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SUPREME COURT  
STATE OF WASHINGTON

No. 80041-3

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THE SUPREME COURT  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESIE PELE PUAPUAGA, PETITIONER

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 06-1-014229-0

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STATE'S RESPONSE *Brief*

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A. IDENTITY OF RESPONDENT.

The STATE OF WASHINGTON, as represented by Gerald H. Horne, Pierce County Prosecuting Attorney, and his undersigned deputy prosecuting attorney asks this court to affirm the rulings of the trial court, but to nonetheless, to now conduct the *in camera* review itself.

B. ASSIGNMENTS OF ERROR

The state assigns no error to the trial court decision.

C. ISSUES PRESENTED FOR REVIEW.

1. Should this court affirm the trial court's discretionary ruling directing *in camera* review of the appellant's materials?
2. Did the appellant lack any privacy rights in the materials that were viewed in the course of an inventory search and subsequently impounded?
3. Did the trial court properly exercise its discretion when it appointed a special master to conduct the *in camera* review?
4. Should this court now conduct the *in camera* review itself?
5. Did the defendant have a full and fair opportunity to be heard by the court prior to the appointment of a special master to review the materials?

6. When the State obtained two *ex parte* orders, first impounding and then seizing the defendant's materials where those materials were already in the possession of Western State Hospital Security, were the defendant's rights properly respected?

7. Did the trial court properly deny the appellant's motion for dismissal?

D. STATEMENT OF THE CASE.

The Pierce County Prosecutor's office charged petitioner, Jesie Puapuaga with murder in the second degree. Puapuaga was one of five co-defendants. The case was charged as the result of an investigation by the Lakewood Police Department.<sup>1</sup>

The case was preassigned for trial to the Honorable, Brian Tollefson on 10-28-2006.<sup>2</sup> On March 16, 2007, prior to trial, counsel for the defendant, Barbara Corey, petitioned the court to have the defendant, Jesie Puapuaga examined for competency. The court granted the defense motion and ordered the defendant to be evaluated.<sup>3</sup> Upon Puapuaga's transfer, staff at Western State Hospital conducted an inventory of

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<sup>1</sup> Information, CP 2-3; Affidavit/Determination of Probable Cause, CP 1.

<sup>2</sup> CP 106. [In Pierce County, the vast majority of trials are not assigned to a trial judge prior to the day of trial. Instead, the parties appear before a presiding judge, who assigns the case to an available trial judge. However, many murder cases as well as some other very serious and/or complex cases are preassigned to a trial department from early in the history of the case. Such a preassignment was made in this case.]

<sup>3</sup> Order for Examination By Western State Hospital (15 Day Evaluation), CP 92-95.

Puapuaga's personal effects under policies adopted by the hospital for handling patients' property.<sup>4</sup>

Among the defendant's personal effects, hospital staff found materials including autopsy photos of the victim in the homicide.<sup>5</sup> This came to the attention of the mental health evaluator who mentioned the autopsy photos in an email that was sent on Friday, March 16, 2007, at 1:13 p.m. to both the defendant's attorney, Barbara Corey, and to Deputy Prosecuting Attorney Kathleen Oliver.<sup>6</sup> The defendant was also in possession of a jail "kite" form that appeared to have a threatening note addressed to a "Tony."<sup>7</sup> Anthony (Tony) Knoefler is a co-defendant in the case who is testifying at trial against the remaining defendants.<sup>8</sup>

The Prosecutor's office had never approved discovery to be turned over to the defendant.<sup>9</sup> The court also never approved or ordered

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<sup>4</sup> Findings and Conclusions on Admissibility of Evidence (hereinafter, FFCL), CP 74; Affidavit of Kathleen Oliver (hereinafter, Aff. K.O.), CP 36.

<sup>5</sup> FFCL, CP 74; Aff. K.O., CP 36, 43.

<sup>6</sup> FFCL, CP 74; Aff. K.O., CP 43.

