10 RP 213. While on the way to Mill Pond to pick her up, an officer stopped Mr. Groves. 2/3/10 RP 167. Unbeknownst to Mr. Groves, Kathy told police that he threatened to cut her up and to put her body in the bathtub where her children could find it. 2/3/10 RP 29; 2/3/10 RP 30. Also unbeknownst to Mr. Groves, Kathy's friend, Jessica, a known police informant, told police that there was warrant for his arrest and that he had drugs in his possession. 2/3/10 RP 73; 2/3/10 RP 77.

According to the officer, Mr. Groves initially refused to stop the car. The officer claimed that Mr. Groves moved about inside the car as if he was trying to conceal something. 2/3/10 RP 88. Mr. Groves stopped and the officer ordered him out of the car. 2/3/10 RP 89. He advised Mr. Groves of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) rights, put him in handcuffs, and then secured him in a patrol car. 2/3/10 RP 89. The officer later confirmed that there was an outstanding warrant for Mr. Groves' arrest. 2/3/10 RP 89.

While in custody, Mr. Groves asked an officer to retrieve his wallet from the back seat of the car. 2/3/10 RP 91. While looking for the wallet, the officer found a glass pipe that contained burned white residue. 2/3/10 RP 92. The officer secured the car and applied for a search warrant. 2/3/10 RP 92. A dog trained to detect drugs alerted the officer that something was in the trunk

under the spare tire. The officer removed the tire and found a black plastic bag that contained smaller bags of marijuana and methamphetamine. 2/3/10 RP 100-101.

The State charged Mr. Groves with felony harassment, possession of marijuana, possession of methamphetamine, and use of drug paraphernalia. CP 4-5. A jury convicted him of all charges. CP 71. The trial court sentenced Mr. Groves to 60 months incarceration and imposed a number of court fees and conditions. 2/16/10 RP 279. Mr. Groves appealed the conviction. CP 108-122. This Court affirmed the convictions, but remanded the case to superior court to prove conviction dates in Mr. Groves' criminal history. CP 478-482.

At some point during the initial appeal, Mr. Groves filed a post conviction motion under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He raised a number of issues that included ineffective assistance of counsel and destruction of material evidence favorable to the defense, specifically the video taped recording from the officer's patrol car. CP 380-396. Mr. Groves learned of the videotape after he made a public disclosure request. CP 397-414.

The trial court appointed counsel for Mr. Groves and scheduled a hearing to decide the Brady motion on February 4, 2011. 2/4/10 RP. The court transcriptionist lost the notes from the hearing. However, she had previously transcribed Mr. Groves' testimony and was able to include that in

this record.

At the hearing, Mr. Groves testified that the officers were looking in the car because the driver's side door was open. 2/4/11 RP 311. He realized the officers saw something in the car, because one of them asked about the pipe. 2/4/11 RP 312; 2/4/11 RP 318. Based on that testimony, Mr. Groves' attorney essentially conceded to the court that there was no issue under Brady. 2/22/11 RP 323-324; 2/4/11 RP 312-313. He suggested that if the officers did not break the door plane, then they must have discovered the pipe in open view. In which case, even if a tape were available, it would not have been material to Mr. Groves' defense. 2/22/11 RP 324.

The trial court denied the motion and Mr. Groves appealed. CP 477, 505, 513-518.

D. ARGUMENT

1. BECAUSE THE RECORD DOES NOT CONTAIN A COMPLETE TRANSCRIPTION OF THE BRADY MOTION HEARING, THIS COURT MUST DETERMINE WHETHER THE TRIAL COURT'S CONCLUSIONS OF LAW ARE SUPPORTED BY FACT.

To satisfy due process, the appellate court must have a "record of sufficient completeness" for a review of the errors raised by a defendant in a criminal case. State v. Larson, 62 Wn.2d 64, 67, 381 P.2d 120 (1963). The onus is on the appellant to perfect the trial record. State v. Larson, 62 Wn.2d at 66-67; State ex rel. Henderson v. Woods, 72 Wn.App. 544, 550-52, 865 P.2d 33 (1994). A "record of sufficient completeness" does not necessarily mean a complete verbatim report of proceedings. Other methods of reporting

trial proceedings may be constitutionally permissible if they permit effective review. An alternative method must allow counsel to determine which issues to raise on appeal, and “place before the appellate court an equivalent report of the events at trial from which the appellant’s contentions arise.” State v. Jackson, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976) (quoting Draper v. Washington, 372 U.S. 487, 495, 83 S.Ct. 774, 9 L.Ed.2d 899 (1962)).

Where an appellant fails to supply a verbatim report of proceedings, this Court’s ability to fairly evaluate the findings in light of the record before the trial court is necessarily compromised. In re Parentage & Custody of A.F.J., 161 Wn.App. 803, 806 n. 2, 260 P.3d 889, review granted in part, denied in part, 172 Wn.2d 1017, 262 P.3d 64 (2011). Here, Mr. Groves moved this Court to remand the case to superior court for complete transcription. But the transcriptionist lost notes from the hearing. She was only able to provide Mr. Groves’ testimony because she had a previous transcription of that portion of the hearing.

