

No. 46062-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

vs.

**Ascension Salgado-Mendoza,**

Respondent.

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Jefferson County Superior Court Cause No. 13-1-00105-1

The Honorable Judge Keith Harper

**Respondent's Brief**

Jodi R. Backlund  
Manek R. Mistry  
Skylar T. Brett  
Attorneys for Respondent

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Ascension Salgado-Mendoza with driving under the influence and tried him in district court. CP 20.

Mr. Salgado's attorney made a formal discovery demand, which included a request that the state disclose the names of each witness it would call at trial. CP 11-12; Notice of Appearance (filed 9/28/12), Supp CP.

The prosecutor intended to rely upon the expert testimony of a toxicologist. CP 6. Rather than provide Mr. Salgado with the name of the witness it would call, however, the state provided Mr. Salgado with the names of the eight toxicologists at the state laboratory. RP<sup>1</sup> 8; CP 6.

The afternoon before trial, the state provided Mr. Salgado with a narrowed-down list of three toxicologists. RP 21.

On the morning of trial – still not knowing which expert the prosecutor would call – Mr. Salgado moved to either dismiss the charge or to strike the toxicologist's testimony. RP 26, 27; CP 39-44.

Defense counsel explained that he was unable to adequately represent Mr. Salgado-Mendoza because he was not prepared to

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<sup>1</sup> Each citation to the Report of Proceedings refers to the complete, 535-page document encompassing the entire trial.

effectively cross-examine the state's expert. RP 20-21. He was not able to prepare to cross-examine all eight potential experts because of the lengthy and complex materials related to each one. RP 21. He argued that the state's inability to provide the name of its expert witness until the morning of trial constituted governmental mismanagement. RP 25.

The district court denied Mr. Salgado-Mendoza's motion to strike the state's late-disclosed expert. RP 35-36. The judge said that the toxicology lab only had seven potential witnesses when they needed closer to twenty to run effectively. RP 35. The court ruled that that was not governmental mismanagement. RP 35.

After the court's ruling, defense counsel explained that he would like to move to continue so he could prepare to cross-examine the state's expert but that Mr. Salgado-Mendoza did not want to waive his right to a speedy trial. RP 36-37.

Accordingly, defense counsel said that he would move forward with the trial even though he was not fully prepared. RP 37. He explained that he was ready to question the expert about the breath machine simulator solution, but that he would have trouble if the witness testified about other things as well. RP 37.

At trial, Christopher Johnston – a scientist from the toxicology lab -- provided expert testimony on behalf of the prosecution. RP 228-63. He

talked about much more than the simulator solution. RP 228-63. Johnston also testified at length regarding the effect of alcohol on the human body and the reliability of the field sobriety tests. RP 232-39.

The trial court admitted Mr. Salgado's breath test results, conducted on a BAC Datamaster machine, into evidence. RP 180. Mr. Salgado sought to present expert testimony regarding the functionality of the machine. RP 370-89. The court granted the state's motion to prohibit a defense expert from testifying regarding the details of the BAC machine. RP 398.

Mr. Salgado was convicted of DUI. RP 515. He appealed his case to the superior court under the Rules of Appeal from Courts of Limited Jurisdiction (RALJ). CP 56.

The RALJ court reversed Mr. Salgado's conviction on two grounds. CP 60, 66.

First, the superior court found that the prosecutor had violated the discovery rules and engaged in governmental mismanagement. This finding was based on the state's failure to disclose the name of its expert until the day of trial. CP 60.

Second, the superior court held that the trial court had abused its discretion by excluding the defense expert's testimony regarding the breathalyzer machine. CP 66.

The state sought discretionary review of the superior court's RALJ opinion. Motion for Discretionary Review.

The Court of Appeals commissioner granted review only of the issue regarding the late disclosure of the state's toxicologist expert. Ruling Granting Motion for Discretionary Review of a court of Limited jurisdiction in Part and Denying in Part. The state did not move to modify the commissioner's decision denying review of the issue regarding the improper limitations on the defense expert's testimony.

