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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,  
Appellant,

v.

DANIEL BATSELL,  
Respondent.

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STATE'S DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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BRIEF OF APPELLANT

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Respectfully submitted:  
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## **I. IDENTITY OF APPELLANT**

The State of Washington, represented by the Franklin County Prosecutor, is the Appellant herein.

## **II. ASSIGNMENTS OF ERROR**

### Assignments of Error

1. The superior court erred in dismissing the State's case with prejudice.
2. The superior court erred in finding that the State failed to provide a police report, which was in fact provided.
3. The superior court erred in ruling that the State was required to produce the report under *Brady v. Maryland*.
4. The superior court erred in holding that dismissal was the appropriate remedy, despite defense's request for a continuance of the trial date.
5. The superior court judge erred in denying the Motion for Reconsideration under the mistaken belief that he did not have authority to reconsider his own ruling.

### Issues Pertaining to Assignments of Error

1. Whether the superior court's decision met the standards for

dismissal under CrR 8.3?

2. Whether it was governmental misconduct for the prosecutor to discover and provide a report to defense counsel the day before trial and minutes after receiving the defense request?
3. Whether the report, which describes that the Defendant was walking quickly away from the vicinity of a suspected burglary (before he was arrested on warrants and found in possession of methamphetamine), is exculpatory versus unduly prejudicial to the Defendant and unrelated to his possession charge?
4. Whether dismissal, a remedy of last resort, was the appropriate remedy as compared with a continuance of the trial date?
5. Whether a superior court judge has the authority to reconsider his own order dismissing a case with prejudice?

### **III. STATEMENT OF THE CASE**

The State appeals from the dismissal of the prosecution against the Defendant Daniel Batsell for possessing methamphetamine. CP 3-5, 41-42.

Pasco police officers were responding to a suspicious

circumstances call at a residence when they came across the Defendant who was wanted on seven outstanding warrants. CP 29, 39, 44-45. Officer Cobb searched the Defendant incident to his arrest and prior to placing him in the police vehicle. CP 30, 45. Officer Cobb discovered a broken glass pipe with methamphetamine in the Defendant's right shorts pocket. CP 30, 45. The Defendant was holding a large black duffle bag and a set of keys. CP 30, 45. There was a multi-colored bag on the key chain which held a metal screw top container, also with methamphetamine. CP 30, 33, 35, 45.

Pretrial communications: In October of 2014, in preparation for trial, defense counsel Craig Stilwill told the prosecutor Teddy Chow that his client was claiming that neither the car nor the car keys belonged to him. CP 8. Mr. Stilwill advised he would be requesting a competency evaluation of his client. CP 8. He would also be trying to locate the owner/s of the vehicle with the assistance of defense investigators. CP 8-9.

In January, an order of competency was entered. CP 8. Mr. Stilwill told Mr. Chow that he was seeking evidence to demonstrate that on the night of his arrest the Defendant had been helping a friend

move and had been using that friend's vehicle. CP 18. Defense counsel did not provide a name for this friend. *Id.* The prosecutor had no information in the file to assist defense counsel with this theory. CP 9, 18.

Mr. Chow pointed out that, if the Defendant was going to claim the methamphetamine on the key chain was not his, he would still have to account for the methamphetamine in the pipe in his pants. CP 9. Mr. Stilwill requested a fingerprint analysis of the pipe. CP 9.

When the crime lab could not find any usable prints on the glass pipe, Mr. Stilwill informed the prosecutor that the Defendant now claimed that the pants he had been wearing on the night of his arrest were also not his. CP 18, 36. Mr. Stilwill did not provide the prosecutor with this pants-sharing friend's name. *Id.*

On March 17, the day before trial, Mr. Stilwill emailed Mr. Chow at 2:30 p.m. advising that his client suspected there may be other police reports related to his case. CP 9, 19. Mr. Chow opened the email at 4 p.m. and immediately searched the ILEADS law enforcement database for reports in which the Defendant was named as an "involved other." CP 19. He discovered that Mr. Batsell's name came up in 384 law enforcement involvements. *Id.* One of these

reports, prepared by Officer Leininger, was for the same night as the Defendant's arrest and describes the suspicious circumstances call that brought police out to the Defendant's location that night. CP 18, 37-40. "Within minutes" of locating the report, Mr. Chow provided it to Mr. Stilwill. CP 10, 20.

