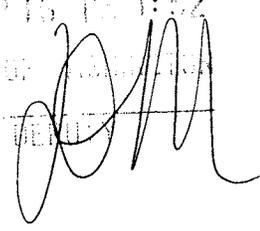


COURT OF APPEALS
DIVISION TWO

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STATE OF WASHINGTON
BY _____



NO. 390698

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINE KRENIK

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF THURSTON

The Honorable CAROL MURPHY, Presiding at the Trial Court

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The verdict should be reversed because the prosecutor failed to disclose material, substantive discovery;
2. The verdict should be reversed because of prosecutorial misconduct.

B. ISSUES PRESENTED

1. Should a verdict be reversed when the prosecutor has failed to disclose tangible material information to the defense attorney?
2. Is such failure to disclose governmental misconduct, which prejudiced the defendant's right to a fair trial?
3. Is dismissal the appropriate remedy under these circumstances?

C. STATEMENT OF THE CASE

Christine D. Krenik (herein Krenik) was charged with and convicted by a jury of Violation of the Uniform Substances Act (with sentencing enhancements). Verbatim Report of Proceedings (hereinafter "RP"), at, generally. The case was investigated by the Thurston County Narcotics Task Force, primarily by Detc. Brian Russell. RP at 8. Essentially, the evidence consisted of a "confidential informant" visiting the Krenik residence and making purchases of controlled substances, while wearing an electronic recordation device (a "wire"). RP, generally.

During the course of the trial and during the direct examination of Detc. Russell, the Deputy Prosecutor advised the Court and Defense Counsel for the first time of the potential existence of electronic images or surveillance, through potentially a “live” camera monitoring, and presumptively recording of those images of the Krenik property/residence by a law enforcement agency other than the agencies within the Thurston County Narcotics Task Force. RP at 67-76; see also, RP at 8. Specifically, a federal law enforcement agency, the Drug Enforcement Agency (“DEA”), had a simultaneous investigation of the Krenik property/residence during the course, scope and time frame of the Thurston County Narcotics Task Force investigation of the Krenik property/residence that resulted in the state court prosecution of Krenik. RP at 67-76. As a part of this DEA investigation there was law enforcement electronic surveillance of the Krenik property, in addition to the state law enforcement electronic surveillance of the property at issue; at no time is this DEA surveillance noted in any discovery or referenced in any discovery. RP at 67-76. ¹

¹ The Prosecutor attempts to mislead the inquiry on the failure to disclose discovery issue during his “voir dire” of this witness following the defense counsels voir dire, by querying the Detective about whether ‘electronic surveillance’ is noted in his report. RP at 76. However, it is clear that the reference the Detective is making in his report about electronic surveillance refers to state law enforcement electronic surveillance, of which in this case there was ample evidence presented-including multiple ‘wires’, ‘photographs’,

At no time was the existence of federal law enforcement electronic surveillance of the Kreink property/residence disclosed either in discovery in the disclosure of state, county, municipal police incident reports, or in supplemental statements or information provided by the Deputy Prosecutor to Defense Counsel. See Footnote 1, supra.

Issues concerning federal electronic surveillance, and the existence therefore of images or potential images of the Krenik property during the exact time frame of the investigation resulting in the prosecution and conviction of Krenik, were first revealed through direct examination of Detc. Russell. Specifically, The Deputy Prosecutor during direct examination of Detc. Russell queried him regarding “cameras.” RP 47-48. Specifically, the Detc. was asked “[s]ometimes, do you have officers that

