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NO. 93293-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,  
Respondent.

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

The Honorable Keith Harper, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1**

**ARGUMENT ..... 3**

**I. The state engaged in governmental mismanagement and violated the discovery rules by failing to disclose the name of its expert witness until the morning of Mr. Salgado-Mendoza’s trial..... 3**

A. The prosecution violated CrRLJ 4.7(a) and d) and engaged in mismanagement by failing to take the steps necessary to provide the defense with the name of its expert witness in a timely manner. .... 3

B. The Court of Appeals’ decision in Mr. Salgado-Mendoza’s case represents a simple application of the plain language of the discovery rules at issue..... 8

C. The crime lab’s allegedly limited resources do not alter the state’s discovery obligations. .... 11

**II. Mr. Salgado-Mendoza was prejudiced by the state’s discovery violation and governmental mismanagement. .... 13**

A. Because of the state’s mismanagement and discovery violation, Mr. Salgado-Mendoza was forced to go to trial with an attorney who was unprepared to cross-examine the prosecution’s expert witness. .... 13

B. The prejudice standard does not require Mr. Salgado-Mendoza to prove that the state’s discovery violation and mismanagement interjected “new facts” into the proceeding. .... 16

**III. Suppression of the toxicologist’s testimony was the appropriate remedy for the state’s mismanagement and discovery violation. .... 18**

**CONCLUSION ..... 20**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983) 10,  
11

**WASHINGTON CASES**

*City of Seattle v. Clewis*, 159 Wn. App. 842, 247 P.3d 449 (2011)..... 19

*City of Seattle v. Holifield*, 170 Wn.2d 230, 240 P.3d 1162 (2010) ... 18, 19

*City of Seattle v. Pearson*, 192 Wn. App. 802, 369 P.3d 194 (2016) ..... 14

*State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010) ..... 4, 7

*State v. Ahmed*, 188 Wn. App. 1033, 2015 WL 4064133 (2015), *review denied*, 185 Wn.2d 1003, 366 P.3d 1243 (2016) ..... 14

*State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993) ..... 8, 9

*State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007)..... 3

*State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009)..... 4, 7

*State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976) ..... 4, 7, 15

*State v. Dunivin*, 65 Wn. App. 728, 829 P.2d 799 (1992) ..... 9, 10

*State v. Koch*, 126 Wn. App. 589, 103 P.3d 1280 (2005) ..... 14

*State v. Mecham*, 186 Wn.2d 128, 380 P.3d 414 (2016) ..... 14

*State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997)..... 4, 7, 16, 17, 18

*State v. Moore*, 178 Wn. App. 489, 314 P.3d 1137 (2013)..... 4

*State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011)..... 10

*State v. Parvin*, 184 Wn.2d 741, 364 P.3d 94 (2015) ..... 4

<i>State v. Price</i> , 94 Wn.2d 810, 620 P.2d 994 (1980) .....	17
<i>State v. Rich</i> , 184 Wn.2d 897, 365 P.3d 746 (2016).....	14
<i>State v. Salgado-Mendoza</i> , 194 Wn. App. 234, 373 P.3d 357 (2016). 2, 13, 15, 17, 18	
<i>State v. Salgado–Mendoza</i> , 93293-0, 2016 WL 6493313 (Wash. Nov. 2, 2016) .....	3
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	9, 10
<i>State v. Wake</i> , 56 Wn. App. 472, 783 P.2d 1131 (1989) .....	12
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001) .....	5, 7, 17

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI.....	4
U.S. Const. Amend. XIV .....	4
Wash. Const. art. I, § 22.....	4

