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SUPREME COURT
STATE OF WASHINGTON

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NO. 80041-3

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESIE PELE PUAPUAGA, PETITIONER

BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR.

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6. Did the prosecutor's conduct in obtaining the illegal orders regarding his property deny the defendant his constitutional rights to counsel and the right to be present at all hearings in his case?

7. Did the trial court erroneously hold that the prosecutor's actions in obtaining two illegal orders regarding the defendant's constitutionally protected personal property was harmless at most because the prosecutor could have obtained the materials via subpoena duces tecum or search warrant?

8. Did the prosecutor's conduct in obtaining without authority ex parte orders regarding the defendant's personal property constitute governmental misconduct under CrR 8.3(b) and therefore warrant dismissal of this prosecution?

B. STATEMENT OF THE CASE:

The State of Washington charged Jessie Sekou Puapuaga, herein-after defendant, with the crime of murder in the second degree in Pierce County Superior Court No. 06-1-04229-0. CP 1-3. His case was assigned to the Honorable Brian Tollefson for trial. SCP (Appendix A).

On March 9, 2007, the court entered an order for the defendant to undergo a competency evaluation at Western State Hospital. SCP (Appendix B). The defendant subsequently was transported there for the examination. Upon the defendant's admission to the hospital, staff conducted a routine inventory of his property. The staff conducted defense counsel and the prosecutor to inform them that the defendant had materials that were not often seen in patient property. This notification occurred via email shortly after 1 p.m. on March 16, 2007. The defendant's possession also included a note written to "Tony". The defendant is called "Tony". The defendant had no means of sending any notes from Western State Hospital – he also had no means to send any notes from the Pierce County Jail where he had been in solitary confinement pending his transfer to Western State Hospital. The staff informed counsel that the defendant appeared to have police reports and possible autopsy photos, although no determination was made regarding whether those materials were related to the defendant's case.

Deputy Prosecutor Kathleen Oliver contacted Western State Hospital to determine what information the defendant had in his personal property. CP 36-61. She reportedly was told that the defendant possessed “a complete set of un-redacted numbered discovery” and an unsent “kite” that appeared to contain a threat to one of his codefendants. On March 16, 2007, the prosecutor appeared before the Honorable Susan Serko, a judge **not** assigned to this case, and obtained an order impounding the defendant’s personal property and further ordering that the material not be released without a search warrant or other court order. Both Judge Tollefson and defense counsel Barbara Corey were available for hearing on March 16, 2007, and the prosecutor purposefully did not inform either of them regarding its appearance before Judge Serko and the presentation of the ex parte order. The prosecution did not seek to have the matter heard on the record and so there is no verbatim proceeding of the presentation of the order. The government did not even send a copy of the order to defense counsel.

Throughout the week of March 19, 2007, the deputy prosecutor repeatedly contacted staff at Western State Hospital to ask about the defendant’s personal property items. The deputy prosecutor repeatedly urged staff to examine the defendant’s personal property to provide her specific information about its contents. The prosecutor therefore con-

ducted a de facto review of the defendant's personal property insofar as she asked individuals at Western State Hospital to read the materials for her and to answer her questions regarding the contents. CP 36-61.

On March 23, 2007, the prosecutor again appeared before Judge Serko and obtained an order transferring the defendant's property to the Lakewood Police Department. CP 9-10. Once again, both Judge Tollefson and defense counsel were available for hearing that day. Once again, the prosecutor purposefully failed to provide any notice of the hearing to the defendant or to the assigned trial department. The prosecutor did not seek to have the matter heard on the record and so there is no verbatim report of proceedings of the presentation of the order.

On March 23, 2007, the Lakewood Police Department obtained a search warrant for "any written communication between defendant and persons involved as codefendants, witnesses, or others that may have potential testimony" that was contained within the defendant's belongings at Western State Hospital." The police did not file a copy of the warrant with the superior court as required by CrR 2.3. This warrant was also presented to Judge Serko.

On March 30, 2007, the prosecutor moved for the appointment of a special master to inspect the defendant's personal property. SCP (Appendix C). The police allegedly had not yet violated the defendant's personal property. The prosecutor wanted the special master to review the materials and to turn over any materials that fell within the scope of the warrant and also any unredacted discovery, apparently assuming that it related to this case and further asserting that unredacted discovery even containing privileged communications should be turned over to the prosecutor.