etc. Further, there was no indication in the Detective’s incident report whatsoever about federal law enforcement electronic surveillance. RP, generally. Moreover, the Deputy Prosecutor falsely asserts to the Court that the reference in the incident report to electronic surveillance “is the DEA camera,” insisting that is what the Detc. is referring to in his report, when the prosecutor falsely indicates that the Detc. Referred to the “DEA camera” in his testimony. (emphasis supplied) See RP at 77; but see Detc.’s response to the Deputy Prosecutor’s questions concerning this reference: RP 76, where the Detc. makes simply a confirmation of “yes” that there was electronic surveillance and NOT that prosecutor’s false reiteration of the Detc.’s testimony as “And he replied, “well, that’s this DEA camera.” (emphasis supplied) RP 77. Finally, the Deputy Prosecutor patently false statements to the Court that the reference in the Detc incident report to ‘electronic surveillance’ refer to the DEA camera are absolutely contradicted by the Detc, as he indicates that information was disclosed to the Deputy Prosecutor verbally---it’s not in his report---and the Detc.’s own candid testimony on this issue contradicts the Deputy Prosecutor See RP 73-74; Namely, this Deputy Prosecutor is directly contradicted by the answers given by the Detc. in Defense Counsel’s voir dire of the witness on this issue. In particular, Defense Counsel directly asked the Detc, “did you make a recordation in your

are equipped with cameras to record the events?” and responded: “yes.” RP 48. The Deputy Prosecutor went on to ask “[w]as that possible in this situation?” to which the Detc. responded “[y]es it was.” At that point, the Deputy Prosecutor asked for a side-bar, and the matter was later reviewed in the absence of the jury. RP 48; RP 67-76.

At side-bar, later put on the record, the Deputy Prosecutor advised that there was some sort of electronic surveillance equipment monitoring the Krenik property/residence, during the same time period as the instant investigation by Detc. Russell. RP. 68. Though the Deputy Prosecutor took pains to not identify the equipment at issue as a “camera”, it is patently clear from all his statements in aggregate and from the Detc’s subsequent statements, that the equipment at issue was in fact a camera that had potential to transmit images electronically, which has been for many decades a commonly accepted description of a “camera.” RP 68. (Deputy Prosecutor indicating “*I don’t want to call it a camera,*” and “*I’m not really sure what it was*” but later contradicting himself and those misleading false statements when indicating “but it was *my understanding* [it was] *something that gives them the opportunity to watch something live.*” RP 68 (emphasis supplied.) This Deputy Prosecutor then *directly*

police report that there was any imaging device installed by the DEA?” The Detc. response was “*Not by the DEA, no.*” (emphasis supplied) RP at 75.

and unequivocally acknowledged that he knew it was in fact a camera, despite his earlier statements to the Court and Defense Counsel about not knowing that to call it, or what it was. In particular, the Deputy Prosecutor stated to the Court and Defense Counsel “*that it was my understanding . . . that the DEA was doing their own investigation . . . and they had a camera in a hidden location.*” (emphasis supplied). RP at 72. Further, the Deputy Prosecutor acknowledge the materiality of the images this camera captured by stating “[i]t was my understanding that there was some sort of camera that could live monitor, was in a position to live monitor what was happening on the property.” RP at 72.

Then, after the contradictory statements to the Court and Defense Counsel concerning the actual equipment, the Deputy Prosecutor tells the Court different reasons for failure to disclose the information concerning electronic surveillance to the Defense Counsel. At first, he indicates it is to protect a potential on-going federal investigation of the same persons/property/residence. Apparently, candid response by the Detc. indicating cameras present was not the answer the Deputy Prosecutor expected on the stand from the witness. Following the intentionally misleading of the Court and Defense Counsel whether the equipment was even a camera, this Deputy Prosecutor then tells the Court and Defense

Counsel as to why he did not disclose this information to Defense Counsel. Specifically, the Deputy Prosecutor indicates to the Court that he does not want the Detc. questioned any more about cameras during cross-examination and that was the obvious purpose as to why the Deputy Prosecutor called a side-bar on the issue. RP 69-76.

Namely, the Deputy Prosecutor indicates when the Court asks the Deputy Prosecutor whether he wants to clarify the camera issue in front of the jury the responses is “[n]o, Your Honor. My concern, quite frankly, but it’s already been discussed here, is that I don’t know what the state of the DEA’s investigation is.” And that was my concern, is I wasn’t going to ask this detective whether he saw anything on that or not. That wasn’t my intention. I asked a question, which I thought was going to be asked one way, was answered a different way, so I brought that to the Court’s attention. “ (emphasis supplied) RP 70. He further explained “I just wanted to bring this to the Court’s attention that this is a concern because I don’t know the state of their operation.” (emphasis supplied.) RP 70.

