

**COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON**

---

**NO. 36171-0-II**

**STATE OF WASHINGTON,**

**Appellant.**

**vs.**

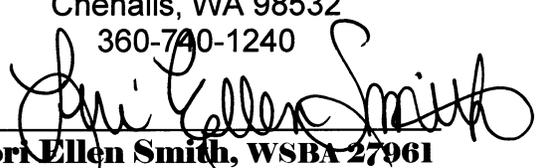
**Natalie R. Brooks & Jason P. Brooks  
Respondents.**

---

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 11 PM 1:48  
STATE OF WASHINGTON  
BY                       
DEPUTY

**OPENING BRIEF OF APPELLANT STATE OF WASHINGTON**

**L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTOR**  
Law and Justice Center  
345 W. Main St. 2nd Floor, MS: PROO1  
Chehalis, WA 98532  
360-740-1240

By: 

**Lori Ellen Smith, WSBA 27961**

**Deputy Prosecutor  
Appeals Unit**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii

ASSIGNMENTS OF ERROR.....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

SUMMARY OF THE ARGUMENT.....2

STATEMENT OF THE CASE.....4

APPLICABLE LAW & ARGUMENT.....22

A. THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THESE CASES WITH PREJUDICE WITHOUT FIRST CONSIDERING ALTERNATIVE, LESS-DRASTIC, REMEDIES.....22

    1. **The 60-day Speedy Trial Time Frame is Not a Constitutional Mandate and the Trial Court Could Have Continued these Cases Beyond the "Rule Created" Speedy Trial Time Frame As a Less Drastic Remedy and To Allow the Parties Additional Time to Examine the Discovery**.....31

    2. **If there Was Mismanagement, The Trial Court Chose the Wrong Remedy When it Ordered the Cases Dismissed**.....34

    3. **The State is Not Conceding Mismanagement or Governmental Misconduct because the Prosecutor Did Not have "Possession or Control" of the Complained-of Missing or Tardy Discovery**.....38

    4. **There was No Mismanagement as to Access to Witnesses Because the Defense Can Interview the Witnesses on Their Own at Any Time And There is No Evidence Here that the State Interfered with the Defenses' Ability to Interview Witnesses**.....1

**5. The Defense did Not Prove that the Complained of "Missing" Discovery Would Interject any New Facts into The Case and Thus they Did Not Prove Prejudice.....45**

**6. The Trial Court Erred in Not Addressing the Materiality of the Late-Received Discovery.....47**

**CONCLUSION.....49**

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Cases**

Barker v. Wingo, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 01 (1972).....32,33

**Washington Cases**

City of Seattle v. Orwick, 113 Wn.2d 823, 784 P.2d 161 (19889) (emphasis added).....25,29

State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993).  
.....24,27,37,38,39,40,44

State v. Cannon, 130 Wn.2d 313, 922 P.2d 1293 (1996) .....45

State v. Cantrell, 111 Wn.2d 385, 758 P.2d 1 (1988).....25

State v. Clark, 53 Wn.App. 120, 765 P.2d 916 (1988), *rev. denied*, 112 Wn.2d 1018 (1989).....26

State v. Coleman, 54 Wn.App. 742, 775 P.2d 986, *rev. denied*, 113 Wn.2d 1017 (1989).....26,27,32,41,43

State v. Dunivin, 65 Wn.App. 728, 829 P.2d 799 (1992) .....24

State v. Ervin, 22 Wn.App. 898, 495 P.\* 934, *rev. den.* 192 Wn.2d 1017 (1979).....23.

State v. Farnsworth, 133 Wn.App. 1, 130 P.3d 389(2006).....26,41

State v. Flinn, 119 Wn.App. 232, 80 P.3d 171, review granted 152 Wn.2d 1013, 101 P.3d 108, affirmed, 54 Wn.2d 193, 110 P.3d 748 (2003).....30

State v. Garza, 90 Wn.App. 29, 994 P.2d 868, review denied 141 Wn.2d 1015, 10 P.3d 1072 (2000) .....29,34

State v. Getty, 55 Wn.App. 152, 777 P.2d 1 (1989) .....26,28

|  |                      |
|--|----------------------|
| <u>State v. Hanna</u> , 123 Wn.2d 704, 871 P.2d 1135, reconsideration denied, cert. denied, 115 S.Ct. 299, 513 U.S. 919, 130 L.Ed. 2d 212, grant of habeas corpus affirmed, 87 F.3d 1034 (amended on denial of rehearing) (1994) ..... | 43                   |
| <u>State v. Hutchinson</u> , 135 Wn.2d 863, 959 P.2d 1061 (1998), <i>aff'd</i> , 147 Wn.2d 197, 53 P.3d 17 (2002) .....  | 28,37                |
| <u>State v. Koerber</u> , 85 Wn.App. 1, 931 P.2d 904 (1997)<br>.....   | 22,23,28,29,30,35,36 |
| <u>State v. Laureano</u> , 101 Wn.2d 745, 683 P.2d 889 (1984).....   | 25                   |
| <u>State v. McReynolds</u> , 104 Wn.App. 560, 17 P.3d 608, amended on denial of reconsideration, review denied, 144 Wn.2d 1003, 29 P.3d 719, on subsequent appeal, 117 Wn. App. 309, 71 P.3d 663 (2000).....                           | 37                   |
| <u>State v. Marks</u> , 114 Wn.2d 724, 790 P.2d 138 (1990).....  | 29,37                |
| <u>State v. Martinez</u> , 121 Wn.App. 21, 86 P.3d 1210 (2004).....  | 25                   |
| <u>State v. Moen</u> , 150 Wn.2d 221, 76 P.3d 721 (2003). .....  | 30,31                |
| <u>State v. McConville</u> , 1232 Wn.App. 640, 94 P.3d 401, review denied, 153 Wn.2d 1025, 110 P.3d 213 (2004).....  | 26                   |
| <u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1996).....  | 27                   |
| <u>State v. Orwick</u> , 113 Wn.2d 823, 784 P.2d 161 (1989).....   | 25,29                |
| <u>State v. Price</u> , 94 Wn.2d 810, 620 P.2d 994 (1980).....   | 45,46,47,48          |
| <u>State v. Prok</u> , 107 Wn.2d 153, 727 P.2d 652 (1986).....   | 29                   |
| <u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2008),.....  | 24                   |
| <u>State v. Rundquist</u> , 79 Wn.App. 786, 905 P.2d 922, review denied 129 Wn.2d 1003, 914 P.2d 66 (1995). .....  | 29,30                |
| <u>State v. Sherman</u> , 59 Wn.App 763, 801 P.2d 274 (1990).....  | 28                   |

|  |                   |
|--|-------------------|
| <u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997)..... | 24                |
| <u>State v. Wilson</u> 149 Wn.2d 1, 65 P.3d 657 (2003)<br>.....    | 27,28,36,37,43,44 |
| <u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....    | 24,45,48          |

**COURT RULES**

|               |                   |
|---------------|-------------------|
| CrR 4.7. .... | 1,8,23,24,38,40   |
| CrR 8.3.....  | 1,2,8,24,27,28,36 |

**Cases from other Jurisdictions**

|   |    |
|---|----|
| <u>Beavers v. State</u> , 498 So.2d 788, 790 (Miss. 1986).....            | 33 |
| <u>Flora v. State</u> , 925 So.2d 797, 814-814 (Miss. 2006).....          | 33 |
| <u>Griffith v. State</u> , 976 S.W.2d 686, 692 (Tex.App.-Tyler 1997)..... | 33 |

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in dismissing these cases with prejudice under CrR 8.3 for alleged discovery violations without first considering alternative, less drastic remedies.
2. The trial court erred in making the following findings of fact and conclusions of law:

### **Findings of Fact:<sup>1</sup>**

- 3.17 Defense counsel attempted, on multiple occasions, to obtain missing information to no avail.
- 3.18 There was little defense counsel could do with the 60 day speedy trial deadline and incomplete discovery.
- 3.35 The defendants were forced to choose between effective representation of counsel and their right to a speedy trial.
- 3.36 The nine (9) days between the second and third trial date for Ms. Brooks and the first and second trial date for Mr. Brooks was insufficient to cure the damage that had been done.

### **Conclusions of Law:**

- 4.2 The court has no difficulty concluding that there is misconduct in the form of mismanagement in the case at hand. This is not simple mismanagement. Rather, gross mismanagement has occurred in this case.
- 4.3 The delay in providing discovery violates CrR 4.7(a). Despite several accommodations by the defendants' counsel, the state violated the rule.
- 4.5 The state failed to provide written and recorded statements made by the defendants in this matter in violation of CrR 4.7(a)(ii). It is no excuse that the reports were dictated but for whatever reason could not be transcribed.
- 4.9 The rights of the defendants have been materially affected by the actions, or inactions, of the state in this matter.

---

<sup>1</sup> The State is citing only to the Findings entered in the Jason Brooks case to reduce confusion in this appeal and because Ms. Brooks' findings are not substantially different. However, the State's intention is that it is assigning error to *all* of the findings entered in Ms. Brooks' case as well.

4.10 Defendants were forced to choose between effective assistance of counsel and their right to a speedy trial based upon the actions and inactions of the state, a choice they cannot be required to make.

5.1 The Defendants' motion to dismiss the Information is Granted. This case is dismissed with prejudice.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion by choosing the extraordinary remedy of dismissal with prejudice under CrR 8.3 without first considering alternative, less drastic alternatives?
2. Should the trial court have considered the fact that the 60-day trial rule is not a constitutional mandate when deciding the remedy for these motions to dismiss for discovery violations?
3. Are tape recordings of witness statements and case reports held by the sheriff's office and not turned over to the prosecutor considered "evidence in the possession or control of the prosecutor"?
4. Did the Defendants meet their burden to show that they were prejudiced by proving by a preponderance of the evidence when the State has not acted with due diligence that interjection of new facts into the case compelled them to choose between the right to speedy trial or effective assistance of counsel?

### **SUMMARY OF THE ARGUMENT**

The State's chief argument is that the trial court abused its discretion when it ordered the extraordinary remedy of dismissing these cases with prejudice without first considering any alternative, less-drastring remedies such as release of the accused, suppression of evidence or testimony, or a "Campbell continuance" past the speedy trial time to allow all parties time to prepare.

The State is not conceding that there was government misconduct because the prosecution turned over to defense all evidence it had in its possession or control--the rest of the evidence was in the sheriff's possession and was turned over to the prosecutor in a tardy manner, but everything the prosecutor had it

turned over to the defense as it received it. Furthermore, the State does not believe there can be "gross governmental misconduct" considering delivery of discovery when the court and defense counsel both stated at the March 1, 2007, dismissal hearing that discovery was "99% complete." This being the case, it certainly would not have taken much of a continuance for defense counsel to "get up to speed" for trial.

Furthermore, much of the evidence complained about by the defense involved access to witnesses or witness testimony and there is no evidence that the State hampered defense counsel's access to any witnesses, and the defense can go interview witnesses on their own at any time. Additionally, the items that the defense complained they did not get were never with any certainty shown to be those that would "interject new facts into the case," or any other showing of materiality, meaning that the defendants did not meet their burden to show prejudice. Also significant is that there was about a week's span of time when the defense apparently did nothing at all to study the new discovery given to them because they were instead "working on the motion to dismiss."

