

No. 36212-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Covarrubias,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00079-1

The Honorable Judge George L. Wood

Appellant's Opening Brief

Corrected Copy

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
(866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

ASSIGNMENTS OF ERROR ix

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR x

1. Did the prosecutor’s delay in providing discovery deprive Mr. Covarrubias of his constitutional right to due process under the state and federal constitutions? Assignments of Error Nos. 1-30. xi

2. Did the prosecutor’s failure to disclose material exculpatory evidence violate Mr. Covarrubias’s constitutional right to due process under *Brady v. Maryland*? Assignments of Error Nos. 1-5, 7-8, 10-15. xi

3. Did the trial court abuse its discretion by refusing to grant a new trial as a result of governmental mismanagement and discovery violations? Assignments of Error Nos. 1-30. xi

4. Did the trial court abuse its discretion by refusing to dismiss the case as a result of governmental mismanagement and discovery violations? Assignments of Error Nos. 1-30. xi

5. Did the state’s mismanagement and discovery violations force Mr. Covarrubias to choose between the effective assistance of counsel and his constitutional right under the double jeopardy clause to have his case determined by a particular tribunal? Assignments of Error Nos. 1-30..... xi

6. Did the state's mismanagement prevent defense counsel from adequately preparing for trial? Assignments of Error Nos. 1-34.....	xii
7. Did the state's discovery violations interfere with defense counsel's ability to advocate for Mr. Covarrubias during trial? Assignments of Error Nos. 31-34.....	xii
8. Did the state's mismanagement and discovery violations deprive Mr. Covarrubias of the effective assistance of counsel? Assignments of Error Nos. 31-34.....	xii
9. Did the state's mismanagement and discovery violations create circumstances under which the chances of a reasonably competent attorney providing effective assistance were so small that prejudice should be presumed without a specific inquiry into defense counsel's performance? Assignments of Error Nos. 31-34.	xii

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

A. Late motion to disqualify defense counsel for numerous conflicts of interest.....	1
B. Late discovery provided prior to and during trial.	2
1. Delayed disclosure of information relating to Travis Criswell.	3
2. Delayed disclosure of information relating to Dr. Selove's autopsy.	4
3. Delayed disclosure of information relating to the WSP Crime Lab's DNA analysis.....	5
4. Delayed disclosure of information relating to the WSP Crime Lab's blood test results.	7
5. Delayed disclosure of information relating to the impeachment of eyewitness Jon Sonnabend.....	8

6. Delayed disclosure of miscellaneous reports and information.....	9
C. Defense Motions to Dismiss.....	12
1. March 30 th Motion to Dismiss.	13
2. April 4 th Motion to Dismiss.	14
3. April 17 th Motion to Dismiss.	15
4. April 19 th Motion to Dismiss.	16
D. Verdict, post-trial disclosures and motions.....	16
ARGUMENT	18
I. The prosecutor’s mismanagement and ongoing discovery violations deprived Mr. Covarrubias of his constitutional right to due process and denied him a fair trial.	18
A. The prosecutor violated CrR 4.7 and prejudiced Mr. Covarrubias by failing to provide information relating to Travis Criswell.....	21
B. The prosecutor violated CrR 4.7 by failing to provide Dr. Selove’s autopsy notes and photographs.	23
C. The prosecutor violated CrR 4.7 by failing to provide information relating to the WSP Crime Lab’s DNA analysis.....	25
D. The prosecutor violated CrR 4.7 by failing to provide information relating to Melissa Carter’s initial blood alcohol test results. 27	
E. The prosecutor violated CrR 4.7 by failing to provide information relating to Jon Sonnabend.	30
F. The prosecutor violated CrR 4.7 by failing to provide information relating to numerous other witnesses.	32

G. The prosecution violated CrR 4.7 by delaying disclosure until after trial of prior convictions and other information relating to Cody Snow and Edward Steward. 33

H. The cumulative effect of the state’s discovery violations was to deny Mr. Covarrubias a fair trial..... 34

II. The government failed to disclose material exculpatory evidence in violation of *Brady v. Maryland*..... 35

III. The trial court erred by refusing to dismiss Mr. Covarrubias’s case for discovery violations..... 37

IV. The prosecutor’s mismanagement and violations of the discovery rules prevented the defense team from providing the effective assistance of counsel..... 40

CONCLUSION 44

APPENDIX: FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENSE MOTION FOR NEW TRIAL, ENTERED APRIL 9, 2007 (CP 6-11).

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Arizona v. Washington</i> , 434 U.S., 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)	38, 39
<i>Banks v. Dretke</i> , 540 U.S. 668, 24 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004)	35
<i>Boss v. Pierce</i> , 263 F.3d 734 (7th Cir., 2001)	35
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963)	35
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	40
<i>Kyles v. Whitley</i> , 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)	36, 37
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	41
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)	36
<i>U.S. v. Salemo</i> , 61 F.3d 214 (3 rd Cir., 1995)	40
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)	36
<i>United States v. Cronin</i> , 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)	41, 43, 44
<i>Wade v. Hunter</i> , 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974, (1949)	38, 39

STATE CASES

<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004)	41, 43
---	--------

<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	40
<i>Ongom v. Dep't of Health</i> , 159 Wn.2d 132, 148 P.3d 1029 (2006).....	18
<i>State v. Cannon</i> , 130 Wash.2d 313, 328, 922 P.2d 1293 (1996).....	37
<i>State v. Chamroeum Nam</i> , 136 Wn. App. 698, 150 P.3d 617 (2007). 34, 35	
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	34
<i>State v. Copeland</i> , 89 Wn. App. 492, 949 P.2d 458 (1998).....	19, 20
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P. 3d 390 (2000).....	19
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	40
<i>State v. Linden</i> , 89 Wn. App. 184, 947 P.2d 1284 (1997).....	20
<i>State v. Martinez</i> , 121 Wn. App. 21, 86 P.3d 1210 (2004).....	38
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587, 71 A.L.R.5th 705 (1997)	37
<i>State v. Pete</i> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	19
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	41
<i>State v. Price</i> , 94 Wn.2d 810, 620 P.2d 994 (1980).....	38, 39
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	41
<i>State v. Rohrich</i> , 110 Wn.App. 832, 43 P.3d 32 (2002).....	37
<i>State v. Stein</i> , 140 Wn. App. 43, 165 P.3d 16 (2007).....	37

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	18
Wash. Const. Article I, Section 22.....	40
Wash. Const. Article I, Section 3.....	18

OTHER AUTHORITIES

CrR 4.7..... 23, 25, 27, 30, 32, 33

CrR 4.7(a) 20, 21, 23, 24, 26, 28, 29, 30, 32, 33

CrR 4.7(a)(1)..... 20, 21, 23, 26, 28, 30, 32, 33

CrR 4.7(a)(1)(ii)..... 32

CrR 4.7(a)(1)(iv)..... 23, 26, 28

CrR 4.7(a)(1)(v) 24

CrR 4.7(a)(1)(vi)..... 33

CrR 4.7(a)(2)..... 20, 24, 26, 28, 30

CrR 4.7(a)(3)..... 20, 21, 24, 28, 31

CrR 4.7(c)(3)..... 33

CrR 4.7(d) 26, 29

CrR 4.7(h)(2)..... 20, 24, 29

CrR 4.7(h)(7)..... 20

CrR 7.5 19

CrR 8.3 37

CrR 8.3(b) 37

ASSIGNMENTS OF ERROR

1. The state violated Mr. Covarrubias's federal constitutional right to due process under the Fourteenth Amendment.
2. The state violated Mr. Covarrubias's state constitutional right to due process under Washington Constitution Article I, Section 3.
3. The state's discovery violations denied Mr. Covarrubias a fair trial.
4. The state's failure to provide timely discovery regarding "other suspect" Travis Criswell deprived Mr. Covarrubias of his constitutional right to due process.
5. The state's failure to provide timely discovery regarding Dr. Selove's autopsy notes and autopsy photographs deprived Mr. Covarrubias of his constitutional right to due process.
6. The state's failure to provide timely discovery regarding the WSP Crime Lab's DNA analysis deprived Mr. Covarrubias of his constitutional right to due process.
7. The state's failure to provide timely discovery regarding the WSP Crime Lab's tests on the decedent's blood deprived Mr. Covarrubias of his constitutional right to due process.
8. The state's failure to provide timely discovery regarding impeachment of purported eyewitness Jon Sonnabend deprived Mr. Covarrubias of his constitutional right to due process.
9. The state's failure to provide timely discovery regarding numerous other reports, witness statements, and miscellaneous information deprived Mr. Covarrubias of his constitutional right to due process.
10. The state's delay in furnishing discovery regarding Cody Snow's prior conviction until after trial deprived Mr. Covarrubias of his constitutional right to due process.
11. The state's delay in furnishing discovery regarding Edward Steward's prior convictions until after trial deprived Mr. Covarrubias of his constitutional right to due process.

