AMENDED 7Z0622235

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON V.

LAST	**FIRST**	**MIDDLE**
KERLEY	JAMIE	DONALD
ADDRESS: 155 PORTER RD		
CITY KALAMA	**STATE** WA	**ZIP** 98625	**PHONE**

D/L NUMBER	**ST**	**SEX**	**RACE**	**DOB**	**HGT**	**WGT**	**EYE**
KERLEJD302D8	WA	M	W	3/28/1970	508	175	BRO

COUNT 01 - RECKLESS DRIVING - 46.61.500(1)
That he, JAMIE DONALD KERLEY, in the County of Clark, State of Washington, on or about May 4, 2017, did drive a vehicle in willful or wanton disregard for the safety of persons or property; contrary to Revised Code of Washington 46.61.500(1).

DATED: May 8, 2017

50215

Kelly M. Ryan, WSBA #50215
Deputy Prosecuting Attorney

LE Reports: (WSP 17-12709)

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)

#6

FILED

2018 APR -9 PM 1:01

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JAMIE DONALD KERLEY Defendant.	**INFORMATION** No. 18-1-00998-7 (WSP 17-12709)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - VEHICULAR ASSAULT - 46.61.522 /46.61.522(1)(a) /46.61.522(1)(c)
That he, JAMIE DONALD KERLEY, in the County of Clark, State of Washington, on or about May 4, 2017 did operate or drive a vehicle in a reckless manner and did cause substantial bodily harm to another, to wit: Bryan Covey, and/or did operate or drive a vehicle with disregard for the safety of others and did cause substantial bodily harm to another, to wit: Bryan Covey; contrary to Revised Code of Washington 46.61.522(1)(a), 46.61.522(1)(c)

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(33), RCW 9.94A.030(38), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

ANTHONY F. GOLIK
Prosecuting Attorney in and for
Clark County, Washington

Date: April 5, 2018

BY: _____
Kelly M. Ryan, WSBA #50215
Deputy Prosecuting Attorney

DEFENDANT: JAMIE DONALD KERLEY			
RACE: W	**SEX:** M	**DOB:** 03/28/1970	
DOL: KERLEJD302D8 WA		**SID:** MT01412820	
HGT: 508	**WGT:** 175	**EYES:** BRO	**HAIR:** BLK
WA DOC:		**FBI:** 84330TA8	
LAST KNOWN ADDRESS(ES):			
DOL - 155 PORTER RD, KALAMA WA 98625			

CLARK COUNTY PROSECUTING ATTORNEY
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FILED
APR 09 2018
Scott G. Weber, Clerk, Clark Co.
10:1pm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JAMIE DONALD KERLEY Defendant.	NOTICE OF SPECIAL PUNISHMENT PROVISION 2018-1-00998-7

COMES NOW, the State of Washington, by and through the Prosecuting Attorney and advises the defendant that the following offense(s) with which the defendant has been charged, is/are either classified as a "most serious offense" pursuant to RCW 9.94A.030(32) or is/are a listed offense pursuant to RCW 9.94A.030(38)(a).

Count	Crime Date	Crime	RCW
01	On or about May 4, 2017	VEHICULAR ASSAULT	46.61.522 / 46.61.522(1)(a) / 46.61.522(1)(c)

A person who is convicted in this state of any felony considered a 'most serious offense' and who has been convicted on at least two separate occasions of crimes in this state or another state that would be considered 'most serious offense', shall be classified as a persistent offender and shall be sentenced to a term of total confinement of life imprisonment without the possibility of parole.

DATED this 5 day of April, 2018.

ANTHONY F. GOLIK
Prosecuting Attorney

By: _____
Kelly M. Ryan, WSBA #50215
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
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7Z0622235 WSP CT

FILED
Clark County District Court
May 05, 2017

ARRESTING OFFICER'S DECLARATION OF PROBABLE CAUSE

The undersigned law enforcement officer states that the person whose name appears on the attached Pre-book sheet, which is hereby incorporated by reference, was arrested without a warrant on the date and time shown thereon for the crimes committed in Clark County, Washington based on the following circumstances.

Defendant: Kerley, Jamie D. **DOB: 03-28-1970**

I, Trooper T. S. Gates #558, being first duly sworn upon oath, depose and say:
That I am a Trooper with the Washington State Patrol and have been commissioned since August 22, 2002.

One of the core goals of the Washington State Patrol is reducing aggressive driving on Washington's highways. Along with education and prevention is the enforcement side of combating this problem. In order to deter aggressive driving the Washington State Patrol has used alternative means to observe and record these drivers. The Aggressive Driving Apprehension Team (ADAT) utilizes the use traditional and nontraditional police vehicles as well as the use of patrol motorcycles, and aircraft to observe, record, and arrest these violators. ADAT focuses on aggressive driving violations, which are likely to escalate into collisions, road rage and/or assaults. On the date and time listed on the citation/infraction, I was driving an unmarked dark blue Dodge Charger, in full duty uniform and I was working in Clark County, Washington. The weather was overcast and the roadway was dry.

May 04, 2017 at approximately 1628 hours I was on duty in Clark County Washington and was informed of a two vehicle, injury unknown collision on I-5 northbound, just north of the split that was a possible road rage involved incident. While responding I was informed it was a two vehicle collision and both vehicles were on the right shoulder now.

I arrived on scene at approximately 1632 hours and observed two vehicles were on the right shoulder, with a large fire apparatus behind both, blocking the right lane. As I approached, I observed paramedics were parked in front of the vehicles, and preparing to take the driver of a black Volkswagen Passat out and place him on the gurney.

I contacted the driver in the Volkswagen who explained he was in the left lane and a car came out of no were and cut him off, forcing him onto the left shoulder. He said then the same car spun around and hit him on the passenger's side. I asked him what car and he pointed to the car in front of him saying it was that car. I obtained his information and contacted a maroon Chevrolet 4-door that was parked nearly 10 vehicle lengths in front of the Volkswagen.

I contacted a lone male (Mr. Jamie D. Kerley) who was sitting in the passenger's seat and asked him what happened. The subject stated he was moving into the left lane and the driver of the Volkswagen sped up because he didn't see the Volkswagen and they both spun out of control and he ended up hitting the Volkswagen on the passenger side. I obtained his information and as I was telling him I would be back with the exchange I noticed a male standing in front of the Chevrolet, next to the paramedics vehicle. I contacted him and asked him what was going on.

The male subject, later identified as Mr. Christian Navarro, handed me a piece of paper with three names on it. Mr. Navarro told me he and the two other's had witnessed the maroon Chevrolet driving very aggressively, passing everyone and making multiple lane changes as it passed them and moved into the left lane. Mr. Navarro stated the maroon Chevrolet went around the Volkswagen on the inside shoulder and cut off the Volkswagen. He said they both started spinning and to him it looked like the Chevrolet came around and intentionally hit the Volkswagen on the passenger's side, after they both started spinning around. Mr. Navarro told me the driver of the C-Tran van saw more than he did. I asked Mr. Navarro what he thought of the Chevrolet driver's actions and he stated they were very aggressive.

I then contacted the driver of the C-Tran van, Mr. Mark Chapa who told me the same story as Mr. Navarro. Mr. Chapa stated the Chevrolet was initially behind them very close as they were in the left lane. He said the Chevrolet went around them and several other vehicles and made his way back into the left lane. He said it looked as if the Chevrolet was just trying to get around everyone. He said then the Chevrolet got right on the Volkswagens butt as if he was trying to get the Volkswagen to move. I asked him how close and he said less than ½ a car length. Me. Chapa said the next thing he saw was the Chevrolet going around the Volkswagen on the left shoulder. He said just as he started to get around him, they both started swerving back and forth and then both started spinning out of control, and then the Chevrolet ran into the passenger's side of the Volkswagen. See attached statement from Mr. Chapa.

I then returned to my patrol vehicle and completed the Police Traffic Collision Report (PTCR) and checked the driving status for the driver of the Chevrolet, Mr. Kerley, which returned no violations. I chose to cite on scene and release for reckless driving based on the statements from Mr. Navarro and Mr. Chapa.

I then returned to the defendant and informed him of my decision and advised him of his constitutional rights to which he stated he understood. The defendant stated he did not pass on the left shoulder, that the driver of the Volkswagen did that.

Mr. Jamie D. Kerley was cited for:

[X] RCW 46.61.500 Reckless Driving. The defendant was driving in a willful and wanton disregard for the safety of person or property.

Aggressive Violations committed as marked below:
[X] Passing all traffic in area.
[X] Catching up to traffic.
[X] Traveling in an area of high collision rate.
[X] Following too closely
[X] Multiple lane changes

Aggressive Driving definition: The commission of two or more moving violations that likely to endanger other person or property, or any single intentional violation that requires a defensive reaction of another driver or any speed 20 miles or more over the posted speed limit.(Washington State Patrol Definition)

[X] Other Violation(s) and/or Comments: See attached PTCR..

TRAFFIC STOP AUDIO/VIDEO RECORDED.

The undersigned declares and certifies under penalty of perjury under the laws of the State of Washington that the preceding statement is true and correct to the best of his knowledge.

Signed this May 4, 2017 at 2129 **hours in Vancouver, Clark County, Washington.**

Trooper T. S. Gates _____ _____ **558**____
Printed name **Signature** **PSN**

The undersigned Judge/Magistrate/Commissioner hereby certifies that I have read or had read to me the above statement of probable cause to arrest and that I find probable cause to arrest is X **established** _____ **not established (release defendant).**

Signed this 6 **day of** Jan 1 _____, 2018 **in Vancouver, Clark County, Washington**

_____ **Time:** 4:09pm
Judge/Magistrate

ARRESTING OFFICER'S DECLARATION OF PROBABLE CAUSE

The undersigned law enforcement officer states that the person whose name appears on the attached Pre-book sheet, which is hereby incorporated by reference, was arrested without a warrant on the date and time shown thereon for the crimes committed in Clark County, Washington based on the following circumstances.