The bottom line is that the State believes that the prosecution *cannot* be punished by dismissal of a case for not turning over what was not in its possession or control in the first place, but even if this was governmental misconduct, the defendants did not meet their burden to show prejudice because they did not show that the complained-of, missing-or-tardy discovery interjected new facts into the case. And, most importantly, the trial court abused its discretion by choosing the most draconian, extraordinary, remedy of dismissing these cases with prejudice without first considering less-drastring, intermediate remedies. The dismissals should be reversed and the cases should be remanded for new trials.

## STATEMENT OF THE CASE

On December 27, 2007,<sup>2</sup> in Lewis County, Washington, Billy Elkins knocked on Gary Greig's door and said he wanted to make good on a debt he owed to Mr. Greig. CP 63. Elkins told Greig he had a sword collection that Greig could choose a sword to pay off the debt. CP 63. Accompanying Elkins that day were three other persons: Jason and Natalie Brooks and another woman named "Candace." CP 63. Greig had not met these three other people before. Jason Brooks brought out the swords to show Greig, and Greig picked one out in exchange for discharging the debt that Billy Elkins owed him. CP 63. Then, when Elkins and Jason and Natalie Brooks were leaving Greig's residence, Greig noticed that a CB radio had been moved in the lower level of his house. CP 63. Greig looked again and also saw that a safe which contained several firearms had been tampered with. CP 63. It soon dawned on Mr. Greig that by this time Elkins and Jason and Natalie Brooks had conspired to keep him busy while the theft went on downstairs. CP 61-66. At this point Greig armed himself with an AR15 rifle and he went outside to confront Elkins and Jason and Natalie Brooks.

---

<sup>2</sup> This crime thus occurred not only around the holidays but also during the time these crimes were being investigated, the sheriff's office was also engaged in cleanup and other matters concerning the serious flooding that occurred right around Christmas time. 3/1/07 RP 37.

Greig said he did not actually point the gun at the three except for one time when Billy Elkins kept his hands in his coat pocket as though concealing a handgun. CP 61-66. Once Greig realized this he armed himself with a rifle and he went outside and confronted the suspects. When Greig got to the suspects' vehicle he looked inside and saw three crossbows that belonged to him. CP 63. Greig also found a pair of his binoculars in the suspect's truck. During this time Billy Elkins kept his hands in his coat pockets, making Greig suspect Elkins might be armed. Greig told Elkins to remove his hands from his pockets but Elkins refused to do so. CP 63.

According to Natalie Brooks' statement to police, the four of them had conspired to steal property from Greig and that she, Jason and Elkins were to keep Greig busy while "Candace" stole items downstairs. CP 66. Natalie Brooks said that Billy Elkins told them that they could sell items to Greig, and then purchase methamphetamine and also steal Greig's property. CP 61-66. But, while Greig was trying to keep an eye on three of the suspects, Candace opened fire on Greig, grazing his ear lobe. CP 62. Feeling outnumbered by four people, Greig fired a shot at Elkins' legs and Elkins ran around to the front of the truck. CP 63. Greig

then headed for his house when he heard another shot ring out from behind him. CP 63. Greig turned and looked and saw an adult-sized person near his pump house. CP 63. The person ducked behind the pump house and Greig fired into the pump house, unsure if he had hit anyone. Greig made it to a phone and called 911. CP 63.

Although he had only been shot in the leg, the shot fired at Billy Elkins ruptured an artery and Elkins died from blood loss. CP 62. The other person who died was "Candace." CP 65. A 9mm firearm, a bag of ammunition, and some crossbows-- all belonging to Greig-- were found in the suspects' truck. CP 65, 66. Jason and Natalie Brooks were arrested and booked on suspicion of burglary, robbery and theft. CP Id

On December 28, 2006, Jason Brooks and Natalie Brooks appeared in Lewis County Superior Court for a first appearance/bail hearing, at which time the court set \$100,000 bail. 12/28/06 RP 2-13. Defendants Jason Brooks and Natalie Pitts Brooks were charged by Information with one count of Burglary in the First Degree, one count of Robbery in the First Degree, and one count of Theft of a Firearm. CP 57-59; 70-72; CP 53-54; CP 67-68; CP 66. The Superior Court found probable cause. CP 60; CP 73.

Defendant Pitts was arraigned on February 1, 2007, and entered pleas of not-guilty to all three counts. 2/1/07 RP 7.

On January 25, 2007, Mrs. Brooks' case came before the court for an omnibus order. 1/25/07 RP. At this hearing the defense stated, "all we have so far is a PC statement." Id

At the February 1, 2007, hearing Mrs. Brooks' attorney said that he had just received additional discovery on January 31, 2007. Defense counsel also commented that the, "[f]irst discovery [he] received in this case was . . . Friday of last week." 2/1/07 RP 8. During this hearing the trial court also ordered the state to turn over some autopsy photographs. 2/1/07 RP 9. At the February 1, 2007, hearing defense counsel asked to set the omnibus hearing over one week and the State objected to this. 2/1/07 RP 9. The trial court continued the omnibus hearing over the State's objection. Id. At the February 8, 2007, omnibus hearing, defense counsel said that he was confirming for trial. 2/8/07 RP 12. At this hearing defense counsel also commented that he had received the first set of discovery about two weeks prior, and got "six more inches" of discovery Friday afternoon . . . 2/8/07 RP 12. As of the February 8, 2007, hearing, it was noted on the record that the speedy trial expiration date was March 2, 2007. 2/8/07 RP 13. Also at this

hearing, the trial was continued to February 19, 2007, for Mrs. Brooks. 2/8/07 RP 13, 14. A 3.5 hearing was also set. 2/8/07 RP 13. The trial date of February 12th was stricken. 2/8/07 RP 14. At a February 20th, 2007, hearing Mr. Brooks' attorney made a record of not receiving various witness statements and of getting some new police reports apparently that day. 2/20/07 RP 2-5. Then, on March 1, 2007, a hearing on the defendants' motions to dismiss for alleged discovery violations was held. 3/1/07 RP 2-89. At this joint court hearing with Mr. and Mrs. Brooks and their respective attorneys, the defendants moved for dismissal of their cases due to claimed discovery violations, citing both CrR 4.7 and CrR 8.3. CP 38-46; CP 40-48; 3/1/07 RP 2-89. Among other claimed discovery violations, Mrs. Brooks' defense counsel told the court that he had not been able to arrange an interview with the victim, Mr. Greig, saying that the interview had been set for February 26, 2007. 3/1/07 RP 3. Then another interview was set for March 1, 2007, at noon. Id. 4 But neither Mrs. Brooks' Attorney or her investigator were available for this particular date. Id. Mrs. Brooks' counsel said that his client prejudiced because he was not able to interview the victim. Id. 4. Mrs. Brooks' attorney stated, "I won't have a chance to talk with him [Mr. Greig, the victim] because presumably, if this

motion fails today, we'll be in trial tomorrow and I won't have the opportunity to interview. The court made it clear that " both cases -- if these motions fail-- both cases go to trial tomorrow which means I'll be in one courtroom, Mr. Blair will be in the other." Id. Mrs. Brooks' attorney went on, "I'm not going to have my private investigator simply interview Mr. Greig when I'm not present." Id. 4,5. Mrs. Brooks' attorney also complained that he had not seen the deputy prosecutors' "notes" regarding their interviews with the victim and he also complained that he had not received the officers' notes. 3/1/07 RP 5. Mrs. Brooks' attorney claimed "prejudice" to his client at this March 1, 2007, hearing and stated as follows:

I guess I'll call it mismanagement at every level. The first discovery in this matter wasn't received until after the first omnibus hearing. I agreed to continue the omnibus hearing. I agreed to continue the trial date once. It's now been continued twice to allow the state to try to get the discovery to me. We still don't have a complete set of discovery. \* \* \* The report of--I believe it's Chief Deputy Smith . . . [t]hat still has not been received by this office. According to [Mr. Brooks' attorney] he had a conversation with [the deputy prosecutor] who said there wasn't one [a tape recording]. Mr. Blair [Mr. Brooks' attorney] then had a conversation with Chief Deputy Smith who said " Yeah, there is one. I'm just not done with it yet."

3/1/07 RP 5, 6. Defense counsel went on to claim "mismanagement" by the State because there were allegedly 20-day or nine-day delays between the time the State received some

of the discovery and the time the defense got the discovery. 3/1/07

RP 6. Mrs. Brooks' attorney also claimed that he did not have one

of the statements taken from Mr. Brooks. 3/1/07 RP 8.

Mrs. Brooks' attorney also stated that

we received 138 additional pages of discovery which included 12 taped statements on the day of trial. . . . We also received a witness list on the day of trial which is the first time I had access to it. I don't care if they put it in Friday. I don't care when they put it in. I didn't have time to get it. They didn't deliver it to my office which certainly on such late notice one could reasonably expect."

3/1/07 8, 9. Mrs. Brooks' attorney continued:

Now my client is in a position to go to trial, presumably tomorrow, on incomplete discovery with an alleged victim who hasn't been interviewed, despite written requests, oral requests, things of that nature, and skipped interviews by the alleged victim. And she's gonna be forced to go with counsel that isn't prepared, and realistically, Your Honor, I can't be prepared. I don't have all the discovery.

3/1/07 RP 9, 10. Defense counsel also noted that speedy trial "in

essence" would expire on March 2, 2007 (the next day after the

hearing on the motion to dismiss). 3/1/07 RP 10. Mrs. Brooks'

attorney claimed they were still missing "two" statements of Mr.

Brooks that were apparently missing because of a "tape recorder

malfunction." 3/1/07 RP 10. Mrs. Brooks' attorney noted that Mr.

Brooks' attorney had gone out to interview the victim, Mr. Greig,

"basically . . . the eve of trial, the week before trial." 3/1/07 RP 13. The State's witness list was filed on February 15, 2007, but Mrs. Brooks' attorney said he did not get the list until the morning of trial. CP 48-49; 3/1/07 RP 11. Mr. Brooks' attorney said that he adopted everything said by Mrs. Brooks' attorney regarding claimed discovery violations at the dismissal hearing. 3/1/07 RP 13. Mr. Brooks' attorney claimed he had a number of discussions with the deputy prosecutor handling the case in which he inquired about getting discovery in the case. 3/1/07 RP 14. Mr. Brooks' attorney said that there had been an eight or nine day delay in getting some of the witness statements. 3/1/07 RP 15.

Mrs. Brooks' attorney complained about a missing diagram that had purportedly been drawn by the victim. 3/1/07 RP 17, 23. Mrs. Brooks' attorney also said that on February 22, 2007, he had tried to re-interview the victim in the case at the prosecutor's office but that the victim showed up more than an hour-and-forty minutes late by which time the attorney had left. 3/1/07 RP 19, 20. Defense counsel also said that they were not provided with two taped statements of Mr. Brooks' discussions with police. 3/1/07 RP 20, 21,22. There were, however, summaries of the statements in the police reports. 3/1/07 RP 22. Mr. Brooks' attorney complained

about getting the statements of several witnesses the morning of trial, even though the State said it did not plan to call those witnesses. 3/1/07 RP 26. When asked about specific prejudice from the alleged discovery violation, Mr. Brooks' attorney said, "Bottom line, your Honor, I am not ready to go to trial." 3/1/07 RP 28. Mr. Brooks' attorney went on to say that before he could be ready for trial he needed to talk with the victim, Mr. Greig, again, and he needed to talk to the other witnesses whose statements he had just received. 3/1/07 RP 38. It appears that most of the respondents claims about discovery violations center around various witness statements made either by the victim, Mr. Greig, or others. See Affidavit of Sara Beigh and attachments thereto. CP 18-26.