This first stated reason then is contradicted by the Deputy Prosecutor as to why this information was not disclosed to the Defense Counsel in or as discovery. *This Deputy Prosecutor directly states that he just found out about the electronic surveillance on the morning of the*

instant trial. Specifically, the Deputy Prosecutor represents to the Court that he just found about it “in speaking with the detective today.” (emphasis supplied.) RP at 72. This Deputy Prosecutor further explains that had he known about it, “I would have turned that over.” RP 72. Further, this Deputy Prosecutor explains “[t]hat’s (the camera) not something I knew really coming into this case, as I told the Court. I picked upon this case just a little while ago, so that’s what I know.” RP 72-73.

These statements concerning knowledge of this discovery issue are directly and unequivocally contradicted by the voir dire testimony of the Detc. on this matter by Defense Counsel. In particular, the testimony on voir dire by Detc. Russell responding to the issue concerning the camera and electronic surveillance were as follows:

Defense Counsel Piculell questioning

Answers by Detc. Russell

Q. When did you tell the prosecutor, Detective, about this videotape?

(Objection by Prosecutor to question)

Q. Well, this recording, this imaging device that was installed by the DEA, when did you tell the prosecutor of that?

A. Honestly, I don’t know what date, but it was recently.

Q. How recently?

A. I was just informed that this case was going to trial maybe a week ago. I'm not sure.

Q. So when did you tell him, Detective, was my question.

A. I don't know exactly what date. I don't know.

Q. Could you give me an estimate? Was it a week ago, two weeks ago?

A. Probably within the past week, two weeks. It was just recently.

Q. So it wasn't this morning, as Mr. Jackson just indicated

A. I don't recall just telling him this morning.

(emphasis supplied) RP 73-74.

Defense counsel made a motion for a mistrial, on the basis that such knowledge existed with the Deputy Prosecutor concerning potential evidence and it was not disclosed. RP 79. The Court denied the motion without a single reason being placed on the record as to the basis for the Court's ruling. RP 79. The Court simply indicated "And that motion is denied." RP 79. At no time during the course of the trial, or any other supplementary hearings, did the Court clarify the basis for the denial of the motion, make any findings of fact concerning the matter before the Court,

nor indicate court rules or decision law the Court may be relying upon to summarily deny the motion without explanation as to basis or authority.

Krenik was found guilty. This appeal results.

D. ARGUMENT

1. The Court should have granted a mistrial where the Prosecutor failed to disclose discovery to Defense Counsel, to wit., the existence of federal law enforcement surveillance of the Krenik property/residence, which presumptively would have captured the events alleged in the case at bar. Such failure is governmental misconduct, which prejudiced defendant's right to a fair trial, and dismissal is the appropriate remedy under the circumstances, where the Deputy Prosecutor intentionally attempts to mislead the Court and Defense Counsel regarding the facts surrounding failure to disclose.

1A. The Court made no factual findings nor legal rulings concerning the issue of a mistrial, simply indicating a general denial of defense motion at trial.

Under CrR 4.7(h)(7), the court can dismiss an action where a party has failed to comply with discovery rules. In addition, under CrR 8.3(b), trial court can dismiss an action when the State's action constitutes misconduct that has prejudiced the defendant. That rule states the following:

The court, in the furtherance of justice after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or government misconduct when there has been prejudice to the rights of the accused which materially affect the accused's rights to a fair trial. The court shall set for its reasons in the order.

CrR 8.3(b).

