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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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OCT 05, 2016  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Appellant,

v.

DANIEL BATSELL,

Respondent.

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STATE'S DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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REPLY BRIEF OF APPELLANT

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Respectfully submitted:  
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## TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF APPELLANT</u> .....	1
II. <u>STATEMENT OF THE CASE IN REPLY</u> .....	1
III. <u>ARGUMENT IN REPLY</u> .....	4
A. <u>A Trial Court Has Authority to Reconsider         a Dismissal Under CR 59</u> .....	4
B. <u>The Appeal is Proper Under RAP 2.2         and RAP 5.2</u> .....	6
C. <u>Dismissal of the Prosecution         was an Abuse of Discretion</u> .....	10
1. The Defendant's counsel on appeal misrepresents or misunderstands the record .....	10
2. The Defendant does not dispute that the court's finding is unsupported in the record .....	11
3. The State has never asserted that the State lacked access to Pasco police records .....	12
4. The Defendant provides no analysis to support a determination that the report is <i>Brady</i> material .....	13
5. The parties are agreed that reversal is required.....	14
VII. <u>CONCLUSION</u> .....	15

## TABLE OF AUTHORITIES

### State Cases

	Page No.
<i>Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.</i> , 177 Wn.2d 136, 298 P.3d 704 (2013) .....	9, 10
<i>Davies v. Holy Family Hosp.</i> , 144 Wn. App. 483, 183 P.3d 283 (2008) .....	8, 9
<i>In re Marriage of Estes</i> , 84 Wn. App. 586, 929 P.2d 500 (1997) .....	7
<i>In re Stenson</i> , 174 Wn.2d , 276 P.3d 286 (2012) .....	15
<i>King Cty. v. Williamson</i> , 66 Wn. App. 10, 830 P.2d 392 (1992) .....	7
<i>Martini v. Post</i> , 178 Wn.App. 153, 313 P.3d 473 (2013) .....	7
<i>State v. Englund</i> , 186 Wn. App. 444, 345 P.3d 859 (2015) .....	4
<i>State v. Gaut</i> , 111 Wn. App. 875, 46 P.3d 832 (2002) .....	10
<i>State v. Ramos</i> , 83 Wn. App. 622, 922 P.2d 193 (1996) .....	14

Court Rules

	Page No.
CR 59 .....	5, 6, 8
CR 60 .....	5
CrR 1.1 .....	4, 5
CrR 4.7 .....	14
CrR 7.8 .....	5
CrR 8.3 .....	6
RAP 2.2 .....	6, 8, 9
RAP 2.4 .....	9
RAP 5.2 .....	7

## I. IDENTITY OF APPELLANT

The State of Washington, represented by the Franklin County Prosecutor, is the Appellant herein.

## II. STATEMENT OF THE CASE IN REPLY

Relying on trial counsel's argument, the Defendant states that the name "Joshua" would have been known to the prosecutor because it was in the State's initial discovery packet. BOR at 3. Trial counsel Mr. Stilwill misspoke. The initial discovery in its entirety is included in this record and does not include the name "Josh" or "Joshua." CP 28-32. The prosecutor Mr. Chow only heard the name "Joshua" through defense counsel and in the context of a matter that the defense would be investigating on its own, not as any kind of discovery request. CP 18; RP 7-8.

On the afternoon before trial, defense counsel inquired about other police reports that might be related to this case. CP 19. The prosecutor conducted a search on a privileged police database, not generally accessible to prosecutors. *Id.* He searched by the **Defendant's** name, not Joshua's name, that being the only useful information he had. *Id.* He discovered a report which describes a

sighting of Mr. Batsell. During the investigation of an alleged attempted burglary, police observed Mr. Batsell on the street and arrested him on outstanding warrants. CP 29-30, 39, 44-45.

Officer Leininger was investigating the attempted burglary. In his burglary report, he noted that he observed the Defendant attempting to access a red car and he recorded the vehicle information. CP 39. A different officer, Jeffrey Cobb, was summoned to take the Defendant into custody on warrants. CP 29-30. Officer Cobb discovered the drugs and wrote a report as to this new offense. *Id.* Officer Cobb did not observe the Defendant in association with any vehicle, so this information is not in his report. CP 29-30.

Upon receipt of Officer Leininger's burglary report, the Defendant initially claimed Mr. Ferris owned the vehicle associated with the keys that the Defendant had been holding. CP 20; RP 2-4. Defense counsel claimed that the prosecutor "has known that I've been trying to find Joshua [Ferris] **because Joshua is connected to the car.**" RP 6-7. In fact, Joshua Ferris is not connected to the car. CP 20. It belongs to a Benjamin Freeman. CP 20.

