

Feb 03, 2017, 1:26 pm

RECEIVED ELECTRONICALLY

NO. 93293-0

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,

Respondent.

---

**WASHINGTON STATE PATROL'S AMICUS CURIAE BRIEF**

---

ROBERT W. FERGUSON  
Attorney General

SHELLEY A. WILLIAMS  
Assistant Attorney General  
WSBA No. 37035 / OID No. 91094  
Office of the Attorney General  
800 Fifth Ave, Suite 2000  
Seattle, WA 98104  
(206) 389-3807

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. IDENTITY AND INTEREST OF AMICUS CURIAE .....1

III. ISSUE ADDRESSED BY AMICUS CURIAE .....5

IV. STATEMENT OF THE CASE.....5

V. ARGUMENT .....5

    A. The Toxicology Laboratory Providing A List Of Several  
        Potential Toxicologists Who May Testify To The  
        Simulator Solution Is A Practical Solution That Satisfies  
        The Purpose Of CrRLJ 8.3 And Does Not Prejudice The  
        Defense. ....5

VI. CONCLUSION .....11

## TABLE OF AUTHORITIES

### Cases

<i>City of Seattle v. Holifield</i> , 170 Wn.2d 230, 240 P.3d 1162 (2010).....	6
<i>State v. Barry</i> , 184 Wn. App. 790, 339 P.3d 200 (2014).....	7, 8
<i>State v. Brooks</i> , 149 Wn. App. 373, 203 P.3d 397 (2009).....	7
<i>State v. Cannon</i> , 130 Wn.2d 313, 922 P.2d 1293 (1996).....	8
<i>State v. Heredia-Juarez</i> , 119 Wn. App. 150, 79 P.3d 987 (2003).....	6
<i>State v. Koerber</i> , 85 Wn. App. 1, 931 P.2d 904 (1996).....	6, 10
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	7, 9, 10
<i>State v. Salgado-Mendoza</i> , 194 Wn. App. 234, 373 P.3d 357 (2016).....	5, 8, 10
<i>State v. Straka</i> , 116 Wn.2d 859, 810 P.2d 888 (1991).....	2
<i>State v. Wake</i> , 56 Wn. App. 472, 783 P.2d 1131 (1989).....	6
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	8

**Statutes**

RCW 42.62.065 ..... 2  
RCW 68.50.107 ..... 2

**Rules**

CrR 8.3(b) ..... 7  
CrRLJ 4.7 ..... 7  
CrRLJ 8.3 ..... 1, 5  
CrRLJ 8.3(b) ..... 4, 5, 6, 8

## **I. INTRODUCTION**

A purpose of the court rules for criminal proceedings is to provide fairness to a defendant and prevent surprise that prejudices a defendant. The Washington State Patrol Toxicology Laboratory's practice of sending a list with the names of several toxicologists who could testify to the DataMaster breath test instrument's simulator solution in a Driving Under the Influence (DUI) trial met that purpose. This practice was a practical solution that balanced the Toxicology Laboratory's competing demands and a defendant's right to fair notice. The list (when provided months ahead of trial) provided the defense with fair notice of the potential toxicologists who could testify to the simulator solution. The list did not prejudice the defense as contemplated by CrRLJ 8.3. By providing the list months ahead of trial, the defense had the opportunity to properly prepare for trial. Accordingly, amicus curiae respectfully requests this Court to reverse the Court of Appeals.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Patrol Toxicology Laboratory Division is the exclusive provider of toxicological testing services for Washington law enforcement agencies, prosecuting attorneys, and coroners. The Toxicology Laboratory performs toxicology testing in a variety of cases. Both Washington and Alaskan law enforcement agencies submit

blood samples from suspected impaired drivers for testing of drugs and alcohol. Additionally, the Toxicology Laboratory's toxicologists certify simulator solutions for the DataMaster breath test instrument. *State v. Straka*, 116 Wn.2d 859, 865, 810 P.2d 888 (1991). Apart from these impaired driving cases, the Toxicology Laboratory is charged with the responsibility to perform toxicology testing of biological samples submitted by coroners for autopsies or postmortems (death investigations). RCW 42.62.065; RCW 68.50.107. The Toxicology Laboratory may perform toxicology testing in other cases such as sexual assault cases and drug investigations.