Thus, in order for a Court to dismiss the charges in the instant case, Krenik must demonstrate arbitrary action or governmental misconduct that prejudiced his rights to a fair trial; instantly, that proof is both the failure to disclose the discovery at issue, the reasons for the non-disclosure advanced by the Deputy Prosecutor, the patently false representations that the Deputy Prosecutor gives for his actions, and the conflicting statements of the Deputy Prosecutor in representing to the Court and Defense Counsel the posture of the case and the issues at bar. Therefore, the failure to provide timely discovery of material evidence establishes clear discovery violations and corresponding governmental misconduct, and that such misconduct severely prejudiced her rights to be adequately prepared for trial or to gather potential evidence on her behalf.

In most instances, trial court decisions are evaluated under an 'abuse of discretion' standard. *See, State v. Blight* (89 Wn.2d 38, 41 (1977)); *see also, Carroll v. Junker*, 79 Wn.2d 12, 26 (1971) (trial court evidentiary decisions are evaluated on review against the independent standards of "untenable" grounds or "unreasonable" exercise of discretion.). However, here, it is impossible to determine how and why the Court entered its denial of the motion as there was a 'general' denial without supporting

factual findings or legal basis for such decision denying Defense Counsel's Motion for a mistrial.

1. GOVERNMENTAL MISCONDUCT

The term governmental misconduct has been reviewed in a number of Washington cases interpreting the CrR 8.3. In these cases the courts have determined that it is not necessary for a defendant to demonstrate evil intent or actions of a dishonest nature (though they do in fact exist here) to demonstrate governmental misconduct because simple mismanagement is sufficient to show government misconduct sufficient to justify a dismissal.

[G]overnment misconduct 'need not be of an evil or dishonest nature; *simple mismanagement* is sufficient' to warrant dismissal.

State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993); State v. Teems, 1997 WL 793272, 948 P.2d 1336 (1997)(State's failure to provide defendant with notice of refilling of charges after a mistrial until only twelve days prior to end of speedy trial constituted simple mismanagement that was government misconduct), citing State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (State's filing of additional charges five days before trial thereby forcing defendant to waive speedy trial in order to prepare defense to new charges constituted simple mismanagement that

was government misconduct), quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). (Italics in original).

The State's failure to provide a significant, substantial potential evidence to the defense until the last possible moment are clearly the result of the State's mismanagement of this case, by the prosecutor's office or the police department. Providing notice of potential evidence during the direct examination of a witness is clearly prejudicial to a fair trial, o to allow defense counsel to appropriately investigate the issues that may be raised by this additional evidence.

While CrR 4.7 regulates discovery in the possession or control of the prosecutor, a CrR 8.3 government misconduct dismissal is not limited to actions by the prosecutor. Police misconduct, to include simple mismanagement, can result in an CrR 8.3 dismissal. State v. Granacki, 90 Wn.App. 598 (1998). In other words, the knowledge by Detc. Russell of the existence of this federal surveillance, and his failure to include it in his incident report can be the basis for governmental misconduct as well. See, *Supra*.

Instantly, the state was aware of the existence of potential evidence – the federal law enforcement surveillance- yet did nothing to notify the defense. Of course, the court rules and decisional law provide an

affirmative obligation on the part of the prosecutor to disclose evidence. The rules do not countenance *hiding* of discovery or information, which was the Deputy Prosecutor's conduct here; the rules are designed to ensure a full disclosure of information and potential evidence to permit defense counsel to be adequately prepared for trial on all issues. Secreting, hiding evidence by the government does not make for a fair trial.

2. PREJUDICE TO DEFENDANT'S RIGHT TO A FAIR TRIAL

In addition to demonstrating that there was governmental misconduct by simple mismanagement or otherwise, Krenik must also demonstrate that the mismanagement materially prejudiced his right to a fair trial. CrR 8.3, See State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

The same line of cases out of the Washington Supreme Court that have discussed government misconduct have also determined that prejudice of a defendant's right to a fair trial occurs when his or her right to simply a speedy trial is affected by the government's conduct *or* when his right to be represented by adequate counsel is affected. These issues generally arise together as when there is failure to disclose the general remedy is a continuance; however, here, in Krenik's case, the trial had commenced and the disclosure occurred during the governments' case-in-chief. Therefore, the more narrowly defined issued is whether Defense Counsel had an

adequate opportunity to prepare where evidence was hidden from the defense.