The Defendant claimed that he had been helping Mr. Ferris move out of the house, because Mr. Ferris wanted to participate in

drug treatment. RP 4. But in fact, rather than moving out to seek treatment, Mr. Ferris was high on drugs in a house littered with syringes and bunkered down with a loaded shotgun. CP 39-40. Mr. Ferris did not say Daniel Batsell was helping him move; he said a “Daniel Bates” “was trying to set him up because he was supposedly sleeping with another man’s wife.” CP 40.

The Defendant characterizes the trial judge’s statements as “invi[t]ing” of the prosecutor’s explanation. BOR at 7. And the Defendant claims the judge knew the police report “was critical to the defense theory and material to defense counsel’s trial preparation.” BOR at 24. But the transcript shows the court interrupted the prosecutor, saying that the apparent falsity of the Defendant’s allegations about Mr. Ferris’s identity and likely testimony was “not really relevant.” RP 6. He did not permit the prosecutor to explain that this so-called “smoking gun” report by Officer Leininger did not actually substantiate in any way the Defendant’s allegations of a purported defense. RP 6. Some time later, when the judge reviewed the information he had previously refused to hear, he said, “if I had this information set forth in the way Mr. Chow set forth I may not have granted the dismissal.” RP 9, 13.

### III. ARGUMENT IN REPLY

The Respondent's Brief is replete with misstatements of both the record on appeal and the State's argument. However, in the end, the Defendant/ Respondent does not dispute essential issues. The Defendant does not dispute that there is no basis in the record for the finding the provided report was not provided. The Defendant does not, and likely cannot, provide any analysis in support of the court's finding that the report was *Brady* material. And the Defendant agrees with the State that reversal is required.

A. A TRIAL COURT HAS AUTHORITY TO RECONSIDER A DISMISSAL UNDER CR 59.

The Defendant/Respondent complains that the State has provided no authority for the application of CR 59. In fact, the State cited both court rules and case law in its opening brief on this matter. BOA at 14-15 (citing CrR 1.1 and *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859 (2015)). The rule states: "On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted."

CR 59(a).

The Respondent sets up a lengthy straw man argument by asserting that CR 60(b) circumscribes the superior court's authority on motions for reconsideration. BOR at 8-9. Because this premise is incorrect, the entire argument can be disregarded.

Application of a civil rule to criminal matters is only appropriate where no criminal rule covers the subject matter. CrR 1.1. CR 60 is the civil equivalent of the criminal rule 7.8 (adopted effective September 1, 1986). Therefore, CrR 7.8 supercedes CR 60, and CR 60 does not apply in criminal matters.

CR 59, however, has no counterpart in the criminal rules. Because the State was asking for reconsideration, the State has correctly stated that the State's motion for reconsideration was governed by CR 59. BOA at 14-15.

Citing to cases that issued before the adoption of CrR 7.8 and CR 59, the Defendant argues that errors of law are not correctable under CR 60(b). BOR at 10. The State has not cited CR 60 as authority for the motion. CR 59(a)(8) explicitly authorizes reconsideration and vacation of a verdict for errors of law.

The Defendant claims the State did not specify which of the

nine grounds in CR 59(a) apply here. First, the State's argument was that the superior court erred in failing to recognize that reconsideration **as a whole** is something it is authorized to do. Second, throughout its opening brief the State has argued the various errors in the initial ruling. The lower court's ruling that the State failed to produce a *Brady* record is without evidence, so as to be an abuse of discretion preventing a fair trial, legal error, an irregularity in the proceeding, and not substantial justice. CR 59(a)(1), (7), (8) and (9); BOA at 16. The same grounds justify reconsideration where there was a dismissal under CrR 8.3 without any requisite showing of governmental misconduct. BOA at 16-23. And the same grounds justify reconsideration where the court employed a remedy of last resort when continuance was an available and more appropriate remedy. BOA at 24-25.

B. THE APPEAL IS PROPER UNDER RAP 2.2 AND RAP 5.2.

The Defendant acknowledges that the State has a right to appeal from a dismissal of a criminal prosecution with prejudice. BOR at 13, citing RAP 2.2(b)(1). However, the Defendant argues that there is something improper in the procedure the State employed by first seeking reconsideration of the same court before appealing to a

higher court. BOR at 13.