12. The state's delay in furnishing discovery regarding Edward Steward's arrest and purported exoneration of major crimes in Clallam County until after trial deprived Mr. Covarrubias of his constitutional right to due process.
13. The state's delay in furnishing discovery regarding Edward Steward's admissions contradicting his trial testimony until after trial deprived Mr. Covarrubias of his constitutional right to due process.
14. The trial court erred by refusing to grant Mr. Covarrubias a new trial.
15. The trial court erred by refusing to dismiss Mr. Covarrubias's case.
16. The trial court erred by entering Finding of Fact Nos. 1, 2, 8, 9, 10, 11, 12, 13, 14, and 15. See Appendix, CP 7-10.
17. The trial court erred by entering Conclusions of Law Nos. 1, 4, 5, 6, 7, and 16. See Appendix, CP 10.
18. The prosecutor's mismanagement and discovery violations prevented defense counsel from providing effective assistance.
19. The prosecutor's mismanagement and discovery violations diminished the chance that any reasonably competent attorney could provide effective assistance.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Robert Covarrubias was charged with First-Degree Murder. Despite multiple requests and specific discovery demands, the prosecution delayed providing information relating to Travis Criswell (who was the focus of Mr. Covarrubias's "other suspect" defense), statements of the accused, reports authored by the lead investigator, autopsy photographs, autopsy notes, the report and notes of the Washington State Patrol Crime Lab DNA analyst who testified at trial, WSP Crime Lab notes relating to the decedent's initial blood tests, crime scene photographs, fingerprint analysis performed on Mr. Covarrubias's dwelling, numerous witness statements, prior convictions of state witnesses, and other miscellaneous information critical to the case. Some of the materials were provided just

prior to trial, some was provided during trial, and some was provided after the verdict.

1. Did the prosecutor's delay in providing discovery deprive Mr. Covarrubias of his constitutional right to due process under the state and federal constitutions? Assignments of Error Nos. 1-19.

Among the material that the state failed to provide prior to trial was a quantity of exculpatory evidence. This included "other suspect" Travis Criswell's statements, information contained in the autopsy photographs and notes prepared by prosecution expert Dr. Selove, notes from the WSP Crime Lab, and impeachment evidence regarding state witnesses.

2. Did the prosecutor's failure to disclose material exculpatory evidence violate Mr. Covarrubias's constitutional right to due process under *Brady v. Maryland*? Assignments of Error Nos. 1-5, 7-8, 10-15.

Defense counsel moved to dismiss the case prior to and during trial, arguing that governmental mismanagement and discovery violations prejudiced Mr. Covarrubias. Defense counsel also moved for a new trial after the verdict. The trial court denied the motions, reasoning that Mr. Covarrubias should have moved for a continuance before trial. Defense counsel was not aware of all the information withheld by the prosecutor until after the trial concluded.

3. Did the trial court abuse its discretion by refusing to grant a new trial as a result of governmental mismanagement and discovery violations? Assignments of Error Nos. 1-17.
4. Did the trial court abuse its discretion by refusing to dismiss the case as a result of governmental mismanagement and discovery violations? Assignments of Error Nos. 1-17.
5. Did the state's mismanagement and discovery violations force Mr. Covarrubias to choose between the effective assistance of counsel and his constitutional right under the double jeopardy

clause to have his case determined by a particular tribunal?
Assignments of Error Nos. 1-17.

Shortly before trial, the prosecution moved to disqualify the defense team for a conflict of interest. The defense team was forced to respond to this motion and to process late discovery instead of preparing for trial during the month leading up to the trial date. This problem continued during the trial, and counsel was distracted from advocating for Mr. Covarrubias by the need to review and respond to late discovery.

6. Did the state's mismanagement prevent defense counsel from adequately preparing for trial? Assignments of Error Nos. 1-19.
7. Did the state's discovery violations interfere with defense counsel's ability to advocate for Mr. Covarrubias during trial? Assignments of Error Nos. 17-19.
8. Did the state's mismanagement and discovery violations deprive Mr. Covarrubias of the effective assistance of counsel? Assignments of Error Nos. 17-19.
9. Did the state's mismanagement and discovery violations create circumstances under which the chances of a reasonably competent attorney providing effective assistance were so small that prejudice should be presumed without a specific inquiry into defense counsel's performance? Assignments of Error Nos. 17-19.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Robert Covarrubias was charged with First Degree Felony Murder. The state alleged that he caused the death of Melissa Carter during a rape accomplished by forcible compulsion. Supp. CP, Information. Mr. Covarrubias appeared in court on February 17, 2005, and requested counsel. The court appointed the Clallam Public Defender. RP (2/17/05) 6; Supp. CP, Order Appointing Attorney.

Mr. Covarrubias was arraigned on March 11, 2005. Supp. CP, Order Setting Case Schedule. Trial was initially set to commence on May 2, 2005, but it was continued several times, and ultimately scheduled for March 27, 2006. Supp. CP, Order Setting Case Schedule. Trial began on that date with jury selection. RP (3/27/06) 16. The presentation of evidence began on April 3, 2006. RP (4/3/06) 50.

A. Late motion to disqualify defense counsel for numerous conflicts of interest.

On March 8, 2006, the Court ordered the defense attorneys to provide additional information regarding their former and current clients, including two individuals that they planned to point to as other suspects, listed as witnesses. RP (3/8/06) 7-12. On March 9, 2006, the state filed a Motion For Judicial Inquiry into Conflict of Interest, as the public

defenders office currently or previously represented 28 people on the state's witness list. Supp. CP.

The court held a hearings relating to the conflict issue, appointed special counsel, and accepted a lengthy written waiver of the conflict, and the public defender remained on the case. Supp. CP, Order Denying Motion for Disqualification, Defendant's Acknowledgment of Conflict.¹

On March 27, 2006 (the first day of trial) and March 30, 2006, the state added witnesses formerly represented by the public defender, and once again, Mr. Covarrubias was asked to waive any conflicts. Without conferring with special counsel, he did so. RP (3/30/06) 44-54.

After conviction, Mr. Covarrubias appealed from his judgment and sentence, raising (among other issues) a claim of ineffective assistance based on conflicts of interest affecting the public defenders' performance. That appeal is pending. *See* Court of Appeals No. 35042-4-II.

B. Late discovery provided prior to and during trial.

More than a month prior to trial, Mr. Covarrubias' attorneys complained that they had yet to receive several important items from the prosecution. RP (2/23/06) 6, 16. Additional discovery delays, including

¹ This decision was the subject of a Motion for Discretionary Review brought by the state. That motion was denied. Further, this issue is one of the challenges that Mr. Covarrubias raised in his other appeal under cause no. 35042-4-II.

late disclosures made during trial, led to further hearings. These problems culminated in motions to dismiss for mismanagement made on March 30, April 4, April 17, and April 19, 2006. RP (3/30/06) 29-34; RP (4/4/06) 86; RP (4/17/06) 158; RP (4/19/06) 113-114.

1. Delayed disclosure of information relating to Travis Criswell.

Travis Criswell was the focus of Mr. Covarrubias' 'other suspect' defense.² CP 6-7. Criswell, the adult boyfriend of fifteen-year-old Carter, had argued with her the day of her death, had thought about "removing [her] from the world," and had initially denied and later admitted having had sex with her, despite the fact that she was only 15 and he was 23. RP (4/11/06) 21-87; RP (4/17/06) 83-93. On March 28, 2006, after trial had commenced, defense counsel complained that the state had not provided statements from two inmates who had allegedly heard from Criswell that he'd written in his diary that he was responsible for Carter's death. RP (3/28/06) 12. This information was provided the following day (March 29). RP (3/30/06) 49. On March 29, the defense also received a statement taken from Criswell one month earlier, in February 2007. In that

² In the absence of complete discovery relating to Criswell, the defense 'other suspect' theory lacked focus initially, pointing instead to several alternate suspects. RP (4/3/06) 54-153; RP (4/5/06) 12-198; RP (4/6/06) 18-196; RP (4/10/06) 35-180; RP (4/11/06) 21-202; RP (4/12/06) 15-226; RP (4/13/06) 24-222; RP (4/17/06) 40-145; RP (4/18/06) 27-147; RP (4/19/06) 18-155; RP (4/20/06) 25-112, 180-204.

statement, Criswell admitted that he'd thought about "removing Carter from the world." RP (3/30/06) 7.

Finally, police reports summarizing Mr. Criswell's statements left out the fact that in his first statement he denied having had sex with Ms. Carter (a fact that he later admitted). RP (4/17/06) 165-166. The initial statement was provided on CD in a recorded statement that was never transcribed. Defense counsel had not listened to the recording, in part because he was too busy reviewing late discovery³ when he should have been preparing for trial. RP (4-17-06) 73-76.

2. Delayed disclosure of information relating to Dr. Selove's autopsy.

Dr. Daniel Selove performed an autopsy on the deceased, and testified at trial regarding his findings. The prosecution provided late disclosure relating to this autopsy.⁴ On March 16, 2006, the defense expert had yet to receive Dr. Selove's autopsy photos and notes, and could not finish his review and render an opinion without them. RP (3/16/06) 55. Defense counsel raised this issue again on March 22. RP (3/22/06)

³ He was also busy responding to the state's 11th hour motion to disqualify the public defenders' office. See Supp. CP, Motion for Judicial Inquiry into Conflicts of Interest.

⁴ At a hearing on December 22, 2005, the defense attorney noted that he did not expect the DNA results to be of great consequence. RP (12/22/05) 6.

21. On March 27, the prosecutor indicated that she planned to give the defense the last batch of photos by the next day. RP (3/27/06) 152-153. The photos were not actually provided until March 30, 2006. RP (3/30/06) 58. Defense counsel reiterated its request for Dr. Selove's autopsy notes on April 3, 2006.⁵ RP (4/3/06) 32-35. The court ordered the state to provide the notes. RP (4/3/06) 35. On April 4, 2006, defense counsel received Dr. Selove's notes. The notes indicated that Ms. Carter's neck was not injured,⁶ and included Dr. Selove's opinion that the body had been dragged on asphalt. RP (4/4/06) 84-85.

