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SUPREME COURT NO. 93293-0

COA NO. 46062-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

RESPONSE TO AMICUS WASHINGTON STATE PATROL

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I. RESPONSE TO ARGUMENTS OF AMICUS WASHINGTON STATE PATROL

A. The discovery rules do not contain exceptions based on governmental preference or convenience.

CrRLJ 4.7 requires a prosecutor to provide discovery that has been specifically requested by the defense within twenty-one days of the demand. This is true even if the discovery material is in the possession of a third party. CrRLJ 4.7(d). If the prosecutor is unable to do so, s/he must inform the court so that the court may issue necessary subpoenas to make the information available to the defense. *Id.*; *State v. Blackwell*, 120 Wn.2d 822, 826-28, 845 P.2d 1017 (1993); *State v. Brooks*, 149 Wn. App. 373, 385-86, 203 P.3d 397 (2009).

CrRLJ 4.7 does not provide for exceptions to these duties of the prosecution and the court, even when compliance is cumbersome for the government. To the contrary, the discovery rules are designed, in part, to compel the state to create systems that make necessary information available to accused persons in a timely manner. *See e.g. State v. Wake*, 56 Wn. App. 472, 475, 783 P.2d 1131 (1989) (enforcing the discovery rules, in part, to induce the state to remedy congestion at the crime lab).

Even so, amicus curiae Washington State Patrol (WSP) encourages this Court to adopt a kind of balancing test, which would require a trial

court to weigh any issues of governmental convenience before requiring the state to comply with CrRLJ 4.7. *See* Brief of Amicus WSP, pp. 1-6.

But amicus cannot point to any relevant authority supporting that argument. *See* Brief of Amicus WSP, p. 6 (*relying on State v. Heredia-Juarez*, 119 Wn. App. 150, 154, 79 P.3d 987 (2003) (holding that a prosecutor's vacation can provide good cause for a continuance; not addressing any discovery issues)).¹

This Court should decline to impose WSP's proposed exception to CrRLJ 4.7, which would relieve the state of its discovery obligations based on a showing of inconvenience to the government.

Additionally, there was no evidence or offer of proof before the trial court (and there is no claim before this Court) that the WSP Toxicology Lab is actually *unable* to provide the parties in a criminal case with the name of the toxicologist who will testify at trial in a timely manner. WSP does not maintain otherwise in its amicus brief. *See* Brief of Amicus WSP.

Indeed, the lab is able to provide the information in advance of trial in at least one jurisdiction in Washington State. *See* RP (3/7/13) 26;

¹ Amicus also relies on *Wake*. Brief of Amicus WSP, p. 6 (*citing Wake*, 56 Wn. App. at 475-76). But *Wake* does not purport to conduct any type of balancing test. *See Wake*, 56 Wn. App. 472. In fact, the *Wake* court holds that the trial court erred by taking the crime lab's high workload into account. *Id.* at 475-76.

Brief of Amicus WDA, pp. 23-25. Neither the state nor amicus can explain why they would be unable to do so statewide.

The state's discovery obligations do not change based on the government's preference or convenience.

B. Even if the Toxicology Lab's limited resources were to make timely disclosure impossible, those constraints would not shield the prosecution from its duty under CrRLJ 4.7(d).

Assuming, *arguendo*, that the Toxicology Lab were to become unable to timely disclose the name of a testifying witness due to budget constraints, the state's duty under CrRLJ 4.7 would remain the same.

The discovery rules do place an unreasonable burden upon the prosecutor. Rather, upon request for specific discoverable information by the accused, the prosecutor must simply *attempt* to obtain that information if it is in the hands of a third party. CrRLJ 4.7(d); *Brooks*, 149 Wn. App. at 385-86; *Blackwell*, 120 Wn.2d at 826-27.

If the prosecutor's efforts are unsuccessful, s/he must do nothing more than inform the trial court. *Blackwell*, 120 Wn.2d at 826-28. The onus then shifts the court to issue any subpoenas or other orders necessary to make the material available to the defense. *Id.*

The prosecution's duty does not change based on the funding of the party with access to the discoverable information. *See e.g. Brooks*, 149 Wn. App. 373 (state committed mismanagement by failing to provide

timely discovery even when delay was due, in part, to staffing shortage at the Sheriff's office); *Wake*, 56 Wn. App. at 475.

Finally, the state has no incentive to remedy funding deficiencies affecting the rights of accused persons if the prosecution is excused from its discovery obligations based on lack of resources to other governmental agencies. *See Wake*, 56 Wn. App. at 475.