Officer Leininger's report: According to that report, Joshua Ferris had called police that night to report that someone was walking around the house and looking in the windows. CP 38-39. Mr. Ferris saw the person near the front bushes, and the back door was open. CP 38. Mr. Ferris said he believed the person may be Mark Baits; he also said that a man named Daniel Bates had been at the location earlier, acting funny, and was asked to leave. *Id.* Mr. Ferris told dispatch that police should be aware that he had armed himself with a shotgun. *Id.*

When police arrived, they found the Defendant Daniel Batsell in front of the house, holding a black duffle bag, and attempting to get into a vehicle. CP 39. There was a knife hanging out of his left sweater pocket from a chain. *Id.* Police detained him and determined he had seven warrants for his arrest and was in possession of methamphetamine. *Id.*

Police then contacted Mr. Ferris. *Id.* They noticed a disassembled shotgun, shotgun shells and used hypodermic needles littering the home. *Id.* Mr. Ferris was “extremely paranoid.” *Id.* Mr. Ferris told police that he believed the Defendant was trying to set him up in retribution for sleeping with another man’s wife in Finley. CP 40. He was sure people were out to get him. *Id.* Police were alarmed that Mr. Ferris had been loading and assembling a shotgun while obviously high on methamphetamine. *Id.* He was arrested on warrants of his own. CP 39.

The homeowner Michelle Myer was not present. CP 40. In the residence, there was a large gun safe with several guns locked away. *Id.* There were several hundred rounds of ammunition and “obvious signs of drug use including a broken meth pipe on the fridge.” *Id.*

Motion to Dismiss: The morning after Mr. Stilwill received the report, he advised the prosecutor that he believed Mr. Ferris owned the vehicle and keys that the Defendant had been holding. CP 20. He did not. Mr. Chow had Officer Cobb check the license plate of the vehicle listed in the report. *Id.* It returned to Benjamin Freeman, not Mr. Ferris. *Id.*

Mr. Stilwill told Judge Vanderschoor that “we were looking for Mr. F[e]rris from the beginning of this case.” RP 2. “We knew him just as Josh.” RP 3. Mr. Stilwill claimed he had “no way of knowing” Mr. Ferris’ full name except through police. RP 7. He alleged that the Defendant’s possession of the methamphetamine had been unwitting and that Mr. Ferris was the actual owner of the car, car keys, and pants as well as the duffel bag. RP 2-4. He alleged that the Defendant had been helping Mr. Ferris load property into the car, “because Mr. F[e]rris had indicated a willingness or desire to undergo some treatment.” RP 4. Mr. Stilwill claimed that Officer Leininger’s report, “if not exculpatory,” was “relevant in that it would lead me to be able to locate this witness.” RP 3.

Mr. Stilwill told the court he would not have time to contact Mr. Ferris if the trial were not continued. RP 5. He asked the court to dismiss or, in the alternative, to continue the trial date. RP 5.

Mr. Chow explained that he had not been in possession of the report until minutes before he passed it along to Mr. Stilwill. RP 5-6. He attempted to explain that Officer Leininger’s report did not support Mr. Stilwill’s allegations. RP 6. The court cut Mr. Chow off and then allowed Mr. Stilwill to repeat his arguments. RP 6-8.

Before dismissing the State's case, Judge Vanderschoor allowed Mr. Chow one more sentence of explanation. RP 7-8. Mr. Chow explained that the Defendant had never indicated he needed the State's assistance in identifying his own friend. RP 7-8.

Motion for Reconsideration: The State filed a motion for reconsideration. CP 17-41. The motion set forth in detail the legal standards. CP 21-22. It explained that there had been no governmental misconduct and no *Brady* violation. CP 22-25. It explained that the Defendant had not been prejudiced by a report which only served to implicate him in an additional crime. CP 25. It explained that a continuance was the proper remedy to the late request and providing of the report. CP 25-26.

Six weeks later and the afternoon before the hearing, the defense filed a response. CP 17-16. In his response, Mr. Stilwill argued that the superior court did not have authority to reconsider its own ruling. CP 8.