In these situations, this Court will accept the trial court’s findings of fact as verities. In re A.F.J., 161 Wn.App. at 806 n. 2; see also Happy Bunch, LLC v. Grandview N., LLC, 142 Wn.App. 81, 88 n. 1, 173 P.3d 959 (2007); St. Hilaire v. Food Servs. of Am., Inc., 82 Wn.App. 343, 351–52, 917 P.2d 1114 (1996); Rekhi v. Olason, 28 Wn.App. 751, 753, 626 P.2d 513 (1981); Gaupholm v. Aurora Office Bldgs., Inc., 2 Wn.App. 256, 257, 467 P.2d 628 (1970). This has long been the rule. See Apostle v. Lillions, 8 Wn.2d 118,

121, 111 P. 2d 789 (1941); Deller v. Long, 96 Wn. 372, 373, 165 P. 98 (1917). Accordingly, this Court's review will be limited to determining whether the trial court's conclusions of law are supported by its findings of fact. In re A.F.J., 161 Wn.App. at 807.

Here, the trial court concluded that since Deputy Vraves testified that he was not in the vehicle and had to move the seat forward in order to retrieve a wallet at the defendant's request, and that he saw the pipe before he reached in for the wallet, the alleged drug pipe was properly viewed from outside the car and was legitimately the basis for a search warrant for the car. CP 472-476. However, the trial court's findings of fact do not support this conclusion. The trial court specifically found that Mr. Groves' testimony about whether the officers saw the glass pipe in the car before they went in to retrieve the wallet was disputed. CP 472-476. If testimony was disputed, then the trial court's conclusion of law is not supported by fact. Consequently, this conclusion should be reversed.

The court also concluded that the defense had not demonstrated the video could be materially exculpatory or contain material exculpatory evidence of any kind. The video was materially exculpatory and quite possibly contained material evidence as analyzed below.

2. WHEN LAW ENFORCEMENT DESTROYED EVIDENCE THAT WAS MATERIAL TO MR. GROVES DEFENSE, THEY DENIED HIM DUE PROCESS PROTECTIONS.

a. The trial court erred when it determined Mr. Groves failed to

demonstrate that the video or videos were materially exculpatory or contained material exculpatory evidence of any kind. This Court will review de novo a trial court's determination on whether missing evidence is materially exculpatory. State v. Burden, 104 Wn.App. 507, 512, 17 P.3d 1211 (2001).

A defendant charged with a crime has a constitutional right to have material evidence preserved for use at trial. State v. Stannard, 109 Wn.2d 29, 37, 742 P.2d 1244 (1987) citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Under both the Washington Constitution and the United States Constitution, due process imposes a duty on the State to disclose and to preserve material exculpatory evidence to the defense. Const. Art. 1, § 3; Const. Amend. 14; State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Even before the defense requests discovery, the State has a duty to preserve evidence, if there is a "reasonable possibility" it would be material and favorable to the defense. State v. Gallauher, 21 Wn.App. 437, 439, 587 P.2d 549 (1978).

The State's duty to preserve evidence extends to evidence in the possession of anyone working on the State's behalf, including law enforcement. State v. Lord, 161 Wn.2d 276, 291, 292, 165 P.3d 1251 (2007) (citing Brady, 373 U.S. at 87); In re Pers. Restraint of Woods, 154 Wn.2d 400, 428, 114 P.3d 607 (2005) (quoting State v. Wittenbarger, 124 Wn.2d at 475;

Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

This rule has not been interpreted to require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case. See State v. Turrubiates, 25 Ariz.App. 234, 542 P.2d 427 (1975). However, the police are required to preserve that which comes into their possession either as a tangible object or a sense impression, if it is reasonably apparent the object or sense impression potentially constitutes material evidence. State v. Hall, 22 Wn.App. 862, 867, 593 P.2d 554 (1979).

Evidence is “material” and therefore must be disclosed under Brady “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); In re Pers. Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999).

For evidence to be materially exculpatory, two requirements must be met: (i) the evidence’s exculpatory value must have been apparent before it was destroyed, and (ii) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonable means. Wittenbarger, 124 Wn.2d at 475; California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

(i) The exculpatory value of the video was apparent before it was destroyed. Evidence is material if its absence undermines confidence in

the verdict. In re Pers. Restraint of Woods, 154 Wn.2d 400, 429, 114 P.3d 607 (2005) (citing State v. Straka, 116 Wn.2d 859, 884, 810 P.2d 888 (1991)). In Seattle v. Fettig, 10 Wn.App. 773, 776, 519 P.2d 1002 (1974). Division One of this Court found evidence was material to the defense if it tended to rebut a police officer's testimony; evidence was held to be favorable if there was at least a "reasonable possibility" the evidence rebutted such testimony.