The prosecution's discovery obligations do not change based on the resources available to other state agencies. *Id.*

C. The accused is not required to prove malice or of "unfair gamesmanship" on the part of the state before the court can order the exclusion of non-disclosed discovery; simple governmental mismanagement is sufficient.

Governmental mismanagement "need not be of an evil or dishonest nature" to warrant remedy under CrRLJ 8.3. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (*quoting Blackwell*, 120 Wn.2d at 831)).

Nonetheless, amicus claims that WSP's failure to timely disclose the name of the testifying expert should be excused because it was not undertaken as "unfair gamesmanship" or with "less than honorable motives." Brief of Amicus WSP, pp. 8-10.

But Mr. Salgado-Mendoza's case addresses the failure of the prosecutor to comply with the discovery obligations under CrRLJ 4.7. Any action or inaction on the part of WSP is inapposite.

Even so, the prosecutor's motives and intent are also irrelevant to the inquiry. *See Michielli*, 132 Wn.2d at 239-40; *Blackwell*, 120 Wn.2d at 831.

Amicus's argument encouraging this Court to investigate the intent behind the discovery violations in Mr. Salgado-Mendoza's case is misplaced and directly contradicted by this Court's decisions in *Michielli* and *Blackwell*. *Michielli*, 132 Wn.2d at 239-40; *Blackwell*, 120 Wn.2d at 831.

D. Mr. Salgado-Mendoza was prejudiced by the government's mismanagement.

1. The "new facts" standard does not apply to a motion to exclude late-disclosed discovery.

When the accused moves to dismiss the prosecution's case based on governmental mismanagement and discovery violations, s/he must demonstrate prejudice by showing that the error imposed "new facts" into the proceeding. *See e.g. State v. Woods*, 143 Wn.2d 561, 583-84, 23 P.3d 1046 (2001). But the court can still impose other sanctions for late-disclosed discovery absent proof of "new facts." *Id.* at 585 n. 6.

In *Holifield*, for example, governmental misconduct justified exclusion of breath test evidence even where the "extraordinary remedy" of dismissal would not have been appropriate. *City of Seattle v. Holifield*,

170 Wn.2d 230, 237, 240 P.3d 1162 (2010). This is because suppression was adequate to eliminate the prejudice caused by the misconduct. *Id.* at 237. The misconduct in *Holifield* did not involve any “new facts.” *Id.*

Likewise, in *Michielli*, this Court upheld dismissal of charges even though the governmental misconduct of adding three additional charges three days before trial did not inject any “new facts” into the proceeding. *Michielli*, 132 Wn.2d 229. The *Michielli* court based its decision, in part, on the information that the additional charges were based on exactly the same facts as the original charge. *Id.* at 243.

Amicus cannot point to any authority applying the “new facts” standard to a motion to exclude late-disclosed discovery material. *See* Brief of Amicus WSP *generally*. Amicus’s claim that Mr. Salgado-Mendoza must prove that the late disclosure of the state’s raised “new facts” is mistaken. Brief of Amicus WSP, pp. 8-9.

2. In the alternative, the name of the state’s expert witness was a “new fact” that the state failed to provide to Mr. Salgado-Mendoza until the morning of trial.

In the alternative, if this Court extends the “new facts” standard to motions to exclude late discovery (for the first time), then the name of the state’s testifying expert constitutes a “new fact” in Mr. Salgado-Mendoza’s case.

The name of a witness who will testify on behalf of the state is a fact that must be timely disclosed to the accused. CrRLJ 4.7(a)(1)(i); *See also Brooks*, 149 Wn. App. 373 (“new facts” standard met where state failed to provide timely discovery, including of witness list and police reports containing the names of new witnesses).

As outlined in Mr. Salgado-Mendoza’s other briefing, the state’s failure to disclose the identity of its expert witness until the morning of trial forced Mr. Salgado-Mendoza to go to trial with an underprepared attorney.² Accordingly, the state’s failure to timely disclose the name of its expert had the same consequences for the defense as failure to disclose any other type of fact.

If this Court requires Mr. Salgado-Mendoza to show that the state’s mismanagement injected “new facts” into his proceeding, he has met that standard because the prosecution did not provide him with the name of its testifying expert until the morning of trial.

² It was undisputed in the trial court that a continuance would have required Mr. Salgado-Mendoza to waive his right to a speedy trial. *See* CP 42 (defense counsel’s undisputed declaration averring to that fact).

II. CONCLUSION

This Court should affirm the Court of Appeals for the reasons set forth above and in Mr. Salgado-Mendoza's other briefing.

Respectfully submitted March 1, 2017.



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Response to Amicus, postage pre-paid, to:

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In addition, I electronically filed the original with the Supreme Court.

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

Signed at Seattle, Washington on March 1, 2017.



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