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IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 74300-7-1)

CITY OF KIRKLAND,

Respondent,

v.

HOPE STEVENS,

Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF IN LIGHT OF THIS
COURT'S RECENT DECISION IN *STATE OF WASHINGTON* v.
ASCENSION SALGADO-MENDOZA, CASE NO. 93293-0

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I. ISSUE PRESENTED

1. Whether, in light of *State v. Salgado-Mendoza*, it is clear that “simple mismanagement” of the discovery process by the prosecution is sufficient to support a finding of governmental misconduct under CrRLJ 8.3(b)?
2. Whether, in light of *State v. Salgado-Mendoza*, it is clear that the trial judge did not abuse his discretion in dismissing the charges against Petitioner when the un rebutted evidence showed that the prosecution disclosed four unique and important witnesses on the eve of trial, and thereby forced the Petitioner to choose between her right to receive discovery in time to adequately prepare for trial and her right to a speedy trial?

II. ARGUMENT

A. Background

In his oral ruling granting Petitioner’s motion to dismiss under CrRLJ 8.3(b) and CrRLJ 4.7, the trial judge noted that the City’s complaining witnesses had engaged in a pattern of obstructionist conduct. These witnesses refused to questions that were essential to the defense of the charges and then repeatedly failed to appear for court-ordered depositions. Moreover, the trial judge faulted the City’s prosecutors for its last-minute disclosure of four trial witnesses.

[O]n December 30, 2014, more than six months after the government filed charges against the defendant, and less than two weeks before trial readiness, the City filed an additional witness list endorsing four additional witnesses. The witness list included two medical health professionals, a

doctor and a physician's assistant. Both apparently took part in examining the alleged victim/witness after the assault.

The defense again moved to dismiss charges, citing mismanagement on the part of the prosecutors by waiting over six months to endorse expert witnesses only days before the trial. Again, [on January 6th] the court chose to reserve ruling and urged defense counsel to attempt to interview the newly-endorsed witnesses with the time left before trial.

Today, according to declarations filed by the defense, the two medical professionals have declined to discuss their involvement in this case citing privilege. It's interesting to note that the government has endorsed two doctor witnesses, albeit late, to testify as to the condition of the alleged victim following the altercation. Still, both medical witnesses are refusing to discuss the case with the defense. Consequently, the defendant will hear this crucial testimony for the first time during trial in front of the jury. The testimony, and that of others – this testimony, and that of others, will be a complete surprise to the defendant.

According to defense counsel, the third witness endorsed by the City on December 30th, 2014 is Jeffrey Obert. . . . Mr. Obert declined to appear for the [defense] interview.

The fourth witness added to the government's list on December 30, 2014 is a Corey Parks. According to the declaration filed by the defense, this witness lives in Florida and has also declined to be interviewed over the phone. According to the declaration, Ms. Parks states she has not received a subpoena to appear in court . . .

Consequently, there are four witnesses that have all refused to talk to defense counsel. These witnesses were added to the government's witness list less than two weeks before trial readiness and more than six months after charges were filed

....

RP III, 12-14. Acknowledging that “a dismissal of a criminal prosecution is an extraordinary remedy,” the trial judge concluded that he had no choice

but to dismiss the charges because the government's mismanagement had forced the Petitioner to choose between her right to a speedy trial, and her due process rights to adequately prepare for trial. RP III, 15-16.

The City appealed the dismissal to the King County Superior Court. In reversing the dismissal, the Superior Court RALJ judge complained that the trial judge had failed to file written findings in support of the dismissal. RP IV, 7-8. In addition, the RALJ judge emphasized that the trial judge did not find that the prosecutors had engaged in "gross mismanagement" of the case. *See* RP IV, 12.

Petitioner has repeatedly argued that "gross mismanagement" is not required, and that "simple mismanagement" is sufficient. *See, e.g., State v. Dailey*, 93 Wn.2d 454, 457 (1980) ("we have made it clear that "governmental misconduct" need not be of an evil or dishonest nature, simple mismanagement is sufficient."); *State v. Michielli*, 132 Wn.2d 229, 243 (1997) (same); *State v. Blackwell*, 120 Wn.2d 822, 831 (1993) (same); *State v. Brooks*, 149 Wn.App. 373, 384 (2009) (same). Nevertheless, this Court of Appeals refused to grant discretionary review.