At the March 1, 2007, hearing on the motions to dismiss, the trial court wanted to know what defense counsel had done since the 21st --when he first learned of the statements of the other witnesses. 3/1/07 RP 28. The trial court said, "You need to tell me . . . what you've tried to do since then. It's been eight days or a week or something." Id. To this, defense counsel replied, "Bottom line, your Honor, I've been writing this brief" [referring to defense motion to dismiss]. 3/1/07 RP 28. The trial court then commented,

"The reason I'm asking is a lot of the claims of discovery not being provided has to do it seems to me with the homicides which, assuming the state's version is correct, are--I don't like to say ancillary when people die, but that's actually ancillary to the charges which were already committed at the time." 3/1/07 RP 30.

The trial court then said:

And each of you are claiming. . . that you're being forced to choose between being ready to go to trial tomorrow or giving up your rule-created right to a speedy trial and having a rather extensive continuance because of - - well, I mean, I just happen to know that there are cases out there that are coming up in the next month that we'd be looking at an April reset at the earliest. . . .

3/1/07 RP 33.

Additionally, the deputy prosecutor who originally handled the Brooks' case left the Lewis County Prosecutor's office as of February 12, 2007. 3/1/07 RP 15. At that point, different prosecutors had to take over the case. Id. 14, 15. At the March 1st hearing the deputy prosecutor summed up what the State had done to try to catch up on the discovery obligations in the case. 3/1/07 RP 34. The deputy prosecutor stated, "I don't see the mismanagement by our office. When I see the dates that we received certain reports and the dates they were given to the

defense, there's a very short time lag there. Id. 35. The trial judge then said, "I don't think that the issue here is the prosecutor's office had it and didn't give it. It was that the state had it and somehow it didn't get to where it should have gone." 3/1/07 RP 36. The deputy prosecutor then responded:

There are [sic] a grand total of two persons downstairs in the sheriff's office transcribing statements. When the court looks at the volume of what is here and the dates it was investigated versus when the dates [sic] it was received by our office, a lot of that lag has to do with the fact of just the sheer volume that had to be transcribed.

\* \* \*

And secondly, if the court will recall the sheriff's office was also engaged in cleanup and ancillary matters regarding the floods that occurred right around Christmastime, the date of the incidents in this particular case being December 27th. And lastly, there is the time lag that I suppose counsel hits on the most and that is the one on page five of our grid which shows a nine-day delay between the date our office received an item and it was provided to defense counsel. I would simply note that that was --actually the date received was the last day that [the former prosecutor] left and there was a three-day weekend in between there, so when I say nine days, that's total days, but in terms of business days it's only six.

3/1/07 RP 36, 37, 38. To this, the trial judge replied,

Well, once again, I'm not really too concerned about the adequacy of the response by the prosecutor's office when they got it, but the issue is how do we bridge this gap between the sheriff's office and the

prosecutor's office? That to me is the issue here. . . .  
what happened between December 27th, which is the  
date of these alleged offenses, and the receipt by the  
prosecutor's office which in some cases was a month  
and a half later or almost a month and a half later.

3/1/07 RP 38, 39. The prosecutor responded to the court as

follows:

[W]e have a certain number of detectives downstairs  
[sheriff's office], we were on a fast track, the 60 day  
rule, due to the in-custody nature of the case, and  
lastly, these guys worked as hard as they possibly  
could to nail down everything. These officers had to  
not only interview people in this particular county, but  
as they started to uncover the trail of these particular  
individuals they had to interview people in Snohomish  
County, which led to interviews with people they met  
in Oregon which led to them calling people in Las  
Vegas. \* \* \* it's impossible in a case of this magnitude  
to simply pull it altogether, wrap it up in a bow, and  
give it to them on the day we charge it two months  
down the road.

3/1/07 RP 39. During the hearing on the motion to dismiss, the  
State submitted a table which listed what discovery was sent to the  
defense and when. CP 18-26 (Affidavit of Sara Beigh and  
attachments). The trial judge referenced that table when he noted:

So the transcription [of the statement] is not the problem.  
The problem is that ---The first one I'm looking to here on  
Table 2 is Taped statement of Gary Greig<sup>3</sup> dated 12/27.  
Date investigated --well, that was 12/27. . . . That was taken

---

<sup>3</sup> Mr. Greig's name is spelled differently in several different areas of the record.  
Apparently, the correct spelling is Greig, and except when quoting a report that is  
how the State has spelled it.

12/27 and it wasn't transcribed it appears until February 12th. This is the initial statement of the victim, right?

3/1/07 RP 49. The prosecutor stated, "yes." Id. The trial court also noted that, "it was the day before trial the victim's original statement was written or transcribed or somehow --whatever that column means for that particular item." Id. at 41 (referencing the table, Appendix A here). The Court then emphasized, "[t]hat's a very important thing to have waiting a month and a half and to provide the day before trial, isn't it? And that, again, is a rhetorical question I guess because I am assuming that you would agree that that is a fairly significant piece of evidence, would it not be?" Id. To which the deputy prosecutor stated, "Yes, Your Honor." Id. The trial Court went on:

THE COURT: And how would they be able to effectively interview Mr. Grieg? Even if I say they have a duty to interview Mr. Grieg, how could they effectively interview him without being provided his original statement, the one that, you know, for all I know he could be moving to admit as an excited utterance?

3/1/07 RP 42. The "original statement" of the victim, Mr. Greig, was said to be over an hour long, since the police ran out of tape after recording Greig for an hour. 3/1/07 RP 43. The trial court then said, "If I'm doing a cross examination of Mr. Grieg and I'm given what, a

60-or-70 page statement, maybe longer than that, and I am given it the day before trial, are you going to tell me that I am going to be able to do an effective cross examination of that individual?" 3/1/07 RP 43. The prosecutor replied, "well, not if it's the day before trial, but this was - -" Id.

The trial judge continued, stating:

See. . .--that's what I think you're missing the point of what the defense argument is and that is not that the prosecutor's office necessarily, certainly not deliberately or even necessarily delayed to gain a tactical advantage. It's just that it was done. It was obviously done on December 27th, and I'm just focusing on this one instance. It happens to be one of the most important. But it wasn't even transcribed until a month and a half later, and it wasn't provided . . . . It was not received by your [office] until the date of trial, and the original provision to the defense was on 12/21 which was in fact the date of the continued trial date.

3/1/07 RP 43, 44. In response to this the prosecutor said,

Well, no, because in this particular case the matter was continued yet again to the end of the speedy trial. You can't put all these facts, just isolate them by themselves. . . . So the question becomes as we sit here right now with trial tomorrow, are they prejudiced? I say no. They have the statements . They can talk to Mr. Grieg. We had no control whether or not Mr. Grieg was going to be there on time or not.

But to answer the court's question, if the end of speedy trial would have been the first time this trial was set I'd be sitting here agreeing with you, but it

wasn't. The end of speedy trial was effectively tomorrow. The case was continued to allow them to review those statements. They in fact have them. They've had an opportunity to review them.

3/1/07 RP 45. The prosecutor continued:

I walked into this thing and my first thought is I've got a client too. I'm a deputy prosecuting attorney for the state of Washington. My clients are the people of this state. The people of the state have a right to hold people charged with crimes accountable. The court would have to --. . . You've got to balance the interests of the state. In this particular case we did our level best to get this case ready to go on the short track we had to do it in. One of the things the court has to look at is whether there's been arbitrary action. I don't think there's been any showing of arbitrary action on this part. . . . Both the officers and the prosecutor's office have worked as hard as they could to get it all together within the confines that they had and get it to the defendant. . . . \* \* \*

At this point they have everything I have. I'm ready to go to trial tomorrow on what I have, and they should be too. This isn't the type of--the type of facts here are not the type of facts that are in the cases reported. You don't have things such as late lab reports. There is [sic] no forensics in this particular case.

3/1/07 RP 47. During the March 1, 2007, hearing the court asked the defense what they were still missing. Defense counsel stated:

We're missing [Detective] Smith's report, we're missing a drawing from Mr. Grieg, we're missing an interview with Mr. Grieg which we have been attempting [sic] since the beginning to do that [sic]. Is it beyond the State's control that he didn't show up? Perhaps, but I think it's a bit disingenuous to say Mr.

Blair and I didn't wait around long enough for an interview to be conducted.

3/1/07 RP 53. Ultimately, in the dismissal hearing the defense stated that the defendants were being forced to choose between effective representation and their right to a speedy trial. 3/1/07 RP 56. , 57. The prosecutor did not know why there was a lag in getting some of the statements transcribed other than that the sheriff's office only had two people to do the transcribing of such statements, and there were other cases to work on besides just these two. 3/1/07 RP 62. But the trial court also noted there were no motions to compel discovery on the part of the defense, also stating, "there's also some case law saying you just can't stand on your rights and wait." 3/1/07 RP 62. Defense counsel replied that there had been "repeated" requests in "written and oral form." Id. 63.

One issue was accessibility to Mr. Greig, the victim of the alleged robbery/burglary/theft. 3/1/07 RP 66. But a complicating factor was that Mr. Greig could have been charged with a crime himself. 3/1/07 RP 67, 68, 69. There had been a 3.5 hearing set but no subpoenas had been sent out for that. 3/1/07 RP 71, 72., 74 (discussing re-set of 3.5 hearing).

The trial court also inquired as to whether any "new facts have been interjected into this case as a result of late discovery." 3/1/07 RP 75. Defense counsel for Mrs. Brooks responded, "A, we now know who the witnesses are; B, we know that Mr. Brooks made two more taped statements that we didn't know about. There have been additional --well, I guess . . . I don't know because we still don't have all the discovery." 3/1/07 RP 75. The trial court then stated, "Yes, but you've got like 99 percent of it at this point." Id. Mrs. Brooks' counsel responded, "Depending on how large Deputy Smith's report is and the drawing that . . . Mr. Grieg made that we still don't have, I would agree with 99 percent." Id. 75. Defense counsel also noted that Deputy English's report that was received the day of trial disclosed two additional witnesses. Id. According to defense counsel, they received about eleven "additional taped statements the day of trial." 3/1/07 RP 75. Defense counsel also asserted that those taped statements interjected new facts into the case because they contained interviews of neighbors and of people in Oregon and other witnesses. Id. The trial court tried to get the issue narrowed down to whether any of the newest discovery contained facts that were new to the case. Id. 76.

After hearing from both sides, the trial court granted the defendants' motions to dismiss, finding, *inter alia*, governmental misconduct in the form of "gross mismanagement" on the part of the "State". 3/1/07 RP 81-84; Findings of Fact and Conclusions of Law were entered. CP 99-14; CP 10-15. And, in its oral ruling the trial court stated that in his opinion there was "no excuse . . . that the reports were dictated but for whatever reason could not be transcribed and provided. That just is not an acceptable excuse under these circumstances." 3/1/07 RP 82, 83.

However, as to the issue of prejudice to the defendants the trial court stated, "[t]he issue of prejudice, however, is a closer call, but I do find that the rights of the defendants to a fair trial have been substantially and materially affected." 3/1/07 RP 85. The trial court went on to say that there was a "total failure to provide discovery in a timely fashion, one that would allow for adequate preparation. . . [which] has forced the defendants to elect to proceed with unprepared counsel or to waive speedy trial." 3/1/07 RP 85, 86. The trial court did not address any alternative remedies to dismissal. Id. The trial court did note that it was not finding misconduct on the issue of trying to arrange the interviews of the witnesses in the case. 3/1/07 RP 84. And, the trial court further

ruled that it was not blaming the prosecutor's office for not having the police reports typed. 3/1/07 RP 87. Findings of Fact and Conclusions of Law were entered later wherein the trial court officially ordered that these cases were dismissed with prejudice. CP 10-15; CP 9-15.