At the hearing, Mr. Chow objected to this late response and explained that the civil rule CR 59 regarding motions for reconsideration applied to criminal cases under CrR 1.1. RP 11. He

explained that reconsideration motions are routine in criminal matters and provided the court with the citation of *State v. Englund*, 345 P.3d 859 (2015). RP 11.

Mr. Stilwill insisted that the superior court had no authority to reconsider, and that the only available remedy to the State was an appeal. RP 13. Mr. Stilwill inquired if he needed to address the merits of the State's motion. RP 13. Judge Vanderschoor responded:

I'm going to allow the dismissal to stand. Primarily I'm not sure if I have the authority to do anything else. I will indicate if I had this information set forth in the way Mr. Chow set forth [in the Motion for Reconsideration] I may not have granted the dismissal at the time it happened. I didn't have it at the time.

RP 13.

#### **IV. SUMMARY OF ARGUMENT**

A superior court has authority to reconsider its own ruling.

*Brady* is not grounds for dismissal. It is only grounds for a new trial. However, there was no *Brady* violation and no basis for dismissal under CrR 8.3. The State did not commit misconduct by providing a report immediately upon request. The report is not exculpatory. The Defendant's case was not prejudiced by the receipt

of the late requested report the day before trial. The Defendant could have discovered Mr. Ferris' name through due diligence and without the State's assistance. The Defendant could have discovered the name and the report from the State earlier by making an earlier identifiable request for the information. If defense required more time to prepare for trial, the proper remedy would have been a continuance, not dismissal.

## **V. APPLICABLE STANDARDS**

### **A. STANDARD FOR A TRIAL COURT'S DISMISSAL UNDER CrR 8.3(b).**

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

CrR 8.3 (b).

A trial court may dismiss a criminal case if the defendant makes two showings. First, the defendant must show arbitrary action or governmental misconduct. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). Misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *State v.*

*Michielli*, 132 Wn.2d at 239. Second, the defendant must show that this misconduct prejudiced his or her right to a fair trial. *State v. Michielli*, 132 Wn.2d at 240. “The burden is on the defendant to establish by a preponderance of the evidence, prejudice requiring dismissal.” *State v. Hoffman*, 115 Wn. App. 91, 102-03, 60 P.3d 1261, *rev'd on other grounds*, 150 Wn.2d 536, 78 P.3d 1289 (2003).

Washington courts have clearly maintained that dismissal is an **extraordinary remedy** to which the court should only turn to as a **last resort** in “truly egregious cases of mismanagement or misconduct” when no intermediate remedial steps exist (such as continuance or suppression). *State v. Wilson*, 149 Wn.2d 1, 9, 12, 65 P.3d 657, 661 (2003).

We repeat and emphasize that CrR 8.3(b) “is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor.” *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988) (quoting *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975)).

*State v. Michielli*, 132 Wn.2d at 240.

#### B. APPELLATE STANDARD.

A trial court’s decision to dismiss is reviewed for abuse of discretion. *State v. Michielli*, 132 Wn.2d at 240. A court abuses its

discretion when applies the wrong legal standard to an issue or it takes a view no reasonable person would take. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). A court's dismissal of an action must be reversed if there is no evidence of government misconduct or no showing of prejudice to the defense. *State v. Blackwell*, 120 Wn. 822, 832, 845 P.2d 1017 (1993).

### C. *BRADY* STANDARDS

If the prosecution suppresses evidence "favorable to an accused upon request" and "where the evidence is material either to guilt or to punishment," due process is violated. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The remedy is not dismissal, but a new trial in which the accused has access to the previously withheld evidence. *Id.*

The defendant must demonstrate three necessary elements:

(1) the State failed to disclose evidence that is favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the undisclosed evidence was prejudicial.

*State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

To show prejudice, the defendant must show “the omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt as to the defendant’s guilty that did not otherwise exist.” *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995) (defense must show a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”); *State v. Bebb*, 108 Wn.2d 515, 522, 740 P.2d 829 (1987). A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

When evidence comes to light *after* a trial, the remedy for a *Brady* violation is a new trial, not dismissal. *In re Stenson*, 174 Wn.2d, 500, 276 P.3d 286 (2012) (reversing and remanding for new trial after finding that state failed to disclose FBI file which revealed mishandling of evidence). When evidence comes to light *before* a trial, the remedy is a continuance so that the parties may properly assess the evidence for use at trial. CrR 4.7(h)(7)(i); *State v. Ramos*, 83 Wn. App. 622, 636, 922 P.2d 193 (1996).