Defendant: Kerley, Jamie D. **DOB: 03-28-1970**

Supplemental PC Statement

On February 9, 2018 I received information that the victim Mr. Bryan R. Covey has injuries that would amount to RCW 46.61.522, Vehicular Assault. The defendant was operating a vehicle in a reckless manner and or with disregard for the safety of other's that caused substantial bodily harm to Mr. Covey.

Mr. Covey's medical records indicate several bulging disks and post concussive headaches.

TRAFFIC STOP AUDIO/VIDEO RECORDED.

The undersigned declares and certifies under penalty of perjury under the laws of the State of Washington that the preceding statement is true and correct to the best of his knowledge.

Signed this February 09, 2018 at 2211 **hours in Vancouver, Clark County, Washington.**

Trooper T. S. Gates _____ _____ **558**____
Printed name **Signature** **PSN**

The undersigned Judge/Magistrate/Commissioner hereby certifies that I have read or had read to me the above statement of probable cause to arrest and that I find probable cause to arrest is X **established**_____**not established (release defendant).**

Signed this 6 **day of** April, **20**18 **in Vancouver, Clark County, Washington**

_____ **Time:** 4:09pm
Judge~~/Magistrate~~

2
HC
Jail

#2

Lee

FILED
AUG 27 2021 3:10
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. JAMIE DONALD KERLEY, Defendant	No. 18-1-00998-7 MOTION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE

MOTION

COMES NOW, Kelly M. Ryan, Deputy Prosecuting Attorney, and moves the above Court to dismiss the criminal charges filed in the above-entitled case for the reason that: the State is unable to prove the charge beyond a reasonable doubt at this time.

DATED this 19 day of August, 2021.

Kelly Ryan
Kelly M. Ryan, WSBA #50215
Deputy Prosecuting Attorney

ORDER

THIS MATTER having come before the Court upon the Motion and the Court now being fully advised in the premises and on consideration whereof finds said Motion should be sustained;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said case is hereby dismissed without prejudice.

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IT IS FURTHER ORDERED that bail and release conditions previously imposed are hereby exonerated and the Clerk shall disburse it to the appropriate person.

DONE IN OPEN COURT this 30th day of August, 2021.

THE HONORABLE JOHN P. FAIRGRIEVE
JUDGE OF THE SUPERIOR COURT

Presented by:

Kelly Ryan
Kelly M. Ryan, WSBA #50215
Deputy Prosecuting Attorney

Agreed to:

Angus Lee
Attorney for Defendant

JAMIE DONALD KERLEY
Defendant

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4 pages

HON. JOHN FAIRGRIEVE

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF, vs. JAMIE KERLEY, DEFENDANT.	No. 18-1-00998-7 JAMIE KERLEY'S TRIAL MEMORANDUM

COMES NOW Jamie Kerley, by and through the Angus Lee Law Firm, and submits this trial memorandum to the Honorable Judge John Fairgrieve, of the Clark County Superior Court. Motions in limine have been filed in a separate pleading.

A. INTRODUCTION

Mr. Kerley was driving on I-205 when he was involved in a sideswipe with a car driven on the left side shoulder of the freeway by Brian Covey. Mr. Covey was under the influence of drugs at the time. The sideswipe did minimal damage to the two cars. Both cars were operable, but Mr. Covey's car had a flat tire as a result and later needed to be towed for that reason. The damage to Covey's car was so minimal he did not have it repaired.

The Trooper on scene for the accident issued a reckless driving citation to Mr. Kerley because the Trooper mistakenly believed that Mr. Kerley was the one driving on the shoulder of

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the freeway. The Trooper mistakenly believed this because a third party witness was confused about the colors of the two cars and misidentified the color of Mr. Kerley's car as the color of the car driving on the shoulder.

But not only does Mr. Kerley deny ever driving on the shoulder, but in a defense interview of Mr. Covey, and in the 911 call, Mr. Covey admitted plainly that he was in fact the person driving on the left side shoulder of the freeway and that Mr. Kerley was on the right (not the shoulder).

> AL: Okay. And, I want to make sure I understand this, it appears as though what you are telling me is that my client came to the right of you and then from the right of you, he impacted you with the left side of his car, hitting the right side of your car. Is that accurate?
>
> BC: That's correct.
>
> …
>
> AL: So you don't have any personal recollection of his vehicle being on the shoulder of the road, to the left of you, at any time related to this accident?
>
> BC: I do not. I did not see his car on the left, on the shoulder, I did not see him try to pass me on the left.
>
> …
>
> AL: And there was a point where your vehicle was entirely on the shoulder of the road as it relates to this accident, correct?
>
> BC: Yes…
>
> …
>
> 911 Operator: Go ahead. Yeah, I'm speaking to you, go ahead.
>
> BC: Yeah, okay, this guy, um, he, he passed me on the right? And then he looped over into my lane, I had no choice but to run into a concrete median.

In the 911 call, Mr. Covey went on to explain to dispatch that he was on the shoulder and next to the median, saying "so then after-after I ran into the median, he was behind me." There was no reckless driving by Mr. Kerley and he was never driving on the shoulder. He made a legal pass in the lane to the right of Mr. Covey.

Further, there is no significant injury as the accident was minor. Mr. Kerley was not injured. Mr. Covey bumped his left shoulder. Mr. Covey was 'talked into' a trip to the hospital.

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At the hospital he was released and advised to follow basic fender bender recovery procedures. Much later, Mr. Covey claimed that some of his already pre-existing injuries were caused by the accident (but did not disclose to new medical providers that all the conditions he complained of existed prior to the accident). Mr. Covey's medical records confirm that all of the conditions existed prior to the accident.

No State's medical witness has issued any report that concludes that the side-swipe caused the injuries (that pre-existed the sideswipe). No State's medical witness reviewed Mr. Covey's prior medical records. The State has no x-ray, MRI, CT scan, MRI, or any other imaging. Medical opinions/testimony of witness for the State are based fully on limited information provided by Mr. Covey, and not verified by any scientific testing independent of Mr. Covey's self-report. None of the individual injuries claimed are sufficiently serious as a matter of law.

Defense expert witness Carl Wigren has reviewed Mr. Covey's medical records and can testify regarding the pre-existing injuries and lack of causation. Expert Allan Tencer has reviewed discovery and can testify that this sideswipe accident had a low energy/force transfer, that the description of the accident provided by Mr. Covey is not consistent with the damage to the vehicles, and that the alleged injuries in this case are not consistent with being caused by the low energy transfer between the two cars.

This is a minor sideswipe caused by Mr. Covey while he was driving under the influence of drugs. There is no reckless driving and no substantial bodily harm caused by the minor accident.

B. PROCEDURE

A hearing under rule 3.5 has not yet been held. It can be conducted at any point that pleases the court.

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C. WITNESS FOR DEFENSE

Mr. Kerley reserves the right to call any and all of the State of Washington's witnesses. Additionally, Mr. Kerley currently intends to call the below witnesses during the defense case in chief.

1. Dr. Carl Wigren
2. Allan Tencer

D. WITNESS ISSUES

A motion has been filed asking that Dr. Wigren be allowed to testify via zoom.

E. ESTIMATED TRIAL TIME

Mr. Kerley anticipates that trial in this matter will last 2 to 4 days.

Respectfully submitted this Thursday, August 5, 2021.

ANGUS LEE LAW FIRM, PLLC

S// D. Angus Lee
D. Angus Lee, WSBA# 36473
Attorneys for Jamie Kerley
Angus Lee Law Firm, PLLC
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E-mail: Angus@AngusLeeLaw.com

5 PAGES

HON. JOHN FAIRGRIEVE

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF, vs. JAMIE KERLEY, DEFENDANT.	No. 18-1-00998-7 JAMIE KERLEY'S MOTION TO HOLD DR. NEWELL-EGGERT IN CONTEMPT

MOTION

COMES NOW Jamie Kerley, by and through the Angus Lee Law Firm, PLLC, and moves the Clark County Superior Court to hold Dr. Newell-Eggert in contempt.

FACTS

In this case Dr. Newell-Eggert is listed as a witness for the State. This witness has refused to be interviewed by the defense unless the defense pays the witness for the interview. This court authorized her deposition. She was served notice of deposition but still refuses to be deposed unless she is paid. See attached Exhibit A.

LAW

The trial judge is the administrator and representative of the powers and authority of the judicial department of the state. Royce A. Ferguson, 13 Wash. Prac., Criminal Practice & Procedure § 3901 (3d ed.). In this capacity, the trial judge is in charge of the trial, of the courtroom, and of all that pertains to the administration of justice. *Id.* The trial judge may

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also enforce court rules and orders by imposing sanctions and punishing contempt. *Id.* (*citing State v. Salazar*, 170 Wash. App. 486, 291 P.3d 255 (Div. 2 2012)).

CONCLUSION

Jamie Kerley respectfully requests the Clark County Superior Court hold Dr. Newell-Eggert in contempt.

DATED this Thursday, April 15, 2021 A.D.

S// D. Angus Lee
D. Angus Lee, WSBA# 36473
Attorneys for Jamie Kerley
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11 pages

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF, vs. JAMIE KERLEY, DEFENDANT.	No. 18-1-00998-7 JAMIE KERLEY'S MOTION TO EXCLUDE WITNESS

MOTION

COMES NOW Jamie Kerley, by and through the Angus Lee Law Firm, PLLC, and moves the Clark County Superior Court to exclude witness Dr. Newell-Eggert from testifying.