During February 2017, this Court's Commissioner reached a similar conclusion. *See* Ruling Denying Review. When discussing CrRLJ 8.3(b), the Commissioner attempted to side-step the issue and failed to make any definitive statement whether the case presented sufficient evidence of

government misconduct. Nevertheless, rather than applying the well-recognized test that was first enunciated in *Michielli*, the Commissioner opined that a dismissal can only be ordered in a case where a prosecutor engages in “truly egregious” conduct. *See id.* at 7.

B. Procedural History in this Court

Petitioner has moved this Court to modify the Commissioner’s ruling. Initially, the Court deferred any ruling pending a final decision in *State of Washington v. Ascencion Salgado-Mendoza*, Supreme Court No. 93293-0. *See* Order (May 2, 2017). Subsequently, following the decision in *Salgado-Mendoza*, the Court lifted the previous stay and set this case for consideration. *See* Order (December 14, 2017).

C. The RALJ Judge Committed Obvious Error and his Ruling Cannot be Squared with this Court’s Recent Decision in State v. Salgado-Mendoza

Background

On October 12, 2017, this Court issued its decision in *State v. Salgado-Mendoza*, 189 Wn.2d 420 (2017). There, the Court was asked to decide whether the district court in *Salgado-Mendoza*’s 2013 trial for driving under the influence abused its discretion by refusing to suppress the testimony of the State’s toxicology witness.

In examining the trial court’s decision in *Salgado-Mendoza*, the Court explained:

The State initially disclosed the names of nine toxicologists from the Washington State Patrol toxicology laboratory, indicating its intent to call “one of the following.” Clerk's Papers (CP) at 6. It whittled the list to three names the day before trial, but did not specify which toxicologist it would call until the morning of trial, noting that it provided the witness's name “as soon as we had it and that's all that we can do in terms of disclosure.” Verbatim Report of Proceedings (VRP) (May 9, 2013) at 31.

See id. at 424. Salgado-Mendoza moved to suppress the toxicologist's testimony under CrRLJ 8.3(b) based on late disclosure, asking the court to “send a message” to the state patrol crime lab. *See id.* Yet the trial court refused, finding no actual prejudice to the defense and observing that the practice of disclosing a list of available toxicologists rather than a specific witness was driven more by underfunding of the crime labs than by mismanagement. *See id.*

Salgado-Mendoza appealed to the superior court, which found the district court had abused its discretion. The Court of Appeals affirmed the superior court's decision, reasoning that the delayed disclosure violated the discovery rules and caused prejudice to the defendant.

A majority of this Court reversed the decision of the Court of Appeals and affirmed the decision of the district court. In so ruling, every member of this Court concluded that the State's disclosure practice amounted to mismanagement within the meaning of CrRLJ 8.3(b). However, the majority ultimately held that the district court did not abuse

its discretion when it found that Salgado-Mendoza had not demonstrated actual prejudice. As the majority emphasized:

The trial court considered all the circumstances, including the nature of the witness's testimony and the five months that counsel had to prepare following the State's initial disclosure. Thus, on this record, we cannot say the district court's ruling was "manifestly unreasonable" and thus an abuse of discretion.

Id.

The Court's reasoning in *Salgado-Mendoza* applies with great force in this case – and it cannot be squared with the ruling of the RALJ judge. Moreover, the *Salgado-Mendoza* decision demonstrates that this Court's Commissioner misapplied the appropriate legal standards.

Simple Mismanagement is Sufficient

The *Salgado-Mendoza* Court made clear that a defendant need not prove gross mismanagement to support a claim under CrRLJ 8.3(b). As the majority explained:

The party seeking relief bears the burden to show misconduct by a preponderance of the evidence. *See, e.g., State v. Rohrich*, 149 Wn.2d 647, 654 (2003). However, the party does not need to prove bad faith on the part of the prosecutor. *See State v. Dailey*, 93 Wn.2d 454, 457 (1980). As this court noted in *Dailey*, the "governmental misconduct' need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Id.*

Id. at 431.