## VI. ARGUMENT

### A. THE TRIAL COURT ERRED IN RULING THAT IT LACKED AUTHORITY TO RECONSIDER ITS OWN RULING.

The superior court did not permit the prosecutor to make a full response on the day of dismissal. The superior court did not permit a continuance for briefing on the dismissal.

However, once the facts and law were finally before the court, the trial judge indicated that if he had understood the facts and law at the time of his ruling, "I may not have granted the dismissal." RP 13.

Even so, the judge denied the State's Motion for Reconsideration, because he did not believe he had the authority to hear it. RP 13 ("Primarily I'm not sure if I have the authority to do anything else.") This was error.

The criminal court rules supersede **conflicting** procedural rules and statutes. CrR 1.1. Otherwise, the criminal procedures are "interpreted and supplemented" by other appropriate rules, law, and practice. CrR 1.1. No criminal rule is in conflict with the civil rule describing motions for reconsideration, therefore, the CR 59 applies in criminal cases and provides the procedure and authority for the superior court to reconsider its own rulings.

We see this procedure applied in *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859 (2015). There a criminal defendant made a motion for self-representation. *State v. Englund*, 186 Wn. App. at 459. When his motion was denied, he made a motion for reconsideration. The superior court denied the motion, relying on CR 59. *Id.* When the defendant appealed from the denial of his motion for reconsideration, the court of appeals applied the standard of review found in a civil case. *Id.*, (citing *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997)).

The application of the civil rule for reconsideration is appropriate in criminal cases. Motions for reconsideration are a cost effective procedure that permits a court to correct its own errors that it catches and recognizes without further ado.

The court's error in believing it lacked authority to reconsider placed a significant burden on the State. A trial court has considerable discretion in deciding motions to dismiss and motions to reconsider. *State v. Michielli*, 132 Wn.2d at 240; *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859 (2015). A court sitting in review has less. By refusing to reconsider the Defendant's motion on the merits when the State was allowed to present a proper response,

the court altered the standard of review to unfairly prejudice the State. This Court should hold the superior court erred in finding that it lacked authority to grant the State's motion and should remand the matter for the superior court to decide the motion on its merits.

B. THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING THE STATE'S CASE CONTRARY TO THE LEGAL STANDARD REQUIRED BY CrR 8.3.

1. The prosecutor did not fail to produce any record, but in fact provided it on the very day it was requested by defense counsel and in advance of trial.

The order dismissing the State's case reads that dismissal is granted "for the State's failure to produce a report that was required to be produced under *Brady v. Maryland*." Setting aside for the moment whether the report was *Brady* material, the court errs in finding the report was not produced. The report was produced. And it was produced promptly in response to an emailed request of defense counsel made the day before trial. The finding of fact is not factual.

2. There was no governmental misconduct for the late production of a report which was late requested, discoverable by defense with due diligence, and not exculpatory.

Under CrR 8.3, the Defendant must prove governmental misconduct. There is none.

The State did not fail to respond to any request by the defense. For the first time on the first day of trial, the Defendant claimed he had been looking for Joshua Ferris' *name*. The Defendant claimed that he had no way of discovering this name without Officer Leininger's report.

When the defense made this eleventh hour request for any reports related to this case, the prosecutor located and promptly produced a report in which the Defendant is identified as an "involved other" on the same day of his arrest in this case.

That report is unrelated to the Defendant's possession of methamphetamine, but suggests the Defendant is a person of interest in an attempted residential burglary. Its only connection was the time and date. The Defendant was found in possession of methamphetamine near a location where police were in the process of investigating a suspected attempted burglary.

The State could have produced any one of the 348 "involvement" reports with the Defendant's name, and the Defendant could have asserted that someone in that report was his friend. The fact that the State did not produce every one of these reports is not misconduct. And this bare, unsubstantiated and unsworn assertion

by a person with Mr. Batsell's criminal history that his apparent burglary victim "shared" his pants and vehicle with the Defendant cannot be sufficient cause for dismissal. If the Defendant wants to claim that he took Mr. Ferris' property (although the vehicle does not belong to Mr. Ferris) without knowledge that it contained methamphetamine (although the house was littered with drug paraphernalia and the Defendant acknowledges that he was aware of Mr. Ferris' drug habit (RP 4)), he should have to take the stand and be impeached with his significant criminal history.