On April 10, 2007, Judge Tollefson granted the prosecutor's motion to appoint a special master. CP 81-83. The court held that the prosecutor possessed broad "police powers" that could be used to seize and review a pretrial defendant's personal property. The court held that the prosecutor could have obtained the materials either by subpoena or search warrant. The court also failed to sanction the prosecutor for circumventing the case assignment in this case, for failing to provide notice to the defendant of presentation of its order, for failing to ensure the presence of the defendant at these important hearings, and also for failing to ensure that the proceedings occurred in open court.

The prosecutor has admitted that she had staff at Western State Hospital read portions of the defendant's personal property to her. CP 36-61.

During the time periods relevant to the issues raised, the defendant was either in solitary confinement in "the hole" at the Pierce County Jail or at Western State Hospital, where his ability to communicate with witnesses and other individuals related to this case was severely restricted.

The defendant appeals the entry of the order. CP 79-80.

This court accepted interlocutory discretionary review in this case. SCP (Appendix D).

C. LAW AND ARGUMENT:

1. The trial court erred when it entered unnumbered findings of fact and conclusions on admissibility of evidence sections "findings as to the disputed facts" and "reasons for the court's rulings" where the factual findings are not supported by the record and the conclusions of law cannot survive de novo review.

This court reviews findings of fact related to a motion to suppress under the substantial evidence standard. Substantial evidence is "evidence sufficient to persuade a fair-minded rational person of the truth of the finding." This court reviews conclusions of law de novo. State v. Levy, 156 Wn.2d 709, 132 P.2d 1076, 1086-87 (2006).

In this case, and for the reasons set forth below, the trial court's findings are not supported by substantial evidence and the trial court's conclusions of law cannot pass appellate muster.

2. The trial court erred when it entered an order appointing a special master to examine the defendant's personal property which were seized without authority during his Western State Hospital competency examination.

Pretrial detainees have a reasonable expectation of privacy in their property and affairs which prohibit government searches and seizures absent a showing of legitimate reasons for breaching such privacy rights.. Block v. Rutherford, 468 U.S. 576, 590-91, 104 S.Ct. 3227, 3234-35, 82 L.Ed.2d 438, 449-50 (1984); Bell v. Wolfish, 441 U.S. 520, 555-57, 99 S.Ct. 1861, 1882-84, 60 L.Ed.2d 447, 479-80 (1979).

A pretrial criminal defendant's privacy interests are protected by, Wash. Const., art. I, section 7 (App. E), and, the Fourth Amendment of the United States Constitution. (Appe. F) When a valid privacy interest has been disturbed, this court asks whether "authority of law" justifies the intrusion. The authority of law required by Article I, section 7 is a valid search warrant or a lawfully issued subpoena served on the subject party. State v. Miles, 160 Wn.2d 236, 244, 156 P.3d 864 (2007).

The State lacked probable cause for a search warrant in this case. Probable cause is established by "setting forth facts sufficient for a

reasonable person to conclude the defendant probably is engaged in criminal activity.” State v. Huft, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). In this case, there was no probable cause that the defendant had committed any crime whatsoever. Even assuming arguendo that the note to “Tony” was intended for a testimonial codefendant, the defendant never took any efforts to convey the content to “Tony” and indeed could not have given his living conditions in the Pierce County Jail and at Western State Hospital.

Criminal subpoenas must be served upon the adverse party so that the party may appear in court and object to the subpoena. State v. White, 126 Wn. App. 131, 107 P.3d 753 (2005). In this case, the government could not have obtained a subpoena duces tecum without service upon the defendant and an open court hearing where the defendant could interpose his objections and seek to quash or other limit the subpoena.

In this case, the government lacked any legitimate means by which to acquire the defendant’s personal property. To the extent that the government could have used a subpoena duces tecum, the government would have been required to give the requisite notice to the defendant.

The government unlawfully seized and continues to hold the defendant’s personal property.

“Under the Washington Constitution, it is well-established that article I, section 7 differs qualitatively from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. State v. Surge, (slip opinion, p. 4) (App. G) citing State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). When analyzing the different protections of the two constitutions, this Court reviews state constitutional arguments first to determine whether article I, section 7 afford enhanced protections in the particular context. *Id.*

The protections of article I, section 7, are triggered only when a person’s private affairs are disturbed or the person’s home is invaded. “Private affairs” has been defined to be “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass without a warrant¹. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994).