**OTHER AUTHORITIES**

American Bar Association Criminal Justice Standards for the Defense Function, Standard 4-4.3(c) (4th ed. 2015).....	15
CrRLJ 4.7 .....	3, 5, 6, 7, 8, 9, 10, 11, 12, 13
CrRLJ 8.3 .....	3, 7, 8, 11
GR 14.1 .....	14
RALJ 9.1 .....	4
Thomas A. Mauet, <i>Trial Techniques</i> 256 (8 <sup>th</sup> Ed. 2010) .....	16
<i>Tickett v. State</i> , 334 P.3d 708 (Alaska Ct. App. 2014) .....	12
<a href="http://www.dps.state.ak.us/CrimeLab/toxicology.aspx">www.dps.state.ak.us/CrimeLab/toxicology.aspx</a> .....	12

[www.wsp.wa.gov/forensics/toxlabindex.php](http://www.wsp.wa.gov/forensics/toxlabindex.php) ..... 13

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Ascension Salgado-Mendoza with driving under the influence and tried him in Jefferson County District Court. CP 56-57.

Mr. Salgado-Mendoza's attorney made a formal discovery demand, which included a request that the state disclose the names of each witness it would call at trial. CP 11-15. The prosecutor intended to rely upon the expert testimony of a toxicologist from the Washington State Patrol Crime Lab. CP 57.

But, rather than provide Mr. Salgado-Mendoza with the name of the witness it would call, the state provided Mr. Salgado-Mendoza with the names of nine toxicologists at the state laboratory. CP 6; RP (5/9/13) 20. The afternoon before trial, the state provided Mr. Salgado-Mendoza with a narrowed-down list of three toxicologists. CP 57; RP 21.

On the morning of trial – still not knowing which witness the prosecutor would call – Mr. Salgado-Mendoza moved to dismiss the charge against him. CP 39-44, 57; RP (5/9/13) 30. In the alternative, Mr. Salgado-Mendoza asked the court to suppress the toxicologist's testimony against him. RP (5/9/13) 26. The district court denied the motion. CP 57; RP 35.

Later that day, Christopher Johnston, an expert from the toxicology lab, provided expert testimony on behalf of the prosecution. CP 57; RP (5/9/13) 228-263. In addition to discussing the preparation of the simulator solution for Mr. Salgado-Mendoza's breath test, Johnston testified at length regarding the effects on alcohol on the human body and the reliability of the field sobriety tests used in Mr. Salgado-Mendoza's case. RP (5/9/13) 232-243.

Mr. Salgado-Mendoza was convicted of DUI. He appealed his case to the Superior Court under the Rules of Appeal from Courts of Limited Jurisdiction (RALJ). CP 56.

The RALJ court reversed Mr. Salgado-Mendoza's conviction. CP 60, 66. The Superior Court found that the prosecutor had violated the discovery rules and engaged in governmental mismanagement by failing to disclose the name of its expert until the day of trial. CP 60.

The Court of Appeals agreed with the RALJ court's decision.<sup>1</sup> *See State v. Salgado-Mendoza*, 194 Wn. App. 234, 373 P.3d 357 (2016), *review granted sub nom. State v. Salgado-Mendoza*, 93293-0, 2016 WL

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<sup>1</sup> The Superior Court also reversed on the independent ground that the trial court had abused its discretion by excluding testimony from Mr. Salgado-Mendoza's expert witness regarding the breathalyzer machine. CP 66. The Court of Appeals denied discretionary review of that decision. Ruling Granting Motion for Discretionary Review in Part. The state did not raise that issue in this Court. *See State's Petition for Review*. Accordingly, Mr. Salgado-Mendoza will receive a new trial regardless of the outcome of his case in this Court.

6493313 (Wash. Nov. 2, 2016). The court held that the prosecutor violated the discovery rules by failing to take reasonable steps to obtain the name of the toxicology expert witness in a timely manner as required by CrRLJ 4.7(d). *Id.* at 243. The court also found that this discovery violation amounted to governmental misconduct under CrRLJ 8.3(b). *Id.* at 249-50. The Court of Appeals ordered that the toxicologist's testimony should be suppressed on remand. *Id.* at 251.

This Court granted review. Order (11/2/16).