In *Salgado-Mendoza*, every member of this Court concluded that the prosecution's late disclosure of a single witness, the State toxicologist, constituted governmental misconduct. *See id.* at 424 ("the State's disclosure practice amounted to mismanagement within the meaning of CrRLJ 8.3(b)); *id.* at 439-40 (Madsen, J, dissenting) ("I agree with the majority that the State's failure to disclose the name of the toxicologist who would testify at Ascension Salgado-Mendoza's trial until the morning of trial was mismanagement sufficient to show governmental misconduct under CrRLJ 8.3(b)."). The majority reached this conclusion even though it also noted that the delay resulted from staffing and resource shortages at the toxicology lab – but not from any failure of due diligence on the part of the prosecutor. *See id.* at 425.

Here, the prosecuting authorities engaged in a cavalcade of discovery violations. For example, there was un rebutted evidence that the prosecutors delayed the deposition of their key witnesses; the prosecutors refused to promptly reschedule these depositions when the witnesses failed to appear; the prosecutors refused to provide discovery of their own interview notes; the prosecutors defended their refusal with a frivolous claim of work-product privilege; the prosecutors waited for six months to identify four critical witnesses just two weeks before the readiness hearing; the prosecutors failed to subpoena their belatedly disclosed experts; and the

prosecutors failed to provide their experts with medical releases thus making it impossible for defense counsel to interview them. Here, unlike the prosecutors in *Salgado-Mendoza*, the City's prosecutors could offer no justification or explanation for their dilatory conduct.

The RALJ judge obviously erred when he concluded that these numerous discovery violations did not support a finding of government mismanagement. That judge's ruling was grounded upon the mistaken notion that a defendant is required to prove "gross misconduct" or "willful" violations of the discovery rules. Likewise, this Court's Commissioner erred when she suggested that the late disclosure of witnesses would not amount to mismanagement within the meaning of CrRLJ 8.3(b). It matters not whether this conduct was "truly egregious." In light of the decisions in *Salgado-Mendoza*, it is apparent that the City's prosecutors engaged in mismanagement of the case when they waited more than six months to disclose four important witnesses.

The RALJ Judge Refused to Apply the Appropriate Standard of Review

In *Salgado-Mendoza*, this Court examined whether a trial court erred when it refused to dismiss the case based on the late identification of a single government witness. Thus, the Court was called upon to decide whether the trial judge's decision was manifestly unreasonable in light of

the record in that case. *See id.* at 427 (discussing the appropriate standard of review).

The RALJ judge in this case was likewise expected to apply the abuse of discretion standard when reviewing the trial judge's ruling. However, that standard is somewhat distinct in a case, such as this one, where the trial judge had determined that dismissal was appropriate:

When reviewing a trial court's dismissal of charges under CrR 8.3(b), appellate courts must ask whether the trial court's conclusion that both elements were satisfied was a "manifest abuse of discretion." *Michielli*, 132 Wn.2d at 240. The reviewing court will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830 (1993); *Michielli*, 132 Wn.2d at 240. A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*, 79 Wn.App. 786, 793 (1995). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," *State v. Lewis*, 115 Wn.2d 294, 298–99 (1990), and arrives at a decision "outside the range of acceptable choices." *Rundquist*, 79 Wn.App. at 793. However, as we explained in *Michielli*, "[e]ven if the trial court based its dismissal of the charges on . . . inappropriate grounds," thus abusing its discretion, the appellate court may yet "affirm the lower court's judgment on any ground within the pleadings and proof": "If we find Defendant raised and proved sufficient grounds for a CrR 8.3(b) dismissal, we must then affirm the trial court's dismissal of the charges." 132 Wn.2d at 242–43.

State v. Rohrich, 149 Wn.2d 647, 654 (2003).