<sup>7</sup> FFCL, CP 74-75; Aff. K.O., CP 37.

[ "Kite" is a term of art in the corrections context. It is a document used in the jail for purposes of formal communication between inmates and jail staff. Here, there was no particular significance to the "kite" form, other than it stood out to the staff at Western State. Beyond that, it was merely a piece of paper that was available to the defendant in the jail, and upon which he had written on the back.]

<sup>8</sup> FFCL, CP 75; Aff. K.O., CP 37.

<sup>9</sup> FFCL, CP 75; Aff. K.O., CP 37.

discovery to be turned over to the defendant.<sup>10</sup> The Prosecutor's office had approved the release of some discovery by attorney Mark Wagner to his client, John Gordon, a co-defendant to Puapuaga.<sup>11</sup> However, the discovery approved for release by Wagner did not include autopsy photos.<sup>12</sup>

On Friday March 16, 2007, at approximately 4:30 p.m., the prosecutor's office obtained a Pierce County Superior Court Order from Judge Susan Serko impounding the defendant's materials at Western State Hospital Security. The order was obtained *ex parte*, without counsel Barbara Corey having the opportunity to be heard.<sup>13</sup>

On March 23, 2007, the prosecutor's office obtained a second *ex parte* order from Judge Serko directing that the defendant's materials be released to the state.<sup>14</sup> Lakewood Police Detective Hall went to Western State Hospital and served a search warrant for the "kite" with the ostensible threat, and obtained both it and the other materials pursuant to

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<sup>10</sup> FFCL, CP 75.

<sup>11</sup> FFCL, CP 75; Aff. K.O., CP 37.

<sup>12</sup> FFCL, CP 75, Aff. K.O., CP 37.

<sup>13</sup> FFCL, CP 75, Aff. K.O., CP 38; Motion In Support of Order For Immediate Impound, CP 5-6; Order to Western State Hospital for Immediate Impound, CP 7-8.

<sup>14</sup> FFCL, CP 75; Aff. K.O., CP 39; Order for Release of Discovery to State; CP 9.

the court's order of release.<sup>15</sup> Detective Hall sealed with evidence tape the box containing the defendant's personal effects, transported it to the Lakewood Police Department, and booked the box into property.<sup>16</sup>

On March 28, 2007, the state filed a motion to appoint a special master to examine the materials and determine whether they contain any material related to the preparation of the defendant's defense, or any attorney-client privileged materials.<sup>17</sup> The state's motion was made out of an abundance of caution with the express purpose of ensuring that the state did not inadvertently gain access to any of the defendant's notes or plans for the preparation of his defense, nor to any attorney-client privileged communications.<sup>18</sup>

Moreover, the prosecutor's office undertook this request notwithstanding the fact that there was nothing in the information available to the state at that point that the defendant's materials contained any protected or privileged information.<sup>19</sup>

On April 3, 2007, the defense cross-filed a motion for immediate return of the defendant's property; opposition to appointment of special

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<sup>15</sup> The search warrant was obtained pursuant to an investigation of the possible crime of witness tampering (RCW 9A.72.120(1)).

<sup>16</sup> FFCL, CP 76; Aff. K.O., CP 39.

<sup>17</sup> States Motion to Appoint a Special Master, CP 96-97.

<sup>18</sup> State's Motion to Appoint a Special Master, CP 97; RP 04-10-2007, p. 29-30.

<sup>19</sup> FFCL, CP 76.

master, and dismissal/sanctions.<sup>20</sup> The court scheduled the motions for a hearing on April 10, 2007.<sup>21</sup>

On April 10, 2007, the court heard argument and issued an oral ruling.<sup>22</sup> The court held that a special master should be appointed to review the materials (and by necessary implication denying the defendant's motion for immediate return of the materials).<sup>23</sup> The court also denied the defendant's motion to dismiss.<sup>24</sup> At the hearing, Lakewood Police were present with the sealed box of impounded materials, and upon conclusion of the hearing transferred them to the custody of the court, where they remain.<sup>25</sup>

The court entered a formal written order appointing a special master on April 13, 2007.<sup>26</sup> The court also entered Findings and Conclusions in support of its ruling on that date.<sup>27</sup> In its order, the court specified that the sole purpose of the Special Master was to review the defendant's materials

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<sup>20</sup> Motion and Declaration for Immediate Return of Defendant's Property, CP 11-23.