The State filed a timely Notice of Appeal and submits this brief in support of the State's appeal of the dismissal of this case.

#### **APPLICABLE LAW / ARGUMENT**

##### **A. THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THESE CASES WITH PREJUDICE WITHOUT FIRST CONSIDERING ALTERNATIVE, LESS-DRASTIC, REMEDIES.**

Instead of considering other, less drastic remedies in dealing with the alleged discovery violations in this case, the trial court refused to examine whether any such alternative measures would cure the alleged discovery violations, and instead went directly to the extraordinary, drastic, remedy of dismissing the cases entirely. CP 10-15; CP 9-15. This was an abuse of discretion. See e.g., State v. Koerber, 85 Wn.App. 1,3, 931 P.2d 904 (1997) (court abused its discretion by dismissing a criminal charge without first considering intermediate and less drastic remedial steps).

Under CrR 4.7(a)(4), "[t]he prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." Indeed,

"[c]riminal convictions should not be dismissed for minor acts of negligence by third parties that are beyond the State's direct control when there is no material prejudice to the defendant. The State did not engage in any unfair "gamemanship," or intentional acts, to prevent the court from administering justice. The State's conduct did not warrant dismissal . . . and was an untenable ground for dismissal."

CrR 4.7(a)(4) (emphasis added); State v. de Wilde 12 Wn.App. 256, 259-260, 529 P.2d 878 (1974) (under CrR 4.7(a)(4) the prosecutors obligation is limited to material and information within the knowledge, possession or control of members of his staff); State v. Koerber, at 3,4. But, CRr 4.7 does not require disclosure of immaterial information. State v. Ervin, 22 Wn.App. 898, 594 P.2d 934, *rev. den.*, 92 Wn.2d 1017 (1979). And, "the *mere possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial. . . does not establish 'materiality' in the constitutional sense." State v. Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407, *cert. den.* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed. 2d 599 (1986) (emphasis added); *accord*,

State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987).

Additionally, "[w]here the prosecutor's efforts to obtain discoverable material held by others are unsuccessful, the court has authority to issue suitable subpoenas or orders." State v. Blackwell, 120 Wn.2d at 826 ("assuming records were shown to be material to the defense, the trial court should have issued a subpoena pursuant to CrR 4.7(d)").

CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal 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 a fair trial.

Id. A trial court's decision on a motion to dismiss under CrR 8.3(b) is reviewed under the abuse of discretion standard. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Rohrich, 149 Wn.2d 657, 654, 71 P.3d 638 (2008). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Trial courts have wide latitude in imposing sanctions for discovery violations. State v. Dunivin, 65 Wn.App. 728, 731, 829 P.2d 799 (1992). A decision to dismiss a criminal prosecution due to arbitrary action or governmental misconduct is

manifestly unreasonable if the court, despite applying the correct legal standard to supported facts, adopts a view that no reasonable person would make. State v. Martinez, 121 Wn.App. 21, 86 P.3d 1210, amended on reconsideration (2004). However, "dismissal under CrR8.3 remains an *extraordinary remedy*, that is exercised only when governmental misconduct or arbitrary action has prejudiced the defendant." City of Seattle v. Orwick, 113 Wn.2d 823, 784 P.2d 161 (1988) (emphasis added), citing State v. Cantrell, 111 Wn.2d 385, 391, 758 P.2d 1 (1988); State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001) (dismissal of a case is available only when there has been prejudice to the accused that materially affected his right to a fair trial.); State v. Laureano, 101 Wn.2d 745, 683 P.2d 889 (1984) (dismissal of charges remains extraordinary remedy and is appropriate only if defendant has been prejudiced in a manner which could not be remedied by a new trial). Indeed,

before a trial court exercises its discretion to dismiss, a defendant must prove that it is more probably true than not that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, which essentially compelled the defendant to choose between two distinct rights.

State v. Farnsworth, 133 Wn.App. 1, 14, 130 P.3d 389(2006)(also noting neither tape recording nor transcript of statement contained a "material fact. . .withheld from [defendant]" because Farnsworth timely received comprehensive summary of statement in detective's report.) In order to succeed on a motion to dismiss a charge due to governmental misconduct the defendant must prove by a preponderance of the evidence that he suffered *actual*, rather than speculative prejudice. State v. McConville, 1232 Wn.App. 640, 94 P.3d 401, review denied, 153 Wn.2d 1025, 110 P.3d 213 (2004).

However, despite the deferential "abuse of discretion" standard, "Washington appellate courts have not hesitated in overturning a trial court's dismissal of charges." See, e.g., State v. Getty, 55 Wn.App. 152, 777 P.2d 1 (1989)(emphasis added) (dismissal of juvenile action reversed because even if government did commit misconduct, defendant suffered no prejudice); State v. Coleman, 54 Wn.App. 742, 775 P.2d 986, *rev. denied*, 113 Wn.2d 1017 (1989) (dismissal overturned because State's dilatory actions produced no demonstrable prejudice to defendant); State v. Clark, 53 Wn.App. 120, 124-25, 765 P.2d 916 (1988), *rev. denied*, 112 Wn.2d 1018 (1989) (trial court's dismissal of charges inappropriate when sex abuse victim refused to give any statements to the

defense in pretrial interviews, and the State had not interfered in the interviews in any way).

So, before dismissing a case under CrR 8.3, there must be a showing of governmental misconduct and "prejudice affecting [the defendant's] right to a fair trial." State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). Where there is no showing of governmental misconduct, the trial court's dismissal of the case will be reversed. State v. Blackwell, 120 Wn.2d at 832 (quoting State v. Underwood, 33 Wn.App. 833, 837, 658 P.2d 50 (1983)). But governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. State v. Coleman, 54 Wn.App. 742, 748-49, 775 P.2d 986 (1989). But again, dismissal is an extraordinary remedy, to which the trial court may resort only in "truly egregious cases of mismanagement or misconduct by the prosecutor." State v. Duggins, 68 Wn.App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852 P.2d 294 (1993) (emphasis added); State v. Wilson, 149 Wn.2d 1,12, 65 P.3d 657 (2003)("dismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort.") Moreover, "[t]he State, as the appellant, has the burden of proving that any prosecution error affecting . . .[defendant's] constitutional rights was harmless error.

"Under the harmless error theory, a violation of [the defendant's constitutional rights does not warrant dismissal if the State proves beyond a reasonable doubt that the violation did not prejudice [the defendant]."  
State v. Sherman, 59 Wn.App. at 277, *quoting State v. Getty*, 55 Wn.App. 152, 777 P.2d 1 (1989).

Most importantly, before dismissing a case under CrR 8.3, a trial court must consider "intermediate remedial steps" before taking the drastic step of dismissing the case entirely. State v. Koerber, 85 Wn.App. 14, 931 P.2d 904 (1996); State v. Wilson, 149 Wn.2d at 12 ("trial judge should have considered intermediate alternatives before resorting to the extraordinary remedy of dismissal). One of the non-dismissal remedies a court should consider in these cases is ordering in-custody defendants released in order to extend the speedy trial expiration from 60 to 90 days: "Although release may not be ideal, such an intermediate step should . . . [be] attempted before resort to the extraordinary remedy of dismissal." State v. Wilson, 149 Wn.2d at 12. Or, our courts have allowed exclusion of a witness's testimony as a sanction for a discovery violation. See State v. Hutchinson, 135 Wn.2d 863, 880-84, 959 P.2d 1061 (1998), *aff'd*, 147 Wn.2d 197, 202-06, 53 P.3d 17 (2002). Another less-dramatic remedy that should be considered before resorting to a

dismissal is the possibility of remedying the violation by suppression of evidence: "Dismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct." State v. Marks, 114 Wn.2d 724,730, 790 P.2d 138 (1990) (citing Orwick, 113 Wn.2d at 831); accord State v. Garza 99 Wn.App. at 295. In other words, "[d]ismissal is also inappropriate when there is credible and admissible evidence obtained against the defendant that is untainted by the governmental misconduct." Marks, 114 Wn.2d at 730, citing Orwick, 113 Wn.2d at 829 (emphasis added); State v. Prok, 107 Wn.2d 153, 157, 727 ).2d 652 (1986).

In sum, our case law is abundantly clear that outright dismissal of a case under CrR8.3 is the absolute last remedy to which a court should resort. State v. Chichester, 141 Wn.App. 446, 464-466, 170 P.3d 583 (2007)(dissent)( Koerber teaches that a trial judge must consider reasonable alternatives when ordering the extraordinary remedy of dismissal. In short, dismissal of a criminal case is a remedy of last resort, and a trial court abuses its discretion by ignoring intermediate remedial steps."); State v. Rundquist, 79 Wn.App. 786, 797, 905 P.2d 922 (1995) (dismissal doctrine must be sparingly applied and used only in the most

egregious situations"); (State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003)("[d]ismissal under this rule is an extraordinary remedy and is improper absent material prejudice to the rights of the accused")(citations omitted); State v. Koerber, supra (dismissal of criminal case is remedy of last resort and "trial judge abuses discretion by ignoring intermediate remedial steps") . State v. Flinn, 119 Wn.App. 232, 80 P.3d 171, review granted 152 Wn.2d 1013, 101 P.3d 108, affirmed, 54 Wn.2d 193, 110 P.3d 748 (2003)(Dismissal for prosecutor mismanagement is an extraordinary remedy used only in truly egregious cases); State v. Rundquist, 79 Wn.App. 786, 905 P.2d 922, review denied 129 Wn.2d 1003, 914 P.2d 66 (1995)(Governmental misconduct must somehow impact the defendant's own rights before it rises to the level of outrageousness justifying a dismissal ); State v. Hoffman, 115 Wn.App. 91, 60 P.3d 1261 (2003)("dismissal remains an extraordinary remedy, to which the trial court may resort only in 'truly egregious cases of mismanagement or misconduct by the prosecutor."(quoting State v. Duggins, 68 Wn.App. 396, 401, 844 P.2d. 441, aff'd 121 Wn.2d 524, 852 P.2d 294 (1993). Furthermore, the Due Process Clause does not permit a court to abort a criminal prosecution simply because the trial court disagrees with a

prosecutor's judgment. State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2003); State v. Starrish, 86 Wn.2d 200, 205, 544 P.2d 1 (1975) (rule is not designed to grant courts the authority to substitute their judgment for that of the prosecutor).

**1. The 60-day Speedy Trial Time Frame is Not a Constitutional Mandate and the Trial Court Could Have Continued these Cases Beyond the "Rule Created" Speedy Trial Time Frame As a Less Drastic Remedy and To Allow the Parties Additional Time to Examine the Discovery.**

The trial judge in the instant case seemed under the impression that he was inexorably bound by the rule-created 60-day speedy trial time for an in-custody defendant in deciding to dismiss these cases. 3/1/07 RP \*\* But this is not always the case. See e.g., State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (defense needed more time to prepare and trial court granted continuance past speedy trial expiration over the objection of the defendant); State v. Schaffer, 63 Wn.App. 761, 767, 822 P.2d 292 (1991) aff'd 120 Wn.2d 616 (1993)("[w]here the defendant fails to ask for a continuance, there is presumed to be a lack of surprise and prejudice.")