No case law authority is offered for this proposition. And certainly no public policy can be advanced for this proposition. A motion for reconsideration, which allows the lower court to correct itself or enlarge the record for review, is a prudent and sensible procedure before forging on to appeal. *Martini v. Post*, 178 Wn.App. 153, 161-62, 313 P.3d 473 (2013) (on reconsideration, the court may consider additional facts).

The Defendant acknowledges that the State followed the procedure approved in *King Cty. v. Williamson*, 66 Wn. App. 10, 830 P.2d 392 (1992). BOR at 14-15. There, following a summary judgment, appellants requested reconsideration. *King Cty. v. Williamson*, 66 Wn. App. at 11. When reconsideration was denied some months later, the appellants appealed from that denial. *Id.* This procedure meets the requirements for timeliness and satisfies RAP 5.2. *In re Marriage of Estes*, 84 Wn. App. 586, 595, 929 P.2d 500, 504 (1997).

The Defendant attempts to distinguish our case from *Williamson*, claiming that there the notice of appeal requested review of more than the motion for reconsideration. BOR at 16-17. In fact,

the *Williamson* opinion was limited to the issue of timeliness and provides no description of the content of the notice of appeal. No distinction is possible.

Under RAP 2.2(b)(1), the State may appeal any decision that abates, discontinues, or determines the case other than by a judgment or verdict of not guilty. The superior court's 3/18/15 order dismissing the prosecution was one such order. That order, however, did not become final until the motion for reconsideration was denied. CR 59(j) (until the motion for reconsideration is heard, no further motion may be made without leave of the court first obtained for good cause). The denial of the motion for reconsideration was the final order or word from the superior court abating the case so as to make that decision appealable as a matter of right under RAP 2.2(b)(1). The State properly and timely appealed after the motion for reconsideration was denied. BOR at 13 (acknowledging the timeliness of the State's appeal).

The Defendant argues that appealing from a motion for reconsideration limits the issues on appeal. This is not the law. "[A]n appeal from an order on a motion for reconsideration, as in this case, allows review of the propriety of the final judgment itself." *Davies v.*

*Holy Family Hosp.*, 144 Wn. App. 483, 492, 183 P.3d 283, 287 (2008). RAP 2.4(c)(3) specifically directs that the court of appeals will review a final judgment not designated in the notice if the order actually designated in the notice is a motion for reconsideration. That is the case here.

The Defendant argues that RAP 2.4(c)(3) only applies to motions for reconsideration that were post-trial. The “post-trial” language in the rule is superfluous, as indicated in *Davies v. Holy Family Hosp.*, 144 Wn. App. at 492 (reviewing a pre-trial summary judgment ruling after reconsideration was denied and the case consequently dismissed). Rulings which are appealable as a matter of right are not necessarily only post-trial motions. RAP 2.2(b). There is no rationale for distinguishing between motions of consideration from any final decision. Moreover, it is a well-established rule that the court may review any related orders or rulings which prejudicially affect the designated decision under review. *Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 143-44, 298 P.3d 704, 708 (2013)

The scope of review is determined by the notice or appeal, assignments of error, and substantive argumentation of the parties.

*Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d at 144. The higher court reviews “the exercise of [the lower court’s] discretion in deciding the issues that were raised by the motion.” *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). The State argues the same issues on appeal that it did in the motion for reconsideration. The scope is the same.

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C. DISMISSAL OF THE PROSECUTION WAS AN ABUSE OF DISCRETION.

1. The Defendant’s counsel on appeal misrepresents or misunderstands the record.

The Defendant misstates that the name “Joshua” was in earlier discovery. BOR at 19-20. Mr. Stilwill misspoke. *See supra* at 1. The entire discovery is in the appellate record. The name “Joshua” does not appear in any other report.

The prosecutor had no facility, and certainly no superior capability, for finding the Defendant’s friend with the only information being that he went by “Josh.” RP 3 (“We knew him just as Josh.”) Moreover, the prosecutor had no indication that the defense was asking for any assistance in this regard. RP 3 (defense stating “we,” the attorney and investigator, were attempting to locate him); RP 7-8

(defense communicated only that he had an investigator looking for the client's friend, leading prosecutor to believe the friend was identified). From defense communications, it would not have been reasonable for the prosecutor to interpret that the defense was asking for the State's assistance in not only locating the client's close friend, but in detecting his full name.

The record does not support the Defendant's claim that the State was without excuse (BOR at 19) in failing to understand that the Defendant would be alleging that his burglary victim who was arming himself with a shotgun, possibly against the Defendant, had given the Defendant pants and keys to a car. The State has no duty (BOR at 20) to decipher a lending relationship between the Defendant and Mr. Ferris – a relationship which to this day is unsupported by the record.