3. Delayed disclosure of information relating to the WSP Crime Lab's DNA analysis.

On October 5, 2005, the defense filed and served a discovery demand that included the following:

...1. A complete copy of the case file of the Washington State Patrol Crime Lab (hereinafter WSP lab) regarding any and all testing of any sort related to this matter, including, but not limited to, all reports, notes, and memoranda: and...
CP 181.

⁵ Defense counsel mistakenly believed that Dr. Selove had dictated his notes; however, the prosecutor clarified that the notes were handwritten. RP (4/3/06) 32-35.

⁶ Dr. Selove had concluded that Carter had been strangled. RP (4/5/06) 64-65.

On April 13, 2006, Greg Frank, DNA analyst from the Washington State Patrol Crime Lab, testified using notes that had not been provided to defense counsel. RP (4/13/06) 216. Defense counsel objected, and the notes were provided. RP (4/13/06) 216. Mr. Frank explained to the jury that Mr. Covarrubias's DNA was found in Carter's oral swab and that he easily saw sperm (which Dr. Selove had missed). RP (4/13/06) 184, 190; RP (4/15/06) 74.

Defense counsel learned during cross-examination of Mr. Frank that he'd examined a hair found between Ms. Carter's buttocks. RP (4-13-06) 201-202. The state had not informed defense counsel that the hair would be studied; nor had the state disclosed the methodology used or the results of the examination. Mr. Frank did not offer any conclusions regarding his study of this hair sample. RP (4-13-06) 201-202. Mr. Frank had not performed any DNA or mtDNA⁷ analysis on the hair; however, defense counsel did not learn of this omission (or about Frank's conclusions regarding the hair) until approximately April 17, 2006, when the defense team received Mr. Frank's report.⁸ RP (4/17/06) 28-29, 31-32.

⁷ Mitochondrial DNA. See, e.g., Deedrick and Koch, "Microscopy of Hair" in *Forensic Science Communications*, January 2004, Vol. 6 No. 1. U.S. Dept. of Justice, Federal Bureau of Investigation.

⁸ On that date, it was revealed that the prosecutor had not even requested analysis of the hair until late March. RP (4-17-06) 31.

The jury was never provided Frank's conclusions from his examination of this particular hair sample; nor was the jury informed of the state's failure to attempt DNA and mtDNA testing on this hair sample. Because Mr. Frank's report was not provided until mid-trial, the defense did not have a subsequent opportunity to have this hair independently analyzed. RP (4-17-06) 28-29, 31-32.

4. Delayed disclosure of information relating to the WSP Crime Lab's blood test results.

On October 5, 2005, the defense specifically demanded notes from any Washington State Patrol lab tests. CP 181. In January of 2005, two blood tests had been performed on samples taken from Ms. Carter's corpse. Supp CP, Exhibit 147. Both tests revealed the presence of alcohol, but because the amounts were low, the results were reported as negative. RP (4/12/06) 71-75. No indication was given that low levels of alcohol had been found, and no notes were provided regarding the test. RP (4/12/06) 71-73.

On April 12, the prosecutor announced that she might call lab technician Ann Marie Gordon to testify about a urine test, completed one day earlier. RP (4/12/06) 69. The defense complained they had not received any report regarding this new test, which revealed an alcohol level of .03 in the urine. RP (4/12/06) 70. Ms. Gordon's testimony was

delayed. RP (4/12/06) 78, 80. Additionally, the prosecutor indicated she planned to have Ms. Gordon testify that the earlier blood tests had revealed the presence of low levels of alcohol. This information was outlined in Ms. Gordon's notes, which were not provided to defense counsel until after April 12, 2006, despite defense counsel's written demand of October 2005. RP (4/12/06) 69-80.

5. Delayed disclosure of information relating to the impeachment of eyewitness Jon Sonnabend.

Jon Sonnabend claimed he saw Mr. Covarrubias and a young woman on the night of Ms. Carter's death, near where the body was later discovered. RP (4/12/06) 103-113. Sonnabend had a head injury and was diagnosed with schizo-affective disorder. His symptoms included visual and auditory hallucinations, which were controlled by his medication. RP (4/12/06) 98-100, 147. As of February 23, defense counsel had not yet received a statement from a friend⁹ of Sonnabend's, who said that Sonnabend was "acting funny" around the time he claimed to have seen Mr. Covarrubias. RP (2/23/06) 6, 16. The state also failed to timely provide a summary of the testimony it planned to offer through

⁹ The friend's name was Mr. Trichtner. RP (2/23/06) 6,16.

Sonnabend's counselor. The summary of proposed testimony was provided on March 30. RP (3/30/06) 58.

6. Delayed disclosure of miscellaneous reports and information.

As of February 23, defense counsel had not received any reports from one of the lead detectives on the case, Detective Ensor. Ensor had interviewed Mr. Covarrubias on December 28, 2004. RP (4/11/06) 113-116, 157-201. The state had also failed to provide statements from two inmates who claimed that Mr. Covarrubias had spoken to them about the case. RP (2/23/06) 6, 16. In addition, the defense team was still missing several pages from the sequentially numbered discovery package. RP (2/23/06) 6, 16. Finally, the prosecutor had yet to provide statements from several of her witnesses, including Jacob Pearce, Kathy Montgomery, Timothy Bruce, Ronald Parker, Joseph Farrington, Solomon Jacobs, Dustin Davis, and Kelly Mortensen. RP (2/23/06) 18.

As of March 23, defense counsel had yet to receive any discovery from follow-up police interviews of the state's witnesses. RP (3/23/06) 20-21. In addition, defense counsel had received a CD (apparently relating to the crime scene survey performed by the Washington State Patrol), but had not been provided a copy of the software necessary to

view the CD's contents.¹⁰ RP (3/23/06) 21. The state had also just provided the defense team with "3 inches" of additional discovery materials. RP (3/23/06) 4.

As of March 27, the state had failed to provide the final fingerprint report from the abandoned "squat" house, where Mr. Covarrubias had been living. The state promised to provide the report by the next day.¹¹ RP (3/27/06) 152-153. On March 27, 2006, defense counsel requested information regarding the background and proposed testimony of Karen Lindel Green, who processed the crime scene as part of the Washington State Patrol Crime Response Team. RP (3/27/06) 144-145. On March 28, 2006, the defense indicated that they had not been provided ongoing messages between the police and Kelly Banner's ex-girlfriend Zornes.¹² RP (3/28/06) 12. On March 30, the defense team complained that the state had endorsed an expert witness just the week before, and had, on March 15, turned over 165 photos taken on December 29, 2004. The photos were

¹⁰ The prosecutor claimed that defense counsel had been given a copy of the program in connection with another, unrelated case. RP (4-12-06) 37.

¹¹ In fact, the report was not provided until April 19, 2006. RP (4-19-06) 8.

¹² The police denied there were any such communications. RP (3/28/06) 12.

provided without any documentation on an unreadable CD. RP (3/30/06) 12-14.

On April 3 (the fourth day of trial, and the first day evidence was presented), the state provided a report prepared by Sgt. Roggenbuck. The report had been prepared the week after the body was discovered in December 2004, but had apparently not been printed until April 1, 2006. RP (4/3/06) 146. Roggenbuck's report included a statement from J. Price, who had found the body.¹³ RP (4/3/06) 8-9.

On April 3, the state also revealed for the first time that the police had told witnesses they would not be pursued for illegal drug and alcohol use and distribution that took place the night of Ms. Carter's death. While no formal immunity was offered by the prosecutor's office, the prosecutor did not pursue charges relating to the illegal drug and alcohol activities. RP (4/3/06) 14-15. The state also noted that none of the witnesses had requested immunity, and that the defense had been given transcripts in which the officer had told the witnesses they were "just interested in the truth." RP (4/3/06) 19.

¹³ The prosecutor offered to call Price to testify later in her case, and noted that the information contained in the report was not new. RP (4/3/06) 9-10. Defense counsel indicated that he was "not very upset about it" but he would need to review the report with his co-counsel. RP (4/3/06) 11-13.

On April 10, 2006, the prosecutor provided photos of the abandoned “squat” house where Mr. Covarrubias resided at the time of his arrest.¹⁴ RP (4/10/06) 8. On April 12, 2006, Jim Tarver from the Washington State Patrol Crime Response Team testified using notes that had not been provided to the defense team. He also disclosed that his report about the search (which took place on December 29, 2004) was not generated until March 16, 2006. RP (4/12/06) 214-215, 217. On April 19, 2006, the state provided information on the fingerprint analysis from the abandoned “squat” house.¹⁵ RP (4/19/06) 8.

C. Defense Motions to Dismiss

Prior to the conclusion of trial, defense counsel made four motions to dismiss the prosecution. These motions were made on March 30th, April 4th, April 17th, and April 19th, 2006. The trial judge denied each of the motions, and the case went to the jury on April 20, 2006.

¹⁴ The prosecutor indicated she did not intend to use the photos at trial. RP (4/10/06) 8.

¹⁵ The prosecutor had requested the analysis earlier but cancelled it after Jon Sonnabend came forward and claimed to be able to identify Mr. Covarrubias. The prosecutor reordered the tests in February of 2006. RP (4/18/06) 9-12. The prosecutor indicated she would strike a witness due to the late discovery, and that the state had only recently become aware that Mr. Covarrubias would claim he had sex with Carter somewhere other than the Waterfront Trail, where the body was discovered. RP (4/19/06) 13-15.