### **ARGUMENT**

**I. THE SUPERIOR COURT PROPERLY REVERSED MR. SALGADO-MENDOZA'S CONVICTION BASED ON DISCOVERY VIOLATION AND GOVERNMENTAL MISMANAGEMENT.**

A. Standard of Review.

RALJ 9.1 governs review of a District Court's decision in both superior court and the court of appeals. *State v. Moore*, 178 Wn. App. 489, 497, 314 P.3d 1137 (2013). The court of appeals reviews factual determinations for substantial evidence and legal issues *de novo*. *Id.*

A trial court's discovery rulings are reviewed for abuse of discretion. *Moore*, 178 Wn. App. at 497. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* A court necessarily abuses its discretion by applying the

wrong legal standard. *In re Marriage of Neumiller*, --- Wn. App. ---, 335 P.3d 1019, 1023 (October 7, 2014).

- B. The state violated the discovery rules and engaged in governmental mismanagement by failing to disclose the name of the expert witness who would testify against Mr. Salgado-Mendoza.

The criminal discovery rules are “designed to enhance the search for truth.” *State v. Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54 (2007). The purpose of the discovery rules is to “provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.” *Id.* at 434. Courts should apply the rules to “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.” *Id.* at 433.<sup>2</sup>

A prosecutor must disclose the names and addresses of persons the state intends to call as witnesses at trial. CrRLJ 4.7(a)(1). If the accused requests specific information, the prosecutor must attempt to provide the information even if it is not within his/her knowledge. CrRLJ 4.7(d). If the prosecutor is unable to obtain the information, the court must issue any

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<sup>2</sup> In addition, “courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial.” *Boyd*, 160 Wn.2d at 434 (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

subpoenas or orders necessary to make the information available to the accused. CrRLJ 4.7(d). The prosecutor must provide discovery materials within twenty-one days of receipt of the demand. CrRLJ 4.7(a)(2).

The state may not, by failure to provide timely discovery, force an accused person to choose between his/her rights to a speedy trial and to the effective assistance of adequately-prepared counsel. *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009).

Late discovery resulting from governmental misconduct is ground for dismissal. *Brooks*, 149 Wn. App. at 391. Governmental misconduct warrants dismissal if the accused can demonstrate misconduct and prejudice. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). Misconduct does not have to be malicious; “*simple mismanagement is sufficient.*” *Id.* (emphasis in original). The accused is prejudiced by governmental mismanagement if it affects his/her right to a speedy trial or “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *Id.*

Here, despite Mr. Salgado’s repeated requests, the state did not provide the name of its toxicology expert until the morning of trial. CP 11-12, 40, 57, Notice of Appearance (filed 9/28/12), Supp CP. This forced Mr. Salgado to choose between his rights to a speedy trial and to adequately-prepared counsel. RP 36-37; CP 59.

The superior court found that the prosecutor had violated the discovery rule at CrRLJ 4.7 by failing to disclose the name of the specific toxicologist who would testify at Mr. Salgado's trial. CP 60. The court found the state's argument based on the toxicology lab's limited resources unpersuasive, noting that the court of appeals had previously rejected a similar argument. (CP 60 (*citing State v. Wake*, 56 Wn. App. 472, 783 P.2d 1131 (1989))).

The state erroneously relies upon a rule limiting the prosecutor's obligation "to material and information within the actual knowledge, possession, or control of members of his or her staff." Brief of Appellant pp. 6, 8 (*citing* CrRLJ 4.7(a)(4)). Unlike documents, photos, or other substantive evidence, the name of a state witness is never *unavailable* to the prosecutor. A prosecutor has access to the personnel at the state crime lab. If necessary, s/he has the capability of contacting supervisors in order to pin down the name of the person who will testify at a particular trial. In short, information that is available to a party's expert witness is available to the party.