Such prejudice includes the right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense. (emphasis supplied).

State v. Michielli, supra, at 240, citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

In Michielli, the court sua sponte addressed the issues of government misconduct and prejudice to the defendant's rights and determined that the State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, constituted mismanagement and prejudice sufficient to satisfy CrR 8.3(b). Michielli, supra, at 243. So, even had the defense simply been in the position to have continued the matter here because of the disclosure during trial, which of course is not a practical remedy, decisional law has established that merely impacting the right to a speedy trial is sufficient to justify a dismissal.

In particular, earlier cases both the Court of Appeals and the Washington Supreme Court have found that it is unacceptable to require defendants to make a choice between sacrificing rights to speedy trial or sacrificing their rights to be adequately prepared for trial. Hiding discovery

impacts the Defense Counsel's obligation to be adequately prepared on all issues at trial.

We agree that if the State inexcusably fails to act with due diligence, and the material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible that either a defendant's right to speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. *Such unexcused conduct by the State cannot force a defendant to choose between these rights.*

In circumstances such as these, we do not believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State's lack of diligence.(emphasis supplied).

State v. Sherman, 59 Wn.App 766, 770, 801 P.2d 274 (1990)(State failed to timely produce IRS records in custody of State's main witness) quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). (emphasis in original).

In another case on this issue, State v. Teems, the Supreme Court has held fast to the concept that actions affecting the constitutional rights of speedy trial and adequate counsel constitute grounds for dismissal:

Where such misconduct jeopardizes a fundamental right of the accused, though, appellate courts have upheld the decision to dismiss...Included among these rights are the right to a speedy trial and the right to be adequately represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.

Teems, supra, at 2, citing Michielli, supra, at 240.

The court has held that in order to show prejudice justifying dismissal, the defendant must establish "by a preponderance of the evidence that interjection of new facts into the case ... will compel him to choose between prejudicing" his right to a speedy trial and his right to effective assistance of counsel. State v. Price, 94 Wash.2d 810, 814, 620 P.2d 994 (1980).

Regardless of the burden of proof, however, Krenik has been seriously prejudiced by the government's actions. It is simply not possible for counsel to be effectively or adequately prepared for trial where evidence counsel was not aware of was disclosed during the government's case-in-chief. Further, as indicated above, the Deputy Prosecutor's disclosure of this information was inadvertent. The Deputy Prosecutor had never intended to disclose this information whatsoever. It was disclosed because Detc. Russell answered the questions candidly and the Deputy Prosecutor had not expected the answer which revealed the existence of federal electronic surveillance. Had Detc. Russell not responded truthfully under oath, then the hiding of this evidence would have been complete-the Deputy Prosecutor never would have disclosed the existence of such evidence.

A conviction resting on governmental misconduct should not stand. A conviction resting on misfeasance is unfair. A conviction resting on malfeasance is indefensible.

3. DISMISSAL AS A REMEDY

In determining whether dismissal is an appropriate remedy for discovery violations, the court must engage in a fact-specific analysis that must be resolved on a case-by-case basis. State v. Ramos, 83 Wn.App. 622, 637, 922 P.2d 193 (1996). Discovery rules are intended to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the State. State v. Cannon, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996).

Without question, defense was clearly legally surprised within the meaning of decisional law in the instant matter. Within the legal and factual meaning of the term, there was “surprise” in the instant case. The evidence was disclosed during the government’s case-in-chief; discovery revealed within a trial would characterize the very definition of ‘surprise.’ Within the legal and factual meaning of the term, there was “misconduct.” The Deputy Prosecutor hid the evidence and never intended to reveal it. The Deputy Prosecutor of course has an obligation to reveal all evidence. He did not.

The remedies for discovery violations are set forth in CrR 4.7(h)(7)(i), which states that if a party fails to comply with an applicable discovery rule, the court may 'grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.' CrR 4.7(h)(7)(i); Ramos, 83 Wn.App. at 636.