The Toxicology Laboratory currently employs fourteen toxicologists to conduct toxicology testing and testify in court. However, the Toxicology Laboratory typically only has twelve toxicologists available at any given time due to maternity leave, vacation, court testimony, or other duties.

The Toxicology Laboratory receives scores of subpoenas for toxicologists to testify in criminal cases. It is not uncommon for the Toxicology Laboratory to receive numerous subpoenas commanding a toxicologist to testify on a specific day in different courts. Many of these cases resolve or are continued, but there is still the potential of two or more criminal trials simultaneously requiring a toxicologist's testimony.

In the context of limited resources and competing duties, the Toxicology Laboratory developed a practice of providing a list of several toxicologists who each tested a simulator solution and who could testify to that solution in a DUI prosecution. For the DataMaster breath test instruments, a simulator solution of a known sample is used to verify that the instrument is in proper working order before a suspected impaired driver submits to a breath test. The toxicologists prepare and certify these simulator solutions. Several toxicologists prepare and certify a simulator solution so that there is more than one toxicologist who can testify about the simulator solution at trial. Since each toxicologist on the list tested the simulator solution at issue in the case, each toxicologist on the list could testify regarding that simulator solution. This practice balanced the Toxicology Laboratory's limited resources and competing duties with a criminal defendant's right to full and timely information. Under this practice, there was no surprise to the defense if a specific toxicologist was unavailable and another toxicologist had to substitute in the case. Rather, the defense was on notice that one of several toxicologists may testify to the simulator solution.

This amicus brief explains why the practice of providing multiple, possible witnesses from the Toxicology Laboratory complied with the letter and spirit of the relevant court rules. Specifically, providing a list of

several potential toxicologists who may testify regarding the simulator solution *several months before the trial date* is not government mismanagement or prejudicial to the defense. First, government mismanagement generally involves the government acting (or failing to act) without justification. And there are legitimate justifications for providing a list of several toxicologists, including balancing the Toxicology Laboratory's competing duties and providing fair notice to the defense. Second, suppression for governmental misconduct requires prejudice to the defense to choose between constitutional rights (i.e., waiving speedy trial or proceeding to trial with unprepared counsel). Providing the names of multiple potential witnesses who would testify to the same thing did not create such a dilemma when the defense had the list months before trial.

The practice balanced competing obligations and the court rules' requirements that the defense receive timely information to guard against unfair surprise. Accordingly, the Patrol respectfully requests this Court to reverse the Court of Appeals holding that identifying several toxicologists (rather than a specific toxicologist) prejudiced the defense and merited suppression under CrRLJ 8.3(b).

///

///

### **III. ISSUE ADDRESSED BY AMICUS CURIAE**

Whether the Toxicology Laboratory's practice of providing a list of potential toxicologists who could testify to the simulator solution provided full information to the defense to prepare for trial and did not constitute prejudice meriting suppression of the toxicologist's testimony under CrRLJ 8.3(b).

### **IV. STATEMENT OF THE CASE**

The Patrol respectfully incorporates the statement of facts in the Court of Appeals majority opinion and Judge Worswick's dissenting opinion in *State v. Salgado-Mendoza*, 194 Wn. App. 234, 373 P.3d 357 (2016).

