

No. 36212-1-II

Consolidated with 35042-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Robert Covarrubias,**

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
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Clallam County Superior Court

Cause No. 05-1-00079-1

The Honorable Judge George L. Wood

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THIS COURT SHOULD GRANT A NEW TRIAL BECAUSE DISCOVERY VIOLATIONS AFFECTED THE JURY'S VERDICT.**

Mr. Covarrubias seeks a new trial because there exists a substantial likelihood that discovery violations affected the jury's verdict. *State v. Greiff*, 141 Wn.2d 910 at 920, 10 P. 3d 390 (2000). Respondent erroneously cites to cases and standards involving *dismissal* for discovery violations. Brief of Respondent, pp. 11-12, *citing State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) and *State v. Farnsworth*, 133 Wn.App. 1, 130 P.3d 289 (2006). These cases impose a higher standard, and are inapplicable to the argument raised in Section I of the Opening Brief.

The violations here affected the jury's verdict, and require a new trial. Although Respondent's brief sets forth the correct standard for assessing prejudice, Respondent only applies this standard to one piece of missing evidence. Brief of Respondent, pp. 13-15. Respondent's assessment of the evidence as a whole and its assessment of prejudice caused by one discovery violation are incorrect.

First, the evidence against Mr. Covarrubias was not as strong as Respondent claims. Brief of Respondent, p. 13 (describing the evidence of guilt as "compelling.") The physical evidence was consistent with Mr. Covarrubias's version of events: he had consensual oral sex with Ms.

Carter, and someone else killed her later. The physical evidence was also consistent with other theories of innocence (of the charged crime)—that he had a consensual encounter with her and killed her later, that he killed her and then violated her corpse, or that he orally raped her and someone else killed her later. The circumstantial evidence was weak: Sonnabend's identification was plagued by problems, Ms. Carter's purported distaste for fellatio was subject to question, and Mr. Covarrubias's initial denial of sexual contact was easily explained by his knowledge that Ms. Carter was underage.

Second, much of the missing and late discovery went to the heart of Mr. Covarrubias's defense. The state's discovery violations forced the defense team to improvise and amend their strategy mid-trial, rather than presenting a unified theory in opening statement, cross-examination, direct testimony, and closing arguments. In particular, Travis Criswell emerged as the prime alternate suspect for the killing itself; had defense counsel been provided the information to focus on him from the outset, the defense case would have been far more persuasive. Dr. Selove's photographs and notes were also critical and were not duplicated by his report; the photographs and notes suggested that Ms. Carter was killed by some means other than strangulation, and was dragged across asphalt to the spot where her body was ultimately discovered. RP (3/30/06) 58; RP (4/4/06)

84-85. The lab notes and information relating to Mr. Frank's DNA analysis would have helped Mr. Covarrubias's argument that the state failed to adequately investigate alternate suspects. The state's failure left open the possibility that other suspects (such as Mr. Criswell) left the hair sample on Ms. Carter's body resulted in the defense's inability to put forward a coherent theory of their case. The lab notes relating to Ms. Carter's alcohol consumption would have helped the defense team establish that she had been drinking, but had lived long enough after her last drink to metabolize the alcohol in her system.<sup>1</sup> RP (4/12/06) 18-20.

Third, even those pieces of missing and late discovery less central to the defense (and those materials that supplemented other discovery already provided) would have contributed to a stronger defense case had they been disclosed in a timely fashion. Collectively, violations relating to these items affected the jury's verdict. Information regarding Sonnabend's mental health was critical to the case, because Sonnabend claimed he saw Mr. Covarrubias with an unidentified young woman on the waterfront trail. The defense was provided significant impeachment material; however, timely disclosure of the remaining material would have

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<sup>1</sup> Of course, the witness who testified about her alcohol levels has since admitted to perjury and been fired from the Washington State Patrol crime lab. RP (4/19/06) 18-47.

permitted an even stronger attack on Sonnabend's credibility. RP (2/23/06) 6, 16; RP (3/30/07) 58; RP (4/12/06) 97-188. Similarly, although Cody Snow and Edward Steward's contributions to the state's proof were relatively minor, when compared to the rest of the evidence, what they did contribute undermined Mr. Covarrubias's credibility and the defense theory; the undisclosed impeachment materials would have helped strengthen Mr. Covarrubias's case. RP (6/12/06) 6; RP (7/12/06) 6-7.