2. The Defendant does not dispute that the court's finding is unsupported in the record.

The State has argued in its opening brief that, contrary to the court's order, the prosecutor did not fail to provide information. BOA at 16. In fact, the prosecutor promptly provided the report on the very same day it was requested. The Defendant does not dispute the State's assertion – the court's finding is unsupported in the record.

Rather, the Defendant claims that the prosecutor “waited until the last minute.” BOR at 19. This characterization cannot be maintained. The prosecutor provided the report on the very same afternoon that the defense requested any reports that may be related to his case – within minutes of opening the defense email. The prosecutor found a report that was related, but not material or exculpatory, and immediately provided it.

3. The State has never asserted that the State lacked access to Pasco police reports.

The Defendant presents a straw man argument, claiming that prosecutor “offered the excuse” that he was not accountable for information not in his possession. BOR at 19, citing RP 6. The Defendant does not claim, nor may he, that this is the State’s argument on appeal. Nor was it the prosecutor’s argument at the trial level. The prosecutor accurately advised the court of events: i.e. that he obtained the report for the first time at 4 p.m. – within minutes of receiving the defense request. RP 6. The judge inquired: “You hadn’t had it before yesterday?” RP 6. And the prosecutor answered, “No, I just got it myself.” RP 6. This was not an excuse. This was a recitation of events.

4. The Defendant provides no analysis to support a determination that the report is *Brady* material.

The State has argued that the police report regarding Mr. Ferris is not *Brady* material. BOA at 16-24. It does not demonstrate that the Defendant was wearing Joshua Ferris' pants. And it does not corroborate the Defendant's account that he was helping his friend Ferris move in to rehab. Quite the opposite, the report tends to show that Ferris was not on friendly terms with Daniel Bates (who was trying to set Ferris up in retribution for sleeping with another man's wife and who had been asked to leave), and Ferris was not on his way to rehab. The report does not demonstrate that the key chain belonged to Joshua Ferris. The key chain is for a car owned by Benjamin Freeman. The report does not demonstrate that the Defendant was in *unwitting* possession of drugs. Quite the opposite, the report demonstrates that a person who took anything from Ferris' house, a drug den littered in hypodermic needles and drug paraphernalia, would have been well aware of the existence of drugs there.

The Defendant provides the standards under *Brady*. BOR at 17-18. However, he makes no argument even attempting to demonstrate how the report could be *Brady* material. Therefore, the

State's essential claim is undisputed.

Instead, the Defendant argues that if he had received (requested?) the report earlier, he might have been able to make something of it. BOR at 20, 21. Such a claim is entirely hypothetical and unpersuasive. The record at this point is only that the Defendant's claims about "Josh" were not borne out in the police reports, and even contradicted therein.

Absent evidence on the record demonstrating a *Brady* violation, there is no cause to dismiss and nothing to remedy.

5. The parties are agreed that reversal is required.

The Defendant argues that "reversal is the proper remedy." BOR at 22. It is also the remedy the State is requesting. The court's dismissal should be reversed.

Even if the record supported the finding of a *Brady* violation, which it does not, a dismissal is not appropriate. Rather, the parties should proceed to trial with the *Brady* material available for use in trial. BOA at 12-13, 24-25 (citing CrR 4.7(h)(7)(i) and *State v. Ramos*, 83 Wn. App. 622, 636, 922 P.2d 193 (1996)). Here the Defendant claims that the report was received "at the last minute." But *Brady* evidence that is produced much later, e.g. years after conviction, does

not result in the dismissal of prosecution. The remedy is a reversal of the conviction and a retrial. See *In re Stenson*, 174 Wn.2d 500, 276 P.3d 286 (2012).

The Defendant argues that the trial judge was not presented with any alternative remedies, that “the state was absolutely silent.” BOR at 23, 24. This is false. The State argued to the trial judge in bold and italicized letters that dismissal was an extraordinary remedy of last resort. CP 21. In capital letters, the State argued that continuance was the proper remedy. CP 25. The trial judge appeared persuaded. RP 13 (“I may not have granted the dismissal”).

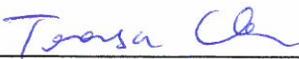
## VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court reverse the superior court’s dismissal and remand this matter for further proceedings.

DATED: October 5, 2016.

Respectfully submitted:

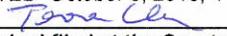
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED October 5, 2016, Pasco, WA

  
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