FACTS

In this case Dr. Newell-Eggert is listed as a witness for the State. This witness has refused to be interviewed by the defense unless the defense paid the witness for the interview. This court ordered a deposition.

A deposition was scheduled for April 19, 2021, and Dr. Newell-Eggert was served a subpoena for on April 7, 2021. (Exhibit A)[1] On April 8th, the defense received an invoice from Providence Physical Medicine and Rehab for $3,600, and a cover letter stating "if we do not receive payment 10 days prior to deposition it will need to be rescheduled." (Exhibit B)

[1] The proof of service has a scrivener's error indicating service on March 7th, when it was served April 7th.

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LAW

CrR 4.6 allows either party to take depositions of witnesses who may be unavailable for trial or who refuse to discuss the case with either counsel. 12 Wash. Prac., Criminal Practice & Procedure § 1302 (3d ed.) (2016). The court may order the testimony of the witness taken by deposition in the manner provided in civil actions. CrR 4.6(c); *see also State v. Peele*, 10 Wash. App. 58, 68, 516 P.2d 788, 794 (1973); *State v. Gonzalez*, 110 Wash. 2d 738, 745, 757 P.2d 925, 929 (1988).

Under Rule 4.7, Washington courts have allowed the exclusion of a witness' testimony as a sanction for discovery violations. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). The trial court has broad discretion to choose the appropriate sanction for violation of the discovery rules. 12 Wash. Prac., Criminal Practice & Procedure § 1315 (3d ed.). The trial court is not limited to the sanctions listed in the rule, but "may enter such order as it deems just under the circumstances." *Wilson*, 56 Wn. App. 63, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010, 790 P.2d 167 (1990); *State v. Oughton*, 26 Wash. App. 74, 612 P.2d 812 (1980); *State v. Greene*, 49 Wn.App. 49, 742 P.2d 152 (1987); *State v. Jones*, 33 Wn.App. 865, 658 P.2d 1262 (1983).

CONCLUSION

Jamie Kerley respectfully requests that the above motion to depose or exclude be granted.

DATED this Thursday, April 8, 2021 A.D.

S// D. Angus Lee
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Attorneys for Jamie Kerley
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. JAMIE DONALD KERLEY, Defendant.	No. 18-1-00998-7 COURT'S RULING DENYING DEFENDANT'S MOTION TO DISMISS

I. Procedural and factual background relevant to this motion

The defendant was originally charged with reckless driving in district court for an incident that occurred on May 4, 2017. He did not have an attorney during the time the matter was pending in district court. The State eventually moved to dismiss the case with fifteen days of speedy trial time remaining. The defendant was subsequently charged with a single count of vehicular assault in an Information filed on April 9, 2018. He made first appearance on April 24, 2018 and was arraigned on that same date. A trial date was set for May 7, 2018 with 28 days elapsed. The defendant was released on personal recognizance.

On May 1, 2018 the defendant moved for a continuance of his trial date to give his attorney more time to prepare his defense and waived his speedy trial rights. Trial was reset for September 26, 2018.

On August 27, 2018 the prosecutor hosted a defense interview of the alleged victim, Brian Covey. The interview was contentious, and at one point Mr. Covey indicated he wanted to end it. However, the interview continued and later Mr. Covey told defense counsel he had no problem with defense counsel looking at his medical records. Defense counsel then produced a medical release form for Mr. Covey to sign. The deputy prosecuting attorney present for the interview objected, stating "We're not going to have him sign any kind of release of records to you." Mr. Covey did not sign the release.

The defense subsequently filed a Motion to Dismiss based on CrR 8.3. At a hearing on the defendant's motion on October 30, 2018 the court found that the prosecutor's actions on August 27, 2018 violated CrR 4.7(h)(1). However, it did not find that the defendant had been actually prejudiced and denied his motion. The State informed the court that it had a signed medical release from the alleged victim but was unsure whether a request for the records had been mailed out.

The defense received the records it had been seeking in two portions; one on December 4, 2018 and one on December 13, 2108. The records totaled about 2800 pages. The defendant had retained a forensic pathologist to review the records and to offer expert testimony in the case. The expert told defense counsel that he would not be able to review the records and be ready to testify by the current trial date of January 7, 2018.

II. Materials considered

In making its decision the court considered the material in its file and the following material submitted by the parties:

-Defendant's Motion to dismiss with attachments

-State's Response to Motion to Dismiss Pursuant to CrR 8.3(b) with attachments

-Defendant's Reply Brief on Motion to Dismiss with exhibit

III. Arguments of the parties

The defendant initially argues that the State's delay in dismissing the reckless driving count in district court forced him to waive his right to speedy trial in superior court and violated his constitutional right to a speedy trial. He then argues that there was a 63-day delay between the interview on August 27, 2018 when the prosecution interfered with his ability to obtain records from the alleged victim and the hearing on the defendant's Motion to Dismiss on October 30, 2018 and that this delay has resulted in actual prejudice to his ability put on his defense. He finally argues that the case should be dismissed under CrR 8.3 as a result of the prosecution's violation of CrR 4.7.

The State initially asks that the court reconsider its ruling on October 30, 2018 that it violated CrR 4.7. It then argues that dismissal under CrR 8.3(b) is not appropriate in this case because even if the State violated CrR 4.7 the defendant has failed to meet his burden of proving actual prejudice.

IV. Analysis

a. State's Motion for Reconsideration

In its brief the State moves the court to reconsider its ruling of October 30, 2018 that it committed prosecutorial misconduct under CrR 8.3 by violating CrR 4.7(h)(1). The Criminal Rules for Superior Court do not address Motions for Reconsideration of a trial court's decision. However, the Civil Rules for Superior Court do and give the court guidance on how to proceed. CR 59(a) indicates that on the motion of a party any decision or order may be vacated and reconsideration granted on any one of nine specific bases. CR 59(b) requires that such a motion shall be filed not more than ten days after entry of the order or decision in question and requires that the motion "shall identify the specific reasons in fact and law as to each ground on which the motion is based." Clark County Local Rule 59 also provides that a Motion for Reconsideration shall be filed not later than ten days after the entry of the order in question.

In the instant case a hearing was held on the defendant's Motion to Dismiss on October 30, 2018 and the court orally denied the motion. A review of the file reveals that no written order was ever entered reflecting the court's oral ruling. However, considering the clear mandates of CR 59 and CCLR 59 that Motions for Reconsideration be filed within ten days of entry of the order in question, that approximately 57 days have passed since the court ruled on the defendant's motion, and that the State's motion fails to comply with the requirements of CR 59(b), the court denies the State's Motion for Reconsideration.

b. Defendant's Motion to Dismiss based on the State's delay in dismissing the reckless driving charge in district court

CrR 3.3(d)(1) requires the court is required to set a date for trial within 15 days of the defendant's actual arraignment or at the omnibus hearing. CrR 3.3(d)(3) indicates that a party who objects to the date set for trial based on the ground that it is not within the time limits established in the rule must within ten days move the court to set trial within those time limits. Failure to do so waives the right to later object that a trial commenced on the date set was not within the time limits prescribed in the rule. There is no indication that the defendant in this case filed a motion objecting to his initial trial setting in superior court within ten days after his arraignment. He has thus waived his right to object under the rule.

Neither party fully addresses the issue of the State's alleged delay in dismissing the reckless driving charge in district court and its impact on the defendant's speedy trial rights in superior court, choosing to focus on subsequent events. Lacking clear authority upon which to dismiss the current charge on this basis, the court declines to do so.

c. Defendant's Motion to Dismiss based on prosecutorial misconduct

CrR 8.3 (b) provides:

> The 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 a fair trial. The court shall set forth its reasons in a written order.

Dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when a defendant has been prejudiced by the prosecution's actions. *State v. Cannon,* 130 Wash.2d 313, 922 P.2d 1293 (1996). "In considering whether a criminal case may be dismissed under CrR 8.3(b), the trial court must determine: (1) whether there has been any governmental misconduct or arbitrary action, and (2) whether there has been prejudice to the rights of the accused." *State v. Korber,* 85 Wn. App 1, 5, 931 P.2d 904 (1996). "Dismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps. ...The trial court's authority under CrR 8.3(b) to dismiss has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." Dismissal of a criminal proceeding is an extraordinary remedy. Absent a finding of prejudice to the defendant, dismissal of a criminal case is not warranted." *Id.*

In this case the State, through its deputy prosecuting attorney, did impede opposing counsel's investigation of the case by prohibiting Mr. Covey from signing a medical records release form on August 27, 2018. The records in question, however, were in the possession of a third party, not the State. The State did eventually obtain the records in question and turned them over to the defense on December 4 and 13, 2018. In doing so the State complied with its obligations under CrR 4.7(d).

What distinguishes this case from many of the cases cited by the defendant supporting dismissal of charges as a sanction for a discovery violation is that the records in question were in the possession of a third party, not the State. The defendant could have at any time after August 27, 2018 applied to the court under CrR 4.7(d) for a court-issued subpoena for the records or could have subpoenaed them himself under CrR 4.8(b).

Additionally, there is just over three weeks between December 13, 2018 and the trial date of January 7, 2019. This appears to be sufficient time for defense counsel to review the records in question. While the court appreciates the defendant's desire to have his expert

review the records, the availability of a particular expert to do so is not within the control of the State. Finally, the defendant's current trial date is set on the 67th day out of a 90-day trial setting period. He still has 23 days to continue the case within the current speedy trial period if his attorney and expert need additional time to prepare.