Officer's Leininger's report would not appear to be of use to the defense. The report does not name Joshua Ferris as the car's owner. It states that the Defendant was trying to enter a vehicle with Washington license plates AQE2581. CP 39. When police ran the plates, they learned the owner of that vehicle is Benjamin Freeman, not Joshua Ferris. CP 20.

In other words, if the State had produced Benjamin Freeman's name sooner, it would have complied with the defense request and produced no material assistance to the defense in any way. The Defendant does not claim that the car keys belong to Mr. Freeman.

As it turns out, the report is not exculpatory. The Defendant

believed that there was evidence which would show that his possession was unwitting. The report does not show this. It establishes that not only was the Defendant in possession of methamphetamine, he was also suspected of attempting to burglarize a meth den. It does not establish or even suggest that the Defendant was wearing someone else's pants or carrying someone else's keys. It does not name a pants-sharing friend.

On the morning of trial, the Defendant suggested that evidence would show that the car he was attempting to enter belonged to Joshua Ferris. But when police ran the plate, it did not return to Mr. Ferris. The evidence is not what the Defendant believes but what the reports actually show. And that evidence is NOT exculpatory.

This evidence is both irrelevant and unduly prejudicial. It would not be admissible. ER 401; ER 403. Evidence that is neither admissible nor likely to lead to admissible evidence is unlikely to affect the outcome of a proceeding and cannot be the basis for a *Brady* challenge. *State v. Mullen*, 171 Wn.2d at 897.

While the report does expand on the scope of the investigation, “[n]either *Brady* nor *Wright*, or their progeny,” imposes a duty on the State to expand the scope of a criminal investigation or “exhaustively

pursue every angle on a case.” *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984) (quoting *State v. Jones*, 26 Wn.App. 551, 554, 614 P.2d 190 (1980)).

Although the Defendant claims that Mr. Ferris is a friend, so close to him that they share a vehicle and pants, his story is unbelievable when compared with Officer’s Leininger’s report. In that report, Mr. Ferris said the Defendant had been at the location earlier, acting funny, and had been asked to leave. He believed the Defendant had returned to set him up in retribution for sleeping with another man’s wife in Finley. Mr. Ferris was assembling a shotgun in order to shoot the Defendant, whom he believed was prowling outside his house. Mr. Ferris called police to protect him from the Defendant.

The defense had indicated that it was seeking out a witness through its own channels. But *Brady* “does not place any burden upon the government to conduct a defendant’s investigation or assist in the presentation of the defendant’s case.” *United States v. White*, 970 F.2d 328, 337 (7<sup>th</sup> Cir. 1992).

Due diligence. The Defendant could have obtained either this report or Mr. Ferris’ name much sooner through due diligence. Where “a

defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.” *State v. Mullen*, 171 Wn.2d at 896. See e.g. *State v. Lord*, 161 Wn.2d 276, 292-93, 165 P.3d 1251 (2007)(no *Brady* violation where defense could have located the dog handler based on information in its own possession); *In re Benn*, 134 Wn.2d 868, 916-17, 952 P.2d 116 (1998); *Raley v. Ylst*, 470 F.3d 792, 804 (9<sup>th</sup> Cir. 2006) (no *Brady* violation when a defendant possessed the information that he claims was withheld or where he possesses the salient facts regarding the existence of the evidence that he claims was withheld); *Boss v. Pierce*, 263 F.3d 734, 740 (7<sup>th</sup> Cir.2001) (“Evidence is suppressed for *Brady* purposes only if [...] the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.”).

The Defendant claims Joshua Ferris is his good friend. He claims Mr. Ferris lets him drive his car and lets him wear his pants. He claims they are such good friends that he was helping Mr. Ferris move and taking him to rehab. If any of this is true, it is not credible that he could not have found this good friend without the State’s assistance. Friends of this intimacy would know each other’s full

names and contact information and would have friends in common.