<sup>21</sup> On April 4, 2007, the court entered an order finding the defendant competent to stand trial. While that matter is not directly relevant to the issues here, it did affect the timeline of the proceedings as no hearing on the motions could be held until after the defendant was determined to be competent. See, CP 108-109. It was for this reason that the hearing on this motion was continued from April 6, 2007, to April 10, 2007. See, CP 4; CP 107.

<sup>22</sup> RP 04-10-07.

<sup>23</sup> RP 04-10-07, p. 1-3.

<sup>24</sup> RP 04-10-07, p. 9.

<sup>25</sup> RP 04-10-07, p. 59-60

<sup>26</sup> RP 04-13-07, pp. 35ff; Order Appointing Special Master, CP 81-83.

<sup>27</sup> RP 04-13-07, pp. 2-35; FFCL, CP 74-78.

for any items that contained notes related to the defendant's preparation of his case, and for attorney-client privileged communications.<sup>28</sup> The special master was then to remove and or redact those items from the defendant's materials, and forward the remaining items to the trial court for further review prior to any determination as to what items if any the state should be granted access to.<sup>29</sup>

The defendant requested and received a temporary stay from the trial court in order to file a petition for discretionary review.<sup>30</sup> After that stay had expired, and before the Supreme Court entered its own stay on May 24, 2007, the trial court directed the parties to present argument as to the effect of State v. Miles on the court's order appointing a special master.<sup>31</sup> After consideration of argument on May 23, 2007, the court concluded that State v. Miles presented no basis for altering the court's order appointing a special master. The Petitioner now seeks interlocutory review of the Court's April 13, 2007, order appointing a special master.

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<sup>28</sup> Order Appointing Special Master, CP 81.

<sup>29</sup> Order Appointing Special Master, CP 82.

<sup>30</sup> RP 04-13-2007, p. 49.

<sup>31</sup> State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007).

E. ARGUMENT

1. THE APPELLANT'S PRIVACY RIGHTS HAVE NOT BEEN VIOLATED.

Under Article I, section 7 of the Washington Constitution, once police have conducted an inventory search of an inmate's effects, the inmate no longer holds a privacy interest in already searched items, and the items are not free from further governmental searches.<sup>32</sup>

This rule under Article I, section 7 is consistent with the rule under the Fourth Amendment to the United States Constitution. Once an inmate's personal effects have been exposed to police view in a lawful inventory search, the inmate no longer has a legitimate expectation of privacy in the items free of further governmental action.<sup>33</sup>

Here, the appellant's privacy rights were not violated where his materials were inventoried upon his transfer to Western State Hospital,

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<sup>32</sup> State v. Cheatam, 150 Wn.2d 626, 642, 81 P.3d 830 (2003).

<sup>33</sup> Cheatam, 150 Wn.2d at 638; Illinois v. Lafayette, 462 U.S. 640, 646, 77 L.Ed.2d 65, 103 S. Ct. 2605 (1983). See also, United States v. Stumes, 549 F.2d 831, 832 (1977); Colorado v. Bertine, 479 U.S. 367, 374, 93 L.Ed.2d. 739, 107 S. Ct. 738 (1987); United States v. Edwards, 415 U.S. 800, 806-809, 94 S. Ct. 1234, 39 L.Ed.2d 771 (1974). Moreover, the reduced expectation of privacy possessed by convicted prisoners generally also applies to pretrial detainees. See, Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861 (1979) (holding that pretrial detainees do not have a Fourth Amendment right to protection from random cell searches); Block v. Rutherford, 468 U.S. 576, 104 S. Ct. 3227 (1984) (holding that pretrial detainees do not have a Fourth Amendment right to observe searches of their cell).

and where the materials were impounded and turned over to the custody of the state by two separate court orders, having remained in the possession of security staff at Western State Hospital the entire time.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED AN *IN CAMERA* REVIEW OF THE MATERIALS.