V. Conclusion

In considering whether a case may be dismissed under CrR 8.3(b), the trial court must determine whether there has been any governmental misconduct or arbitrary action and whether there has been prejudice to the rights of the accused. *State v. Korber, supra.* While there was government misconduct in this case the misconduct did not prejudice the rights of the defendant because he could have obtained the records through other means, there was adequate time between receipt of the records and trial for his counsel to review the records, and he still has time left within his speedy trial for an additional continuance if necessary. The defendant's Motion to Dismiss this case is denied.

Dated this 3rd day of January, 2019.

John P. Fairgrieve
Superior Court Judge

137 pages

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF, vs. JAMIE KERLEY, DEFENDANT.	No. 18-1-00998-7 JAMIE KERLEY'S MOTION TO DISMISS

MOTION

COMES NOW Jamie Kerley, by and through the Angus Lee Law Firm, PLLC, and moves the Clark County Superior Court to dismiss. This motion is brought pursuant to *State v. Knapstad*, 107 Wn.2d 346, 355-56, 729 P.2d 48 (1986), and U.S. Const. amend. 6; Wa. Const. art. 1, § 22.

INTRODUCTION

First, there is insufficient evidence of a substanial bodily harm. Second, there is insufficient evidence that any substanial bodily harm was caused by the accident and not a pre-existing condition. Third, the prosecution affirmativly obstructed the defense investigation into the first and second described insufficiencies. Fourth, and contrary to the State's written contention that evidence will show Mr. Kerley drove on the shoulder of the road while passing the alleged victim, Mr. Covey has acknowledged he was the one driving on the shoulder.

Mr. Covey has now been interviewed. In his interview he acknowledged that he was taking several medications at or around the time of the accident, and at least on (morphine) he

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was warned not to take before driving. Mr. Covey has admitted he was the one driving on the shoulder of the road. He has also admitted that prior to the accident involved in this case he had over a dozen pre-existing conditions, but could not identify what those injuries were. When defense counsel asked if Mr. Covey would sign a medical records release so that the defense could determine what, if any of the injries now being attributed to the accident were not pre-existing, Mr. Covey was willing. However, the deputy prosecutor interjected "I'm going to have to stop you right now, Mr. Lee, we're not going to have him sign any release of records to you."

The is no reasonable fact finder that would find the driving in this case was reckless or with conscious disregard for the safety of others. There is also no way of showing that the injuries the State now attributes to this accident were not pre-existing. This is especially true considering the shocking interference with a defense investigation.

FACTS

Background

In this case Mr. Kerley is charged with a single count of Vehicular Assault (reckless & disregard). The information alleges that he (1) operated a vehicle in a manner that was reckless or with disregard for the safety of others, and (2) that as a result he caused "substantial bodily harm" to another. Mr. Kerley filed a motion for a bill of particulars as to the driving element and the substantial bodily harm element.

According to the discovery, on the day of the accident Mr. Covey was diagnosed only with "shoulder pain" and "cervical strain."[1] He was told to use ice and heat, and to "take [his] medication as normal."[2]

[1] See attached Exhibit B, Page 36.
[2] Id.

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In the State's response, it identified the bodily harm as only "bulging discs, tinnitus, chronic headaches, post-concussion syndrome, and neck and shoulder pain that had caused tingling down into his forearm and fingers."[3]

As to the alleged driving, the State responded that "As Mr. Kerley approached Mr. Covey's car, he was driving behind Mr. Covey in the far left lane by less than one-half car length. In an attempt to pass Mr. Covey on the left inside shoulder."[4]

Brian Covey's Driving[5]

A defense interview of Brian Covery, the alleged victim, was conducted on August 27, 2018. During the interview he made clear that Mr. Kerley was on the right.

> BC: Okay? So that's my interpretation of what happened. He drove aggressively to get into the fast lane, I was already in the fast lane, following traffic. He makes a maneuver to go past all of the cars that are already in the fast lane, because some of these cars that were in the secondary lane moved over towards the third or the fourth lane, ***and somebody pulled out in front of him and he swerved right over and hit into my car***.
> AL: So let me make sure I understand this and for your information, I was trying to make sure that, that there was no confusion that you guys were both straddling the far lane.
> BC: We weren't straddling any lanes. We were driving down the middle of the fast lane.
> AL: Okay. And, I want to make sure I understand this, it appears as though what you are telling me is that my client came to the right of you and then from the right of you, he impacted you with the left side of his car, hitting the right side of your car. Is that accurate?
> BC: That's correct.
> AL: Now are you sure that you actually recall that?
> BC: Absolutely.
> AL: You're sure that you didn't hit him –
> BC: (Laughs)
> AL: On the other side? Let me, let me ask the question a little bit further. Are you sure that you weren't on his right-hand side and he was on your left?
> BC: No.
> AL: Never?

[3] State's Response to Motion for a Bill of Particulars, at 2.
[4] Id., at 1 (emphasis added).
[5] While there is a witness who alleges to have seen Mr. Kerley's vehicle on the shoulder of the road, it is clear from Mr. Covey's past and present statements that this witness is simply confused as to which car he observed on the shoulder.

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BC: Never. So –[6]

Mr. Covey also made clear during the interview that it was he, Mr. Covey, on the shoulder of the freeway.

> AL: So you don't have any personal recollection of his vehicle being on the shoulder of the road, to the left of you, at any time related to this accident?
> BC: I do not. I did not see his car on the left, on the shoulder, I did not see him try to pass me on the left.
> ...
> AL: And there was a point where your vehicle was entirely on the shoulder of the road as it relates to this accident, correct?
> BC: Yes, he put, he was pushing me onto the shoulder of the road, yeah.[7]

Mr. Covey was played a recording of the 911 call he made shortly after the accident and he confirmed it was his voice on the recording saying:

> BC: Yeah, okay, this guy, um, he, ***he passed me on the right***? And then he looped over into my lane, I had no choice but to run into a concrete median. After I ran into the median, he went behind me. I swear to God as my witness, he came right up to me and ram-, then attacking me.[8]

Brian Covey's Drugged Driving

Mr. Covey admitted to regularly taking several drugs at the time period of the accident, including gabapentin or Neurontin,[9] and morphine.[10] On the day of the accident he was regularly taking 60 milligrams of morphine three times a day.[11] His regularly practice was to take a 60 milligram of morphine at 6:00 AM, 3:00 PM, and before bed.[12]

> AL: So on the day of the accident, your normal practice would have been to take 60 milligrams of morphine at six in the morning when you woke up, and another 60 milligrams of morphine, uh, at three in the afternoon.
> BC: That's correct.
> AL: And that's one hour before the accident.

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[6] Exhibit A, Page 38, Line 3 (emphasis added).
[7] Id., Page 42, Line 3
[8] Id., Page 43, Line 19 (emphasis added).
[9] Id., Page 18, Line 12.
[10] Id., Line 21.
[11] Id., Page 19, Line 10.
[12] Id., Page 20, Line 6-20.

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BC: That's correct…[13]

Mr. Covey confirmed that the morphine prescription bottle provided a warning against driving while taking the medication.[14]

Brian Covey's Pre-Existing Conditions

Mr. Covey was a communications expert on a submarine, and asserted he was injured during his service but said "[t]he nature of my incident, what happened to me, when it happened and where it happened is all classified."[15] As a result of his injuries the Department of Veterans Affairs (DVA) rated him at 100% disabled.[16] When asked "So as it's related to your military service, or as it's connected to your military service, uh, you've had quite a few medical, uh, disabilities, is that accurate," he stated "Yes."[17]

When asked about what disabilities he has that are service connected he stated "there's a list of probably 15 to 20 different items that I get a rating for ... And I don't know exactly what those are called. Some of them is fibromyalgia, others, um, um, degenerative joint disease, osteoporosis, um, whole body bone pain."[18]

Interference With Investigation of Injury and Pre-Existing Conditions

Mr. Covey was willing to provide a copy of his DVA rating award letter.[19] He was also willing to release medical records, until the prosecution interfered.

> BC: I'm going to reiterate that, uh, I take a lot of medicine and I take it very faithfully, I take it on a regular basis. I do know that the first four or five of the medicines that you mentioned were something that I was taking after the car accident? Uh, Amitriptyline, for example, I took that many years ago and it's been out of my system for ten years. And that's something new that they off-, that they've been giving to me for my migraines. So I cannot, not 100 percent without

[13] Id., Page 21, Line 1.
[14] Id., Page 21, Line 18.
[15] Id., Page 11.
[16] Id., Page 14, Line 6.
[17] Id., Page 14.
[18] Id.
[19] Id., Page 15, Line 2.

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a doubt, tell you what medicine I was taking or what medicine I was not taking. Uh, ***I can refer you to my medical records, if you'd like to look at my medical records, I can tell you which ones I recognize and, uh, if you want to look at my medical records, that's fine by me. I have no, I have no problems with that.***
AL: Okay, that's great. So do you, um, have you ever signed a medical record release to the department of (inaudible) administration? I brought one so you can release your medical records to me, uh, to the –
KR: I'm going to have to stop you right now, Mr. Lee, we're not going to have him sign any release of records to you.
AL: Are you seriously interfering with my interview and telling me –
KR: Well, I apologize (inaudible – both talking) I'm stopping you handing the victim a medical release record. So we're not going to have that happen with you right now.[20]

ARGUMENT

1. THERE IS INSUFFICIENT ADMISSABLE EVIDENCE TO SUPPORT THE CRIME OF VEHICULAR ASSAULT.

As a matter of law, there is insufficient evidence of recklessness, conscious disregard for the safety of others, or substantial bodily harm. Without evidence of every element of a crime charged the crime should be dismissed by the court. "In a sense, this [Knapstad motion] is somewhat similar to summary judgment proceedings in civil cases, but a dismissal under this rule is not a bar to a subsequent prosecution." *State v. Knapstad*, 107 Wn.2d 346, 355-56, 729 P.2d 48 (1986). In evaluating a *Knapstad* motion, a trial court cannot treat hearsay as if it were substantive evidence in making a prima facie case determination. *State v. Freigang*, 115 Wash. App. 496, 503-04, 61 P.3d 343, 348 (2002).