### **ARGUMENT**

**I. THE STATE ENGAGED IN GOVERNMENTAL MISMANAGEMENT AND VIOLATED THE DISCOVERY RULES BY FAILING TO DISCLOSE THE NAME OF ITS EXPERT WITNESS UNTIL THE MORNING OF MR. SALGADO-MENDOZA'S TRIAL.**

A. The prosecution violated CrRLJ 4.7(a) and d) and engaged in mismanagement by failing to take the steps necessary to provide the defense with the name of its expert witness in a timely manner.

The criminal discovery rules are "designed to enhance the search for truth." *State v. Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54 (2007). The purpose of the discovery rules is to "provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process." *Id.* at 434.

Courts should apply the discovery rules to “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.” *Id.* at 433.<sup>2</sup>

Late discovery resulting from governmental misconduct is grounds for dismissal. *State v. Brooks*, 149 Wn. App. 373, 391, 203 P.3d 397 (2009). Misconduct does not have to be malicious; “*simple mismanagement is sufficient.*” *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). (emphasis in original).

An accused person has a constitutional right to the effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. In order to be effective, defense counsel must investigate each case. *Id.* at 111. Such investigation includes interviewing the witnesses against the accused. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

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<sup>2</sup> RALJ 9.1 governs review of a District Court’s decision in both superior court and the courts of appeals. *State v. Moore*, 178 Wn. App. 489, 497, 314 P.3d 1137 (2013). The court of appeals reviews factual determinations for substantial evidence and legal issues *de novo*. *Id.*

A trial court’s discovery rulings are reviewed for abuse of discretion. *Moore*, 178 Wn. App. at 497. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* A court necessarily abuses its discretion by applying the wrong legal standard. *State v. Parvin*, 184 Wn.2d 741, 752, 364 P.3d 94 (2015).

An accused person is denied his/her right to counsel if the state's actions prevent defense counsel from adequately preparing for trial. *Id.* at 180.

The discovery rules require a prosecutor to disclose the names and addresses of persons the state intends to call as witnesses at trial. CrRLJ 4.7(a)(1). This subsection applies to information that is within the prosecutor's "possession or control." CrRLJ 4.7(a)(4).

Unlike documents, photos, or other substantive evidence, the name of a state witness is never truly *unavailable* to the prosecutor. A prosecutor has access to the personnel at the state crime lab. If necessary, s/he has the capability of contacting supervisors in order to pin down the name of the person who will testify at a particular trial. In short, information that is available to a party's expert witness is within that party's possession or control under CrRLJ 4.7(a)(4).

Here, the name of the toxicologist who would testify against Mr. Salgado-Mendoza was available to the prosecutor. *See State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001) ("... the conduct of employees of the crime laboratory... constitutes actions on the part of the state").

Indeed, a contrary interpretation of CrRLJ 4.7(a)(4) would absolve parties of responsibility for providing discovery of material available to their experts on the grounds that the information is not within the

possession or control the parties themselves. Such a ruling would incentivize litigants against effective and timely communication with their own witnesses.

Even if discovery material is not already in the prosecutor's possession or control, s/he must attempt to provide the information if it is specifically requested by the defense. CrRLJ 4.7(d). The prosecutor must provide discovery materials within twenty-one days of receipt of the demand. CrRLJ 4.7(a)(2).

If the prosecutor is unable to obtain the information, the court must issue any subpoenas or orders necessary to make the information available to the accused. CrRLJ 4.7(d).

Mr. Salgado-Mendoza asked the prosecutor for the names of the witnesses the state would call at trial. CP 11-15. He also asked for the toxicologist's name, specifically, several times in the weeks leading up to trial. CP 39-40.

Despite Mr. Salgado-Mendoza's repeated requests, the state did not provide the name of its toxicology expert until the morning of trial. CP 39-44, 57; RP (5/9/13) 30.