While the appellant claims that the court's appointment of a special master to conduct an *in camera* review of the materials was error, appellant cites no relevant authority to support his position.<sup>34</sup> Accordingly, this court should refuse to consider the appellant's claim for failure to cite to authority.<sup>35</sup>

A trial court's decision to conduct an *in camera* review of privileged records is reviewed for abuse of discretion.<sup>36</sup> Here, it remains unclear whether the materials to be reviewed contain privileged records, which, indeed, is the very point of conducting the review.

CrR 4.7(h) regulates discovery, and subsection (6) specifically provides for *in camera* review as part of the process of regulation of discovery. Here, the state was seeking *in camera* review of the materials

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<sup>34</sup> Br. Appellant, pp. 15-16.

<sup>35</sup> Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 825 P.2d 549 (1992) (citing RAP 10.3(a)(5)).

<sup>36</sup> State v. Gregory, 158 Wn.2d 759, 793-95, 147 P.2d 1201 (2006) (citing State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993)).

in part because of an apparent discovery violation, so CrR 4.7(h)(6) is wholly applicable.

Contrary to the appellant's claim, CrR 4.7(h)(6) is not limited to materials such as psychological and dependency materials which defendant wants to use in a criminal case.<sup>37</sup> The appellant attempts to rely on State v. Gregory, in which the court considered *in camera* review of dependency files.<sup>38</sup> Contrary to the appellant's argument, nothing in Gregory suggests that *in camera* review is limited to those types of materials. Accordingly, Gregory does not support the appellant's position.

The trial court's broad discretion to conduct an *in camera* review has previously been established under Washington law. In State v. Garcia, the court held that where the prosecution claimed interview notes were protected work product, the court erred when it failed to conduct an *in camera* review of the materials to determine if they contained any additional evidence not previously disclosed to the defense.<sup>39</sup> Additionally, in State v. Jones, while reversing the court of appeals on other grounds, the Supreme Court found no error with the court of appeals's requirement that the trial court conduct an *in camera* review of

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<sup>37</sup> See Brief of Appellant, p. 14.

<sup>38</sup> State v. Gregory, 158 Wn.2d 759, 793-95, 147 P.2d 1201 (2006).

<sup>39</sup> State v. Garcia, 45 Wn. App. 132, 724 P.2d 412 (1986). See also, State v. Dictado, 102 Wn.2d 272, 298, 687 P.2d 172 (1984).

records of an internal police investigation demanded as discovery by the defendant.<sup>40</sup>

3. WHERE THE *IN CAMERA* REVIEW HAS NOT YET TAKEN PLACE, THIS COURT SHOULD CONDUCT THE REVIEW.

Where the trial court has not conducted an *in camera* review of materials protected by a privilege, it is expedient and appropriate for the appellate court to do so.<sup>41</sup> Here, the trial court has not yet conducted the *in camera* review to determine whether the materials contain any items that are attorney-client privileged, or related to the defendant's preparation of his case. Accordingly, this court should do so in furtherance of interests of judicial economy.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPOINTING A SPECIAL MASTER TO REVIEW THE DEFENDANT'S MATERIALS.

The appellant's argument against the appointment of the special master conflates the analysis of *in camera* review and the appointment of the special master. The two issues are in fact separate. For the reasons laid forth in the preceding section, *in camera* review is the proper mechanism for review of privileged materials.

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<sup>40</sup> State v. Jones, 148 Wn.2d 719, 62 P.3d 887 (2003).