To prevail on a Knapstad motion, the defendant must show that there are no material facts in dispute and that the undisputed facts do not establish a prima facie case of guilt. *State v. Knapstad*, 107 Wn.2d 346, 356, 729 P.2d 48 (1986). If the State does not deny the defendant's statement of facts or allege other material facts, the facts are deemed admitted and the trial court decides whether, as a matter of law, they establish a prima facie case of guilt. *Knapstad*, 107

[20] Id., Page 24, Line 10.

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Wn.2d at 356-57. "Since the court is not to rule on factual questions, no findings of fact should be entered" in the trial court's order. *Knapstad*, 107 Wn.2d at 357.

A trial court's dismissal of a charge pursuant to a *Knapstad* motion will be upheld if no rational finder of fact could have found beyond a reasonable doubt the essential elements of the crime. *State v. Snedden*, 112 Wn. App. 122, 127, 47 P.3d 184 (2002), *aff'd*, 149 Wn.2d 914, 73 P.3d 995 (2003); *see also State v. Olson*, 73 Wn. App. 348, 357 n.6, 869 P.2d 110 (1994) (noting similarity between standards of review for *Knapstad* motion and challenge to the sufficiency of the evidence). In this case, there is insufficient evidence of recklessness, conscious disregard for the safety of others, or substantial bodily harm, and as such the charge should be dismissed.

a. THERE WAS NO RECKLESS DRIVING OR CONSCIOUS DISREGARD

There is insufficient evidence for any reasonable fact finder to conclude that Mr. Kerley drove in a rash or heedless manner. The crime of Vehicular Assault, RCW 46.61.522, requires proof of reckless driving. The definition of "reckless," applicable to vehicular assault, means driving in a rash or heedless manner, indifferent to the consequences. *State v. Clark*, 117 Wn. App. 281, 71 P.3d 224 (2003), *aff'd*, 153 Wn.2d 614, 106 P.3d 196 (2005); WPIC 90.05.

The State has asserted that "As Mr. Kerley approached Mr. Covey's car, he was driving behind Mr. Covey in the far left lane by less than one-half car length. In an attempt to pass Mr. Covey on the left inside shoulder..."[21] However, Mr. Covery never said that when he called 911, and he did not say that in his recorded interview. Further, all damage to his car is on the right side, not the left side of his car. In light of Mr. Covey's statements it is incredulous that any reasonable jury would conclude Mr. Kerley was driving on the shoulder. The evidence is insufficient to find reckless driving.

[21] State's Response to Motion for a Bill of Particulars, at 1 (emphasis added)

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Vancouver, WA 98665
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The same is true for the lack of evidence to establish conscious disregard for the safety of others. The disregard for the safety of others element requires an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence. WPIC 90.05. Ordinary negligence is the failure to exercise ordinary care. Id. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Id. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide. Id.

"Some evidence of a defendant's ***conscious*** disregard of the danger to others is necessary to support a charge of vehicular homicide." *State v. Vreen*, 99 Wash. App. 662, 672, 994 P.2d 905, 911 (2000) (emphasis added). "There is a mental element to 'carelessness' or 'conscious disregard.'" *Id.*

In this matter there is evidence of an accident. There is no evidence of a "conscious" disregard for the safety of others, or rash or heedless driving.

a. THERE WAS NO SUBSTANTIAL BODILY HARM.

The crime of Vehicular Assault, RCW 46.61.522, requires proof of substantial bodily harm. "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. RCW 9A.04.011(4)(b). In this case there is no such evidence.

The State has asserted that the injury sustained by Mr. Covey is "bulging discs, tinnitus, chronic headaches, post-concussion syndrome, and neck and shoulder pain that had caused tingling down into his forearm and fingers."

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First, while Mr. Covey may have those symptoms now, there is no way of knowing if any of them were actually caused by the accident. Mr. Covey was 100% disabled prior to the accident and had numerous unspecified/undisclosed pre-existing conditions. On the day of the accident he was seen by medical professionals and told only that he had a sprain and pain. There is nothing in the record showing that these symptoms were caused by the accident. Further, as will be discussed below, Mr. Covey's full medical records have not been provided to the defense to determine what symptoms (if any) are not simply pre-existing. Accordingly, there is no evidence these symptoms were caused by the accident.

Second, even if there were a causal connection, these allegedly injuries are simply insufficient to establish "substantial bodily harm." Substantial "signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *State v. McKague*, 172 Wash. 2d 802, 806, 262 P.3d 1225, 1227 (2011).

In *McKague*, Supreme Court noted that the Court of Appeals was in error when it "indicated that impairment of [the victim's] arm and shoulder caused by pain was sufficient to support a finding of substantial bodily harm." *Id.* at 805 n.3. "Pain, by itself, no longer constitutes substantial bodily harm. *See* RCW 9A.04.110(4)(b); *cf.* former RCW 9A.04.110(4)(b) (1988)." *Id.*

Mr. Covey was diagnosed with simply a strain and pain on the day of the accident. He also had numerous unidentified pre-existing conditions. He has also been taking a good deal of pain medication for a long time and he now he complains of pain. This is simply legally insufficient.

2. PROSECUTOR ERROR.

The deputy prosecutor errored when he obstructed a defense interview and a request for a medical records release. As outlined above, those records are critical to determining what if any

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of the alleged injuries were pre-existing, and therefore not caused by the accident. This error was a violation of the duties of the deputy prosecutor and the rights of Mr. Kerley, which necessitate dismissal.

A defendant's right to a fair trial is constitutionally protected. U.S. Const. amend. 6; Wa. Const. art. 1, § 22 (amendment 10). A fair trial contemplates the defendant will not be prejudiced by the denial to him of his right to counsel and compulsory attendance of witnesses. *Wood v. State*, 155 Fla. 256, 260, 19 So. 2d 872 (1944); *see State v. Pryor*, 67 Wash. 216, 219, 121 P. 56 (1912). "As next appears, these rights include the opportunity to prepare for trial." *State v. Burri*, 87 Wash. 2d 175, 180, 550 P.2d 507, 511 (1976).

> It is well established that neither the prosecutor nor the defense may obstruct an attempt by opposing counsel or their agent to communicate with a prospective witness. RPC 3.4(a) provides that a lawyer shall not: "Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."

WSBA Advisory Opinion 1020 (1986) (copy attached as Exhibit C). "A prosecutor should not obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct to advise any person to decline to give information to the defense." Id.

> neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel`s investigation of the case.

Id. (citing *Burri*; CrR 4.7 (h)(1)).

> A defendant is denied his right to counsel (U.S. Const. amend. 6; Const. art. 1, § 22, (amendment 10)), if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case…
>
> The constitutional right to have the assistance of counsel, Art. I, § 22, carries with it a reasonable time for consultation and preparation . . .
>
> . . . [I]t was the duty of appointed counsel to make a full and complete investigation of both the facts and the law in order to advise his client and

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> prepare adequately and efficiently to present any defenses he might have to the charges against him.
>
> Preparation for trial also includes the right to confer with one's own witnesses:
>
> > It was fatal error to refuse the defendant the privilege of conferring with his own witnesses . . . This has been so held where his counsel were refused this right . . . The denial was an invasion of his constitutional right [to counsel]. It is often of vital importance that both defendant and his counsel should, together, confer with his witnesses in the progress of a trial.
>
> The affidavit also shows a substantial interference with defendant's constitutional right to compulsory attendance of witnesses necessary for his defense -- a fundamental element of due process of law.
>
> > The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.
>
> The guaranty of compulsory process is "a fundamental right and one 'which the courts should safeguard with meticulous care'." It may be violated by the actions of the prosecutor as well as the judge.
>
> Moreover, as stated in *State v. Papa*, the defendant's right to compulsory process includes the right to interview a witness in advance of trial.
>
> > The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy. . . . The defendant . . . has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf, he has also the right either personally or by attorney to ascertain what their testimony will be.

Burri, at 180-81 (*internal cites omitted*).

"The violation of defendant's constitutional right to counsel and the right to compulsory process is presumed to be prejudicial. It is nonetheless prejudicial even if the prosecutor believed his conduct lawful" *Id.* at 181. It is "the State's burden to show its error was harmless, *i.e.*, that defendant was not deprived of an opportunity to adequately prepare for trial." *Id.* at 182 (*citing Lee v. United States*, 388 F.2d 737, 739 (9th Cir. 1968); *State v. Bogner*, 62 Wn.2d 247, 254, 382 P.2d 254 (1963)).

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Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* (*citing Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R.3d 1065 (1967); *State v. Johnson*, 71 Wn.2d 239, 244-45, 427 P.2d 705 (1967)). "Such a determination is made from an examination of the record from which it must affirmatively appear the error is harmless." *Id.* (*citing State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429 (1968)).

CONCLUSION

There is insufficient evidence of a substanial bodily harm. There is insufficient evidence that any bodily harm was caused by the accident and not a pre-existing injury. The prosecution affirmativly obstructed the defense investigation into the first and second insufficiencies.