Under Cr 4.7 a mistrial or dismissal is the appropriate and necessary remedy given the circumstances, as it was clear that Krenik could not have fair trial. In particular, Cr 4.7 provides in material part:

The court may at any time dismiss the action if the court determines that failure to comply with an applicable discovery rule or an order issued pursuant thereto is the result of a willful violation or of gross negligence and that the defendant was prejudiced by such failure.

As indicated, the prosecutor's failure to provide discovery of its knowledge of the existence of electronic surveillance by another law enforcement agency of the exact property/location/persons subject to the instant prosecution substantially and significantly prejudiced Krenik's right to a fair trial.

Without question, Krenik's counsel was denied the opportunity to review all evidence or potential evidence and to be adequately prepared at crucial stages of the proceedings. The disclosure of the evidence or potential evidence occurred because of an inadvertent answer by the Detc.

witness to the prosecutor's question-the Deputy Prosecutor had no intention of disclosing this information, and only brought up the issue in a side-bar to prevent the Defense Counsel from inquiring with the Detc. witness further about the subject. The clear intent was to prevent access by Defense Counsel to this evidence or what it might reveal.

The surveillance at issue could have revealed potential witnesses or evidence that may have benefited Krenik's defense. We have to evaluate a complete unknown-as the defense was prevented from the opportunity of viewing such information or evidence, determining if there were defenses, potential witnesses or other information would could potentially help and assist Krenik in the presentation of her case or defense. Further, the lack of knowledge concerning this evidence and other witnesses, including federal law enforcement officers, can very well result in the loss of a witnesses or evidence which at this juncture is unknown due to the Deputy Prosecutor's actions. We simply do not know information what was lost or could have been lost. Certainly, electronic surveillance of the very location, at the very time of the alleged events concerning the instant defendant, could not be more relevant. What could be more relevant than a real time viewing or recordation of events simultaneous with the prosecution at bar?

Further, the Court knows from the direct statements of the Deputy Prosecutor that his actions were intentional. He is not making a good faith mistake here. He intentionally failed to disclose to the Defense Counsel the existence of this potential evidence, apparently under the theory to potentially protect a potentially on-going operation by federal law enforcement with the same individuals/same suspects and the same residence/property. Instead of seeking a protective order on the re-disclosure of the information by defense counsel, the Deputy Prosecutor simply decided on this own judgment that such information did not need or would be required to be disclosed. Further, as illustrated, the disclosure would not have occurred but for the inadvertent response by the Detc. to the prosecutor's questioning. The Deputy Prosecutor only brought this issue to the Court's attention to PREVENT the Defense Counsel from learning any information on cross-examination; he wanted to curtail questioning on an issue of material fact or potential material fact. He did not disclosure it out of a good faith mistake or because he was just finding out about it through the happenstance of a trial examination.

Intentional failure to provide discovery is a basis for dismissal under both the Court rule and decisional law. See CR 4.7.

Further, even if this Court does not find the direct statements of the Deputy Prosecutor to evidence an intentional act, despite his statements as to specific a purpose evidencing his intent to withhold, certainly the prosecutor's actions and inactions constitute gross negligence for which dismissal of this matter is also the appropriate remedy. CR 4.7.

Negligence or gross negligence can be difficult to define given the potential vagaries of a trial environment or pre-trial procedure and the lack of perfect knowledge that only exists in retrospect in many cases. However, that difficulty does not trouble us here. It is evident what the Deputy Prosecutor intended to do, or at the minimum, through his extraordinarily gross inattentiveness to his obligations as a Deputy Prosecutor, as quasi-judicial official, and an Officer of the Court, where it well understood that all who practices before Courts have the requirement of veracity and candor to the Court. Not only was that not met here, but clearly those actions constitute gross negligence to the standards necessary and applicable.

Negligence is defined in the Washington Pattern Jury Instructions 96.03 as follows:

Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the

failure to do something which a reasonably careful person would have done under the same or similar circumstances.