<sup>41</sup> Garcia, 45 Wn. App. at 139.

The state argued below that there was no authority prohibiting the trial court from appointing a special master, and that doing so was within the broad discretion of the trial court to conduct the case.

The state proposed that a special master be appointed to conduct an *in camera* review of the materials in order to determine whether those materials contained anything that was related to the defendant's preparation of his case, or whether there was anything that was protected by attorney-client privilege.<sup>42</sup> Because of the shortened time for the hearing, the state was unsure whether an *in camera* review by the trial court might disqualify the court from overseeing the remainder of the case.<sup>43</sup>

After having had an opportunity to fully review the case law regarding *in camera* review, it appears that the trial court could properly conduct the review without any prejudice to the defendant. Accordingly, the state acknowledges that separate review by a special master now appears to be an unnecessary precaution, and that the trial judge, or this court could conduct the review.

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<sup>42</sup> RP 04-10-07, p. 29, ln. 6 ff.

<sup>43</sup> RP 04-10-07, p. 29, ln. 11ff

Nonetheless, the trial court's ruling was not error. The state's position remains that the trial court had the authority to appoint the special master as part of its broad powers to manage the case.

The trial court's appointment of a special master is consistent with the trial court's authority to regulate discovery, via both *in camera* review under CrR 4.7(h)(6) and especially to issue appropriate protective orders under CrR 4.7(h)(4). The special master was appointed to serve a protective function in the *in camera* review.<sup>44</sup>

While the trial court's order appointing a special master may in retrospect, have been unnecessary, it was not error. Even if this court were to hold it error, the defendant has as yet suffered no prejudice as the proceedings were stayed and this appeal taken before the special master could be appointed.

5. THE STATE DID NOT COMMIT MISCONDUCT WHEN IT OBTAINED *EX PARTE* ORDERS IMPOUNDING THE MATERIALS, AND EVEN IF THE *EX PARTE* ORDERS WERE OBTAINED IN ERROR, THE ISSUE IS MOOT AND THE DEFENDANT SUFFERED NO PREJUDICE.

The state had a legitimate good faith belief that extraordinary circumstances existed which warranted immediate action. CrR 4.7 generally covers discovery in a criminal trial. CrR 4.7(h)(3) requires that

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<sup>44</sup> Further, authority also exists under ER 706, which allows the court, on its own motion or that of either party, to appoint experts.

a defense attorney shall be permitted to provide a copy of the materials to the defendant only after making appropriate redactions which are approved by the prosecuting authority or by order of the court.

Here, the state had a good faith basis for believing that CrR 4.7(h)(3) was violated, where the defendant was reported to have discovery, including autopsy photos of the victim, that appeared to have the Bates numbering from the state issued discovery. Additionally, the apparent death threat against the testimonial co-defendant constitutes a possible discovery violation under CrR 4.7(h)(1), to the extent it discourages another person having relevant information from discussing the case with the prosecution. This is separate from the fact that it is also separately chargeable as a crime of attempted witness tampering.

The state separately had probable cause to support a charge of attempted witness tampering, where the writing of a note written on the back of the jail kite document constitutes a substantial step toward the completion of the crime of attempted witness tampering.

It should additionally be noted that the appellant's claim that the appellant had no ability to transmit the note to the testimonial co-defendant because he was incarcerated flies in the face of ample cases where inmates possess prohibited weapons or controlled substances while

incarcerated.<sup>45</sup> Indeed, that is particularly so where the appellant, Jesie Puapuaga, is separately charged with unlawful possession of a weapon in a correctional institution under CA# 07-1-00410-8.<sup>46</sup>

The trial court has authority to issue protective orders in support of the regulation of discovery. CrR 4.7(h)(4) provides that:

Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate...

Per CrR 8.2, rules 3.5, 3.6, and CR 7(b), shall govern motions in criminal cases. None of these rules prohibit *ex parte* motions for protective orders. Thus, the issuance of an *ex parte* order falls within the court's wide discretion to control discovery and related matters.