And, contrary to the State's written assertion, the evidence will show it was Mr. Covey (not Mr. Kerley) driving on the shoulder of the road.

Jamie Kerley moves the Clark County Superior Court for an order dismissing for lack of evidence to support the elements of the crime alleged.

DATED this Saturday, October 6, 2018

D. Angus Lee, WSBA#36473

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on Saturday, October 6, 2018, this document was delivered to the following person in manner indicated:

Kelly Ryan — Email
State of Washington

D. Angus Lee

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 1020

Year Issued: 1986

Subject: Advice by Prosecuting Attorneys to Prospective Witnesses [Published Informal Opinion 88-2.]

[Formerly published as Published Informal Opinion 88-2. All Informal Opinions are consolidated in this database.]

We have been requested by both defense and prosecuting attorneys to provide guidance as to what advice a prosecutor may ethically offer to witnesses regarding interviews with defense attorneys or investigators. The inquiries raise the issues of whether a prosecutor may advise a witness to refuse to be interviewed by the defense, whether a prosecuting attorney may encourage witnesses not to be interviewed unless a prosecutor is present and whether a witness may be advised of his or her right to be represented by the prosecutor or a person of his or her choice during the defense interview. We offer the following advice.

Question (1):
May a prosecutor discourage witnesses from talking with a defense attorney or investigator?

It is well established that neither the prosecutor nor the defense may obstruct an attempt by opposing counsel or their agent to communicate with a prospective witness. RPC 3.4(a) provides that a lawyer shall not:
"Unlawfully obstruct another party`s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."
A lawyer shall not counsel or assist another person to do any such act. RPC 8.4(a).

Similarly, the American Bar Association`s Standards for Criminal Justice, "The Prosecution Function," explicitly states the prosecutor`s obligation:
"A prosecutor should not obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct to advise any person to decline to give information to the defense."
Section 3.3.1(c), "The Prosecution Function," ABA Standards for Criminal Justice, 2d Ed (1980) at 3-37.

The comments to the ABA Standards enunciate the rationale underlying the standard, and suggest guidelines for prosecutorial conduct in contacting witnesses. Prospective witnesses are nonpartisan; they should be regarded as impartial spokesmen for the facts as they see them. Because witnesses do not

"belong" to either party it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that he not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel or a member of their staffs whether it is proper for a witness to submit to an interview by opposing counsel or whether he is under a duty to do so, the witness should be informed that, although he is not under legal duty to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interests of justice that a witness make himself available for interview by counsel.
Standards (Commentary), supra, at 3-38, 39.

We believe this reasoning is sound and conclude that a prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4.

We note that this ethical principle is embodied in CrR 4.7(h), which provides:
(1) Investigations not to be impeded. Except as otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel`s investigation of the case.
While the Committee may not render legal advice, we note that the Washington Supreme Court has held that conduct by the prosecution which interferes with defense counsel`s ability to interview alibi witnesses is a violation of a defendant`s constitutional rights. In State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) the prosecution held a special inquiry judge hearing and summoned all of the defense alibi witnesses to appear. The prosecutor instructed the alibi witnesses not to discuss their testimony before the inquiry judge with defense counsel. The trial court`s order dismissing the case was affirmed. The Supreme Court held:
A defendant is denied his right to counsel (U.S. Const. amend. 6; Const. art 1 §22, (amendment 10)) if the actions of the prosecution deny the defendant`s attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.
Id. at 180.

Question (2):
May a prosecutor encourage witnesses not to be interviewed unless a prosecutor is present?
We believe that encouraging witnesses not to be interviewed unless a prosecutor is present constitutes obstructing access to the witness, which is prohibited by RPC 3.4. The comments to Section 33.1(c) of the ABA Standards state:
Counsel may properly request an opportunity to be present at opposing counsel`s interview of the witness, but he may not make his presence a condition of the interview.
Standards (Commentary), supra, at 3-39.
The leading federal case on this issue is Gregory v. United States, 369 F2d 185, 188 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969). The court stated:
...He (the prosecutor) did admit that he advised the witnesses not to talk to anyone unless he, the prosecutor, were present.
We accept the prosecutor`s statement as to his advice to the witnesses as true. But we know nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively

denying defense counsel access to the witnesses except in his presence. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have equal opportunity to determine, through interviews with the witnesses, what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct. "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party.
The court held that the prosecutor`s advice to the witnesses that they not talk to anyone unless the prosecutor was present was an impermissible interference with the defense preparation and denied the defendant a fair trial. See also Coppolino v. Helpern, 266 F. Supp. 930, 935-36, (S.D. N.Y 1967).

Ethics Opinion 84-3 of the Alaska Bar Association reached the same conclusion:
A prosecutor or defense counsel may not mail a brochure to his potential witnesses which states that they should refuse to talk to the opposing counsel unless the lawyer or a member of his office is present for the interview and that they should not allow themselves to "be pressured into an on the spot interview." State policy, as evidenced by the statutory and disciplinary rules, is to facilitate the process of interviewing witnesses by requiring cooperation, disclosure and noninterference of both the prosecutor and defense counsel. Crim. R. 16(b)(1); DRs 7-102(A)(3), 7-103(B), 7-109 (3/9/84).
ABA/BNA Lawyers` Manual on Professional Conduct
Sec. 801:1202.

Question (3):
May a prosecutor advise a witness of his or her right to be represented by a person of the witness`s choice during a defense interview?
We believe it is permissible for the prosecutor to advise a witness of his or her rights as a witness. Those rights include the right, if the witness chooses, to have the prosecution present at a defense interview.

The commentary to §3.3.1(c), ABA Standards, "Prosecution Function," states:
Counsel may properly request an opportunity to be present at opposing counsel`s interview of a witness, but he may not make his presence a condition of the interview.
Id., at 3-39.

The Wisconsin Supreme Court adopted this commentary as a guideline for Wisconsin prosecutors, State v. Simmons, 203 N.W. 2d 887 (1973) and Illinois, People v. Steele, 124 Ill. App. 2nd 761, 464 Ne. 2d 788 (1984); People v. Fuller, 117 Ill. App.2nd 1026, 454 N.E. 2d 334 (1983) and a number of federal circuit courts see e.g., U.S. v. Bittner, 728 F.2d 1038 (8th Cir. 1984); U.S. v. Rich, 580 F.2d 929 (9th Cir. 1978); U.S. v White, 454 F.2d 435 (7th Cir. 1972) have reached the same result.

In recognizing the right to provide this advice, however, we caution that a prosecutor may not condition the interview on the prosecutor`s presence or in any other way obstruct the ability of the defense attorney to properly prepare for trial. As the Ninth Circuit stated:
It is imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights. Their role as public servants and as protectors of the integrity of the judicial process permits nothing less.
U.S. v. Rich, supra at p. 934.

We believe that the best practice is for a prosecutor to include in the advice given to witnesses regarding their rights the essence of the following from the commentary to the ABA Standards for the Prosecution Function.

. . . The witness should be informed that, although he is not under a legal duty to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interests of justice that a witness make himself available for interview by counsel.
Id. at p. 3-38-39.

***

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessors. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

HON. JOHN FAIRGRIEVE

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF, vs. JAMIE KERLEY, DEFENDANT.	No. 18-1-00998-7 JAMIE KERLEY'S MOTION TO DISMISS (12/14/18)

MOTION

COMES NOW Mr. Jamie Kerley, by and through the Angus Lee Law Firm, and hereby moves this court to dismiss this action due to prosecutorial mismanagement, and interference with defense investigation and the resulting actual prejudice to Mr. Kerley's right to an effective defense.

FACTS[1]

In this case Mr. Kerley was origionally charged with reckless driving under cause number 7Z0622235 in the Clark County District Court. Ex. A-1. He was arraigned on May 10, 2017. Ex. A-2. His case was later scheduled for readiness and trial, with readiness on July 24, 2017. Ex. A-4. His speedy trial deadline was August 8, 2017. Id. He was representing himself and had no defense counsel in this case while it was in District Court. Ex. A-4&5. At readiness, on July 24, 2017, the State moved to dismiss. Ex. A-5. At that point only 15 days of speedy trial remained.

[1] Mr. Kerley hereby incorporates by reference the facts contained in his previous Motion to Dismiss (filed 10/11/18).

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Mr. Kerley was then charged with Vehicular Assault. He appeared for arraignment, and counsel appeared for Mr. Kerley. Mr. Kerley was soon forced to either go to trial with counsel who had only two weeks to prepare, or forgo his speedy trial right. Having no viable alternative, he waived speedy trial so that he could ensure effective assistance.

Later, a defense interview of the complaining witness was conducted on August 27, 2018. Mr. Covey admitted that he had unspecified injuries and disabilities prior to the accident, and was 100% disabled prior to the accident. Mr. Covey was willing to provide a copy of his rating award letter, and release his medical records to defense counsel, until the prosecution interfered. A defense motion to dismiss was filed on October 11, 2018.

The motion was heard on October 30, 2018, and this court found that the State had violated 4.7(h)(1). Hearing, at 3:33. The Court then found that there was a possibility of prejudice, but the prejudice at that point in time had not materialized and was therefore not "actual" prejudice requiring dismissal. Id., at 3:34.

The State then assured the court that it does "have a signed medical release from the victim. He provided [it] to our office. We have submitted that to the VA." Id., at 3:35. However, the State later told the court that in actuality, "I don't know if our request has gone out." Id., at 3:36 (emphasis added).