A search conducted for administrative purposes, whether or not criminal prosecution is anticipated, is governed by the Fourth Amendment. *E.g.*, Michigan v. Clifford, 464 U.S. 287, 291-93, 104 S.Ct. 641, 646-47, 78 L.Ed.2d 477, 483-84 (1984). The fact that a search is part of

¹ Although the police did obtain a search warrant for the illegally seized materials in this case, they did not execute it within the time limits of CrR 2.3(c), which requires execution of a warrant within 10 days. Because the prosecutor subsequently moved for the appointment of a special master to review the defendant’s materials and decide what would be turned over to the government, the government decided not to proceed by warrant in this case.

an administrative need or has a purpose other than criminal prosecution does not diminish an individual's reasonable expectation of privacy. *See, Camera v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31, 18 L.Ed.2d 930, 935 (1967).

In this case, the defendant has a cognizable privacy right in his personal property. His expectation of privacy was not diminished by the circumstances of the search at Western State Hospital. Likewise, the fact that the hospital conducted its routine search for contraband such as weapons and drugs, did not in any way nullify the defendant's privacy rights into his personal property. Not only should the hospital not have contacted the prosecutor about his materials but also the prosecutor should not have seized the defendant's personal property. The prosecutor's seizure of the defendant's property was preceded by repeated contacts with staff so that she could ascertain the contents of the documents. CP 36-61. To put it another way, the prosecutor obtained the unlawful order for physical seizure of the defendant's personal property only after she de facto seized the property by having other individuals read it and report the contents to her. *Id.* Not only were the prosecutor's actions procedurally flawed, but also the prosecutor acted without authority of law.

This Court has identified several factors, which must be employed to determine the nature and extent of an individual's privacy interest. The

Court looks at (1) whether the citizen is entitled to hold the expectation of privacy in the questioned materials; (2) the nature and extent of the information that may be obtained as a result of the governmental conduct; (3) the extent to which the information has been voluntarily exposed to the public. State v. Surge, slip opinion, page 5, *citing* State v. McKinney, 148 Wn.2d 251, 76 P.3d 217 (2003), 27-29.

Application of these factors affirms that the defendant possessed a cognizable interest in the privacy of his materials. First, the defendant was entitled to hold an expectation of privacy in the questioned materials. The seized property encompasses personal papers, including materials that the defendant needed for the defense of the murder charge. The seized papers also contained personal mail, which identified the names and contact information for people close to the defendant. The defendant has a substantial privacy interest in matters pertaining to his case and enjoys the protection of statutory privileges for communications with his attorney. Second, the nature and extend of the information that may be obtained as a result of the governmental conduct affirms that the defendant's constitutional rights to privacy must be protected. The government easily could exploit even seemingly innocuous information, such as names and addresses of the defendant's family and friends, in its investigation. For example, the government could contact such individuals in an attempt to

identify individuals with whom the defendant might have communicated about his case. The government also wants access to any materials that are not expressly privileged thereby affirming that it believes itself entitled to, conduct a “fishing expedition” into the pretrial detainee’s personal affairs. Third, the defendant did nothing to voluntarily expose his property material to the public; to the contrary, he took his materials with him to Western State Hospital instead of leaving them at the Pierce County Jail; the defendant’s actions affirm that his intention to maintain the privacy of his property.

Although the trial court refused to decide whether the government had acted unlawfully to acquire the materials, the trial court should have decided that the government conduct was unlawful as argued herein. Instead, the trial court took cover under what it termed the broad “police powers” of the prosecutor. As argued *infra*, the prosecutor’s so-called broad “police powers” do not extend to violation of the defendant’s constitutional rights.

The trial court compounded the government’s error by ordering review of the materials by a special master. As the trial court candidly noted in its oral ruling, it could not identify any authority for ordering review of the defendant’s personal property by a special master. Colloquy RP 40-42. Nevertheless, the trial court expressed its belief that

the civil rules provide for their application where there is a void in the criminal rules. Colloquoy RP 44.

The trial court's reasoning was flawed because there is a fundamental distinction between the conduct of civil cases and criminal cases. The criminal defendant enjoys many constitutional protections, which are not available to civil litigants. For example, the criminal defendant enjoys the presumption of innocence and the right against self-incrimination. In this case, the trial court, urged on by the government, ordered review of the defendant's personal property, thereby breaching any attorney-client privilege and violating the aforementioned constitutional principles.