1. March 30th Motion to Dismiss.

On March 30, defense counsel complained that the late disclosures were forcing Mr. Covarrubias to choose between delaying the trial and his right to the effective assistance of counsel, and moved to dismiss. RP (3/30/06) 7-14, 29-34. They told the trial judge that they had agreed to start the trial only because they were prepared to address the late information known at that time, but that additional late and missing information had surfaced since the trial had commenced. RP (3/30/06) 15-17. The state argued that the defense had been aware of the existence of a group of photos for over a year and had only requested them two weeks earlier. The prosecutor also claimed that the information now being disclosed was primarily rebuttal evidence. RP (3/30/06) 20-21, 27. In addition, the prosecutor told the court that she did not intend to endorse Ms. Lindel Green as an expert, but that Ms. Lindel-Green would testify to her opinion that there had been a struggle, that Ms. Carter had been killed where her body was later found, and the state further asserted that the defense had a copy of Ms. Lindel Green's report. RP (3/30/06) 24-25.

The court denied Mr. Covarrubias' motion to dismiss, ruling that the majority of the information was already known to the defense. RP (3/30/06) 29-34. Judge Wood added that speedy trial wasn't the issue, since Mr. Covarrubias's expiration date was April 26, 2006 and a

continuance could have been granted had trial not already commenced.

RP (3/30/06) 38.

2. April 4th Motion to Dismiss.

Another motion to dismiss was made on April 4, 2006. RP (4/4/06) 86. Defense counsel had just received Dr. Selove's notes from his autopsy, which indicated, for the first time, that Ms. Carter's neck was not injured and that Dr. Selove believed her body had been dragged on asphalt. RP (4/4/06) 84-85. This information was consistent with the defense theory that Ms. Carter was murdered elsewhere and then moved to the place where her body was eventually discovered. Defense counsel had received the information 30 minutes prior to Dr. Selove's planned testimony. RP (4/4/06) 85-86. The defense attorneys complained that this late disclosure did not give them enough time to review the information with their expert or to prepare for cross-examination. RP (4/4/06) 86.

In addition to being unprepared for cross-examination, the defense team had been unable to cross-examine Ms. Lindel Green about Dr. Selove's opinions and observations, which conflicted with her opinions and observations. RP (4/6/06) 88-90. In particular, the defense team argued that the doctor's opinions and notes would have been useful in challenging Ms. Lindel Green's expertise and her opinion that the death occurred at the scene where the body was later recovered. RP (4/4/06) 89-

90. The state responded by claiming that the notes were timely provided after a recent defense request. RP (4/4/06) 91-94. Defense counsel responded that a specific request was unnecessary where exculpatory material is concerned. RP (4/4/06) 98.

The court denied the motion. The testimony of Dr. Selove was delayed to another day of trial. RP (4/4/06) 107-108. Ms. Lindel Green was not recalled to the stand.

3. April 17th Motion to Dismiss.

The April 17th motion to dismiss was based on the state's failure to timely provide the defense with hundreds of photos, with materials upon which the state's experts relied, with compact disks, with additional lab testing, and with further lab reports. RP (4/17/06) 158-170. In particular, defense counsel pointed out that earlier reports regarding Mr. Criswell's statements neglected to mention that he first denied and then admitted having had sex with Ms. Carter. RP (4/17/06) 165. Furthermore, the prosecutor should have been aware that Dr. Selove took his own autopsy photos because Detective Ensor and the prosecutor herself were present during the autopsy. RP (4/17/06) 166; RP (11/16/06) 22. All the listed material was provided after trial commenced, and the defense team argued that they could not be expected to provide adequate representation under these circumstances. RP (4/17/06) 157-163. The prosecution responded

that the new information related to minor matters, and had been provided when requested. RP (4/17/06) 163-165.

Once again, the court denied the motion, faulting the defense team for allowing the trial to commence even though they knew discovery was incomplete. RP (4/17/06) 171-173.

4. April 19th Motion to Dismiss.

On April 19, during cross-examination of Mr. Covarrubias, the prosecutor brought forward several booking photos that had not been provided to the defense team. Defense counsel objected and moved to dismiss. RP (4/19/06) 109-111. The prosecutor responded that she could not have anticipated that Mr. Covarrubias would deny that he was able to grow a goatee, and the photos were appropriate cross-examination as they showed goatees. RP (4/19/06) 111, 120. The court allowed the photos' use and denied the motion to dismiss. RP (4/19/06) 113-114.

D. Verdict, post-trial disclosures and motions.

The jury returned a guilty verdict on April 21, 2006. RP (4/21/06)

4. Mr. Covarrubias was sentenced on June 15, 2006, and he appealed from the judgment and sentence. That appeal is pending in Court of Appeals No. 35042-4-II.

On June 12, 2006, the prosecutor indicated that state witness Cody Snow had a previously undisclosed out-of-state conviction for a misdemeanor. RP (6/12/06) 6.

The prosecutor also revealed that state witness Edward Steward had a previously undisclosed theft conviction from Oregon, which would have been admissible to impeach his testimony at trial. RP (6/12/06) 6.

On July 20, 2006, the state acknowledged that Mr. Steward had also been arrested in Clallam County for a major crime while Mr. Covarrubias' case was pending, and that the case had been dismissed because Mr. Steward had been "exonerated." RP (7/20/06) 6-7. The prosecutor acknowledged that she should have known about this arrest, and had made a mistake by failing to provide the information to defense counsel. RP (7/20/06) 6-7.

On November 2, 2006, the prosecutor told the court that she had just provided the defense a report by Detective Ensor (one of the lead investigators on the murder) regarding Mr. Steward's acknowledgement that he was a drug dealer. RP (11/2/2006) 7-8. This acknowledgment contradicted Mr. Steward's trial testimony that he was not involved in criminal activity. RP (4/6/06) 195.

On April 17, 2006 and June 21, 2006, the defense filed motions for a new trial, to set aside the verdict, to dismiss and for other relief. CP 136-141, 178-180. A hearing on Mr. Covarrubias's motions commenced

October 26, 2006. After additional proceedings, the court denied Mr. Covarrubias' motion on April 9, 2007, and entered Findings of Fact and Conclusions of Law. (See Assignments of Error.) CP 6-11.

One of the findings was that all continuances of the trial date were by agreement of the parties and not due to the new discovery. A review of the record indicates that prior to the reset of the trial date on May 2, 2005, the defense noted that the state's DNA testing had not been completed or reviewed. RP (5/2/05) 6. When it was reset again on November 14, 2005, the DNA tests were still not received. RP (11/14/05) 5. At the December 22, 2005 trial review, the state noted that while they could have their DNA results before the currently set trial date, it would not give the defense adequate time to review them. RP (12/22/05) 5-6.

Mr. Covarrubias appealed the trial court's denial of his motions. CP 5.

ARGUMENT

I. THE PROSECUTOR'S MISMANAGEMENT AND ONGOING DISCOVERY VIOLATIONS DEPRIVED MR. COVARRUBIAS OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND DENIED HIM A FAIR TRIAL.

The Fourteenth Amendment to the U.S. Constitution prohibits the state from depriving an accused of liberty without due process of law.

U.S. Const. Amend. XIV. Our state's due process right is coextensive

with the federal right. Wash. Const. Article I, Section 3; *see also Ongom v. Dep't of Health*, 159 Wn.2d 132 at 152, 148 P.3d 1029 (2006). Due process requires that criminal proceedings comport with prevailing notions of fundamental fairness such that the accused is given a meaningful opportunity to present a complete defense. *State v. Greiff*, 141 Wn.2d 910 at 920, 10 P. 3d 390 (2000).

Governmental violation of a discovery rule may infringe an accused's constitutional right to due process. *Greiff*, at 920. A new trial must be granted whenever there is a substantial likelihood that the violation affected the jury's verdict. *Greiff* at 923; *see also CrR 7.5 and State v. Copeland*, 89 Wn. App. 492 at 497-498, 949 P.2d 458 (1998). Denial of a motion for a new trial is reviewed for abuse of discretion. *State v. Pete*, 152 Wn.2d 546 at 552, 98 P.3d 803 (2004).

Criminal Rule 4.7, which governs discovery, requires the prosecutor to disclose (no later than the omnibus hearing) the following items:

- (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;
- (ii) any written or recorded statements and the substance of any oral statements made by the defendant...
- (iv) any reports or statements of experts made in connection with the particular case, including results of physical or

mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial...; and

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

CrR 4.7(a)(1).

The prosecutor must also notify the defense of any experts they plan to call at trial, the subject of the experts' testimony, any reports the experts have provided, and "any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." CrR 4.7(a)(2); CrR 4.7(a)(3). The rule imposes a continuing duty to disclose, and permits dismissal as a sanction for violation. CrR 4.7(h)(2) and (7).

The rule is to be construed liberally, in order to

'provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process...' To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

Copeland, at 497-498, *citation omitted*.

To this end, the phrases "intends to call" and "intends to use" are interpreted to apply where there is a reasonable possibility that the evidence will be used during trial, whether during the case in chief, for

impeachment, or during rebuttal. *State v. Linden*, 89 Wn. App. 184 at 192, 947 P.2d 1284 (1997).

A. The prosecutor violated CrR 4.7 and prejudiced Mr. Covarrubias by failing to provide information relating to Travis Criswell.

By the conclusion of trial, state witness Travis Criswell had become the focus of Mr. Covarrubias's "other suspect" defense. RP (4/13/06) 83-145; RP (4/18/06) 27-147; RP (4/19/06) 18-174; RP (4/20/06) 25-204. Criswell, the adult boyfriend of fifteen-year-old Carter, had argued with her the day of her death, had thought about "removing [her] from the world," and had initially denied and later admitted having had sex with her. RP (4/11/06) 21-87; RP (4/17/06) 83-93. The state waited until March 29—after trial had commenced—to provide the defense with Mr. Criswell's statement about "removing Carter from the world," as well as his conversations with two inmates about his diary.¹⁶ RP (3/28/06) 12, RP (3/30/06) 7, 49.