These requests triggered the prosecutor's obligation under CrRLJ 4.7(d) to attempt to make the information available to Mr. Salgado-Mendoza. If his efforts proved unsuccessful, the prosecutor should have

informed the court so that the court could make the orders necessary to compel the toxicology lab to timely disclose the name of expert who would testify against Mr. Salgado-Mendoza. CrRLJ 4.7(d). The Court of Appeals correctly held that the prosecutor had failed to comply with the requirements of the discovery rules at CrRLJ 4.7(d).

The state engaged in governmental mismanagement by failing to take necessary steps to make the name of its expert witness available to Mr. Salgado-Mendoza in time for his attorney to adequately prepare for trial. *Brooks*, 149 Wn. App. at 387; CrRLJ 4.7(d); CrRLJ 8.3. The inability of the prosecutor's office and the toxicology lab to coordinate their schedules in order to comply with the discovery rules also constitutes governmental mismanagement.<sup>3</sup> *Michielli*, 132 Wn.2d at 239-40. This mismanagement qualifies as governmental misconduct because it affected Mr. Salgado-Mendoza's constitutional rights. *Id.*; *A.N.J.*, 168 Wn.2d at 96; *Burri*, 87 Wn.2d at 181.

If the prosecutor's attempts to obtain the identity of the state's expert witness failed, the state should have notified the trial court in time for it to issue any necessary orders to allow Mr. Salgado-Mendoza to prepare for trial. CrRLJ 4.7(d).

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<sup>3</sup> As noted above, the actions of the state crime lab are also attributed to the prosecution. *Woods*, 143 Wn.2d at 583.

The state's violation of the discovery rules and governmental misconduct require reversal of Mr. Salgado-Mendoza's conviction. *Id.*; CrRLJ 4.7(d); CrRLJ 8.3(b). This Court should affirm the Court of Appeals.

B. The Court of Appeals' decision in Mr. Salgado-Mendoza's case represents a simple application of the plain language of the discovery rules at issue.

The Court of Appeals' decision in Mr. Salgado-Mendoza's case breaks no new ground. Nor does it place any novel discovery obligation upon the state.

CrRLJ 4.7(d) already makes clear that the state (rather than the defense) must take necessary steps to obtain specifically-requested discovery material that is within the control of third parties:

Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority, *the prosecuting authority shall* attempt to cause such material or information to be made available to the defendant...

CrRLJ 4.7(d) (emphasis added); *See also State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993) (prosecutor complied with criminal discovery rule by making reasonable efforts to obtain police personnel files even when the police department refused to provide them and by informing the court of the efforts that had been made).

The rule also spells out that the burden is on the court (rather than the state or the defense) to act as required if the prosecutor's efforts are unsuccessful:

... If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the *court shall* issue suitable subpoenas or orders to cause such material to be made available to the defendant.

CrRLJ 4.7(d) (emphasis added).

In order to trigger the court's obligation, however, logic dictates that the prosecutor must first inform the court that s/he has attempted to obtain the information and has been unable to do so.

In Mr. Salgado-Mendoza's case prosecutor's acquiescence to the toxicology lab's refusal to name the testifying expert and failure to inform the court that the state would be unable to comply with its discovery obligations fell short of that duty. *Blackwell*, 120 Wn.2d at 832; CP 57.

The fact that the toxicology witness who ultimately testified at trial was included in the list of nine possible experts on the state's witness list is inapposite. CP 6.

The rule requires the prosecutor to provide names and addresses of the people it "intends to call as witnesses." CrRLJ 4.7(a)(1)(v).<sup>4</sup> The

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<sup>4</sup> The state argues in its Petition for Review that the prosecution's discovery duty encompasses any material that it "may" introduce at trial. Petition for Review, pp. 10-11 (citing *State v. Dunivin*, 65 Wn. App. 728, 732, 829 P.2d 799 (1992); *State v. Thomas*, 150 (Continued)

prosecutor never intended to call eight of the toxicologists on the state's witness list.