In that case, the defendant was arrested and charged with negligent driving and driving while intoxicated. Immediately upon arrest, he was transported to a police station where he was given a breathalyzer test (reading .12) and where he performed physical tests, which were recorded on video tape. He was tried in Municipal Court. The videotape of the physical tests was a part of the city's case, along with police testimony and the breathalyzer results. Seattle v. Fettig, 10 Wn.App. at 774.

The court found the defendant not guilty of negligent driving and guilty of driving while intoxicated. He appealed his conviction to the Superior Court where the case was tried de novo before a jury. At the beginning of the trial, the defendant moved to dismiss the charges on the ground that the police had negligently destroyed the videotape of his physical tests, thereby denying due process of law. In the alternative, he requested that the jury be given an instruction that it could infer that the video tape, had it been available, would have corroborated his testimony that he was not under the influence of alcohol and rebutted the testimony of the police officers. The

motion to dismiss was denied and the requested instruction was refused.

The defendant offered testimony of the municipal court judge who first heard the matter in an effort to demonstrate that the videotape was material and exculpatory. As a condition of admitting that testimony, the trial court required that the municipal court judge be permitted to testify to having found the defendant guilty. Rather than accept the condition, the defendant withdrew his offer of proof except insofar as it supported his pretrial motion to dismiss. The jury found the defendant guilty of driving while intoxicated; he was fined and given a suspended jail sentence.

The defendant raised a number of issues on appeal. He argued the trial court erred in failing to dismiss on the ground that the destruction of the video tape was a suppression of material and exculpatory evidence in violation of due process; refusing to instruct the jury that it could infer that the video tape would have negated evidence of the defendant's intoxication, and ruling that the testimony of the municipal court judge in the trial de novo must be permitted to include his finding of guilt as well as his belief in the exculpatory nature of the tape.

Division One found the video taped recording was negligently destroyed and suppressed. Although the police destroyed the videotape, Division One charged their acts to the prosecutor. Seattle v. Fetting, 10 Wn.App. at 775 citing, Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); Imbler v. Craven, 298 F.Supp. 795, 806 (C.D.Cal.1969);

Evans v. Kropp, 254 F.Supp. 218, 222 (E.D.Mich.1966). The Court further found that the suppression was negligent rather than deliberate was not material; the defendant's due process rights are affected in either case. Id. citing, Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The Court concluded police officer witnesses were permitted to testify as to their observations regarding the defendant's performance on the physical tests. The videotape was a record of that performance, either substantiating or rebutting the officers' testimony. It was therefore material to defendant's case since the testimony of the officers was the only evidence admitted against him, except the rebuttable presumption of intoxication evidenced by the .12 breathalyzer reading. Id. citing, See Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965).

Like in Fetting, police here were permitted to testify as to their observations before and after Mr. Groves' arrest. The videotape was a record of those observations that either substantiated or rebutted the officers' testimony. At trial, the arresting officer testified that he observed Mr. Groves moving around in the car like he was trying to conceal something. 2/3/10 RP 88. During the arrest, the officer claimed Mr. Groves asked for his wallet, which was in the back seat of the car. When the officer went to retrieve the wallet, he found a glass pipe that contained burned white residue. 2/3/10 RP 91. The officer secured the car and applied for a search warrant. 2/3/10 RP

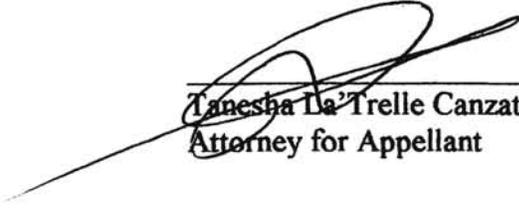
92. The video taped recording of the arrest could have been used to rebut the officer's testimony and to satisfy disputed testimony. Without the videotape, the legitimacy of the verdict is questionable.

What is more, the State neglected to disclose the videotape as possible evidence and failed to give Mr. Groves notice of its intent to destroy it. "If the State destroys evidence without notice to the defendant, and there is a 'reasonable possibility' that the destroyed evidence is material to guilt or innocence and favorable to the defendant, the defendant's due process rights are violated and sanctions will be imposed against the State." State v. Gilcrist, 91 Wn.2d 603, 609, 590 P.2d 809 (1979); cf. State v. Canaday, 90 Wn.2d 808, 815, 585 P.2d 1185 (1978). Because there was a reasonable possibility the videotape was material to Mr. Groves' defense, the State should have notified him of its intent to destroy the evidence.

(ii) The nature of the evidence leaves Mr. Groves unable to obtain comparable evidence by other reasonable means. The evidence here is a videotaped recording. The custodian of records declared the videotape was purged after 90 days. CP 226-227. Law enforcement officers did not create a substitute or backup recording of the arrest; and the still photographs of the car are not comparable evidence. Given that, the nature of the evidence has left Mr. Groves unable to obtain comparable evidence by other reasonable means.

b. The videotape was materially exculpatory to Mr. Groves' defense.

Respectfully submitted this 21st day of February, 2012



Tanesha De'Trelle Canzater, WSBA# 34341
Attorney for Appellant