It is unknown when the State actually submitted a request for the medical records. What is known is that the medical records were only recently obtained by the State and only recently received by defense counsel for Mr. Kerley. What is also known, is that 63 days elapsed from the date of the prosecutor's error on August 27, 2018, to the date of the hearing on the motion to dismiss, when the prosecutor was not even sure if the request for records had been submitted.

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The first portion of the records were received by the defense on December 4, 2018. (Decl. DAL). The second portion was received on December 13, 2018. Id.

Prior to receipt of the above referenced records, Mr. Kerley secured the services of a forensic pathologist to review all medical records relevant to this case. Id. The expert reviewed the discovery that had been provided up to that point, and advised defense counsel that the expert would need to review the VA medical records before he could make the conclusions necessary to testify. Id.

The same day that the first portion of the VA records were received by the defense (December 4, 2018), defense counsel contacted the expert to see how quickly he could review the materials and be prepared for the current trial date. Id. Defense counsel was advised by the expert's office that due to the delay in providing the material to the expert he could not complete his review in advance of the current trial date. Id.

Then, after the second portion of the VA records were received, defense counsel contacted the expert's office on December 14, 2018, to see how quickly the expert could review the approximatly 2800 combined total pages provided in the two packets. Id. Defense counsel was advised that the expert cannot complete a review of the records until late January at the earliest, but more likely early February. Id.

The first interview of one of the State's listed medical experts is currently scheduled for December 17, 2018, just a few days after the defense received all the VA records. Id. This forces the defense to conduct the interview without sufficient opportunity to review the high volume of records, and without having the benefit of having the defense expert review the materials so as to provide assistance to defense counsel in preperation for the defense interviews of State's experts.

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Near conclusion of the hearing on the initial motion to dismiss, this court made clear that the denial of the motion to dismiss was because at that time actual prejudice had not been shown, but noted that if the records are not produced in time for the defense to make use of them then a supplamental motion could be brought on the issue. Hearing, at 3:38.

ARGUMENT

Mr. Kerley hereby incorporates by reference the arguments contained in his previous Motion to Dismiss and provides the below supplemental authority and argument.

First, the State filed felony charges with just a couple of weeks remaining in speedy trial, and then it interfered with the defense investigation by creating a 63-day delay in the production of records relevant to the defense. That 63-day delay from when the State interfered with the defendant's ability to request records from the VA, to when the State finally made the request, constitutes two thirds of the speedy trial in any case, and has had an actual prejudice to Mr. Kerley's ability to use his expert at trial, and to use the assistance of the expert in preparation for the defense interviews of State's experts.

The Supreme Court has held that the constitutional guarantee of effective assistance of counsel includes the right to pretrial gathering of information. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). "The violation of defendant's constitutional right to counsel and the right to compulsory process is presumed to be prejudicial. It is nonetheless prejudicial even if the prosecutor believed his conduct lawful." *State v. Burri*, 87 Wash. 2d 175, 181, 550 P.2d 507, 511 (1976).

It is the State's burden to show its error was harmless, *i.e.*, that defendant was not deprived of an opportunity to adequately prepare for trial. Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is able to declare a belief that it was harmless

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beyond a reasonable doubt. Such a determination is made from an examination of the record from which it must affirmatively appear the error is harmless.

A. RULE 4.7

CrR 4.7 provides the primary basis for pretrial discovery in criminal cases. Id. (*Citing State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied* 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)). The trial court has broad discretion to choose the appropriate sanction for violation of the discovery rules. 12 Wash. Prac., Criminal Practice & Procedure § 1315 (3d ed.). Where Rule 4.7 has been violated, the court has broad discretion as to the sanction, and is not limited to the sanctions listed in the rule, but "may enter such order as it deems just under the circumstances." *State v. Wilson*, 56 Wn. App. 63, 782 P.2d 224 (1989), *review denied*, 114 Wn.2d 1010, 790 P.2d 167 (1990); *State v. Greene*, 49 Wn.App. 49, 742 P.2d 152 (1987) (prosecution's failure to comply with discovery rules may justify dismissal where the defendant proves by a preponderance that the prosecution's conduct forced him to choose between a speedy trial and effective assistance of counsel).

"[W]e do not believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State's lack of diligence." *State v. Sherman*, 59 Wash. App. 763, 801 P.2d 274 (1990) (upholding trial court dismissal due to mismanagement by prosecution).

B. RULE 8.3

CrR 8.3(b) provides that the court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental error when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. *State v. Brooks*, 149 Wash. App. 373, 383-84, 203 P.3d 397, 402 (2009). "[B]ut the governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is

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enough." *Id.* "Such prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *Id.* A dismissal under Rule 8.3(b) is reviewed for an abuse of discretion. *Id.*

In *State v. Teems*, a dismissal under rule 8.3 was upheld where mismanagement by the prosecution forced Teems into choosing between his right to a speedy trial and his right to effective assistance of counsel. 89 Wn. App. 385, 387, 948 P.2d 1336, 1337 (1997). In *Teems*, forty days after a mistrial, Teems' prior counsel (who had withdrawn) was served with a new criminal summons, ordering Teems to appear at a later date where the court would appoint counsel. Just twelve days remained on the speedy trial limit following the initial mistrial when Teems was appointed counsel. The trial court dismissed the charge and stated that it could not force a defendant to choose between his right to a speedy trial and his right to effective assistance of counsel.

The *Teems* court held that the "trial court is ultimately responsible for assuring a defendant's right to a speedy trial under CrR 3.3. The defendant is not required to show prejudice because strict compliance with the speedy trial rule is required." *Id.* at 388 (*citing State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996)).

> Where such misconduct jeopardizes a fundamental right of the accused, though, appellate courts have upheld the decision to dismiss. Included among these rights are the right to a speedy trial and the "'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'"

Id. at 388-89.

To require Mr. Kerley to request a continuance under these circumstances, where it was the State's error that created this situation, would be a violative of his rights, and would force Mr. Kerley into a Hobson's choice: sacrifice either the right to a speedy trial or the right to be

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represented by counsel who has had opportunity to prepare a defense. The Supreme Court recognized the impermissibility of creating this dilemma.

> We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

CONCLUSION

Mr. Kerley respectfully requests this court dismiss this action due to prosecutorial mismanagement and interference with defense investigation that has resulted in actual and demonstrable prejudice to Mr. Kerley's right to an effective defense.

DATED this Friday, December 14, 18.

S// D. Angus Lee
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Attorneys for Jamie Kerley
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DECLARATION OF COUNSEL

I, D. Angus Lee, declare under the penalty of perjury that the following is true and correct to the best of my knowledge. I am over the age of eighteen, and I am competent to testify to the matters herein. I have personal knowledge of the matters stated herein, or as indicated, have information concerning those matters.

1. The undersigned is counsel of record for the Mr. Kerley in this matter.
2. The first portion of the VA records referenced above were received by the defense on December 4, 2018. The second portion was received on December 13, 2018.
3. Prior to receipt of the above referenced records, a forensic pathologist was secured to review all medical records relevant to this case. The expert advised me that he had reviewed the discovery that had been provided up to that point, and that he would need to review the VA medical records before he could make the conclusions necessary to testify.
4. The same day that the first portion of the VA records were received by the defense, defense counsel contacted the expert to see how quickly he could review the materials and be prepared by the current trial date. Defense counsel was advised by the expert's office that due to the delay he could not complete his review in advance of the current trial date.
5. After the second portion of the VA records were received, defense counsel contacted the expert's office on December 14, 2018, to see how quickly the expert could review the approximatly 2800 combined total pages provided in the two packets. Defense counsel was advised that the expert cannot complete a review of the records until late January at the earliest, but more likely early February.
6. The first interview of one of the State's listed medical experts is currently scheduled for December 17, 2018.

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7. I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Signed at Vancouver, Washington, on Friday, December 14, 2018

S// D. Angus Lee
D. Angus Lee

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JAMIE DONALD KERLEY, Defendant.	No. 18-1-00998-7 STATE'S RESPONSE TO MOTION TO DISMISS PURSUANT TO CrR 8.3(b)

COMES NOW the STATE OF WASHINGTON, by and through Deputy Prosecuting Attorney Kelly Ryan, and submits to the Court this response to the defendant's motion to dismiss under CrR 8.3(b). The motion is based on the attached affidavit and authorities cited below:

I. ISSUES

1. Did the State commit prosecutorial misconduct under CrR 8.3(b)?
2. If the State did commit prosecutorial misconduct, has the defendant proven actual prejudice to justify dismissal of the case?

II. ANSWERS

1. No. While this Court has already found that the State committed prosecutorial misconduct, the State respectfully requests this Court to reconsider that decision, because

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the State's actions in this case do not rise to the level of prosecutorial misconduct under CrR 8.3(b).

2. No. The defendant has failed to meet his burden of proving actual prejudice.

III. STATEMENT OF FACTS

Please see the attached appendices as the State's Statement of Facts. Appendix A is the defense transcript of the victim interview on August 27, 2018. However, the defendant's transcript of the interview contains several misstatements and omitted statements by the involved parties. Relevant portions of the interview are transcribed below, with key differences from the defendant's transcript in bold. The State is also attaching the Affidavit of Kelly Ryan as Appendix B is, and a two file audio recording of the 8/27/18 interview as Appendix C.

Appendix A, page 21; Appendix C, "Interview of Bryan Covey Pt. 1" at 29:03 – 30:09:

AL: So on the day of the accident, your normal practice would have been to take 60 milligrams of morphine at six in the morning when you woke up, and another 60 milligrams of morphine, uh, at three in the afternoon.

BC: That's correct.

AL: And that's one hour before the accident.