### **V. ARGUMENT**

#### **A. The Toxicology Laboratory Providing A List Of Several Potential Toxicologists Who May Testify To The Simulator Solution Is A Practical Solution That Satisfies The Purpose Of CrRLJ 8.3 And Does Not Prejudice The Defense.**

Providing the defense with a list of several toxicologists who could potentially testify regarding the simulator solution does not constitute unfair surprise or prejudice. Rather, it is a practical solution to address the competing demands on the Toxicology Laboratory while providing fair notice to the defense of which toxicologists may potentially testify to the simulator solution. To be sure, Washington courts expect the State's

forensic laboratories to develop solutions to address scheduling conflicts for the limited number of forensic scientists or toxicologists that provide expert testimony for prosecuting attorneys. *State v. Wake*, 56 Wn. App. 472, 475-76, 783 P.2d 1131 (1989) (“If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem.”); *see also State v. Heredia-Juarez*, 119 Wn. App. 150, 154, 79 P.3d 987 (2003) (“[T]he State has an obligation to accommodate both responsibly scheduled vacations for its deputy prosecutors and a defendant’s CrR 3.3 rights.”) (citation omitted). The Toxicology Laboratory met that expectation and the practice of sending a list of the toxicologists that tested the simulator solution did not prejudice the defense.

Under CrRLJ 8.3(b), a “court, in the furtherance of justice after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to fair trial.” “Fairness to the defendant underlies the purpose of CrR 8.3(b).” *State v. Koerber*, 85 Wn. App. 1, 5, 931 P.2d 904 (1996) (citation omitted).<sup>1</sup> “A defendant must make two showings to justify

---

<sup>1</sup> The language in CrR 8.3(b) and CrRLJ 8.3(b) is identical and appellate opinions that analyze CrR 8.3(b) apply to CrRLJ 8.3(b). *See City of Seattle v. Holifield*, 170 Wn.2d 230, 238, 240 P.3d 1162 (2010).

dismissal [or suppression] under CrR 8.3(b): (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial." *State v. Barry*, 184 Wn. App. 790, 797, 339 P.3d 200 (2014) (citing *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997)).

A discovery violation may constitute government mismanagement. *State v. Brooks*, 149 Wn. App. 373, 375-76, 203 P.3d 397 (2009).<sup>2</sup> But, the defense still must show that the alleged violation "prejudiced [the] right to a fair trial." *Id.* at 384 (citing *Michielli*, 132 Wn.2d at 240). "Prejudice under CrR 8.3(b) includes the right to a speedy trial and the right to adequately prepared counsel." *Barry*, 184 Wn. App. at 797 (citation omitted). The respondent cannot satisfy the Court's test for showing that his right to a fair trial is prejudiced for three reasons: (1) providing a list of several toxicologists who may testify to the simulator solution does not interject new facts; (2) the Toxicology Laboratory's competing duties and the defense's right to fair notice justified this practice; and (3) the practice was to provide full and timely information to the defense and not engage in unfair gamesmanship.

---

<sup>2</sup> While this amicus brief does not address whether providing the list violates CrRLJ 4.7, the Patrol does not concede that the practice constitutes a discovery violation.

First, a finding of prejudice under CrRLJ 8.3(b) involves “an injection of new facts into the case which then causes the defendant to choose between two constitutional rights.” *State v. Woods*, 143 Wn.2d 561, 584, 23 P.3d 1046 (2001) (citations and internal quotation marks omitted).<sup>3</sup> A defendant cannot show a prejudicial interjection of new facts when the State has placed the defendant on notice of those potential facts. *See id.* at 584-84 (The “delay in producing the DNA test results did not cause the interjection of new information into the case” because the defense was “on notice from the time of charging that the State intended to use the results from forensic testing to prove that [the defendant] was the perpetrator of the crimes.”); *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996) (no prejudice “because [defendant’s] trial counsel was placed on notice from the time of charging that the State intended to introduce scientific evidence relating to blood samples and paint chips in order to tie [the defendant] to the crime.”); *Barry*, 184 Wn. App. at 798 (late disclosure of defendant’s taped

---

<sup>3</sup> The *Salgado-Mendoza* majority opinion distinguished the cases finding that prejudice must involve the injection of new facts by noting that those cases dealt with the remedy of dismissal rather than suppression. 194 Wn. App. at 249 n. 14. The majority opinion also relied on the dicta in *Woods*, 143 Wn.2d 561, that the trial court could have considered lesser sanctions (based on the injection of new facts) rather than dismissal. *Id.* However, remedies under CrRLJ 8.3(b) should be judged by the same standard - whether there is an injection of new facts. The purpose of CrRLJ 8.3(b) is to prevent unfair surprise. Unfair surprise happens when the prosecution injects new facts that the defense did not have fair notice of.