Moreover, CrR 4.8 provides that subpoenas shall be issued in the same manner as in civil actions. CR 45(e) provides that subpoenas may be issued to third parties for the production of documents. CR 45(b) provides that service shall be made on each party at least five days prior to the service of the subpoena, unless the court orders otherwise for good cause

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<sup>45</sup> RCW 9.94.040(2) prohibits prisoners from possessing weapons. See, State v. Barnes, 42 Wn. App. 56; 708 P.2d 414 (1985); State v. Gilcrist, 12 Wn. App. 733, 531 P.2d 841 (1975); State v. Morbec, 22 Wn. App. 404; 589 P.2d 823 (1979). RCW 9.94.041(2) prohibits prisoners from possessing controlled substances. See, State v. Rainford, 86 Wn. App. 431; 936 P.2d 1210 (1997); State v. Brown, 33 Wn. App. 843; 658 P.2d 44 (1983).

<sup>46</sup> This court is entitled to take judicial notice of entries in its own computerized record-keeping system.

shown. CR 45(b) further specifies that a motion for such an order may be made *ex parte*.

The first order impounded the appellant's materials. The second order directed them to be turned over to the state. Neither order specifies a particular basis under the court rules. However, the orders are equally legitimate either as protective orders under CrR 4.7(h)(4), or as subpoenas *deuces tecum*, under CR 45.

The state did not commit misconduct by obtaining the orders *ex parte* or without notice to defense. Rather, the orders were designed to protect the materials as they existed, and ensure the court had the opportunity to review them. Any error on the part of the state merely extended to the improper format of the orders, not the underlying substance of the orders obtained.

Finally, even improper *ex parte* contact is harmless error where the defendant receives notice of the *ex parte* contact and has an opportunity to address the court and correct or complete the record regarding any improper *ex parte* contact prior to a ruling by the court that affects the defendant's substantive rights.<sup>47</sup> Here, the defendant had that opportunity

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<sup>47</sup> See, State v. Ralph, 41 Wn. App. 770, 779, 706 P.2d 641 (1985).

where the court received the sealed box of materials from Lakewood Police, and ordered the items to be held by the court.

The appellant has also repeatedly asserted that he has the right to be present at all hearings in the case against him, and that the *ex parte* orders violated this right.<sup>48</sup> The appellant's position misstates the law with regard to this issue.

The U.S. Constitution gives the defendant the right to be present at critical stages in the trial.<sup>49</sup> CrR 3.4(a) provides that the defendant's presence is necessary at every critical stage of the proceedings.<sup>50</sup> CrR 3.4(a) states:

(a) **When Necessary.** The defendant shall be present at arraignment, at every stage of the trial including the empanelling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

Generally, pre-trial hearings other than those specified in the rule are not a critical stage in the proceedings unless issues of disputed facts

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<sup>48</sup> See, Brief of Petitioner, p. 19 (caption to section 6).

<sup>49</sup> *State v. Chappelle*, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001).

<sup>50</sup> *Chappelle*, 145 Wn.2d at 318 (citing, CrR 3.4(a)).

are resolved or some other determination is made regarding the conduct of trial.<sup>51</sup>

Here, when the *ex parte* orders were obtained, it was not at arraignment, in the course of trial, or at sentencing. Accordingly, the appellant's claim that he was denied his right to be present is without merit.

6. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR DISMISSAL.