At the very least, the Defendant could have reviewed the jails' publicly posted daily in-custody report to find Mr. Ferris' name. They were arrested on the same night within minutes and feet of each other. If the Defendant is indeed Mr. Ferris' friend, he would have known how high Mr. Ferris was that night and that he was assembling a gun and summoning police. The Defendant would have reason to believe that Mr. Ferris would have been arrested that night for his own erratic behavior or warrants.

The Defendant never identified to the State that his pants belonged to the person who had made the 911 call, or the person who was arrested on the same night and location, or the person who was inside 1107 W Yakima at the time of the Defendant's arrest nearby. Any of this information would have assisted the prosecutor in making inquiries. But he only said he was using independent channels to look for a friend whom he had been helping move and whose name he did not provide.

The State would have no reason to know that the Defendant was claiming that his burglary victim was his pants-sharing friend. But with due diligence, the Defendant could have provided useful

information to the prosecutor or law enforcement in order to obtain what he needed. He did not share this information. He did not do his due diligence.

The Defendant himself was in the best position to discover the information he was seeking. The Defendant said he knew there must be other reports related to police contact with him that night. CP 9, ¶21. Knowing this and exercising due diligence, he could have made a discovery demand or a public records request for these reports long ago. He did not. He waited until *the day before trial* to ask for other reports.

A defendant's obligation to conduct a diligent investigation arises whenever the defendant knows or should know of the existence of evidence. *United States v. Hicks*, 848 F.2d 1 (1<sup>st</sup> Cir. 1988) (knowledge that a witness testified before the grand jury sufficient to trigger the defendant's duty of investigation); *In re Benn*, 134 Wn.2d at 916-17 (obligation to investigate further imposed where defendant receives a summary of a proposed witness' testimony).

His failure of diligence voids his *Brady* challenge.

3. The superior court abused its discretion in order dismissal without considering defense counsels' offer of a continuance.

Dismissal is only appropriate where misconduct and prejudice are shown. Because this showing was not made, dismissal was an abuse of discretion. However, even this showing had been made, under the standards provided *supra*, the proper remedy would be a continuance. Even defense counsel proffered this remedy.

The proper remedy for a *Brady* would be a new trial. Here there had not been a first trial. Therefore, the proper remedy would be a trial using the alleged material, exculpatory evidence. If the defense needed more time to prepare, then a continuance would be proper.

In *State v. Ramos*, 83 Wn. App. 622, 636-38, 922 P.2d 193 (1996), the court of appeals reviewed case law regarding dismissals for discovery violations. It noted that court rules clearly allow a continuance when required in the administration of justice and when the defendant will not be substantially prejudiced in the presentation of the defense. *State v. Ramos*, 83 Wn. App. at 636-37. A continuance may be an insufficient remedy when it forces a defendant

to choose between his right to a trial within the time requirements of court rule and his right to effective assistance of counsel. *State v. Ramos*, 83 Wn. App. at 637, (citing *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980)). However, even then, not every untimely discovery which affects the defendant's ability to prepare a defense within CrR 3.3 timeline requires a dismissal. *State v. Ramos*, 83 Wn. App. at 637, (citing *State v. Smith*, 67 Wn. App. 847, 852-54, 841 P.2d 65 (1992)). Each case must be assessed individually. *State v. Ramos*, 83 Wn. App. at 637 (citing *State v. Sherman*, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990)). But here there was not even an allegation about a Hobson's choice.

Because dismissal is a remedy of last resort and no record suggests that another remedy was inappropriate, the court abused its discretion in dismissing the State's case.

**VII. CONCLUSION**

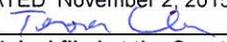
Based upon the forgoing, the State respectfully requests this Court reverse the superior court's dismissal and remand this matter for further proceedings.

DATED: November 2, 2015.

Respectfully submitted:

SHAWN P. SANT  
Prosecuting Attorney

  
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Teresa Chen, WSBA#31762  
Deputy Prosecuting Attorney

<p>Craig Stilwill 1030 N Center Pkwy Kennewick, WA 99336-7160 craigstilwill@gmail.com</p> <p>Daniel Batsell 1422 S Date Place Kennewick, WA 99336-4028</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED November 2, 2015, Pasco, WA</p> <p> _____ Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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