Criswell's statement about "removing" Carter and his statements about his diary were covered by CrR 4.7. The statements were "written or recorded statements [or] ...oral statements of [state] witnesses" under CrR 4.7(a)(1)(i). They were also statements tending to negate Mr.

¹⁶ It was alleged that Criswell said he'd written in his diary that he was responsible for the death.

Covarrubias's guilt under CrR 4.7(a)(3). Accordingly, the prosecutor's delay in disclosing these statements violated the state's discovery obligations.

The state's discovery violation prejudiced Mr. Covarrubias and requires reversal because there is a substantial likelihood that the violation affected the jury's verdict. First, without the information about Mr. Criswell, Mr. Covarrubias's "other suspect" defense was scattered across multiple suspects. Second, the defense team's offer of proof regarding Criswell's status as a viable "other suspect" was incomplete. Without benefit of the missing information (regarding Criswell's statements), the court prohibited Mr. Covarrubias from presenting or even discussing "other suspect" evidence relating to Criswell. The court reversed its decision once the missing information was provided.

Because of the defense team's inability to focus on Criswell from the outset, and because the court prohibited mention of Criswell as an "other suspect," the defense was unable to question the jury venire during *voir dire* about issues relating to Criswell's statement, or about his sexual involvement with the underage Carter. Nor was the defense able to mention Criswell in opening statements as an "other suspect," let alone as *the* "other suspect" upon whom the jury should focus throughout trial. Finally, during cross-examination of Criswell, the defense team neglected

to ask Criswell about his statement that he'd had thoughts of killing Carter, which was likely the most damning evidence against him.¹⁷

B. The prosecutor violated CrR 4.7 by failing to provide Dr. Selove's autopsy notes and photographs.

Dr. Selove performed an autopsy on Carter on 12/27/04. RP (4/5/06) 20. The prosecutor (Deborah Kelly) and one of the lead investigators (Detective Ensor) attended the autopsy. RP (11/16/06) 21-22. Dr. Selove took photographs and wrote notes; at trial he based his testimony on those materials. RP (4/5/06) 12-198. The state did not provide the photographs until March 30th, and failed to provide the notes until April 3rd. RP (4/3/06) 12. These items were covered by CrR 4.7, and should have been provided to defense counsel earlier in the proceedings.

First, Dr. Selove's autopsy notes were "written or recorded statements" of a witness which the state intended to call at trial, and should have been provided under CrR 4.7(a)(1)(i). Second, Dr. Selove's notes were "statements of experts made in connection with the particular case..." and thus should have been disclosed under CrR 4.7(a)(1)(iv). Third, the photographs were "photographs... which the prosecuting

¹⁷ This omission may have resulted from the late discovery, or from the defense team's conflict of interest, discussed at length in Mr. Covarrubias's other appeal, Court of Appeals No. 35042-4-II.

attorney intend[ed] to use in the hearing or trial,” and should have been provided under CrR 4.7(a)(1)(v). Fourth, the materials also fell within CrR 4.7(a)(2)(ii), which requires the prosecuting attorney to “disclose to the defendant... any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney.”

Finally, because the notes indicated (a) that there were no marks on Carter’s neck (despite Dr. Selove’s strangulation theory) and (b) that Carter’s body had been dragged across asphalt (contradicting the testimony of Ms. Lindel Green, who opined that Ms. Carter was killed at the location where her body was discovered), the notes were also “material or information within the prosecuting attorney's knowledge [tending] to negate defendant's guilt as to the offense charged” under CrR 4.7(a)(3).

The state’s failure to provide these materials prior to the omnibus hearing violated CrR 4.7(a). In addition, the prosecuting attorney failed to discharge its continuing obligation to provide these materials under CrR 4.7(h)(2).

The state’s discovery violations with respect to Dr. Selove’s notes and photographs prejudiced Mr. Covarrubias, because there is a substantial likelihood that the violation affected the jury’s verdict. In particular, the defense was unable to thoroughly investigate the issues

raised by the photographs and notes prior to trial, was unable to formulate and ask the appropriate questions during jury selection, was unable to articulate its theory of the case during opening statements, and was unable to cross-examine WSP response team lead investigator Karen Lindel-Green regarding her opinion that Carter was killed at the place where her body was discovered.

C. The prosecutor violated CrR 4.7 by failing to provide information relating to the WSP Crime Lab's DNA analysis.

On October 5, 2005, the defense team requested notes from any relevant analyses conducted by the WSP Crime Lab. CP 181-182. The prosecution did not provide notes prepared by Greg Frank, a forensic scientist at the WSP Crime Lab, who conducted the state's DNA analysis on samples obtained from Carter and from Mr. Covarrubias. The state also failed to notify defense counsel that Mr. Frank had examined a hair sample found between the corpse's buttocks, failed to provide the results of Mr. Frank's examination, and failed to disclose that Mr. Frank had not conducted a DNA or mtDNA analysis of that sample. RP (4/13/06) 216.

The state violated CrR 4.7 by failing to provide Frank's notes on the DNA analysis and his notes and report on his examination of the hair sample. First, Frank's notes and report were "written or recorded statements" of a witness which the state intended to call at trial, and

should have been provided under CrR 4.7(a)(1)(i). Second, Frank's notes and report were "statements of experts made in connection with the particular case..." and thus should have been disclosed under CrR 4.7(a)(1)(iv). Third, the notes and report also fell within CrR 4.7(a)(2)(ii), which requires the prosecuting attorney to "disclose to the defendant... any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." Finally, defense counsel's written demand of October 5, 2005 required the prosecutor to obtain Frank's notes and the report under CrR 4.7(d), which relates to materials held by others.

The state's discovery violations with respect to Greg Frank's notes and report prejudiced Mr. Covarrubias, because there is a substantial likelihood that the violation affected the jury's verdict. The defense was unable to thoroughly investigate the issues raised by the notes and the report prior to trial. For example, had the defense team known that Mr. Frank would be performing a microscopic examination but not performing additional tests (including DNA and mtDNA analysis), defense counsel could have consulted with an expert and had an independent microscopic examination and/or DNA and mtDNA performed. Without knowledge of the microscopic examination, the methodology, and the results, the

defense team was hampered in its ability to prepare Mr. Covarrubias's defense.

In addition, without the notes and report, the defense team was unable to formulate and ask the appropriate questions during jury selection, was unable to confidently articulate a theory of the case during opening statements, and was unable to adequately prepare for and cross-examine Frank when he testified. Indeed, defense counsel's question to Mr. Frank about analysis of this particular hair sample yielded an unexpected answer, which defense counsel could not intelligently pursue further. RP (4-13-06) 201-202. The failure to provide the notes and report on so complex an issue as DNA analysis and a forensic hair examination hampered defense counsel in the preparation of their case.

D. The prosecutor violated CrR 4.7 by failing to provide information relating to Melissa Carter's initial blood alcohol test results.

The Washington State Patrol Crime Lab tested Carter's blood alcohol content twice, in January of 2005. Supp. CP. On October 5, 2005, defense counsel specifically demanded notes from any WSP lab tests. CP 181. Although the prosecutor furnished WSP reports on the blood tests, no notes were provided. WSP reported the results as negative, but the lab notes indicated that low levels of alcohol were found in Carter's blood. RP (4/12/06) 69-80. The issue became important during trial when the

prosecutor, desiring to establish that Carter had been drinking, asked the WSP Crime Lab to run additional tests, and introduced results showing the presence of alcohol in Carter's urine. At that time, the lab notes were used to support the expert's conclusions with respect to the urine test, even though the WSP report on the blood test appeared to contradict the urine test result. RP (4/12/06) 69-75.

The lab notes should have been provided earlier in the proceedings. First, the lab notes were "written or recorded statements" of a witness which the state intended to call at trial, and should have been provided under CrR 4.7(a)(1)(i). Second, the notes were "statements of experts made in connection with the particular case..." and thus should have been disclosed under CrR 4.7(a)(1)(iv). Third, the materials also fell within CrR 4.7(a)(2)(ii), which requires the prosecuting attorney to "disclose to the defendant... any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." Fourth, because the notes indicated alcohol in Carter's blood, they were also "material or information within the prosecuting attorney's knowledge [tending] to negate defendant's guilt as to the offense charged" under CrR 4.7(a)(3). Finally, defense counsel's written demand of October 5, 2005

required the prosecutor to attempt to obtain the photographs and notes under CrR 4.7(d), which relates to materials held by others.

The state's failure to provide these materials prior to the omnibus hearing violated CrR 4.7(a). In addition, the prosecuting attorney failed to discharge its continuing obligation to provide these materials under CrR 4.7(h)(2). Furthermore, by ignoring the defense team's written demand of October 5, 2005, the prosecutor also violated CrR 4.7(d).

The state's late disclosure of the lab notes prejudiced Mr. Covarrubias, because there is a substantial likelihood that the violation affected the jury's verdict. In particular, the defense team was unable to thoroughly investigate the issues raised by the lab notes, and prepared its case with the understanding that WSP would testify that Carter's BAC was zero. As a result, Mr. Covarrubias was unable to formulate and ask appropriate questions about underage drinking during jury selection, was unable to articulate its theory of the case during opening statements, did not have time to consult an expert regarding the low levels of alcohol discovered prior to the start of trial and presented a defense that hinged partly on the fact that Carter had *not* been drinking.