When a continuance of the trial date within the speedy trial deadline *is* possible, then that should be the appropriate remedy to

shortcomings in discovery that prejudice the defendant's preparation. State v. Coleman, 54 Wn.App. 742, 750, 775 P.2d 986 (1989) (prosecutor gave phone numbers for witnesses on the day of trial but that was not grounds for dismissal as a continuance was still a possible remedy). However, the continuance can also be outside Washington's "rule-created" speedy trial time frame, because this time frame is not of constitutional magnitude. State v. Smith, 67 Wn.App. 847, 841 P.2d 65 (1992) *rev. denied*, 121 Wn.2d 1019, 854 P.2d 41 (1993) (there is no absolute bar to granting a continuance beyond the speedy trial period to enable the defense to address new discovery). While CrR 3.3(c)(1) requires that an in-custody defendant's trial be commenced within 60 days of arraignment, that right is not a constitutional mandate. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). "While CrR 3.3 defines a judicially granted procedural right to a speedy trial, it does not define the limits of the constitutional speedy trial right." State v. Nguyen, 68 Wn.App. 906, 914, 847 P.2d 936 (1993), citing State v. Fladebo, 113 Wn.2d 388, 393, 779 P.2d 707 (1989). Indeed, there is "no constitutional basis for holding that the speedy trial right can be qualified into a specified number of days or months." Barker v. Wingo, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972);

State v. Campbell 130 Wn.2d 1, 15, 691 P.2d 929 (1984) (the right to be tried within 60 days of arraignment is not a constitutional mandate); accord State v. White, 94 Wn.2d 498, 501, 617 P.2d 998 (1980). Simply put, trial dates can be continued past the "sixty-day" time limit, even over a defendant's objection. Campbell, supra.

There are no bright lines in determining whether a violation of the defendant's right to speedy trial has been violated, because such evaluation turns upon the facts of each case, with the analysis involving a balancing of the conduct of the State versus that of the defendant and focuses on four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 (1972). "No mathematical formula exists according to which the Barker weighing and balancing process must be performed." Flora v. State, 925 So.2d 797, 814-814 (Miss. 2006), quoting Beavers v. State, 498 So.2d 788, 790 (Miss. 1986). "No specific length of time triggers a speedy trial analysis, but the Court . . . has noted that many courts have found that a delay of eight months or longer is prejudicial." Griffith v. State, 976 S.W.2d 686, 692 (Tex.App.-Tyler 1997).

But the trial court in the instant case did not undertake any meaningful analysis about the effect of granting a continuance, or releasing the accused to allow more time, or granting a continuance pursuant to Campbell, supra--the trial court did not address any alternative remedies that would eliminate whatever prejudice the defendants alleged was caused by the claimed mismanagement. State v. Garza, 99 Wn.App. 291, 994 P.2d, 868, rev. den. 141 Wn.2d 1014 (2000).

**2. If there Was Mismanagement, The Trial Court Chose the Wrong Remedy When it Ordered the Cases Dismissed.**

Assuming *arguendo* that there was mismanagement in the present cases, the trial court did not even *consider* continuing the case for even one week to allow the parties to prepare their cases with whatever additional discovery might come in. Any such continuance would not have had to be very long since the court and defense counsel all agreed that discovery was "99% complete." 3/1/07 RP 75. The trial court should have released the defendants so that would free up an additional thirty days for the parties to get ready. And, as set out above, even if the court did have to go into April--as the court assessed by looking at his trial calendar--that

would also only be about a month past the expiration of the speedy trial time and is certainly allowed under Campbell and its progeny.

Here, as in Koerber, "[t]he trial judge ignored reasonable alternatives when he readily ordered the extraordinary remedy of dismissal. Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps. . . . the trial judge abused his discretion." Koerber at 4. Instead of considering other, less drastic remedies in dealing with the alleged discovery violations in this case, the trial court refused to consider any alternative measures to the extraordinary measure of outright dismissal with prejudice of these cases. This was an abuse of discretion by the trial court. See e.g., State v. Koerber, 85 Wn.App. 1,3, 931 P.2d 904 (1997) (court abused its discretion by dismissing a criminal charge without first considering intermediate and less drastic remedial steps). As the Court noted in Koerber:

"[c]riminal convictions should not be dismissed for minor acts of negligence by third parties that are beyond the State's direct control when there is no material prejudice to the defendant. The State did not engage in any unfair "gamesmanship," or intentional acts, to prevent the court from administering justice. The State's conduct did not warrant dismissal . . . and was an untenable ground for dismissal."

State v. Koerber, at 3,4. See also State v. Wilson, 149 Wn.2d at 9, quoting State v. Duggins, 68 Wn.App. 395, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993) (emphasis added; other citation omitted). In Wilson the Court held that the State's inability to make prosecution witnesses available for defense interviews did *not* warrant dismissal, nor did the State's failure to seek material witness warrants or court-ordered depositions warrant dismissal. Id.

Again, it cannot be emphasized enough that dismissal of a case under CrR 8.3 "is an extraordinary remedy one to which a trial court should turn only as a *last resort*. . . . [yet in the present case] the trial judge . . . *ignored 'intermediate remedial steps'* when it ordered the 'extraordinary remedy of dismissal.'" State v. Wilson, 149 Wn.2d at 12, quoting State v. Koerber, 85 Wn.App. 1,4, 931 P.2d 904 (1996).

In the present case the trial judge could have ordered the defendants released to allow 30 days more speedy trial time (under our rule) and to allow the parties further time for discovery. Id. This option was not even considered here. 3/1/07 RP 1-89. Even though ""release may not be ideal, such an intermediate step should . . . [be] attempted before resort to the extraordinary remedy

of dismissal." State v. Wilson, 149 Wn.2d at 12. Furthermore, as pointed out above, our courts have gone beyond the rule-created "60 day" speedy time frame even over the defendants objection. State v. Campbell, supra.<sup>4</sup> Another remedy courts have used is "exclusion of a witness's testimony as a sanction for a discovery violation." Id. citing State v. Hutchinson, 135 Wn.2d 863, 880-84, 959 P.2d 1061 (1998), *aff'd*, 147 Wn.2d 197, 202-06, 53 P.3d 17 (2002). Or, when suppression of evidence may eliminate the prejudice resulting from governmental misconduct, dismissal on ground of governmental misconduct is not justified. State v. McReynolds, 104 Wn.App. 560, 17 P.3d 608, rev.denied, 144 Wn.2d 1003, 29 P.3d 719 (2000); State v. Marks, 114 Wn.2d 724, 790 P.2d 138 (1990). Rather than dismiss a case, the court may grant a new trial. State v. Coleman, 54 Wn.App. 742. 775 P.2d 986 (1989). A court may also expedite the discovery process by issuing a subpoena duces tecum to agencies outside the prosecutor's office. State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993). Similarly, where the prosecutor's efforts to obtain discoverable material held by others are unsuccessful, the court has the

---

<sup>4</sup> It appears the trial judge was aware of the "Campbell Continuance" (continuance over a defendant's objection and past the speedy trial time frame) and although he alluded to it, he did not do any analysis of whether continuing the case under the Campbell case was an option here. 2/20/07 RP 23

authority to issue suitable subpoenas or orders. CrR 4.7(d); State v. Blackwell, 120 Wn.2d 822, 826-27, 845 P.2d 1017 (1993).

**3. The State is *Not* Conceding Mismanagement or Governmental Misconduct because the Prosecutor Did Not have "Possession or Control" of the Complained-of Missing or Tardy Discovery.**

In State v. Blackwell, defense counsel demanded the prosecutor provide the service records of the arresting officers to pursue the theory that the arrest was racially motivated. Blackwell, 120 Wn.2d at 827. The prosecutor tried but could not obtain these records. The defense declined the court's offer to subpoena, instead moving to dismiss, claiming the state mismanaged its case. The trial court dismissed, and the State appealed. The supreme court held that (1) the files were not within the control or possession of the prosecutor; (2) the trial court abused its discretion in dismissing the case on untenable grounds where there was no evidence of state misconduct or arbitrary action; (3) the trial court abused its discretion in ordering the state to produce discovery that was not substantiated to be material; (4) if the defense requests disclosure beyond what is required in CrR 4.7(a), the defense must prove materiality and not the mere possibility of materiality; (5) the

trial court abused its discretion in dismissing the case where there was no showing of prejudice. Blackwell, 120 Wn.2d at 827-32.

In the instant case, despite the prosecutor's efforts, the complained-of missing, or tardy discovery was in the hands of the sheriff's office and quite simply just did not make it to the prosecutor's office in many instances. See Appendix A (Affidavit of Ms. Beigh with Attachments), CP 18-26. Some of the reports were not turned over until the timeframes shown in Ms. Beigh's graphs, but most of this was not the prosecutor's fault because the prosecutor did not have the information in its possession to be able to turn it over to the defense. Id.; Appendix B (Affidavit of Bradley Meagher); CP 18-26 (Appendix A).

No case law supports the conclusion that it is "mismanagement" when parties miss a compliance deadline. In this case the prosecutor did not have control over the police reports so he could not make any more meaningful compliance until he received the reports. Here the prosecutors turned over to the defense all the reports and statements that were in their possession or control--the rest of the evidence was in the custody of the sheriff. CP 18-16 (Affidavit of Sarah Beigh and attachments). For the court to find mismanagement because the prosecutor failed to do what

he was unable to perform meaningfully is untenable and a gross abuse of discretion.

Under CrR 4.7(a), "the prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession, or control of members of the prosecuting attorney's staff." (Emphasis added). Because the prosecutor did not have control over some of the reports, he could not make any more meaningful compliance until he received the reports. Also significant is that both the Court and defense counsel said at the March 1, 2007, dismissal hearing that discovery was "99% complete!" 3/1/07 RP \* This being the case, it certainly would not have taken much of a continuance for defense counsel to "get up to speed" with the vast majority of discovery in their hands. \* Moreover, the Defendants did not prove the materiality of any of these reports or statements. Blackwell, supra. Because the reports were not in the possession of the prosecutor's office and because the defendants did not show that the reports would interject new, material facts into the case, there can be no mismanagement. Blackwell, 120 Wn.2d at 832 ("there was no showing of "game playing", mismanagement or other governmental misconduct on the part of the State that prejudiced the defense.")

And neither did the defense exhaust its options to interview witnesses or to obtain reports sooner before moving for dismissal. State v. Coleman, 54 Wn.App. at 742 (the State is obligated to fulfill its discovery responsibilities, but the defense also has a responsibility to investigate and prepare).

**4. There was No Mismanagement as to Access to Witnesses Because the Defense Can Interview the Witnesses on Their Own at Any Time And There is No Evidence Here that the State Interfered with the Defenses' Ability to Interview Witnesses.**

Much of the complained of "missing discovery" here seems to revolve around statements of or interviews of, witnesses. CP 18-26 (Appendix A). The defense also complained greatly about not receiving transcripts of tape recordings of witnesses' statements, but this is not grounds for reversal if the police reports contain summaries of the statements. State v. Farnsworth, supra (neither tape recording or transcript of statement contained a "material fact...withheld from [defendant] because he timely received comprehensive summary of statement in detective's report.) Similarly, there were summaries of the statements made by the principal witnesses in the present cases in both the affidavit of probable cause and in other police reports given to the defendants.

2/20/07 RP 9 (Prosecutor stated, "the substance of the taped statements are in the officer's reports. The Court is familiar with that.") The prosecutor continued:

The officers list out what has been told to them, here's what was told to me on a particular date and time and then the taped statements and they attach the taped statement to it. So to say he [defense counsel] by what's in these taped statements I'm not sure he can make that claim, given the fact he does have the actual narratives of the officers [sic].