The prosecutor's obligation to provide the defense with exculpatory evidence under *Brady*<sup>5</sup> also has no bearing on its discovery obligations under CrRLJ 4.7(d). In Mr. Salgado-Mendoza's case, the state has attempted to create a false dichotomy between its duty to "err on the side of giving too much discovery" under *Brady* and its duty to provide the defense with the name of the toxicologist it actually intends to call at trial. *See* Petition for Review, pp. 12-13.

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Wn.2d 821, 852, 83 P.3d 970 (2004); *State v. Mullen*, 171 Wn.2d 881, 896, 259 P.3d 158 (2011)).

First, CrRLJ 4.7 requires disclosure of all witnesses the state "intends to call" at trial, not any witness it "may call." CrRLJ 4.7(a)(1)(i).

Additionally, none of the authority upon which the state relies has any bearing on the discovery rules at issue in Mr. Salgado-Mendoza's case. *See Mullen*, 171 Wn.2d at 896 (state does not commit *Brady*' violation when the defense has access to enough information to ascertain the supposed exculpatory evidence alone); *Thomas*, 150 Wn.2d at 851 (state does not violate *Brady* by failing to inform the defense that a certain witness will not testify at trial); *Dunivin*, 65 Wn. App. at 732 (reversal required when the state failed to disclose before trial that its informant had been paid for the information he provided against the accused).

The state relies on the court's *dicta* in *Dunivin* noting that the fact that the state did not intend to elicit the information unless it was necessary for impeachment was not relevant to the analysis. *Id.* at 732.

Besides the fact that the *Dunivin* court's *dicta* is not controlling precedent, the information the state failed to turn over in that case was indisputably relevant to the defense. The extra information the state provided to the defense in Mr. Salgado-Mendoza's case – the names of seven expert witnesses who had nothing to do with the case – was not.

<sup>5</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983)).

But the names of the eight additional toxicology experts (whom the state had no intention of calling to testify) were not exculpatory evidence. There is no conflict between the prosecutor's obligations to provide the names only of the witnesses the state actually intends to call at trial and to provide the defense with *Brady* material.

The Court of Appeals' decision represents a straightforward application of CrRLJ 4.7(d) and CrRLJ 8.3. It does not impose any new duties or conflict with any other obligation of the state. This Court should affirm the Court of Appeals.

C. The crime lab's allegedly limited resources do not alter the state's discovery obligations.

A prosecutor's discovery obligations do not change based on the funding available to the state's expert witnesses. The discovery rules do not have any provision changing the state's duty to disclose the names of its intended witnesses based on practical considerations.

The prosecutor in Mr. Salgado-Mendoza's case also did not provide any evidence that the toxicology lab was actually unable to provide him with the name of the expert who would testify at trial in a

timely manner. RP (5/9/13) 21-34. Rather, the lab simply has a policy of failing to do so.<sup>6</sup> RP (5/9/13) 21-34.

There is no explanation in the record as to why a different practice, such as assigning each toxicologist to a certain geographic area for a specified period of time, would be unworkable.

Insofar as the lab's practice may be the result of funding or staffing issues, the state has no incentive to remedy those problems unless the prosecution is held to its obligations under the discovery rules. *See State v. Wake*, 56 Wn. App. 472, 475, 783 P.2d 1131 (1989) (noting that congestion at crime lab should not be permitted to excuse continuances based on toxicologist unavailability because the state would then have no incentive to remedy the problem).