- E. The prosecutor violated CrR 4.7 by failing to provide information relating to Jon Sonnabend.

State witness Jon Sonnabend claimed to have seen Mr.

Covarrubias on the waterfront trail with a young woman on the night of Carter's death.¹⁸ According to one of his friends, Sonnabend (who suffered from visual and auditory hallucinations) was "acting funny," and may not have been taking his medication at the time of Carter's death. RP (2/23/06) 6, 16. The state planned to offer testimony through Sonnabend's counselor, apparently to bolster his credibility against an anticipated attack. RP (2/23/06) 6, 16. The prosecutor did not provide a copy of the friend's statement (that Sonnabend was "acting funny") until some time after February 23, 2006. The counselor's proposed testimony was not provided until March 30, 2006. RP (3/30/06) 58.

These materials should have been provided prior to the omnibus hearing. First, the counselor's proposed testimony should have been provided pursuant to CrR 4.7(a)(1)(i), since the prosecutor intended to call the counselor as a witness. Second, the counselor's testimony likely also fell under CrR 4.7(a)(2)(ii), which requires the prosecuting attorney to "disclose to the defendant... any expert witnesses whom the prosecuting

¹⁸ Sonnabend's purported identification of Mr. Covarrubias was problematic, as argued in the Appellant's Opening Brief in Court of Appeals No. 35042-4-II.

attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney.” Third, the friend’s statement provided circumstantial evidence that Sonnabend was not taking his medication, and could have been useful to impeach Sonnabend’s credibility; accordingly, it was “material or information within the prosecuting attorney's knowledge [tending] to negate defendant's guilt as to the offense charged” under CrR 4.7(a)(3).

The state’s late disclosure of these statements prejudiced Mr. Covarrubias, because there is a substantial likelihood that the violation affected the jury’s verdict. Sonnabend’s testimony was critical to the prosecution’s case: Sonnabend was the only eyewitness who claimed to have seen Mr. Covarrubias on the waterfront trail with a young woman on the night of Carter’s death. Given his testimony, any information relating to his credibility was crucial for the defense team. Without timely knowledge of the friend’s statement and the counselor’s proposed testimony, the defense was unable to fully investigate Sonnabend’s credibility, to prepare for cross-examination of Sonnabend and his counselor, to question the jury regarding mental health issues (including their thoughts on lay perceptions of mental health symptoms and their attitudes toward counselors) or to cross-examine Sonnabend and his counselor at trial.

F. The prosecutor violated CrR 4.7 by failing to provide information relating to numerous other witnesses.

The prosecutor's failure to provide the miscellaneous information outlined in the statement of facts above violated CrR 4.7, and prejudiced Mr. Covarrubias. Some of the material comprised information that should have been disclosed under CrR 4.7(a)(1)(i), relating to witnesses the state intended to call at trial. In addition, alleged statements made by Mr. Covarrubias should have been provided under CrR 4.7(a)(1)(ii). Of particular importance was the report of lead detective Ensor, who interviewed Mr. Covarrubias regarding the offense; his report—including his observations and subjective impressions made during the interview of Mr. Covarrubias—had still not been provided as of one month before trial was scheduled to begin. RP (2/23/06) 6, 16. The state also delayed disclosure of numerous additional witness statements, photographs, fingerprint analysis, and other materials. RP (2/23/06) 6, 16.

These delayed disclosures violated CrR 4.7 and prejudiced Mr. Covarrubias. The discovery violations and late disclosures forced defense counsel to focus on obtaining and reviewing discovery, right through the end of trial, instead of concentrating on preparing for trial. Although no specific prejudice relating to these violations can be discerned from the record, the delays and obstruction prevented defense counsel from being

adequately prepared, and contributed to the overall difficulty defense counsel had in responding to the state's case. For example, as previously mentioned, defense counsel did not cross-examine Travis Criswell regarding his statements about "removing" Carter, even though Criswell was the focus of Mr. Covarrubias's "other suspect" defense. RP (4/11/06) 21- 87; RP (4-17-06) 83-93.

- G. The prosecution violated CrR 4.7 by delaying disclosure until after trial of prior convictions and other information relating to Cody Snow and Edward Steward.

State witness Cody Snow had an out-of-state conviction for a misdemeanor. State witness Edward Steward had an Oregon felony conviction for theft. RP (6/12/06) 6. In addition, Steward was arrested for and "exonerated" of a major crime while Mr. Covarrubias's case was pending. RP (7/20/06) 6-7. He also admitted to Detective Ensor that he was a drug dealer; this admission contradicted his trial testimony that he was not involved in any criminal activity. RP (11/2/2006) 7-8; RP (4/6/06) 195.

By failing to disclose this information until after trial, the state violated CrR 4.7(a)(1)(i) (relating to Mr. Steward's prior statements), CrR 4.7(a)(1)(vi) (relating to both witnesses' prior convictions), and CrR 4.7(c)(3) (relating to the relationship between Mr. Steward and the prosecuting attorney.)

These discovery violations prejudiced Mr. Covarrubias. Cody Snow claimed that Covarrubias had (1) discussed selling his story to the newspaper, (2) said he did not make any statements to the police, and (3) said he did not have any marks on his body at the time of his arrest. RP (4/20/06) 85-99. Steward testified that he saw Criswell, Carter, and Mr. Covarrubias at a party the night of Carter's death. He claimed that Mr. Covarrubias was asking about methamphetamine prices and wanted Steward to obtain meth for him. He also testified that Carter was not consuming alcohol at the party. RP (4/6/06) 175-196. Had the state provided the information, Mr. Covarrubias would have been able to impeach the testimony of both Snow and Steward.

H. The cumulative effect of the state's discovery violations was to deny Mr. Covarrubias a fair trial.

Reversal may be required due to the cumulative effects of more than one error, even if each error examined on its own would otherwise be considered harmless. *State v. Chamroeum Nam*, 136 Wn. App. 698 at 708, 150 P.3d 617 (2007); *State v. Coe*, 101 Wn.2d 772 at 789, 684 P.2d 668 (1984). In this case, numerous discovery violations undermine confidence in the outcome of Mr. Covarrubias's trial. The combined effect of these violations was to severely hamper the defense team by distracting the attorneys from trial preparation in the month leading up to

trial, as well as during the trial itself. Each violation also had the specific consequences described above. Because the cumulative effect of these violations prejudiced Mr. Covarrubias and affected the jury's verdict, his conviction must be reversed and the case remanded for a new trial.¹⁹

Chamroeum Nam, supra.

II. THE GOVERNMENT FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND*.

The state's failure to disclose material exculpatory evidence, whether intentional or inadvertent, violates a criminal defendant's constitutional right to due process. *Brady v. Maryland*, 373 U.S. 83 at 87, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963). Evidence is considered suppressed for *Brady* purposes if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence. *Boss v. Pierce*, 263 F.3d 734 at 740 (7th Cir., 2001). Any evidence that is favorable to the defense falls within the rule, whether it is exculpatory or merely impeaching. *Banks v. Dretke*,

¹⁹ The prosecutor's self-imposed "remedies" (for example not calling a witness because of late disclosures to the defense team) do not cure the problems caused by government mismanagement. See RP (4/19/06) 13-15. The defense is entitled to make use of the evidence, even if the state elects not to introduce it at trial. By delaying discovery, the state hampers the defense team's ability to integrate the evidence into the defense theory, and prevents the defense team from using such evidence effectively at trial.

540 U.S. 668 at 691, 24 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). Evidence is material and reversal is required whenever there is a reasonable probability that disclosure would have led to a different result:

[The] touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), quoting *United States v. Bagley*, 473 U.S. 667 at 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The duty to disclose does not depend on a request by the defense. *Bagley*, at 676, 681-682. The prosecutor is responsible for any favorable evidence known to others acting on the government's behalf in the case, including the police. *Strickler v. Greene*, 527 U.S. 263 at 275 n. 12, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), citing *Kyles v. Whitley* at 437.

The government's team was aware of but failed to disclose the following exculpatory evidence in time for the defense team to make use of it at trial: Travis Criswell's statements, Dr. Selove's notes and photographs, the statements made by Jon Sonnabend's friend regarding Sonnabend's general demeanor at the time he claimed to have witnessed Mr. Covarrubias on the waterfront trail, the results of Mr. Frank's microscopic examination of the hair sample retrieved from between the

decendent's buttocks, and the prior convictions of Cody Snow and Edward Steward.

The state's failure to disclose these items requires reversal because there is a reasonable probability that early disclosure would have led to a different result. Confidence in the outcome is undermined; accordingly, the conviction must be reversed and the case remanded for a new trial.

Kyles v. Whitley, supra.

III. THE TRIAL COURT ERRED BY REFUSING TO DISMISS MR. COVARRUBIAS'S CASE FOR DISCOVERY VIOLATIONS.

A trial court has discretion to 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." CrR 8.3(b); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Misconduct and prejudice need only be shown by a preponderance of the evidence. *State v. Stein*, 140 Wn. App. 43 at 53, 165 P.3d 16 (2007). Furthermore, misconduct does not require evil or dishonest action; simple mismanagement is sufficient. *State v. Rohrich*, 110 Wn.App. 832, 43 P.3d 32 (2002); *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587, 71 A.L.R.5th 705 (1997). A trial court's decision under CrR 8.3(b) is reviewed for an abuse of discretion; reversal is required

when the trial court's decision is manifestly unreasonable or based on untenable grounds. *Stein*, at 53.