WPIC 96.03.

Clearly, a reasonably careful prosecutor would have, at the very least, informed counsel of the existence of the tape, potential tape, camera, or potential camera, and the images, or potential images, and the witnesses or potential witnesses, that may exist given the corresponding federal law enforcement investigation and equipment installed at the exact location and focused upon Krenik's property.

It is undisputed, this Deputy Prosecutor did not disclose. In the instant case, nothing concerning this issue was provided to the Defense Counsel. In fact, the Deputy Prosecutor attempts to obfuscate and mislead both the Court and Defense Counsel concerning his intentions and his precise knowledge of the issue, giving alternative versions. At first he indicates that he is doing this intentionally, to protect a potential federal investigation. He then indicates he does not even know if a camera is present, or does not even want to speculate that a camera may be present and professes not to know what equipment is actually at issue, and he specifically says he does not even want to call it a camera and does not know what sort of equipment is present. He then contradicts himself again and acknowledges that he knows of the camera and the potential

recording. His misleading statements betray the very obligations all attorneys, and especially a prosecuting attorney, before the Court should have in providing the Court information: candor.

This Officer of the Court, and this Deputy Prosecutor's attempts to obfuscate and mislead by the Court and the Defense Counsel do not end there. He then indicates he found out about the information on the morning of trial, which is why it was not disclosed (though he could have immediately disclosed it on the morning of trial by this factual position, but he does not). Then, this Officer of the Court and this Deputy Prosecutor contradicts himself. He then states that he knew about it earlier. Most importantly, the Deputy Prosecutor's statements that he found out about equipment on the morning of trial are directly contradicted by the Detective who indicates that he informed the Deputy Prosecutor weeks before the trial. Again, his misleading statements betray the very obligations all attorneys, and especially a prosecuting attorney, before the Court should have in providing the Court information: candor.

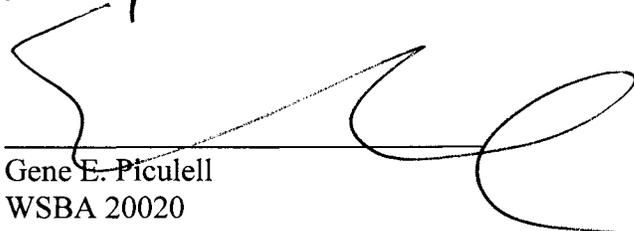
In any event, even despite the clear veracity issues of this individual Deputy Prosecutor, a reasonably careful, candid prosecutor would have noted the existence of the evidence or potential evidence, disclosed it, or in the alternative sought a protection order regarding disclosure or re-

disclosure by Defense Counsel if there were sensitive law enforcement information present, or an *in camera* review of such evidence if necessary by the trial court. Such action by this Deputy Prosecutor is at a minimum gross negligence justifying a mistrial or a dismissal; his actions are not in comport with reasonable care and grossly acted outside the bounds of reasonable care in these circumstances.

E. CONCLUSION

A conviction resting on governmental misconduct should not stand. A conviction resting on misfeasance is unfair. A conviction resting on malfeasance is indefensible.

DATED this 14th day of Sept. 2009



Gene E. Piculell
WSBA 20020
COUNSEL FOR APPELLANT

COURT OF APPEALS
DIVISION TWO
CORRESPONDENCE
STATE OF WASHINGTON
BY _____
DATE _____

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 CHRISTINE KRENIK,)
)
 Appellant.)
 _____)

NO. 390698

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

On September 1, 2009, I caused to be deposited in the mail of the United States of America, postage prepaid through inter-office mailing service a properly stamped and addressed envelope directed to the following:

KRENIK, CHRISTINE D
818896
9601 Bujacich Road NW
Gig Harbor, WA 98332-8300

Such envelope contained a copy of:

BRIEF OF APPELLANT
State v. Christine Krenik
390698 Court of Appeals, Division Two

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of Sept, 2009.



Gene E. Piculell
Executed at Bellevue, Washington