2/20/07 RP 9. The Deputy Prosecutor, who had only recently had to take over the case from a prosecutor who left the office said,

Secondly, there is one more week to speedy trial. Speedy trial runs on the 3rd of March. I got up to speed on this case and basically pared it down. I'm not gonna call every witness in the reports. It is not a homicide case any more. It is a burglary and robbery case. . . I got up to speed in a few days reading all of this stuff.

2/20/07 RP 9 (emphasis added).

And there is no rule that says that the prosecutor has to go out and round up all of the defendant's witnesses for him just so the defense can interview them (so long as the defense as been put on notice who the witnesses are). The trial court acknowledged this too, when it asked defense counsel about contacting witnesses, "why didn't you try it on your own? I mean, that's why we have investigators that are appointed to you." 3/1/07 RP 66, 67. But

defendants complaining about not having interviewed witnesses is not a reason to dismiss the case. See State v. Wilson, supra where the Court held that the State's inability to make prosecution witnesses available for defense interviews did *not* warrant dismissal, nor did the State's failure to seek material witness warrants or court-ordered depositions warrant dismissal. Id. And the trial judge in the instant case also seems to be referring to the Wilson case in the dismissal hearing at page 69, 3/1/07 RP. Simply put, the defense here did not pursue any alternatives other than to move to dismiss, and it certainly appears that the court noticed that the defense had not done much on its part when the trial judge told the defense,, "there's also some case law saying you just can't stand on your rights and wait." 3/1/07 RP 62. See State v. Coleman, 54 Wn.App. 742 (1989) (the defense also has a responsibility to investigate and prepare);

Indeed, there is at least some evidence that the defendant here was at least "partially to blame for the delays because it was not diligent in gleaning the requested information from the discovery material already provided" by the state. State v. Hanna, 126 Wn.2d at 716. See 3/1/07 RP 52, where the trial court asked the defense what it had been doing during the week since it had

received some of the discovery and defense counsel could only mention a drawing and the interview with Mr. Greig. Id.

The prosecution in this case did not engage in any unfair gamesmanship or egregiously neglect its obligations. Wilson, 149 Wn.2d at 9. But Defense counsel disregarded many appropriate options for compelling discovery. CrR 4.5(c)(ii) outlines that the compliance or omnibus date is the time to "ascertain whether the parties have completed discovery and, if not, make orders appropriate to expedited completion." Here, defense counsel did not prepare motions to compel under CrR 4.5(d), the defendant did not request the court to subpoena the reports of anyone who had custody of the materials they were requesting. Instead, in violation of Blackwell, supra, the Defendants simply requested dismissal.

Then, rather than exploring any less- drastic remedies, the trial court did precisely let the defendants "sit on their rights and wait" so that they could ambush with a motion to dismiss. 3/31/07 R 62.

It is untenable for the trial court to have found the necessity for the extraordinary, draconian remedy of dismissal before other less-drastring remedies had been pursued.

**5. The Defense did Not Prove that the Complained of "Missing" Discovery Would Interject any New Facts into The Case and Thus they Did Not Prove Prejudice.**

"In order to show prejudice justifying dismissal, the defendant must establish by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between the right to a speedy trial or effective assistance of counsel." State v. Cannon, 130 Wn.2d 313, 328-29, 922 P.2d 1293 (1996) (quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)); State v. Woods, 143 Wn.2d 561, 582-83, 23 P.3d 1046 (2001)( where the State has not acted with due diligence, the defendant must show by a preponderance of the evidence that the interjection of new facts into the case would compel him to choose between prejudicing one of these rights).

Interjection of new facts" was not shown in this case. This is shown by the trial court's inquiry about this topic and with defense counsel's lukewarm and quite off-topic response to the Court's inquiry:

THE COURT: All right. What new facts have been interjected into this case as a result of late discovery?

MR. MEYER:A. we now know who the witnesses are; B, we know that Mr. Brooks made two more taped

statements that we didn't know about. There have been additional --well, I guess the short answer, I don't know because we still don't have all the discovery.

3/1/RP 75. Yet at the same time both the trial court and defense counsel agreed that they had "99 percent" of the discovery as of the March 1st date. Id. Defense counsel goes on to complain again about getting 11 or 12 additional taped statements "the day of trial." Id. To which the court again asked: "Did those interject any new facts into this case?" Defense counsel said in a conclusory fashion, "They did. That's what contained the interviews of the neighbors, it contained interviews of people down in Oregon, other witnesses of that nature. . ." 3/1/07 RP 75. But it is still not clear that defense counsel could not have gotten to those witnesses on their own or even whether the State planned to call those witnesses. Then once again the trial court stated: "Well, I know you got these new reports, but did they contain facts that are new to the case? That's what the issue is in the case that you cited, State v. Price, that talks about that being a requirement." 3/1/07 RP 76 (emphasis added). Defense counsel responded, "The neighbors, Mr. Griegs [sic] statement and he has given inconsistent statements throughout" and counsel goes on to say that Mr. Greig gives inconsistent statements throughout. 3/1/07 RP 76, 77.

These were rather wishy-washy responses to the court's questions and certainly do not prove by a preponderance of the evidence that the new discovery "interjected new facts into the case." State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (Defendant must prove that interjection of new facts into the case will compel him to choose between prejudicing either of the designated rights). The judge acknowledged that the issue of prejudice was a very close call when in his oral ruling he said, "[t]he issue of prejudice, however, is a closer call, but I do find that the rights of the defendants to a fair trial have been substantially and materially affected." 3/1/07 RP 85(emphasis added). The record does not support the finding that the alleged missing or tardy discovery interjected new facts into the case. Therefore, the defendants did not meet their burden to show they were prejudiced by the alleged discovery violations and the trial court's dismissal of these cases should be reversed.

**6. The Trial Court Erred in Not Addressing the Materiality of the Late-Received Discovery.**

It does not appear from the report of proceedings that the trial court reviewed the supplemental reports received by the defense at any of the hearings in this case. Consequently, the

court's finding that the defendant's rights were "materially" affected is not supported by the evidence and does not show that these additional reports *materially* infringed on the defendant's right to a fair trial. Dismissal for discovery violations is an extraordinary remedy available only when the alleged misconduct has *materially* affected the accused's right to a fair trial. State v. Jacobson, 36 Wn.App. 446, 450, 674 P.2d 1255 (1983).

Before a trial court should exercise its discretion to dismiss a criminal prosecution, a defendant must prove that it is more probably true than not true that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, which essentially compelled the defendant to choose between two distinct rights.

State v. Woods, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001), citing State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980).

Evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Green, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Defense counsel's burden in this regard is more than the mere possibility of materiality. "The mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial, however, does not establish "materiality" in the

constitutional sense." State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407 (1986); See also United States v. Agurs, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 2401,, 2402, 49 L.Ed.2d 342 (1976). The trial court in the instant case tried to get to the issue of materiality of the allegedly unprovided discovery but got no definitive answers from the defense and in fact the trial court admitted what a "close call" these issues were. 3/1/07 85. While supplementary reports arrived in this case after the omnibus date, the defense failed to meet their burden to show that the reports included new or material facts. Defense counsel here received the essential case in the motion and affidavit (and attachments) for arrest. Because it was not shown here by a preponderance of the evidence that the later reports contained material facts or that the reports interjected new facts into the case, it was untenable and an abuse of discretion for the court to find that the Defendants had been prejudiced. The trial court's dismissal of the case should be reversed and the case should be remanded for a new trial before a different judge.

### **CONCLUSION**

The trial court erred when it chose the extraordinary remedy of dismissal of this case for alleged discovery violations by the State instead of imposing less drastic remedies such as release of

the accused, a continuance, or suppression of evidence. The trial court should have considered all other less-onerous remedies first. The trial court also erred in its finding that there was gross misconduct by the State in this case because the court failed to analyze whether the defense met their burden to show that the alleged discovery violations met the test of "materiality" or of "interjecting new facts into the case" which caused the defendant to have to choose between prejudicing the defendants' right to effective representation and their right to a speedy trial. 2/20/07 RP 20. Thus, the defendants did not meet their burden to show they were prejudiced.

In short, the trial court abused its discretion by choosing the extraordinary remedy of dismissal and the trial court's dismissal of the case with prejudice should be reversed and the matter remanded for a new trial before a different judge.

DATED THIS 8 day of February, 2008.

BY:   
L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTOR  
LORI SMITH, WSBA 27961  
Deputy Prosecutor

Deputy A. [unclear]  
Lewis County Superior Court

FEB 28 2007

Deputy A. [unclear]  
Lewis County Superior Court

IN THE SUPERIOR COURT OF STATE OF WASHINGTON FOR LEWIS COUNTY

|                       |   |                  |
|-----------------------|---|------------------|
| STATE OF WASHINGTON,  | ) |                  |
| Plaintiff,            | ) | No. 06-1-00846-9 |
|                       | ) |                  |
| vs.                   | ) | AFFIDAVIT        |
|                       | ) | OF SARA BEIGH    |
| JASON PHILLIP BROOKS, | ) |                  |
| Defendant.            | ) |                  |

STATE OF WASHINGTON )  
: ss.  
COUNTY OF L E W I S )

The undersigned being first duly sworn on oath deposes and says:

That I am a Deputy Prosecuting Attorney in and for Lewis County, Washington; that I am familiar with the record and file herein;

I constructed the attached Table 1 and Table 2 after completing a diligent search of our case file. Table 1 and Table 2 accurately reflects all the police reports contained within our case file. Table 1 includes a section for a description of the police report, date the investigation took place, date the report was written, date the prosecutor's office received the report and the date the report was provided to defense counsel. The date the

MOTION AND AFFIDAVIT FOR 1  
ORDER OF DISMISSAL WITH PREJUDICE

Appendix A

CP 18

L. MICHAEL GOLDEN  
LEWIS COUNTY  
PROSECUTING ATTORNEY  
345 W. MAIN ST., 2nd FLOOR, MSPR001  
CHEHALIS, WA 98532-1900

document was provided to defense counsel is the date the document was placed in defense counsel's pick up basket located at the Lewis County Prosecutor's Office.

Table 2 was created based upon what the defense told the State on 02-21-2007 regarding discovery they claimed they did not receive. Table 2 contains a column for when the police report was originally given to defense counsel and a column for when the reports were given a second time, when applicable.

  
SARA I. BEIGH

SIGNED AND SWORN to before me February 28, 2007.

  
Julainne Booth, NOTARY PUBLIC in and for the State of Washington, residing at Chehalis. My commission expires 08/22/08.

