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STATE OF WASHINGTON  
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NO. 93293-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Petitioner,

vs.

ASENCION SALGADO-MENDOZA,  
Respondent.

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STATE'S RESPONSE TO BRIEF OF *AMICUS CURIAE*  
WASHINGTON DEFENDER ASSOCIATION

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MICHAEL HAAS  
Prosecuting Attorney

PAMELA B. LOGINSKY  
WSBA No. 18096  
Special Deputy Prosecuting Attorney  
206 10th Ave. S.E.  
Olympia, WA 98501  
(360) 753-2175

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## I. INTRODUCTION

Amicus curiae, Washington Defender Association (“WDA”), offers numerous policy arguments in support of amending the current discovery rules regarding the State’s disclosure obligations with respect to the identification of witnesses. If such an amendment is “desirable, the rule should be adopted through the normal rule-making process. That process enables all interested and affected parties to participate in creating the rule. Foisting the rule upon courts and parties by judicial fiat could lead to unforeseen consequences.” *In re Personal Restraint of Carlstad*, 150 Wn.2d 583, 592, 80 P.3d 587 (2003). WDA may properly initiate the “normal rule-making process” by submitting a GR 9(e) request to change the existing rules to this Court.

The question before this Court in this appeal is not whether a different set of rules would be more convenient to the defense. The question before this Court is whether the district court judge abuse her discretion by denying the defendant’s request for sanctions for an alleged discovery violation. The answer to this question is an emphatic “no.”

The following is a brief response to selected points in WDA’s amicus brief. Points not addressed in this response are not conceded; rather they are not addressed because the State believes them to be adequately addressed in the State’s Petition for Review and the Supplemental Brief of Petitioner.

## II. RESPONSE TO WDA'S ARGUMENTS

Every year, hundreds of driving while under the influence (“DUI”) trials are conducted in Washington.<sup>1</sup> The State’s twelve toxicologists testify in most, if not all, of the trials.<sup>2</sup> Any single toxicologist will testify in multiple cases each year.

The toxicologists testify about a limited number of topics, including simulator solution preparation, the role the simulator solution plays in testing, retrograde extrapolation, the effects of alcohol upon a person, Widmark’s formula, and field sobriety tests.<sup>3</sup> Whether testimony is elicited on some of these topics during the State’s case in chief is dependent upon a combination of factors, including the prosecutor’s trial strategy and the appearing toxicologist’s training, experience and expertise.<sup>4</sup>

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<sup>1</sup>*See, e.g.*, Caseloads of the Courts of Washington, Courts of Limited Jurisdiction, DUI/Physical Control Misdemeanors – 2015 Annual Report (647 DUI jury trials and 250 DUI bench trials in 2015) (available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=Statewide&fileID=cityr> (last visited Feb. 10, 2017)).

<sup>2</sup>In this case, the State’s witness list identified nine toxicologists by name. *See* CP 6. The Washington State Patrol’s Amicus Curiae Brief indicates that “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 time due to maternity leave, vacation, court testimony, or other duties.” Washington State Patrol’s Amicus Curiae Brief, at 2 (hereinafter cited as “WSP Brief”).

<sup>3</sup>*See* Brief of Amicus Curiae Washington Defender Association in Support of Respondent, at 3 and 5-17 (hereinafter cited as “WDA Brief”).

<sup>4</sup>The toxicologists have a wide range of experience and education. *See* WDA Brief, at 18-22. *See also* CP 40 (referencing the WSP website, which includes curriculum vitae of the toxicologists).

An individual defense attorney is likely to handle a large number of DUI offenses each year.<sup>5</sup> Due to the limited number of toxicologists, a defense attorney is likely to confront each one on the stand within a relatively short period of time. In the instant case, Asencion Salgado-Mendoza's attorney, who had appeared as a prosecutor or defense attorney in one thousand DUI trials prior to Salgado-Mendoza's trial,<sup>6</sup> did not state that he was unfamiliar with any of the nine toxicologists whose names appeared on the State's witness list.

Regardless of which toxicologist is called to the stand in a particular case, defense attorneys who represent individuals charged with DUI must be conversant with all of the scientific concepts that a toxicologist may testify about. A defense attorney must be prepared to cross-examine on any or all of the concepts and/or be prepared to present a defense expert on one or more of the concepts. The science related to breath tests, effects of alcohol, retrograde extrapolation and Widmark's formula is well settled, allowing

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<sup>5</sup>WDA Brief, at 22 (public defenders often handle 300 to 400 cases a year); Caseloads of the Courts of Washington, Courts of Limited Jurisdiction Misdemeanor Activity - 2015 Annual Report (DUI cases constitute slightly more than ten percent of all misdemeanor filings (27,060 DUI/Physical Control out of 246,799 total violations) and approximately 23.5 percent of all misdemeanor trials (897 of the 3,804 trials were for DUI/Physical Control)).

<sup>6</sup>RP (May 9, 2013) at 22.

defense counsel to utilize decades-old materials in crafting their trial case.<sup>7</sup>

A newer defense attorney, who has not observed or participated in a number of DUI trials, may always move the presiding judge to modify the State's discovery obligations to enable the defense attorney to adequately prepare for trial in a reasonable amount of time. In such a case, the presiding judge may consider the defense attorney's specific requests; the availability of the information to the State, logistical issues—such as the distance the witness must travel from his office to the courthouse, and a myriad of other factors.

With respect to more experienced attorneys, DUI trials, although unique, all follow a predictable script. The judge, prosecutor, defense counsel and toxicologist are all familiar with the questions that will be asked, the concepts that will be addressed, and the concessions that will be extracted. Only the jury is unfamiliar with the materials that will be presented.

### III. CONCLUSION

In the instant case, Salgado-Mendoza's extremely experienced attorney never requested a case-specific alteration to the discovery rules. The district court judge did not abuse her discretion by denying Salgado-

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<sup>7</sup>The WDA Brief describes the "complex scientific subjects" that toxicologists may testify about and provides a survey of studies on each topic. The majority of the articles cited by WDA were published last century, between 1950 and 1998. *See* WDA Brief at 6-18.

Mendoza's CrRLJ 8.3(b) and CrRLJ 4.7(g)(7) motion to exclude the toxicologist's testimony, where the State fully discharged its discovery obligations five months prior to trial.

Respectfully Submitted this 10th day of February, 2017.

MICHAEL HAAS<sup>8</sup>  
Prosecuting Attorney

  
PAMELA B. LOGINSKY, WSBA No. 18096  
Special Deputy Prosecuting Attorney  
206 10th Ave. S.E.  
Olympia, WA 98501

Phone (360) 753-2175  
E-Mail [pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org)

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<sup>8</sup>Prosecutor Haas, who represented Ascension Salgado-Mendoza in the trial court, has been screened from this matter since assuming office.

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 10th day of February, 2017, I served a copy of the document to which this proof of service is attached by e-mail, pursuant to an agreement with counsel, to

Skylar Brett at skylarbrettlawoffice@gmail.com

Magda Baker at magda@defensenet.org

Lauren McLane at lauren@paduladefense.com

Peter Gonick at peterg@atg.wa.gov and Stephaniel1@atg.wa.gov

Shelley A. Williams at ShelleyW1@ATG.WA.GOV

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

Signed this 10th day of February, 2017, at Olympia, Washington.



PAMELA B. LOGINSKY, WSBA No. 18096  
Special Deputy Prosecuting Attorney  
206 10th Ave. S.E.  
Olympia, WA 98501

Phone: (360) 753-2175

E-mail: pamloginsky@waprosecutors.org