Even so, the Court of Appeals decision in Mr. Salgado-Mendoza's case casts no aspersions on the toxicology lab's policies or hiring practices. Rather, the Court simply finds that the prosecutor in Mr. Salgado-Mendoza's case failed to comply with CrRLJ 4.7(d) by neglecting to inform the trial court that his efforts to obtain the name of

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<sup>6</sup> Likely contributing to the problem, the Washington State toxicology experts also work on Alaskan cases and travel to testify in Alaska. *See e.g. Tickett v. State*, 334 P.3d 708, 710 (Alaska Ct. App. 2014) (recounting testimony of Washington toxicology supervisor Brian Capron); *See also* <http://www.dps.state.ak.us/CrimeLab/toxicology.aspx> (noting that all drug testing samples for Alaska cases are sent to the WSP toxicology lab).

the testifying toxicologist has been unsuccessful. *See Salgado-Mendoza*, 194 Wn. App. 234.

Had the prosecutor told the court that he was unable to obtain the discovery information Mr. Salgado-Mendoza requested, the burden would have then fallen upon the court to take whatever steps were necessary to make the information available. CrRLJ 4.7(d).

The Court of Appeals properly applied the plain language of the discovery rules, which contain no exception based on the funding and resources available to the state crime lab. CrRLJ 4.7(d). This Court should affirm the Court of Appeals.

**II. MR. SALGADO-MENDOZA WAS PREJUDICED BY THE STATE'S DISCOVERY VIOLATION AND GOVERNMENTAL MISMANAGEMENT.**

A. Because of the state's mismanagement and discovery violation, Mr. Salgado-Mendoza was forced to go to trial with an attorney who was unprepared to cross-examine the prosecution's expert witness.

The toxicology lab's twenty experts are not interchangeable. They have vastly different levels of expertise in varying areas. *See* <http://www.wsp.wa.gov/forensics/toxlabindex.php> (providing Curricula Vitae for each of the toxicologists). While many of the experts have only bachelor's degrees in various scientific disciplines, several have master's degrees or higher in toxicology, and at least two have Ph.D.s in medical fields. *Id.*

A toxicologist's testimony can change widely depending on the issues and potential defenses in a case.<sup>7</sup> In this case, for example, Johnston testified at length about the reliability of the field sobriety tests that Mr. Salgado-Mendoza had been asked to perform and the effects of alcohol on the human body. RP (5/10/16) 232-239. The prosecutor asked Johnston specifically about the effects of alcohol as they related to the arresting officer's testimony about Mr. Salgado-Mendoza's behavior. RP (5/10/16) 232-239. The toxicologist also provided a protracted explanation of the horizontal gaze nystagmus (HGN) test because the prosecution considered Mr. Salgado-Mendoza's performance on that test particularly inculpatory in his case. RP (5/10/16) 237-239, 503.

Adequately prepared defense counsel would have been ready to cross-examine Johnston about the specifics of these issues as they applied to the evidence against Mr. Salgado-Mendoza. Such preparation should

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<sup>7</sup> See e.g. *State v. Mecham*, 186 Wn.2d 128, 133, 380 P.3d 414 (2016) (toxicologist testified, based on application of the rate at which alcohol is metabolized in the body, to the accused's likely BAC level at the time he was driving); *State v. Ahmed*, 188 Wn. App. 1033, 2015 WL 4064133\* (2015), *review denied*, 185 Wn.2d 1003, 366 P.3d 1243 (2016) (toxicologist testified that, in her expert opinion, the behavior of the accused was "consistent with someone who is under the influence of alcohol and/or drugs"); *City of Seattle v. Pearson*, 192 Wn. App. 802, 809, 369 P.3d 194 (2016) (toxicologist testified regarding the rate at which THC dissipates in the bloodstream and how that rate varies depending on the frequency of use); *State v. Rich*, 184 Wn.2d 897, 902, 365 P.3d 746 (2016) (toxicologist provided expert opinion regarding how many shots of alcohol accused would have had to drink to reach a certain BAC level); *State v. Koch*, 126 Wn. App. 589, 593, 103 P.3d 1280 (2005) (toxicologist testified that HGN test was 91-92% reliable at the BAC level of the accused).