MOTION AND AFFIDAVIT FOR 2  
ORDER OF DISMISSAL WITH PREJUDICE

L. MICHAEL GOLDEN  
LEWIS COUNTY  
PROSECUTING ATTORNEY  
345 W. MAIN ST., 2nd FLOOR, MSPRO01  
CHEHALIS, WA 98532-1900

19

TABLE 1 : POLICE REPORTS TABLE

| Document Description                                    | Date(s) Investigated   | Date Report Written | Date Received | Date Provided to Defense | Time Lapse |
|---|------------------------|---------------------|---------------|--------------------------|------------|
| Initial LCSO report – 93 pages of the following:        | 1. 12-27-06            | 1.12-28-06          | 01-24-07      | 01-26-07                 | 2 days     |
| 1. English Narrative                                    | 2. 12-27-06            | 2.12-28-06          |               |                          |            |
| 2. Statement of Natalie (Brooks) Pitts taken by English | 3. 12-27-06            | 3.01-04-07          |               |                          |            |
| 3. Statement of Jason Brooks taken by English           | 4. 12-27-06            | 4.12-29-06          |               |                          |            |
| 4. Statement of Natalie (Brooks) Pitts taken by Kinsey  | 5. 12-28-06            | 5.01-04-07          |               |                          |            |
| 5. Statement of Gary Greig taken by Neiser              | 6. 01-02-07 - 1-9-07   | 6.01-09-07          |               |                          |            |
| 6. Report by Isabelle Williams regarding Items 5 and 8  | 7. 01/16/07            | 7.01-16-07          |               |                          |            |
| 7. Neiser supp. regarding 24 photos                     | 8. 01-19-07            | 8.01-19-07          |               |                          |            |
| 8. Kenepah Fingerprint report                           |                        |                     |               |                          |            |
| Supplemental Reports                                    | 1. 12-27-06            | 1.12-28-06          | 01-25-07      | 01-26-07                 | 1 day      |
| 1. English Supp   | 2. 12-27-06 - 1-1-07   | 2.01-17-07          |               |                          |            |
| 2. Callas Supp  | 3. 12-27-06 - 1-5-07   | 3.01-24-07          |               |                          |            |
| 3. Neiser Supp  | 4. 12-27-06 - 12-28    | 4.01-24-07          |               |                          |            |
| 4. Wallace Supp   | 5. 12-27-06 - 12-28    | 5.01-24-07          |               |                          |            |
| 5. Seiber Supp  | 6. 12-27-06 - 12-27-06 | 6.01-01-07          |               |                          |            |
| 6. Kinsey Supp  | 7. 12-27-06 - 1-3-07   | 7.01-24-07          |               |                          |            |
| 7. Seiber Supp (re: consent to search home)             | 8. 12-29-07            | 8.01-24-07          |               |                          |            |
| 8. Wallace Supp (autopsies)                             | 9. 01-02-07            | 9.01-24-07          |               |                          |            |
| 9. Wallace Supp (search warrant on truck)               | 10. 1-3-07 - 1-4-07    | 10. 1-19-07         |               |                          |            |
| 10. Callas Supp   | 11. 1-3-07 - 1-9       | 11. 1-24-07         |               |                          |            |
| 11. Wallace Supp  |                        |                     |               |                          |            |

| Document Description  | Date(s) Investigated   | Date Report Written   | Date Received     | Date Provided to Defense | Time Lapse      |
|---|--|---|-------------------|--------------------------|-----------------|
| 12. Wallace Supp.<br>13. WSP McBride<br>14. WSP Herron<br>15. Mortensen Supp  | 12. 1-17-07 - 1-24-07<br>13. 12-27-06<br>14. 12-27-06<br>15. 12-27-06  | 12. 01-24-07<br>13. 01-07-07<br>14. 01-09-07<br>15. 12-27-06  | 01-25-07<br>Cont. | 01-26-07<br>Cont.        | 1 day cont. . . |
| Supplemental Reports<br>1. Wallace Supp<br>2. Wallace Supp (autopsies)<br>3. Wallace Supp (truck search warrant)<br>4. Callas Supp<br>5. Wallace Supp<br>6. Isabelle Williams (items 5 and 8)<br>7. Neiser Supp<br>8. Nesor Supp (photos)<br>9. Kenepah Supp (fingerprints)<br>10. Wallace Supp<br>11. Kinsey Supp<br>12. Callas Supp | 1. 12-27-06<br>2. 12-29-06<br>3. 01-02-07<br>4. 01-03-07 - 1-4-07<br>5. 01-03-07 - 1-9-07<br>6. 12-27-06 - 1-9-07<br>7. 12-27-06<br>8. 01-16-07<br>9. 01-19-07<br>10. 01-17-07 - 1-24-07<br>11. 01-02-07<br>12. 01-09-07 - 1-10-07 | 1. 01-24-07<br>2. 01-24-07<br>3. 01-24-07<br>4. 01-19-07<br>5. 01-24-07<br>6. 01-09-07<br>7. 01-24-07<br>8. 01-24-07<br>9. 01-24-07<br>10. 01-24-07<br>11. 01-25-07<br>12. 01-25-07 | 01-30-07          | 01-30-07                 | 0               |
| 10 CD's containing photos and a copy of Gary Greig's 911 call   | Unknown and 12-27-06   | Photos taken on various dates   | 01-30-07          | 01-31-07                 | 1 day           |
| Autopsy photos  | 12-29-06   | Unknown when photos put on CD   | 01-30-07          | 02-01-07                 | 2 days          |
| //////  |  |   |                   |                          |                 |
| //////  |  |   |                   |                          |                 |
| //////  |  |   |                   |                          |                 |
| //////  |  |   |                   |                          |                 |
| //////  |  |   |                   |                          |                 |

| Document Description   | Date(s) Investigated  | Date Report Written   | Date Received   | Date Provided to Defense | Time Lapse   |
|--|---|---|-----------------|--------------------------|--------------|
| <p>175 page report – containing lists of contacts and property as well as narrative</p> <ol style="list-style-type: none"> <li>1. English Narrative</li> <li>2. Statement of Natalie (Brooks) Pitts taken by English</li> <li>3. Statement of Jason Brooks taken by English</li> <li>4. Statement of Natalie (Brooks) Pitts taken by Kimsey</li> <li>5. Kimsey Supp</li> <li>6. Statement of Gary Greig taken by Neiser</li> <li>7. Seiber Supp</li> <li>8. Callas Supp</li> <li>9. Seiber Supp (consent to search)</li> <li>10. Wallace Supp</li> <li>11. Wallace Supp (autopsies)</li> <li>12. Wallace Supp (search warrant on truck)</li> <li>13. Callas Supp (Glock, etc. . .)</li> <li>14. Wallace Supp</li> <li>15. Isabelle Williams (items 5 and 8)</li> <li>16. Neiser Supp (Greig at hospital, etc)</li> <li>17. Neiser Supp (photos)</li> <li>18. Kenepah Supp (fingerprints)</li> <li>19. Wallace Supp</li> <li>20. Kimsey Supp (truck)</li> </ol> | <ol style="list-style-type: none"> <li>1. 12-27-06</li> <li>2. 12-27-06</li> <li>3. 12-27-06</li> <li>4. 12-27-07</li> <li>5. 12-27-06–</li> <li>6. 12-28-06</li> <li>7. 12-27-06–</li> <li>8. 12-28-06</li> <li>9. 12-27-06–</li> <li>10. 12-29-06</li> <li>11. 12-29-07</li> <li>12. 01-02-07</li> <li>13. 01-03-07–</li> <li>14. 01-03-07–</li> <li>15. 01-03-07–</li> <li>16. 12-27-06–</li> <li>17. 01-16-07</li> <li>18. 01-19-07</li> <li>19. 01-17-07–</li> <li>20. 01-02-07</li> </ol> | <ol style="list-style-type: none"> <li>1. 12-28-06</li> <li>2. 12-28-06</li> <li>3. 01-04-07</li> <li>4. 12-29-06</li> <li>5. 01-01-07</li> <li>6. 01-04-07</li> <li>7. 01-01-07</li> <li>8. 01-17-07</li> <li>9. 01-24-07</li> <li>10. 01-24-07</li> <li>11. 01-24-07</li> <li>12. 01-24-07</li> <li>13. 01-19-07</li> <li>14. 01-24-07</li> <li>15. 01-09-07</li> <li>16. 01-24-07</li> <li>17. 01-24-07</li> <li>18. 01-24-07</li> <li>19. 01-24-07</li> <li>20. 01-25-07</li> </ol> | <p>02-01-07</p> | <p>02-02-07</p>          | <p>1 day</p> |
| <p>//</p>  |   |   |                 |                          |              |

| Document Description   | Date(s) Investigated   | Date Report Written  | Date Received     | Date Provided to Defense | Time Lapse      |
|--|--|--|-------------------|--------------------------|-----------------|
| 175 page report cont . . .<br>21. Callas Supp (medics etc. . .)<br>22. Statement of Gary Greig by Callus | 21. 01-09-07 -<br>01-10-07<br>22. 01-25-07                                     | 21. 01-25-07<br>22. 01-31-07   | 02-01-07<br>Cont. | 02-02-07<br>Cont.        | 1 day cont. . . |
| 22 folders with various information  | 1. 12-27-06<br>2. 12-27-06 -<br>12-29<br>3. 12-28-06<br>4. 01-03-07 -<br>01-09 | 1. 12-27-07<br>2. 12-27-06<br>-12-29<br>3. 12-28-06<br>4. 01-03-07<br>-01-09 | 02-01-07          | 02-02-07                 | 1 day           |
| 1. Arrest sheets   | 1. 12-27-06  | 1. 12-27-07  |                   |                          |                 |
| 2. Property Sheets   | 2. 12-27-06 -<br>12-29   | 2. 12-27-06<br>-12-29  |                   |                          |                 |
| 3. Search Warrants   | 3. 12-28-06  | 3. 12-28-06  |                   |                          |                 |
| 4. Hits Bulletins  | 4. 01-03-07 -<br>01-09   | 4. 01-03-07<br>-01-09  |                   |                          |                 |
| 5. Verizon Wireless  | 5. unknown   | 5. unknown   |                   |                          |                 |
| 6. Nevada DMV Records  | 6. 12-29-06  | 6. 01-02-07  |                   |                          |                 |
| 7. Washington DMV Records  | 7. 12-29-06  | 7. 12-29-06  |                   |                          |                 |
| 8. EMS Services Report   | 8. 12-27-06  | -01-02   |                   |                          |                 |
| 9. Morton General Hospital   | 9. 12-27-06  | 8. 12-27-06  |                   |                          |                 |
| 10. FBI/FP/KIDRICK   | 10. 01-03-07   | 9. 12-27-06  |                   |                          |                 |
| 11. Snohomish Co. Report   | 11. 12-26-06   | 10. 01-03-07   |                   |                          |                 |
| 12. ATF Firearms Trace   | 12. 01-04-07   | 11. 01-18-07   |                   |                          |                 |
| 13. Las Vegas Police Report  | 13. 12-11-06   | 12. 01-04-07   |                   |                          |                 |
| 14. Linn County Police Report  | 14. 12-28-06   | 13. 01-04-07   |                   |                          |                 |
| 15. Scene Log  | 15. 12-27-06 -<br>12-28  | 14. 01-03-07<br>15. 12-27-06<br>-12-28                                       |                   |                          |                 |
| 16. Miscellaneous  | 16. various  | 16. various  |                   |                          |                 |
| 17. Did not send 7 folders, duplicates of other reports, Emails, teletypes and news articles             | 17.  | 17.  |                   |                          |                 |
| 2 DVD's -<br>1. Video of the scene on 12-28-07<br>2. Walk through incident with Gary Greig               | 12-28-07   | Unknown<br>when copies<br>made   | 02-05-07          | 02-06-07                 | 1 day           |
| WSP C.R. Powell supp   | 12-27-06   | 01-16-07   | 02-01-07          | 02-01-07                 | 0               |
| WSP Total Station Diagrams   | 12-28-07   | Unknown  | 02-09-07          | 02-09-07                 | 0               |
| ///  |  |  |                   |                          |                 |
| ///  |  |  |                   |                          |                 |
| ///  |  |  |                   |                          |                 |