confession did not prejudice defendant in part because defendant knew he gave a recorded confession). Here, the list was not an injection of new facts. The list provided the defense fair notice that the prosecution intended to call a toxicologist to testify to the simulator solution, and listed all of the potential toxicologists who may provide such testimony. As such, there is no injection of new facts, no unfair surprise, and no prejudice.

Second, courts may find prejudice when the State acts (or fails to act) without justification. *See Michielli*, 132 Wn.2d at 244 (“The prosecutor delayed adding four serious charges until three business days before trial without any justification[.]”). Here, there is ample justification. The Toxicology Laboratory is vested with the responsibility to test blood for impaired driving cases, test biological samples for death investigations, and prepare the simulator solution for the DataMaster breath test instruments. Each of these obligations may require the toxicologist to testify in any municipal, district, or superior court across the state of Washington. Rather than identify one toxicologist to testify to the simulator solution (and then notify the prosecutor that the toxicologist is unavailable to testify due to another court case, illness, or other good reason), the Toxicology Laboratory provided a list of the potential toxicologists. This list (provided months ahead of trial) enabled the

defense to investigate the several toxicologists. The alternative could be the surprise of the prosecutor informing the defense that the specified toxicologist is unavailable, but another toxicologist could testify to the simulator solution. As such, the list of several toxicologists balanced the Toxicology Laboratory's multiple obligations and gave the defense ample notice of the toxicologists who may testify.

Third, apart from the Toxicology Laboratory's list providing the defense fair notice of the potential toxicologists who may testify, the practice did not constitute "unfair gamesmanship or intentional acts, to prevent the court from administering justice." *Koerber*, 85 Wn. App. at 4 (internal quotation marks omitted). The practice provided full information to the defense and certainly did not indicate "less than honorable motives." *Michielli*, 132 Wn.2d at 244. The list does not interfere with defense counsel's ability to investigate potential witnesses. *See contra Salgado-Mendoza*, 194 Wn. App. at 251. Rather, a list of several toxicologists gave the defense ample opportunity to review the Patrol's website with the curriculum vitae for each toxicologist and call each toxicologist for a telephonic interview (or arrange for an in-person interview). Accordingly, the practice did not constitute an unfair surprise, did not place the defendant in the position of choosing between speedy

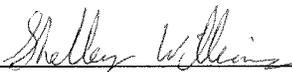
trial rights and right to prepared counsel, and did not prejudice the defendant.

## VI. CONCLUSION

For these reasons, the Patrol respectfully requests this Court to reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of February, 2017.

ROBERT W. FERGUSON  
Attorney General

  
\_\_\_\_\_  
SHELLEY A. WILLIAMS, WSBA # 37035  
Assistant Attorney General  
Attorneys for Washington State Patrol

NO. 93293-0

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,

Respondent.

DECLARATION OF  
SERVICE

I, Lucy Pippin, declare as follows:

On February 3, 2017, I sent, pursuant to the electronic service agreement, a true and correct copy of Motion for Leave to File Amicus Curiae Brief, Washington State Patrol's Amicus Curiae Brief, and Declaration of Service, addressed as follows:

PAMELA LOGINSKY  
[Pamloginsky@waprosecutors.org](mailto:Pamloginsky@waprosecutors.org)

JULIE ST. MARIE  
[jstmarie@co.jefferson.wa.us](mailto:jstmarie@co.jefferson.wa.us)

SKYLAR BRETT  
[skylarbrettlawoffice@gmail.com](mailto:skylarbrettlawoffice@gmail.com)

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

DATED this 3<sup>rd</sup> day of February, 2017, at Seattle, Washington.

  
LUCY PIPPIN