The RALJ judge simply refused to apply the correct standard of review. Instead, he chose to substitute his judgement for the decision of the trial judge. Remarkably, the RALJ judge advised the parties that he would not decide whether any reasonable trial judge could have entered a dismissal given the record in this case. *See* RP IV, 15. The RALJ judge claimed that this standard was not proper even though “there are cases that articulated it that way.” *Id.*

In *Salgado-Mendoza*, a majority of this Court emphasized that the “trial court was in the best position to make a fair call” and “disagreement in result is an insufficient basis to find an abuse of discretion.” *Id.* at 429. Here, the trial judge applied the correct legal standards and issued a decision that was amply supported by the record. That judge held three separate court hearings before issuing his ruling and he afforded the City every opportunity to remedy the discovery violations prior to trial. The RALJ judge obviously erred in reversing that decision, as there was no basis to conclude that “no reasonable person would take the view adopted by the trial court.” *See id.* (quoting *State v. Perez-Cervantes*, 141 Wn.2d 468, 475 (2000)). Simply put, the trial judge’s decision was within the range of acceptable choices in light of the pattern of mismanagement in the case.

**Petitioner Was Very Clearly Prejudiced by the City's
Mismanagement in this Case**

In *Salgado-Mendoza*, the majority ultimately concluded that the trial court had not abused its discretion when it refused to dismiss the charges. In so ruling, the majority explained that the State's initial error was a matter of "overdisclosure." *Id.* at 438. The majority explained that the type of expert at issue in that case – a state toxicologist – cannot be compared with a witness who would present unique testimony at a criminal trial. *See id.* Although the nine toxicologists that were included on the list were not truly fungible as had been suggested by the district court, the fact remained that "any state toxicologist called to testify in Salgado-Mendoza's case would give similar substantive testimony: a description of the effects of alcohol on the body, how blood-alcohol is measured, and procedures for roadside sobriety testing, etc." *Id.* In essence, the majority concluded that the witness in question was somewhat generic and that the defense had fair and adequate opportunity to respond to the State's discovery disclosures.

Here, by contrast, the City failed to disclose four important witnesses until the eve of trial. Each of these witnesses would present unique testimony and they are in no way comparable to the generic expert in *Salgado-Mendoza*. Two of the witnesses were medical experts; and two of the witnesses were expected to present eye-witness testimony regarding

the incidents in question. Because of the prosecution's last-minute disclosures, the defense was deprived of any fair opportunity to prepare for their testimony at trial. All four of the witnesses refused to be interviewed prior to trial. Moreover, given the City's mismanagement, the defense was left with no time to arrange depositions.

And, it is noteworthy that the City made these late disclosures at the very same time that the City's other witnesses were engaging in a pattern of obstructionist conduct. Because of the intransigence of these other witnesses, the defense had been forced to attend a series of court-ordered depositions. Yet, although these witnesses had previously agreed to meet with the City's prosecutors to discuss the case, they refused to appear at these court-ordered depositions.

Simply put, in light of these circumstances, the trial court was undoubtedly correct when he concluded:

Here the Defendant's right to a fair trial has been materially affected in that the Defendant is now at the point where she is compelled to choose between two distinct rights – either proceed as scheduled and hear testimony from many witnesses for the first time during trial, thereby violating her effective assistance of counsel right to confront witnesses and right to fair due process or give up her right to speedy trial and ask for yet another extension in hopes the witnesses may cooperate. The Government simply cannot force a defendant, a criminal defendant, to choose between these rights.

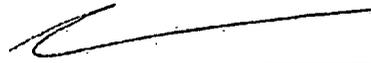
RP III, 14-15.

By contrast, the RALJ judge's decision was obviously erroneous – and patently unreasonable – as there was no basis to conclude that trial judge's decision was an abuse of discretion.

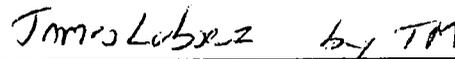
IV. CONCLUSION

For all of these reasons, and in the interests of justice, Petitioner asks this Court to modify the Commissioner's Ruling, to grant discretionary review of the Superior Court's RALJ decision, and to summarily vacate the decision of the RALJ judge.

RESPECTFULLY SUBMITTED this 21st day of January, 2018.



Todd Maybrown, WSBA # 18557



James E. Lobsenz, WSBA # 8787

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Allen, Hansen, Maybrow & Offenbecher, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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