All of the missing and late materials would have helped the defense team present its case to the jury. Although some materials were more important than others, as a whole, they could have made a difference. There is a substantial likelihood that these discovery violations affected the jury's verdict. *Greiff, supra*. Because of this, the conviction must be reversed, and the case remanded to the trial court for a new trial.

**II. RESPONDENT FAILS TO ADDRESS MR. COVARRUBIAS'S *BRADY V. MARYLAND* ARGUMENT.**

Because the state fails to discuss the failure to timely disclose exculpatory evidence, Mr. Covarrubias stands on the argument made in his opening brief. *See Brady v Maryland*, 373 U.S. 83 at 87, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963).

**III. THIS COURT SHOULD DISMISS THE CASE BECAUSE OF MISMANAGEMENT THAT PREJUDICED MR. COVARRUBIAS'S RIGHTS AND MATERIALLY AFFECTED HIS RIGHT TO A FAIR TRIAL.**

Mr. Covarrubias's main argument in this appeal is his request for a new trial, outlined in Section I of the opening brief. He also asks this Court to review the trial court's decision denying his motion to dismiss for discovery violations. Appellant's Opening Brief, Section III. Respondent has conflated the two requests for relief and mixed up two different standards for review.

Reversal is required whenever a trial court's denial of a motion to dismiss is manifestly unreasonable or based on untenable grounds. *State v. Stein*, 140 Wn. App. 43 at 53, 165 P.3d 16 (2007). The trial court here should have dismissed the case, because governmental misconduct materially affected Mr. Covarrubias's right to a fair trial. *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). In light of the haphazard approach to discovery management taken by the state, the trial court's failure to dismiss is an abuse of discretion. After trial started, Mr. Covarrubias had a constitutional right (under the double jeopardy clause) to a decision by the jury he and his lawyers had selected. *Arizona v. Washington*, 434 U.S. 497 at 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). This right was in tension with his Sixth Amendment right to the effective assistance of counsel, given the constant appearance of new information in

the form of late discovery. Under the circumstances, Mr. Covarrubias was forced to choose between his right to complete the trial with the jury he had selected and his right to the effective assistance of counsel. He could either continue to the end, risking poor performance by counsel, or he could request a mistrial and lose the jury he'd selected.

He should not have been placed in that position. The government's discovery mismanagement was egregious; the appropriate remedy is dismissal, and the trial court abused its discretion by refusing to grant the defense team's post-trial motion. *Stein, supra*.

**IV. THE STATE PREVENTED DEFENSE COUNSEL FROM PROVIDING EFFECTIVE ASSISTANCE.**

Respondent has not addressed Mr. Covarrubias's ineffective assistance claim. Accordingly, Mr. Covarrubias stands on the argument made in the Opening Brief.

**CONCLUSION**

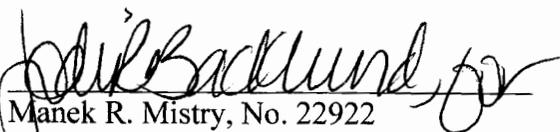
This Court should reverse Mr. Covarrubias's conviction and dismiss his case for government misconduct. In the alternative, this Court should reverse the conviction and remand the case for a new trial.

Respectfully submitted on April 14, 2008.

**BACKLUND AND MISTRY**

A handwritten signature in cursive script, appearing to read "Jodi Backlund", written over a horizontal line.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Robert Covarrubias, DOC #40652  
New Hampshire State Prison  
P.O. Box 14  
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and to:

Clallam County Prosecuting Attorney  
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and to:

Philip J. Buri  
Special Deputy Prosecutor  
1601 F Street  
Bellingham, WA 98225

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

All postage prepaid, on April 14, 2008.

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 April 14, 2008.

  
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