Likewise, although CrR 4.7(h)(6) (App. H) allows for in camera of materials by a trial judge, the in camera procedure has never been used to inspect materials held by the defendant. Rather, the rule is used for in camera review of materials such as psychological and dependency materials which the defendant wants to use in a criminal case. *E.g.* State v. Gregory, 158 Wn.2d 759, 793-95, 147 P.2d 1201 (2006).

The trial court erred in ordering this unlawful intrusion. Its order must be reversed.

3. The trial court erred when it entered an order appointing a special master to examine the defendant's personal property which was seized without authority during his Western State Hospital competency examination and to redact any privileged material and then turn the remaining items to the trial court for review whereupon another court hearing shall be held to determine what materials are to be turned over to the prosecutor under the rules of criminal procedure.

The trial court also erred when it ruled that the special master would redact any materials seized from the defendant which appeared to contain attorney-client privileged communications or notes or thoughts on the preparation of the defendant's defense, and then turn over the remaining items to the court, which will then hold a hearing to determine what information, if any, is to be turned over to the state under the criminal rules. CP 11-23.

As a general rule, the defendant's obligation to provide materials to the prosecutor is limited by CrR 4.7(b). The rule does not require the defendant to provide to the government access to his personal papers. These materials are subject to the constitutional protections noted herein.

The trial court's intention to review the materials to determine what, if anything should be turned over to the government flies in the face of CrR 4.7(b). This court must hold that the government, absent probable cause that a crime has been committed, is entitled to court review of a

defendant's personal papers and discovery of non-privileged materials and other materials not related to the preparation of the defense.

4. The prosecutor committed misconduct by presenting ex parte an order seizing the defendant's personal property where the prosecutor circumvented the assigned trial court and failed to give any notice to the defendant.

In this case, the prosecutor ignored rules on notice and assignment of cases when obtaining the order seizing the defendant's personal property. Although the government was implied that there existed some emergency, which permitted it to ignore rules and due process of law when it acted as it did, the government cannot and has not established the propriety of its actions.

CrR 8.2 (App. I) requires that motions (excerpt for motions pursuant to CrR 3.5 (App. J) and 3.6 (App. K) *shall* be governed by CR 7(b) (App. L). CR 7(b) requires motions to made an application to the court for an order which shall be by motion which shall be in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. It is well-settled, that motions in criminal cases shall be filed and served on the opposing party at least 5 days prior to the motion hearing².

² This practice is consistent with PCLR (2), which requires motions to be filed "with the clerk not later than the close of business on the sixth court day before the date set for hearing." In addition, PCLR (3) provides that no motion may will be heard unless there is on file proof of service of sufficient notice of the hearing upon the opposing party or there is an admission of such service by the opposing party.

Further, the practice of assigning judges in criminal cases is consistent with PCLR 40, "Assignments of Cases to Departments." PCLR (b) provides, "The case will be assigned to a department at the time of filing and *once so assigned shall remain in the department for all future proceedings unless returned to the court administrator by the judge for reassignment. The assigned department will hear all pretrial motions as are subsequently filed. Each department maintains its own hearing and trial docket.*" *(Italics added for emphasis)*

In this case, the State, without notice or service on the defendant, obtained two ex parte orders from Judge Serko, not the judge assigned to this case.

There is absolutely no authority whatsoever for the State's egregious and repeated violations of the rules governing motion practice in this jurisdiction.

The State's committed misconduct in obtaining two orders ex parte and off the record in a court other than the one assigned to this case. The lack of any record further works to the disadvantage of the defendant because he cannot determine what was said to Judge Serko and he is denied any record for appellate review of such misconduct.

For the reasons set forth above, this court must find that the State committed misconduct when on two occasions, the State presented orders to a judge other than the assigned judge and without notice and service on the defendant. This court shall not tolerate this reprehensible conduct.

The State's apparent justification for violating the rules of notice to opposing counsel and the requirement of making their motions before the assigned judge is that they were in a hurry and it was late in the day. Counsel for Mr. Puapuaga has carefully studied that rules and the case law and has been unable to find any authority, which justifies the "late in day" argument.