Withholding exculpatory evidence until the middle of trial is “so repugnant to principles of fundamental fairness that it constitutes a violation of due process.” *State v. Martinez*, 121 Wn. App. 21 at 36, 86 P.3d 1210 (2004). Dismissal is also required where a defendant is forced by late disclosures to choose between two constitutional rights. *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980).

Once the trial had begun and new discovery kept flowing continually, then Mr. Covarrubias was forced to choose between his right to the effective assistance of counsel and his right under the double jeopardy clause. The constitutional prohibition against double jeopardy “embraces the defendant’s ‘valued right to have his trial completed by a particular tribunal.’” *Arizona v. Washington*, 434 U.S. at 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), quoting *Wade v. Hunter*, 336 U.S. 684, at 689, 69 S. Ct. 834, 93 L.Ed. 974, (1949). Late disclosures by the state should not force an accused to seek a mistrial and thus give up his right to be free from being twice put in jeopardy. *See, e.g., Martinez*, at 36. Under such circumstances, granting a new trial instead of a dismissal does not provide a sufficient deterrent to prompt the government to properly manage its cases. *Martinez*, at 35-36.

The level of mismanagement in this case was extreme and inexcusable, and warrants dismissal of the charge. Any person of common sense understands that a murder investigation necessarily produces volumes of documentary evidence, large quantities of tangible evidence, and enormous quantities of information. To ensure that the evidence is properly handled, a prosecuting attorney's office faced with a murder case must assign someone—whether attorney or support staff—to be responsible for collecting, organizing, and disclosing the information related to the investigation and prosecution of the case.

It appears that the Clallam County Prosecuting Attorney's office paid no attention to discovery management in this case. Despite written and oral demands, the prosecutor delayed disclosure of statements of the accused, reports authored by the lead investigator, autopsy and crime scene photographs, notes from experts, numerous witness statements, and other information critical to the case. Although some of the information was disclosed just before trial, much of it was not provided until during or even after trial, when it was too late to conduct meaningful investigation, consult with experts regarding the information, use the information during jury selection or opening statements, or prepare for and conduct thorough cross examination based on the information.

Mr. Covarrubias was forced to make a choice between his constitutional right to the effective assistance of counsel and his “ ‘valued right to have his trial completed by a particular tribunal.’ ” *Arizona v. Washington*, at 503 quoting *Wade v. Hunter* at 689. He should not have had to sacrifice his right to the effective assistance of counsel in order to preserve his right to be free from being twice put in jeopardy for the same offense. *Arizona v. Washington, supra; State v. Price, supra*. Colossal mismanagement of this magnitude is completely indefensible. The only appropriate sanction in this case is reversal of Mr. Covarrubias’s conviction and dismissal of the charge. *Martinez, supra*.

IV. THE PROSECUTOR’S MISMANAGEMENT AND VIOLATIONS OF THE DISCOVERY RULES PREVENTED THE DEFENSE TEAM FROM PROVIDING THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental

and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Ordinarily, an appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

In certain cases, however, prejudice is presumed without inquiry into the specific conduct of defense counsel. *In re Davis*, 152 Wn.2d 647 at 673, 101 P.3d 1 (2004), citing *United States v. Cronin*, 466 U.S. 648 at 656-657, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The presumption arises whenever “the circumstances are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry

into the actual conduct of the trial...” *Davis, supra* at 674, *citations and quotation marks omitted*.

In this case, state mismanagement and ongoing discovery violations deprived Mr. Covarrubias of the effective assistance of counsel. First, the state’s motion regarding defense counsel’s numerous conflicts of interest should have been made early in the case, since it was clear from the outset that the decedent and numerous witnesses had been represented by the Clallam Public Defenders’ office. Instead, the state did not bring the motion until March 9, 2006, more than one year after the public defenders’ office was appointed, and less than a month before trial was scheduled to begin. *See Motion For Judicial Inquiry into Conflict of Interest, Supp. CP; RP (2/17/05) 6*. The state’s 11th hour motion forced the defense team to devote hours to the conflict issue when it should have been working on trial preparation.²⁰ Defense counsel noted that the state’s motion prevented the defense team from focusing on preparing Mr. Covarrubias’s defense.²¹ CP 45.

²⁰ In addition, by delaying the motion until the month of trial, the state put the judge in the untenable position of either allowing the trial to go forward with clear conflicts of interest or delaying the trial and wasting the money, time, and other resources already invested.

²¹ Trial counsel believed the conflict issue was simply a smokescreen motivated by the state’s lack of readiness for trial. CP 45.

Second, the state delayed disclosure of information, reports, statements, and tangible evidence relating to “other suspect” Travis Criswell, statements of the accused, reports authored by the lead investigator, autopsy photographs, autopsy notes, notes of the WSP DNA analyst, the DNA analyst’s report regarding his analysis of a hair sample, notes relating to the decedent’s initial blood tests, crime scene photographs, fingerprint analysis, numerous witness statements, and other information critical to the case.

In every case, defense counsel should be able to stop processing new information and start preparing for trial. Ideally this turning point comes a month or more prior to the start of trial. This is especially true in a murder case, where the information is voluminous, the facts are complex, and the stakes are high. Attorneys should not have to scramble to assimilate new information during the month leading up to trial, much less after the trial has started.

By delaying its motion for inquiry into potential conflicts until just before trial instead of when the public defender was initially appointed a year earlier, and by delaying disclosure of a large quantity of important information, the prosecutor created circumstances under which no competent attorney could reasonably have been expected to provide effective assistance. The state’s mismanagement and discovery violations

are so severe that misconduct is presumed. *In re Davis, supra; Cronic, supra.*

Although no specific inquiry into deficient performance and prejudice is required under these circumstances, the impact on the defense team in this case is apparent. It is reflected (for example) in defense counsel's failure to (1) introduce "other suspect" Travis Criswell's statement that he had considered "removing" Carter from the world, (2) seek instructions on the inferior offense of Murder in the Second Degree, (3) seek exclusion of Mr. Covarrubias's statements, (4) seek exclusion of Sonnabend's tainted identification of Mr. Covarrubias, and (4) seek exclusion of expert testimony that this was a "typical" and/or "classic" rape and murder case. *See* Appellant's briefing in Court of Appeals No. 35042-4-II.

Because the state's mismanagement and delay in providing discovery prevented defense counsel from providing effective assistance, Mr. Covarrubias was deprived of his Sixth Amendment right to counsel. His conviction must be reversed and the case remanded to the superior court for a new trial. *Cronic, supra.*

CONCLUSION

Trying a murder case is an arduous task under the best of circumstances. That task is made even more difficult when basic facts

about the case are dribbled out piecemeal during the days leading up to trial and in the middle of the trial itself. No one is entitled to a perfect trial, and new information can arise late in a prosecution, but at some point discovery delays and problems created by government mismanagement make trial unfair.

In this case, the information that was not disclosed until trial included reports from the lead investigator, inculpatory statements by the primary alternate suspect, autopsy photographs, autopsy notes, notes from the DNA analyst, notes regarding analysis of a particularly critical hair sample, the report regarding analysis of that hair sample, notes relating to the decedent's blood test results, photographs of the crime scene, reports on fingerprint analysis, numerous witness statements, and evidence that could have been used to impeach state witnesses.

While dealing with the flood of late discovery and fighting to obtain missing information from the government, defense counsel was also forced to make a time-consuming response to the state's last-minute motion to disqualify the defense team for conflicts of interest. The potential for conflict was evident from the very beginning of the case, and the prosecutor provided no explanation for why it waited more than a year to ask the court to inquire into the conflicts.

The state's mismanagement and numerous discovery violations prejudiced Mr. Covarrubias and prevented his attorneys from providing effective representation. The trial judge should have either dismissed the case or granted a new trial because of the state's gross mismanagement of the prosecution.

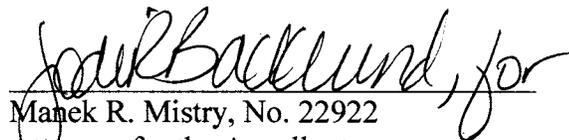
For all these reasons, Mr. Covarrubias's conviction must be reversed and the case dismissed with prejudice. In the alternative, if the case is not dismissed, it must be remanded to the trial court for a new trial.

Respectfully submitted on December 13, 2007.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief, Corrected Copy, to:

Robert Covarrubias, DOC #40652
New Hampshire State Prison
P.O. Box 14
Concord, NH 03302

and to:

Clallam County Prosecuting Attorney
Deborah Snyder Kelly
223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

CLALLAM COUNTY
PROSECUTOR
DEBORAH SNYDER KELLY
223 EAST 4TH STREET, SUITE 11
PORT ANGELES, WA 98362-3015
DEC 13 2007

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 13, 2007.

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

Signed at Olympia, Washington on December 13, 2007.



Jodi R. Backlund, No. 22917
Attorney for the Appellant

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BARBARA CHRISTENSEN, Clerk

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

STATE OF WASHINGTON,
Plaintiff,
vs.
ROBERT GENE COVARRUBIAS,
Defendant.