| Document Description                               | Date(s) Investigated | Date Report Written | Date Received | Date Provided to Defense | Time Lapse |
|--|----------------------|---------------------|---------------|--------------------------|------------|
| Statements   |                      |                     |               |                          |            |
| 1. Statement of Jason Brooks taken by Callas       | 1. 12-27-06          | 1. 02-02-07         | 02-12-07      | 02-21-07                 | 9 days     |
| 2. Statement of Gary Greig taken by Callas         | 2. 01-03-07          | 2. 02-04-07         |               |                          |            |
| 3. Statement of Gary Greig taken by Callas         | 3. 01-25-07          | 3. 01-31-07         |               |                          |            |
| Statement of Gary Greig taken by Neiser            | 12-27-06             | 02-12-07            | 02-13-07      | 02-21-07                 | 8 days     |
| Lewis County Coroner's Report                      | 12-29-06             | 01-09-07            | 02-15-07      | 02-16-07                 | 1 day      |
| Supplemental Statements                            |                      |                     |               |                          |            |
| 1. Statement of Gary Phillips taken by Wallace     | 1. 01-17-07          | 1. 02-13-07         | 02-15-07      | 02-16-07                 | 1 day      |
| 2. Statement of Gary Phillips taken by Wallace     | 2. 01-17-07          | 2. 02-14-07         |               |                          |            |
| 3. Statement of Kriste Mercowicz taken by Wallace  | 3. 01-08-07          | 3. unknown          |               |                          |            |
| 4. Statement of Ronald Blankenship taken by Callas | 4. 01-09-07          | 4. 02-14-07         |               |                          |            |
| 5. Statement of Jeff Jaques taken by Callas        | 5. 01-03-07          | 5. 02-14-07         |               |                          |            |
| 6. Statement of Joe Thompson taken by Callas       | 6. 01-03-07          | 6. 02-14-07         |               |                          |            |
| 7. Statement of Ralph Johnson taken by Callas      | 7. 01-03-07          | 7. 02-14-07         |               |                          |            |
| 8. Statement of Shirley Porter taken by Callas     | 8. 01-04-07          | 8. 02-14-07         |               |                          |            |
| 9. Statement of Kent Smith taken by Callas         | 9. 01-04-07          | 9. 02-14-07         |               |                          |            |
| 10. Statement of John Ashe taken by Callas         | 10. 01-09-07         | 10. 02-15-07        |               |                          |            |
| 11. Continued below                                |                      |                     |               |                          |            |
| //   |                      |                     |               |                          |            |



**TABLE 2 : DON BLAIR AND JONATHAN MEYER'S 02-21-2007 LIST OF POLICE REPORTS THEY CLAIMED WAS NOT PROVIDED TO THEM**

| <b>Document Description</b>                                  | <b>Date(s) Investigated</b> | <b>Date Report Written</b> | <b>Date Received</b>       | <b>Date Originally Provided to Defense</b> | <b>2<sup>nd</sup> Date Provided to Defense</b> |
|--|-----------------------------|----------------------------|----------------------------|--|--|
| Taped Statement of Gary Greig dated 12-27-06 taken by Neiser | 12-27-06                    | 02-12-07                   | 02-13-07                   | 12-21-2007                                 | N/A  |
| 2 taped statements by Natalie Pitts                          | 1. 12-27-06<br>2. 12-27-06  | 1.12-28-06<br>2.12-29-06   | 1. 01-24-07<br>2. 01-24-07 | 1. 01-26-07<br>2. 01-26-07                 | 1. 02-21-07<br>2. 02-21-07                     |
| 2 taped statements by Jason Brooks                           | 1. 12-27-06<br>2. 12-27-06  | 1. 01-04-07<br>2. 02-02-07 | 1. 01-24-07<br>2. 02-12-07 | 1. 01-26-07<br>2. 02-21-07                 | 1. 02-21-07                                    |
| Prepared Diagrams – WSP Total Station Diagrams               | 12-28-06                    | Unknown                    | 02-09-07                   | 02-09-07                                   | 02-21-07                                       |
| Hand prepared diagram dictated by Jason Brooks               | 12-27-06                    | 12-27-06                   | Unknown                    | 02-21-07                                   | N/A  |
| 2 Hand prepared diagrams by Natalie Pitts                    | 12-27-06                    | 12-27-06                   | Unknown                    | 02-210-07                                  | N/A  |
| Report from Detective Pat Smith                              | Unknown                     | Unknown                    | Not Received               | Report not received                        | Report nor received                            |
| Legible copies of the hand-written property log sheets       | 12-27-06 -<br>12-29-06      | 12-27-06 -<br>12-29-06     | 02-01-07                   | 02-02-07                                   | 02-21-07                                       |

CP 26

Filed  
Lewis County Superior Court

FEB 28 2007

Kathy A. Brook  
Lewis County Clerk

**SUPERIOR COURT OF WASHINGTON STATE, IN AND FOR LEWIS COUNTY**

STATE OF WASHINGTON,

Plaintiff,

NO. 06-1-00846-9

v.

JASON PHILLIPS BROOKS,

DECLARATION OF  
DPA J. BRADLEY MEAGHER

Defendant.

J. Bradley Meagher declares under penalty of perjury of the laws of the State of Washington that the following is true and correct:

Attached are true copies of the letters I sent to Mr. Meyer and to Mr. Blair. The hearing was heard on February 20, 2007. Both defense counsel and I agreed to meet the following morning, February 21, 2007, at 8:00 a.m., to nail down what items the defense still needed. Mr. Blair showed up, however Mr. Meyer left a phone message earlier that morning (about 7:45 a.m.) stating he couldn't make it, but that he had what Mr. Blair had, and therefore he would need any items Mr. Blair needed. Quite frankly, I was surprised at how short Mr. Blair's list was.

That same day, February 21, 2007, I delivered to both defense counsel the requested items along with copies of both letters. Delivery was made by placing the items in the attorney pick-up boxes.

DECLARATION OF  
DPA J. BRADLEY MEAGHER  
Page 1 of 2

Lewis County Prosecuting Attorney  
360 NW North Street, Ms:PRO-01,  
Chehalis, WA 98532-1900  
Phone: (360) 740-1240 Fax: (360) 740-1497

**APPENDIX B**

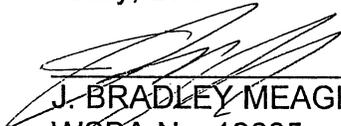
**CP 33**

1 On Thursday, February 21, 2007, Mr. Blair called. He stated he already had the  
2 two statements of each defendant. What he needed was the "other" taped statement  
3 taken by Deputy English.

4 Later that evening, Thursday, February 21, 2007, I spoke with deputy English.  
5 He said those "Other" taped statements did not exist. The tapes were blank, that the  
6 recorder malfunctioned, and there were no "other" taped statements. Consequently,  
7 there were no "other" transcriptions. A malfunctioning tape recorder is not  
8 "mismanagement" by law enforcement, or the prosecutor's office.

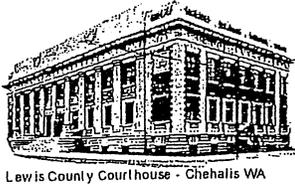
9  
10 Lastly, I am now told by defense counsel, on February 27, 2007, that there is  
11 one last police report being prepared by Detective Pat Smith (LCSO). I do not have a  
12 copy, nor has this office ever been given one. Once again, there has been no  
13 mismanagement of that report, because our office did not receive it.

14  
15 DATED this 29 day of February, 2007.

16  
17   
18 J. BRADLEY MEAGHER, DPA  
19 WSBA No. 18685  
20 Signed in Chehalis, WA  
21  
22  
23  
24  
25  
26

"Equal Justice For All"

Lewis County Prosecuting Attorney



Michael Golden  
*Prosecuting Attorney*

Douglas E. Jensen  
*Chief Civil Deputy*

Jason Richards  
*Chief Criminal Deputy*

February 21, 2007

Mr. Jon Meyer  
Attorney at Law  
207 West Main  
Centralia, WA 98531

Re: Lewis County Cause No. 06-1-00847-7  
State v. Natalie Pitts

Dear Mr. Meyer:

I received your voice message this morning stating you were unable to make this morning's meeting with me and Mr. Blair. The message also said you had the reports and other discovery that Mr. Blair had, and that if any items were missing you would need the same items that Mr. Blair needed.

I have enclosed with this letter a copy of the letter I sent to Mr. Blair along with the attachments. You should now have a complete copy of the discovery regarding Mr. Brooks and Ms. Pitts.

As I stated to Mr. Blair, it is my intent that this be a full and final accounting of all items you were not originally provided. If there is anything else, please call me immediately. My direct phone number is 740-1181. If I do not hear from you, I will assume you have everything you requested.

Sincerely,

  
J. Bradley Meagher, DPA  
Lewis County Prosecutor's Office

JBM/bm  
Enclosures  
Cc: Don Blair

"Equal Justice For All"

Lewis County Prosecuting Attorney



Michael Golden  
Prosecuting Attorney

Douglas E. Jensen  
Chief Civil Deputy

Jason Richards  
Chief Criminal Deputy

February 21, 2007

Mr. Donald Blair  
Attorney at Law  
P.O. Box 1207  
Centralia, WA 98531

Re: Lewis County Cause No. 06-1-00846-9  
State v. Jason Brooks

Dear Mr. Blair:

Thank you for meeting with me this morning. Here is the complete list of items you told me you still do not have:

1. *Taped Statement taken from Gary Greig dated 12-27-2006 by Detective David Neiser.*
2. *Two Taped Statements taken from Natalie Pitts.*
3. *Two Taped Statements taken from Jason Brooks.*
4. *Prepared Diagrams.*
5. *Hand prepared Diagram from Jason Brooks.*
6. *Two hand prepared Diagrams from Natalie Pitts.*
7. *Report from Detective Pat Smith.*
8. *Legible copies of the hand-written property log sheets.*

I met with Detective Bruce Kimsey, and he provided me the following, copies of which are enclosed with this letter:

1. *Taped Statement taken from Gary Greig dated 12-27-2006 by Detective David Neiser.*
2. *Two Taped Statements taken from Natalie Pitts.*
3. *Two Taped Statements taken from Jason Brooks.*
8. *Legible copies of the hand-written property log sheets.*

The next few items are attached to this letter but require some explanation.

4. *Prepared Diagrams(four).* My understanding is the Defense will stipulate to the one diagram most complete, so long as we redact the numbered legend at the bottom.

Mr. Donald Blair  
Page 2  
February 21, 2007

5. *Hand Prepared Diagram from Jason Brooks.* There is only one diagram. This diagram was drawn by Detective Tom Callas, but Jason directed his drawing. There is not a separate drawing actually drawn by Jason.
6. *Two hand prepared Diagrams from Natalie Pitts.* There are only two diagrams, both prepared by Detective Bruce Kimsey at Natalie's direction. There are no separate drawings actually drawn by Natalie.

The next item is not provided because it does not exist.

7. *Report from Detective Pat Smith.* From my conversation with Detective Bruce Kimsey, Det. Smith was present at the crime scene in a supportive role only. He did not interview anyone, he did not prepare a report. Any observations would be cumulative. Det. Smith will not be called by the State as a witness at trial.

It is my intent that this be a full and final accounting of all items you were not originally provided. If there is anything else, please call me immediately. My direct phone number is 740-1181. If I do not hear from you, I will assume you have everything you requested.

Sincerely,



J. Bradley Meagher, DPA  
Lewis County Prosecutor's Office

JBM/bm  
Enclosures  
Cc: Jon Meyer

CP 37