Here, the name of the toxicologist who would testify against Mr. Salgado was available to the prosecutor. The fact that the prosecutor did not make any effort to obtain that name does not excuse his failure to provide it as part of timely discovery. Indeed, a contrary interpretation of

CrRLJ 4.7(a)(4) would absolve parties of responsibility for providing discovery of material that was available to their experts under the grounds that the information was not available to the parties themselves. Such a ruling would incentivize litigants against effective and timely communication with their own witnesses.

Additionally, the discovery rule provides that:

Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority, the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

CrRLJ 4.7(d).

Mr. Salgado specifically asked the prosecutor for the names of the witnesses the state would call at trial. CP 11-12, Notice of Appearance (filed 9/28/12), Supp CP. He also asked for the toxicologist's name, specifically, several times in the weeks leading up to trial. CP 39-40. These requests triggered the prosecutor's obligation under subsection (d) to attempt to make the information available to Mr. Salgado. If his efforts proved unsuccessful, the court should have made the orders necessary to compel the toxicology lab to disclose the name of expert who would

testify against Mr. Salgado. CrRLJ 4.7(d). The superior court correctly held that the prosecutor had failed to comply with the requirements of the discovery rules at CrRLJ 4.7. CP 59-60

Furthermore, the inability of the prosecutor's office and the toxicology lab to coordinate their schedules in order to comply with the discovery rules constitutes governmental mismanagement. *Michielli*, 132 Wn.2d at 239-40. Governmental mismanagement that affects the rights of accused person's qualifies as governmental misconduct. *Id.*

The toxicology lab and the prosecutor's office are both part of the executive branch of state government. *See e.g. Wake*, 56 Wn. App. at 475 (noting that congestion at crime lab should not be permitted to excuse continuances based on toxicologist unavailability because the state would then have no incentive to remedy the problem). The state does not present any explanation as to why the two offices should be unable to exchange the information necessary to get a specific expert witness to court with more than a few hours' notice. Brief of Appellant.

The state argues that "it is well known" that trial dates often change. Brief of Appellant, p. 8. Accordingly, the state contends, it would constitute mismanagement for the State Toxicologist to respond to subpoenas until a trial date is certain. Brief of Appellant, p. 8.

Here, however, the prosecutor was still unable to provide the name of its testifying expert *the afternoon before trial*. RP 21. Mr. Salgado-Mendoza still did not know who would be testifying against him on the morning the trial began. RP 21. Mr. Salgado-Mendoza does not complain of the state's inability to provide a name months in advance. The fluctuation in trial dates cannot explain the prosecution's failure to disclose the name of its expert one day in advance.

An accused person is prejudiced by governmental mismanagement if it affects his/her right to a speedy trial or to adequately-prepared counsel. *Michielli*, 132 Wn.2d at 239-40. Still, the state relies on the standard for prosecutorial misconduct, to argue that reversal is not required because Mr. Salgado-Mendoza cannot demonstrate that the outcome of the trial would have been different. Brief of Appellant, pp. 9-10. But the RALJ court did not find – and Mr. Salgado-Mendoza did not argue – that the prosecutor committed misconduct. CP 56-66.

Rather, Mr. Salgado-Mendoza was prejudiced by the government's mismanagement because he was forced to choose between his right to a speedy trial and his right to fully-prepared counsel. RP 36-37. Mr. Salgado-Mendoza's attorney was not ready to effectively cross-examine the state's expert because he did not get the witness's name until the

morning of trial. RP 21.<sup>3</sup> No further showing is required. *Michielli*, 132 Wn.2d at 239-40. The state errs by conflating the standards for governmental mismanagement and prosecutorial misconduct.

The prosecutor in Mr. Salgado's case did not make any effort to communicate with the toxicology lab in order to comply with the demands of the discovery rules. The superior court correctly found that governmental misconduct required reversal of Mr. Salgado's conviction. (Response to Motion for Discretionary Review, Appendix A, p. 4-5).

C. The authority upon which the state relies does not support its argument.

In *Brooks*, the court of appeals upheld dismissal based on the prosecution's failure to provide timely discovery. *Brooks*, 149 Wn. App. at 391. The state argues that the superior court's decision conflicts with *Brooks*. Brief of Appellant, pp. 5-6.