\*Note that unpublished opinions of the Courts of Appeals filed after March 1, 2013 may be cited as non-binding authority. GR 14.1(a).

have included a case-specific interview with the toxicologist who would testify at trial.<sup>8</sup> *See* American Bar Association Criminal Justice Standards for the Defense Function, Standard 4-4.3(c) (4th ed. 2015) (defense counsel should seek to interview all witnesses before trial); *See also Burri*, 87 Wn.2d at 181.

Mr. Salgado-Mendoza's attorney does not appear to have the opportunity to interview Johnston before trial.<sup>9</sup>

As a result, defense counsel was not prepared to cross-examine the toxicologist regarding the shortcomings of the state's case against his client. For example, Mr. Salgado-Mendoza's attorney tried unsuccessfully to elicit that his performance on the HGN test could have been caused by the flashing lights on the police car in the background. RP (5/10/16) 241. But his questions ended up merely reinforcing the state's case. RP (5/10/16) 241. Defense counsel also tried to confront the toxicologist with

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<sup>8</sup> Mr. Salgado-Mendoza's attorney told the court that he did not have the obligation to prepare to cross-examine all nine toxicologists listed on the state's witness list. RP (5/9/13) 24-25. The Court of Appeals dissent cites this statement as evidence that defense counsel *could have* prepared to cross-examine all nine witnesses if he had put in the effort. *Salgado-Mendoza*, 194 Wn. App. at 255, (Worswick, J. dissenting)

But interviewing nine experts regarding the evidence in Mr. Salgado-Mendoza's case (in addition to other background investigation) would have been extremely onerous. In fact, it would likely have been impossible if the Court of Appeals' dissent's allegations regarding the extensive demands on the toxicologists' time are accurate. *Id.* at 259-60.

<sup>9</sup> Rather, defense counsel was only given the opportunity to briefly question the witness in open court, without the jury present. RP (5/10/16) 244-249.

a scientific study that the witness had never seen before. RP (5/10/16) 243.

In these attempts, defense counsel violated one of the basic tenets of cross-examination: that an attorney should not ask a question on cross-examination to which s/he does not already know the answer. *See* Thomas A. Mauet, *Trial Techniques* 256 (8<sup>th</sup> Ed. 2010). Because he had not been able to actually prepare to cross-examine the toxicologist, defense counsel resorted to ineffectively grasping at straws rather than raising reasons to doubt the state's evidence against his client.

B. The prejudice standard does not require Mr. Salgado-Mendoza to prove that the state's discovery violation and mismanagement interjected "new facts" into the proceeding.

Governmental misconduct warrants dismissal if the accused can demonstrate misconduct and prejudice. *Michielli*, 132 Wn.2d at 239-40. The accused is prejudiced by governmental mismanagement if it affects his/her right to a speedy trial or "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." *Id.*

A continuance would have violated Mr. Salgado-Mendoza's right to a speedy trial. RP (5/9/13) 36. Indeed, a continuance would almost certainly not have caused the state to comply with its discovery obligations, but would have resulted in a narrowing down of the list of

possible witnesses to three names on the eve of trial and the provision of the name of the actual testifying witness again only on the day trial began.

As a result, Mr. Salgado-Mendoza was forced to go to trial with an attorney who had not had the opportunity to adequately prepare to cross-examine the state's expert witness.

Still, the Court of Appeals dissent contends that Mr. Salgado-Mendoza cannot show prejudice because there were no "new facts" interjected into the proceeding by the state's rule violation. *Salgado-Mendoza*, 194 Wn. App. at 260, (Worswick, J. dissenting) (citing *Woods*, 143 Wn.2d at 583-84; *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980); *Michielli*, 132 Wn.2d at 244-45).

But the "new facts" standard only applies to the remedy of dismissal. See e.g. *Woods*, 143 Wn.2d at 585 n. 6 ("new facts" required for dismissal but the trial court could still have imposed other sanctions for the state's discovery violations).