The State's position rings false because the documents at issue were not going away. If the State really believed that the defendant possessed documents to which he was not entitled, then the State easily could have made their motion with proper notice. This is no evidence to support any speculation that Mr. Puapuaga would have destroyed his personal papers.

5. The prosecutor committed misconduct by presenting ex parte a second order transferring the defendant's personal property to the Lakewood Police Department where the prosecutor circumvented the assigned trial court and failed to give any notice to the defendant.

The defendant incorporates the argument made in the previous section in support of this argument.

6. The prosecutor's conduct in obtaining the illegal orders regarding his property denied the defendant his constitutional rights to counsel, his right to be present at all hearings in his case, his right to open hearings and also RCW 2.08.080.

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment (App. M). In addition, the Washington State Constitution also provides a criminal defendant with "the right to appear and defend in person." Wash. Const., art 1, sec. 22. Additionally, Washington's criminal rules state that "[t]he defendant shall be present at every stage of the trial . . . except. . . for good cause shown." CrR 3.4(a) (App. N).

In this case, the government procured its subpoena for the defendant's file and its order impounding the defendant's property in clear violation of constitutional principles. Any hearing wherein the government seeks to intrude into the defendant's constitutionally protected personal property and materials protected by the attorney-client privilege, is a hearing affecting the substantial rights of the defendant. In this case, despite the availability of both the assigned court and defense counsel, the government obtained an illegal order affecting the disposition of the defendant's personal property.

In addition, the government violated the defendant's constitutional rights to effective assistance of counsel. The government did so by convening an ex parte proceeding, which affected the substantial rights of the defendant without notice to the defendant and his attorney, before a judge other than the assigned and available trial department, and without making a record of the proceeding.

Finally, the government violated the defendant's right to open criminal proceedings. This fundamental right, protected by Article I, section 22 of the Washington State Constitution and U.S. Const. amend VI, ensures that justice will be administered openly. This court has reiterated that closure of a proceeding is warranted only under "the most unusual circumstances." Personal Restraint Petition of Orange, 152 Wn.2d 795, 803, 100 P.3d 291 (2004).

The government's violation of the defendant's constitutional rights denied him the opportunity to address the court regarding the disposition of his personal property, the opportunity to appear and defend in person, and the right to have proceedings in this murder prosecution occurs in public view.

Because the State's motions in this case also were presented off the record and so there is no way to determine what happened when the State obtained those motions. This violates RCW 2.08.080 (App. O), which

requires the superior courts to be courts of record. (The only superior court criminal proceedings permitted to be secret and confidential, are grand juries (RCW 10.27.030) (App. P) and special inquiry courts (RCW 10.29.030) (App. Q). The instant case is neither of the above.

The prosecutor's actions violated the defendant's fundamental constitutional rights and have prejudiced his ability to defend in this action.

7. The trial court erroneously held that the prosecutor's actions in obtaining two illegal orders regarding the defendant's constitutionally protected personal property was harmless at most because the prosecutor could have obtained the materials via subpoena duces tecum or search warrant.

The trial court held that the prosecutor could have acquired the defendant's personal property by means of a subpoena duces tecum or search warrant. The trial court also held that a subpoena duces tecum could have been obtained ex parte. The trial court's attempt to justify the state's actions based on alternative means of obtaining the materials fails. The trial court was wrong.

The office of the prosecuting attorney is a creation of the Legislature, which has defined the prosecutor's duties in great detail. RCW 36.27.020³ (App. R). None of those duties includes the seizing and

³ RCW 36.27.020 defines the duties of the prosecuting attorney. "The prosecuting attorney shall: (1) Be legal adviser of the legislative authority . . . (2) Be legal

inspecting a criminal defendant's personal papers to determine whether he might possess discovery materials contrary to court rule. (A pro se defendant would have the right to possess all of the materials at issue, so there is no criminal behavior present here.) Further, the prosecutor has no authority to compel other individuals to inspect constitutionally protected property for him to determine whether he has a basis for a subpoena or probable cause for a search warrant. Simply put, the prosecutor cannot participate in an illegal search in order to determine whether he has probable cause to ask for a search warrant.