NO. 05-1-00079-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
DEFENSE MOTIONS FOR NEW
TRIAL

Hearings on defense motions for a new trial were held in this matter on October 26, 2006 and November 16, 2006. The Defendant was present by telephone conference and represented by his attorneys, Harry Gasnick and Ralph Anderson. The State was represented by Deborah S. Kelly, Prosecuting Attorney for Clallam County. The Court considered sworn declarations of counsel, its observations during the course of trial and pretrial proceedings in this matter, the pleadings and files herein, and the arguments of counsel

Based upon those, the Court makes the following:

I. FINDINGS OF FACT

With respect to the defense motion for a new trial based upon the argument that the defense was unable to present other suspect evidence concerning the deceased's boyfriend, Travis Criswell:

1 - FINDINGS OF FACT AND CONCLUSIONS OF
LAW; STATE'S OBJECTIONS TO PROPOSED
DEFENSE FINDINGS

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

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Appendix

1 1. While the Court initially limited the defense from presenting other suspect evidence
2 with respect to Travis Criswell, it later reversed its ruling and allowed the presentation of such
3 evidence. The Court had from the outset permitted the defense to present other suspect
4 evidence with respect to Kelly Banner.

5 2. Criswell made two statements to law enforcement both of which were summarized
6 by officers in the initial discovery in early 2005. The defense was also provided with a
7 transcript of the second statement in early 2005. The first statement was not transcribed but a
8 copy of the recording of that statement was provided approximately two weeks prior to trial.
9 While the defense has argued that it was unaware that Criswell had denied a sexual relationship
10 prior to the second interview, it was provided a summary of that interview in which he
11 represented that their relationship was like a brother and sister, and also provided a separate
12 report in which Criswell claimed to actually be the victim's brother.

13 **With respect to the argument that the prosecutor's cross-examination of the Defendant**
14 **was improper and prejudiced the jury, the Court has listened to the recording of**
15 **proceedings and reviewed the series of questions complained of and makes the following**
16 **findings:**

17 3. The prosecutor asked the defendant if he wanted the jury to believe him because he
18 took an oath, whether he agreed that if he didn't tell the truth under oath that it would be
19 perjury, and whether perjury wasn't a crime of dishonesty just like the previous conviction he
20 had admitted to. The Court sustained the objection that was made at that point, and the
21 prosecutor dropped the issue. Under State v. Borboa, 157 Wn.2d 108, 122 (2006), the defense
22 bears the burden of proving that the prosecutor's conduct was both improper and prejudicial,
23 i.e., that there is a substantial likelihood that the conduct affected the jury's verdict. The Court
24 finds the prosecutor was not saying that theft and perjury are the same but eliciting that they are
25 both crimes of dishonesty, which the Court believes is obvious to any member of any jury.

2 - **FINDINGS OF FACT AND CONCLUSIONS OF**
 LAW; STATE'S OBJECTIONS TO PROPOSED
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223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

1 With respect to the argument that the Prosecutor's use of a prop during closing argument
2 that added an additional paragraph (the Castle language) to the Court's instruction on
3 reasonable doubt:

4 4. The Court has again reviewed the record of proceedings to inform its ruling. The
5 Prosecutor offered a modified reasonable doubt instruction that incorporated both the standard
6 WPIC modified to the Court's preference and the Castle formulation of reasonable doubt. The
7 Court rejected the offered instruction and gave its preferred instruction.

8 5. In closing, the prosecutor took its rejected instruction, placed it upon an easel before
9 the jury, and told its members: "I have added a paragraph to the Court's instruction...." The
10 Court sustained a defense instruction at this point, whereupon the prosecutor argued, in
11 response to a defense assertion that it was an incorrect statement of the law, that it was not
12 incorrect and that the Court had previously allowed such argument. The Court stood by its
13 ruling sustaining the objection and the prosecutor removed the prop.

14 6. The interchange was extremely brief; the prop was only in front of the jury a short
15 period of time although the jury undoubtedly had the opportunity to read it.

16 7. While the Court found and finds the use of the prop improper as it appeared similar
17 to a jury instruction, the Court finds that the Castle instruction has been approved by all three
18 divisions ~~of the Court~~ *of the Appellate Court.*
19 ~~of the Court. The Court found that the Castle instruction has been approved by all three~~
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25 ~~divisions of the Court. The Court found that the Castle instruction has been approved by all three~~
instructions. Moreover, the prop contained the Court's
instruction as well as the Castle language. The jury had the Court's instructions as well as an
admonishment that it was to disregard any argument not in accordance with the Court's
instructions.

22 With respect to the defense request for a new trial based upon the prosecution's failure to
23 disclose out-of-state history of two witnesses, Edward Steward and Cody Snow:

3 - FINDINGS OF FACT AND CONCLUSIONS OF
LAW; STATE'S OBJECTIONS TO PROPOSED
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1 8. The State has conceded that it failed to disclose the out-of-state history of the above
2 two witnesses. The Court finds this was not a deliberate or intentional failure. Nonetheless the
3 issue is whether the failure to disclose caused prejudice to the defendant. Mr. Steward had no
4 other criminal history with which the defense could impeach him. The State failed to discover
5 and timely turn over evidence of a 1992 robbery conviction in Illinois, and a 2004 felony theft
6 conviction in California.

7 9. Mr. Steward was one of numerous attendees at the drug and alcohol party from
8 which the victim disappeared. He was only present for a short period of time and was not
9 present at the time of her actual disappearance. Some of his testimony was duplicative of other
10 witnesses and some of his testimony was beneficial to the defense's theory of the case. For
11 example, in cross-examination of Mr. Steward, the defense elicited his testimony that relations
12 were strained and distant between the victim and her boyfriend, that he saw some of an
13 argument between them, and that she told her boyfriend to stay away from drugs.

14 10. The Court finds that the inability or failure to impeach Steward through his
15 convictions had no likelihood of affecting the jury's verdict.

16 11. The prosecution additionally failed to disclose an out-of-state misdemeanor theft
17 conviction of Cody Snow. The jury was informed of Snow's recent two felony theft and two
18 felony possession of stolen property convictions. Additionally, Snow's testimony was largely
19 irrelevant and/or collateral to the case.

20 **With respect to the defense request for new trial based upon allegations of general failure**
21 **of discovery and mismanagement.**

22 12. This was a long, complicated trial with many volumes of discovery and many
23 witnesses and exhibits. No intentional failure to disclose has been alleged and the Court does
24 not believe there was any deliberate withholding of evidence. There were, however, many facts
25 that were disclosed shortly before and during trial. The Court finds the majority of these facts

4 - FINDINGS OF FACT AND CONCLUSIONS OF
LAW; STATE'S OBJECTIONS TO PROPOSED
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1 were peripheral and not major to the defense and further finds the defense would not have
2 changed had defense counsel received them six months earlier.

3 13. Moreover, the defense did not make a general discovery demand and many of the
4 items were either never specifically requested or requested shortly prior to or during the trial.
5 None of these discovery items were so material that they prejudicially impacted defense
6 counsel's ability to prepare or the Defendant's ability to receive a fair trial.

7 14. The Court has reviewed the continuances in this case and finds that they were by
8 agreement of the parties, with at least one of the last two continuances occurring in part for the
9 convenience of defense counsel. The new facts disclosed were not the cause of any trial delays.

10 15. Additionally, at the outset of trial when the defense first complained of discovery
11 issues, the Court offered the Defendant a continuance within the existing speedy trial expiration
12 which was refused.

13 16. The Defendant has also complained of the State's attempt shortly before trial to
14 remove his counsel from his representation, based upon the Public Defenders Office prior or
15 current representation of the vast majority of the State's witnesses. The Court finds that the
16 State legitimately raised this issue, as it was one that could be raised for the first time on
17 appeal. While it is unfortunate that it was addressed as late as it was, it was an issue that needed
18 to be dealt with and was properly brought to the Court's attention by the State.

19 Based upon all of the foregoing, the Court makes the following:

20 **Conclusions of Law:**

21 1. The "other suspect" defense was well and vigorously presented. The Court's earlier
22 ruling did not detrimentally impact the defense provided and there is no likelihood that it
23 impacted the jury's final decision.

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**FINDINGS OF FACT AND CONCLUSIONS OF
LAW; STATE'S OBJECTIONS TO PROPOSED
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PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

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2. The Court sustained the objection to the prosecutor's cross-examination of Defendant; there was no prejudice and no likelihood that the questioning affected the verdict.

3. A jury is presumed to follow the Court's instructions. The Court finds there is no likelihood that the use of a prop affected the jury's verdict.

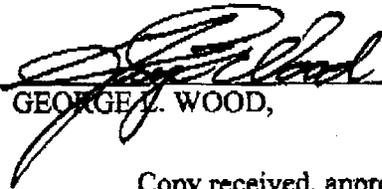
4. The Court finds no likelihood that the failure to provide impeachment material for Edward Steward and Cody Snow impacted the jury's verdict.

5. The standard governing when relief is to be granted on an allegation of general mismanagement or failure of discovery is, whether the defense has proved by a preponderance of the evidence that the State inexcusably failed to act with due diligence such that material facts are not disclosed until shortly before a crucial stage of the proceeding, thereby compelling a defendant to choose between his right to speedy trial and the right to prepared counsel.

6. The Court finds no mismanagement that prejudiced the Defendant, such that he was compelled to choose between his right to speedy trial or prepared counsel.

7. The defense motion for a new trial should be and is hereby denied.

DONE ~~IN OPEN COURT~~ this 9th day of April, 2007.



GEORGE L. WOOD, JUDGE

Presented by:

Copy received, approved for entry
notice of presentation waived:



DEBORAH S. KELLY WBA #8582
Prosecuting Attorney

HARRY GASNICK WBA # _____
Attorney for Defendant

RALPH ANDERSON WBA # _____
Attorney for Defendant

6 - FINDINGS OF FACT AND CONCLUSIONS OF
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PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469