A trial court's denial of a motion to dismiss under CrR 8.3(b) is reviewed for abuse of discretion.<sup>52</sup> To support dismissal, the defendant must show: 1) arbitrary action or governmental misconduct; 2) resulting in prejudice affecting the defendant's right to a fair trial.<sup>53</sup>

The extraordinary remedy of dismissal of charges is available only when the rights of the accused have been prejudiced in a way that materially affects the right to a fair trial by the accused.<sup>54</sup> Even when

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<sup>51</sup> See, State v. Corbin, 79 Wn. App. 446; 903 P.2d 999 (1995). See also, In Re Persona Restraint of Lord, 123 Wn.2d 296; 868 P.2d 835 (1994); State v. Ahern, 64 Wn. App. 731; 826 P.2d 1086 (1992); In Re Personal Restraint of Benn, 134 Wn.2d 868; 952 P.2d 116 (1998); State v. Berry Smith, 87 Wn. App. 268; 944 P.2d 397 (1997).

<sup>52</sup> State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868 (2000) (citing State v. Michelli, 132 Wn.2d 229, 240 937 P.2d 587 (1997)).

<sup>53</sup> Garza, 99 Wn. App. at, 295 (citing, Michelli, 132 Wn.2d at 240).

<sup>54</sup> Garza, 99 Wn. App. at, 295 (citing Seattle v. Orwick, 113 Wn.2d 823, 830, 784 P.2d 161 (1989); State v. Baker, 78 Wn.2d 327, 474 P.2d 254 (1970)).

arbitrary action or governmental misconduct occur, if suppression of the evidence will eliminate the prejudice, dismissal is not justified.<sup>55</sup>

Here, the trial court did not abuse its discretion where the defendant failed to meet his burden to show any misconduct or prejudice. Indeed, there can be no prejudice where the materials await *in camera* review by the trial court. Accordingly, the trial judge did not abuse his discretion where he denied the defendant's motion to dismiss the case.

F. CONCLUSION.

This court should deny the appellant's request and uphold the trial court's decision to conduct an *in camera* review of the materials.

However, at this point in the proceedings, this court should itself conduct the *in camera* review.

The appellant's privacy rights were not violated where the materials were first viewed by security staff at Western State Hospital in the course of an inventory search, and were then subsequently impounded and ultimately turned over to the state while having remained in the possession of Western State Hospital security. The prosecution did not conduct misconduct when it obtained *ex parte* protective orders impounding and

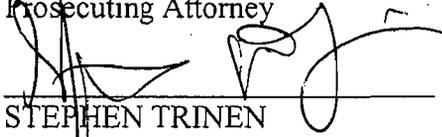
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<sup>55</sup> Garza, 99 Wn. App. at 295 (citing Orwick, 113 Wn.2d at 830).

obtaining the materials. Accordingly, the trial court properly denied the appellant's motion for dismissal where the appellant has shown no prejudice, and where suppression would be the proper remedy.

DATED: December 27, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



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STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date



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Signature

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TO E-MAIL

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SUPREME COURT  
STATE OF WASHINGTON  
2007 DEC 28 A 11: 25  
BY RONALD R. CARPENTER  
CLERK

IN THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JESIE PELE PUAPUAGA

Defendant.

NO. 06-1-04229-0  
S. CT. 80041-3

SUPPLEMENTAL DESIGNATION OF  
CLERK'S PAPERS

TO KEVIN STOCK, CLERK OF THE SUPERIOR COURT OF PIERCE COUNTY:

Please prepare the clerk's papers listed below for transmittal to the Supreme Court of the State of Washington, Cause No. 80041-3. If you have any questions, please contact STEPHEN TRINEN at 798-7426:

<u>Date</u>	<u>Name of Document</u>
4/13/07	Order for Stay
9/28/06	Order Preassigning Judge
4/6/07	Schedule Order
4/13/07	Sealed Box of Defendant's Materials
4/6/07	Order Regarding Competency

FILED AS ATTACHMENT  
TO E-MAIL

DATED: December 27, 2007.

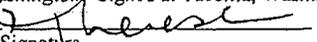
GERALD A. HORNE  
Pierce County Prosecuting Attorney

  
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Steven Trinen  
WSB #30925  
Attorney for Respondent

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail and/or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o of his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-28-09 

Date Signature