Although the prosecutor has the authority to apply for search warrants, CrR 2.3(a)⁴ (App. S), the prosecutor may search and seize *only*: (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise *criminally* possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or (4) person for whose arrest there is probable cause, or who

adviser to all county and precinct officers and school directors . . . (3) Appear for and represent the state, county, and all school districts . . . in all criminal proceedings in which the state and county . . . may be a party; (4) Prosecute all criminal and civil actions in which the state or the county may be a party . . . (5) Attend and appear before the give advice to the grand jury . . . (6) Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies . . . (7) Carefully tax all cost bills in criminal cases . . . (8) Receive all cost bills in criminal cases . . . (9) Present all violations of the election laws . . . (10) Examine once a year the official bonds of all county and precinct officers . . . (11) Make an annual report to the governor . . . (12) Send to the state liquor control board at the end of each year a written report . . . (13) Seek to reform and improve the administration of criminal justice. . .

⁴ CrR 2.3 is set forth in Appendix E.

is unlawfully detained. Search warrants may be issued only upon a finding of probable cause. CrR 2.3(c).

In the instant case, there was no probable cause for the issuance of any search warrant, whether by the prosecutor or the police. The possession of discovery is not criminal conduct. Further, assuming *arguendo* that the defendant had written a possible threatening note to “Tony”, the defendant never was in a position to send the note and took no step to do so. The defendant’s act of writing the note and then safe-keeping it is not criminal behavior. It is simply not a crime to think and then write down one’s thoughts in one’s own private property.

Thus, the prosecutor’s “police power” does not authorize seizure of a criminal defendant’s personal property without legal authority. In this case, the prosecutor would have been required to establish and could not establish probable cause to seize the property under the “impoundment”, which is subject to state and federal constitutional protections under.

Further, assuming *arguendo* that the prosecutor could have obtained a subpoena for the defendant’s personal property, the prosecutor would have had to give notice to defense counsel so that defense counsel could move to quash and/or modify. Had the prosecutor followed the subpoena procedure, the defendant would have been afforded his due process protections, which the prosecutor blatantly violated.

The prosecutor's "police power" does not extend to obtaining search court orders "impounding property". The prosecutor at no time cited any authority for its ex parte actions in this case.

In this case, the prosecutor did not claim to have probable cause for the "order impounding" defendant's property. Indeed, because the prosecutor obtained the order ex parte, off the record, and without the presence of defense counsel, there is no way to determine upon what authority the prosecutor sought the order and what authority the court found persuasive.

The prosecutor's decision not to seek a search warrant bespeaks their own conclusion that its seizure of the defendant's property was made without probable cause.

8. The prosecutor's conduct in obtaining without authority ex parte orders regarding the defendant's personal property constituted governmental misconduct under CrR 8.3(b) and therefore warrants dismissal of this prosecution.

CrR 8.3(b) (App. T) permits this court to dismiss a 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 trial.

In this case, the State committed misconduct⁵ by obtaining two ex parte orders from a judge other than the assigned judge to “impound” the defendant’s property from Western State Hospital. In addition, although the State claims that it has not reviewed or read the materials, the State has asserted that the materials include unredacted discovery, photographs, and a “kite” to an individual, which apparently was never sent to anyone by the defendant. Deputy Prosecutor Oliver acknowledged that she had individuals at Western State Hospital read the defendant’s personal property and then reported the contents to her.

The defendant has been materially prejudiced by the government misconduct. The defendant has been unable to work on his defense for many months. He has been denied access to private and privileged information that he needs to share with counsel.

The defendant has been denied trial with his codefendants whose trial starts on October 31, 2007.

⁵ In addition, the prosecutor does not have absolute immunity when performing duties that traditionally are viewed as investigative duties falling within primarily within the police function. Imbler v. Pachtman, 424 U.S. 408 (1976); National Prosecution Standards, Second Edition, National District Attorneys Association, 1991, Commentary to Section 38.5

D. CONCLUSION:

For the foregoing reasons, the defendant respectfully asks this court to dismiss this prosecution pursuant to CrR 8.3(b). Alternatively, the defendant asks this court to reverse the trial court's order appointing a special master to review his personal property and also to order the immediate return of his property.

Respectfully submitted this 29th day of October, 2007.

Barbara Corey
WSB#11778
Attorney for Petitioner

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct:
That on this date, I delivered via ABC-LMI a copy of the Brief of Petitioner to the Appellate Unit of the Pierce County Prosecutor's Office, Room 946 County-City Building, Tacoma, WA

Date

Signature