Additionally, as the Court of Appeals points out, asking Mr. Salgado-Mendoza to point to "new facts" resulting from the state's late disclosure of its expert witness – when the late disclosure, itself, rendered his attorney unable to investigate that witness – "would be asking Salgado-Mendoza to perform an impossible task." *Salgado-Mendoza*, 194 Wn. App. at 262.

Mr. Salgado-Mendoza was prejudiced by the state's mismanagement and discovery violation because he was forced to go to trial with unprepared counsel. *Michielli*, 132 Wn.2d at 239-40. This Court should affirm the Court of Appeals.

**III. SUPPRESSION OF THE TOXICOLOGIST'S TESTIMONY WAS THE APPROPRIATE REMEDY FOR THE STATE'S MISMANAGEMENT AND DISCOVERY VIOLATION.**

A court can dismiss a case for governmental misconduct, but must first consider lesser sanctions. *City of Seattle v. Holifield*, 170 Wn.2d 230, 238-39, 240 P.3d 1162 (2010).

Suppression is an appropriate, less-severe remedy when it would eliminate the potential prejudice caused by the government's misconduct. *Id.* at 239.

Here, suppression of the toxicologist's testimony was an appropriate and less-restrictive remedy for the discovery violation and governmental mismanagement in Mr. Salgado-Mendoza's case. This is because the prejudice to Mr. Salgado-Mendoza – the Hobson's choice between his rights to adequately prepared counsel and to a speedy trial – could be eliminated only by the suppression of the evidence. *Id.*<sup>10</sup>

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<sup>10</sup> The Court of Appeals also noted that the state likely had sufficient evidence to convict Mr. Salgado-Mendoza even without the Breathalyzer evidence. *Salgado-Mendoza*, 194 Wn. App. at 251.

As outlined above, a continuance would not have remedied the prejudice against Mr. Salgado-Mendoza. Instead, it would have just raised the same problem again when the prosecutor once more narrowed the list of potential witnesses down to three names on the eve of the new trial date and then named the expert the state would call only once trial had begun.

As a result, neither Mr. Salgado-Mendoza nor the prosecutor asked the trial court for a continuance.<sup>11</sup> *See* RP (5/9/13) 21-35.

Suppression of the toxicologist's testimony was the only remedy available to the trial court that would have permitted the case to go forward while protecting Mr. Salgado-Mendoza's right to adequately prepared counsel. *Holifield*, 170 Wn.2d at 239. This court should affirm the Court of Appeals.

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<sup>11</sup> Still, the state asks this Court to decide when a toxicologist's unavailability would constitute good cause to continue trial. Petition for Review, p. 3 But the necessary facts to make such a determination are not on the record in this case.

Busy witnesses (such as other types of forensic scientists, police officers, and professionals from state psychiatric hospitals) are regularly timely named on the state's witness list and successfully testify without requiring copious continuances. Trial courts are generally able to work around the witnesses' other obligations by scheduling creatively within the time for trial. On the rare occasion that a named witness was truly unavailable, the good cause determination would be made within the court's discretion, based on the specific facts of the case, including *inter alia* whether due diligence had been exercised in obtaining his/her presence. *See e.g. City of Seattle v. Clewis*, 159 Wn. App. 842, 848, 247 P.3d 449 (2011).

**CONCLUSION**

For the reasons set forth above, Mr. Salgado-Mendoza's conviction must be reversed based on the state's discovery violations and governmental mismanagement and the toxicologist's testimony must be suppressed on remand. This Court should affirm the Court of Appeals.

Respectfully submitted on December 2, 2016,



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Skylar T. Brett, WSBA No. 45475  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of the Supplemental Brief, postage prepaid, to:

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1657 Carlsborg Rd  
Sequim, WA 98382

and I sent an electronic copy, with the permission of the recipient(s), to:

Pam Loginsky  
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Christopher Ashcraft  
cashcraft@cityofpt.us

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 December 2, 2016.



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Attached is Respondent's Supplemental Brief.

Thank you.

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