But the *Brooks* case actually supports Mr. Salgado's position. Notably, the *Brooks* court rejected the state's argument that it did not have possession or control over the requested discovery because it was in the

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<sup>3</sup> The state suggests that defense counsel was not affected because he had several months to interview and review the personnel files of the eight toxicology experts whose names were originally disclosed. Brief of Appellant, p. 8. Defense counsel, however, informed the trial court that the information on the state patrol website about each of the eight experts, however, exceeded 170 pages. CP 40. The burden on the state of naming a witness within a reasonable time is far less than on defense counsel of interviewing and preparing to cross-examine seven unnecessary witnesses.

custody of the sheriff's office. *Id.* at 403-04. The court noted that there was no evidence that the prosecutor's office had tried to work with the sheriff's office to obtain the discovery material before disclosure was necessary. *Id.* at 403.

Likewise, here, the state presents no evidence that the prosecution made any effort to obtain the name of the specific toxicologist before the day of Mr. Salgado's trial, despite his repeated requests. *Brooks* supports the superior court's decision.

The state also alludes to a conflict between the superior court's decision in Mr. Salgado's case and *State v. Blackwell*. Brief of Appellant pp. 5-6 (citing *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993)). In *Blackwell*, the court found that the prosecutor complied with discovery rules by making significant efforts to obtain a police officer's personnel file. *Id.* at 832. The prosecutor in *Blackwell* even asked the court to issue a *subpoena duces tecum* for the production of the file. *Id.* at 826.

The prosecutor in Mr. Salgado's case, on the other hand, made no effort to produce the name of the testifying toxicologist until the day of trial. The state's reliance on *Blackwell* is misplaced. *See also Brooks*, 149 Wn. App. at 384-84 (noting that *Blackwell* was "easily distinguishable")

based on the *Blackwell* prosecutor's effort to secure the discovery materials and the lack of such effort in *Brooks*).

The superior court properly held that the trial court abused its discretion by failing to hold the prosecution to its discovery obligations. CrRLJ 4.7.

**II. THE ISSUE REGARDING THE DEFENSE EXPERT'S TESTIMONY IS NOT BEFORE THIS COURT ON DISCRETIONARY REVIEW.**

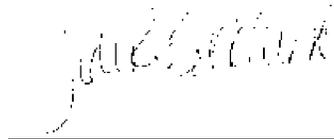
The Court of Appeals commissioner denied discretionary review of the RALJ court's decision concerning improper limitations on the testimony of Mr. Salgado-Mendoza's defense expert. Ruling Granting Motion for Discretionary Review of a court of Limited jurisdiction in Part and Denying in Part. Nonetheless, the state argues that the RALJ court's ruling on that issue was in error. Brief of Appellant, pp. 10-13. The state's arguments are not properly before this court.

**CONCLUSION**

The prosecution's failure to disclose the name of its expert witness until the morning of trial violated the rules of discovery and constituted governmental mismanagement that affected Mr. Salgado-Mendoza's rights. The Superior Court correctly reversed Mr. Salgado-Mendoza's conviction on those grounds.

Respectfully submitted on February 25, 2015,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Respondent



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Manek R. Mistry, WSBA No. 22922  
Attorney for the Respondent



---

Skylar T. Brett, WSBA No. 45475  
Attorney for Respondent

## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Respondent's Brief, postage prepaid, to:

Ascencion Salgado-Mendoza  
1627 Carlsborg Rd  
Sequim, WA 98382

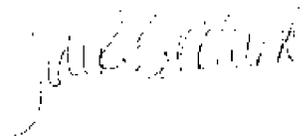
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Jefferson County Prosecuting Attorney  
cashcraft@co.jefferson.wa.us

I filed the Respondent's Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 25, 2015.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Respondent

## BACKLUND & MISTRY

**February 25, 2015 - 3:15 PM**

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