BC: That's correct. And I do not know whether I took that medicine, if that's what you're asking, I don't know whether I took it, whether I had that with me that day, I probably did not. I probably didn't take it until I got home.

AL: But you're just guessing at this point.

BC: **Yes, sir**.

AL: Now, did you, did you tell the State Trooper that you were on morphine and some of these other drugs after you had the accident?

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BC: That's an insult sir.

AL: So is that a yes or no?

BC: (**chuckles**)

KR: **Just yes or no if you-**

BC: No, I did not tell the trooper that I was taking morphine.

AL: Does your morphine prescription have a warning on the bottle that says don't drive when you take this medication?

BC: Yes, it does.

AL: Yet you take it and drive anyhow on the road?

BC: **I want this interview to be over with Ryan. I'm sorry**, this is unacceptable.

Appendix A, page 23 - 25 (Appendix C, "Interview of Bryan Covey Pt.2" at 0:07 – 3:35):

AL: Mr. Covey, do you understand that Mr. Ryan is not your attorney, he represents the State of Washington?

BC: **No**.

AL: Are you aware of that now that I've said that?

BC: Could you, could you explain that to me?

KR: Yeah. So we kinda talked about what the process is and I don't represent you. I'm not your personal attorney. I represent the State. As a witness in the case I don't give you legal advice, can't give you legal advice, haven't given you legal advice. Um, but essentially what Mr. Lee is trying to say, is again, is that I'm not your personal attorney on this. If you had a personal attorney you could have them with you. **But again, I don't give legal advice, essentially.**

BC: I, I didn't – am I supposed to have an attorney for myself here then? I didn't realize I was the one on trial here. And you're treating me like I am the one on trial here.

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AL: Well, um, okay. I want to make sure you know that he represents the prosecutor's office and not you.

BC: I understand that I'm not the one pressing charges.

AL: Okay, um, so what did you guys discuss during that meeting that I was not included in?

BC: Your demeanor, how much of an ass I thought you were.

AL: Anything else that you discussed?

BC: No.

AL: Alright, has he made any promises or has anyone in the prosecutor's office made any promises not to prosecute you for driving under the influence of drugs on the day of the incident?

BC: No.

AL: Are you concerned about that?

BC: Not at all.

AL: Alright. Do you want your own attorney? Uh, do you want to reschedule so you can get an attorney? Considering it, that it appears you might be-

BC: **No I'm fine at this time.**

AL: Okay. So, um, on the day of the accident, within the 24 hours prior to the accident, had you taken Zanaflex, also known as Tizanidine?

BC: I'm going to reiterate that, uh, I take a lot of medicine and I take it very faithfully, I take it on a regular basis. I do know that the first four or five of the medicines that you mentioned were something that I was taking after the car accident. Amitriptyline, for example, I took that many years ago but it had been out of my system for ten years. And that's something new that they off- that they've been giving to me for migraines. So I cannot, 100 percent without

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a doubt, tell you what medicine I was taking and what medicine I was not taking. Um, I can refer you to my medical records if you'd like to look at my medical records. I can tell you which ones I recognize, and uh, if you want to look at my medical records, that's fine by me. I have no problems with that.

AL: Okay, so that's great. So did you, um, have you ever signed a medical records release to the department of administrations. I've brought one so that you can release your medical records to me through the-

KR: So I'm going to stop you right now Mr. Lee. We're not going to have him sign any kind of release of records to you. So-

AL: Are you seriously interfering with my interview? **And telling him what to do or what not to do?**

KR: **If you want to call it interference. I'm stopping this as your handing my victim a medical release record. So, we're not going to have that happen at this interview right now.**

AL: Well, this is the only time we have to interact and he said he'd sign it. So, I'm going to continue to ask questions-

BC: I did not say that I would sign it. **You just said I would**. I didn't say I would.

AL: Okay. So will you release your medical records?

BC: I don't think I will.

IV. ARGUMENT

1. Dismissal under CrR 8.3(b) is not appropriate in this case.

The defendant argues that the State committed prosecutorial misconduct that has prejudiced his right to a fair trial. He specifically claims that the prosecutor preventing his attorney from

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having the victim sign over a medical release form during a pretrial interview has forced him into a choice of waiving his speedy trial right or proceeding to trial unprepared. While this Court previously found the State's actions in the interview amounted to prosecutorial misconduct under CrR 8.3(b), the State respectfully requests this Court to reconsider its ruling as CrR 8.3(b) was not briefed by the parties at the previous bearing. The State asks for reconsideration because the record does not support a finding of prosecutorial misconduct. And even if a finding is made, the defendant has failed to demonstrate actual prejudice, because he was not forced to sacrifice his right to a speedy trial.

A trial court's power to dismiss a criminal case with prejudice is set forth in CrR 8.3(b). Under CrR 8.3(b) "(t)he 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 a fair trial. The court shall set forth its reasons in a written order." When a trial court considers whether or not to dismiss a case with prejudice under CrR 8.3(b), the court must determine "(1) whether there has been any governmental misconduct or arbitrary action, and (2) whether there has been prejudice to the rights of the accused." *State v. Koerber*, 85 Wn. App. 1, 4, 931 P.2d 904 (1996).

A trial court's authority to dismiss with prejudice under CrR 8.3(b) is limited to "truly egregious cases of mismanagement or misconduct by the prosecutor." *Id.* at 5. "'Dismissal is an extraordinary remedy, one to which a trial court should turn only as a *last resort*.'" *City of Seattle v. Holifield,* 170 Wn.2d 230, 237, 240 P.3d 1162 (2010) (quoting *State v. Wilson,* 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (emphasis added)). Furthermore, "trial courts should consider intermediate remedial steps before ordering the extraordinary remedy of dismissal." *Id.* "Absent a finding of prejudice to the defendant, dismissal of a criminal case is not warranted." *Koerber,*

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85 Wn. App. at 5. The prejudice to a defendant must have materially affected his or her right to a fair a trial, and absent that level of prejudice, dismissal is unwarranted. *State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). A defendant must show that actual prejudice, not merely speculative prejudice, affected his or her right to a fair trial. *State v. Kone*, 165 Wn. App. 420, 433, 266 P.3d 916 (2011).

A. There was no misconduct or arbitrary action by the State justifying a dismissal with prejudice under CrR 8.3(b).

As argued above, the State is respectfully asking this Court to reconsider its ruling that the State committed misconduct under CrR 8.3(b). The Court made its previous decision during a motion hearing where CrR 8.3(b) was not at issue. Because of that, the State is requesting an opportunity to brief the issue with support from cases analyzing CrR 8.3(b). A review of the record in the context of these cases shows that the State did not commit misconduct under the rule.

Governmental conduct "need not be of an evil or dishonest nature," and simple mismanagement is sufficient to constitute misconduct under CrR 8.3(b). *Michielli*, 132 Wn.2d 229, 240-241, 937 P.2d 587 (1997) (quoting *State v. Blackwell,* 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges. *Michielli*, 132 Wn.2d at 240. The rule "is designed to protect against government misconduct, and not to grant courts the authority to substitute their judgment for that of the prosecutor." *Id.* at 240 (quoting *State v. Cantrell,* 111 Wn.2d 385, 390, 758 P.2d 1 (1988); and *State v. Starrish,* 86 Wn.2d 200, 205, 544 P.2d 1 (1975)).

The State did not engage in any misconduct that would warrant a dismissal with prejudice under CrR 8.3(b) in this case. This case is distinguishable from *State v. Brooks*, 149 Wn. App.

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373, 203 P.3d 397 (2009), where the State was found to have engaged in prosecutorial misconduct. In *Brooks*, the State committed misconduct under CrR 8.3(b) when it did not disclose the victim statement until the day before trial, failed to provide the Defendant's statements and the lead officer's report, and never subpoenaed the victim for trial. *Id.* at 375. These actions violated the rule because they prevented the Defendant from preparing for trial in a timely fashion. *Id.* at 390. This case is also distinguishable from *State v. Sherman,* 59 Wn. App. 763, 801 P.2d 274 (1990), where misconduct was found because the State: failed to provide discovery that they had agreed to produce, failed to file a motion to reconsider discovery after the scheduled trial date, filed an amended information after the scheduled trial date, failed to produce a separate witness list, and attempted to add an expert witness on the day of trial. A key difference between the misconduct in *Brooks* and *Sherman* and the alleged misconduct in this case is that the State did not fail to provide or disclose materials that were solely in the State's possession. The VA medical records the defendant claims he was denied were not in the State's possession so there was no obligation to provide them to defense. As the records were not under the State's control, the State did not prevent the defendant from obtaining them. Therefore, the State's actions do not amount to misconduct.

The defendant's argument that he was denied the opportunity to obtain the medical records by the State is also flawed. The day the defendant learned of additional VA medical records from the victim was August 27, 2018 during the witness interview the State facilitated as a courtesy to the defendant (as there is no authority the State is aware of mandating the State arrange pretrial interviews). At that point, and every point since then, the defendant has had the power to obtain those records himself through a subpoena under CrR 4.8(b). CrR 4.8(b) gives the defendant the power to subpoena any documents he wants, insofar he complies with that rule. If these records

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are as important to the defendant as he claims, he was free to acquire them himself as soon as he learned of them. The State only prevented the defendant from pressuring the victim to sign a medical release at a pretrial interview. The State did not interfere with the defendant using other methods to obtain these records. That the defendant chose not to employ these other methods supported by the Court Rules does not equate to prosecutorial misconduct under CrR 8.3(b).

Furthermore, the actions by the State in the interview were not misconduct. A review of the record and the attached appendices show that the State prevented the defendant's attorney from having the victim sign a medical release during an interview because the victim was being insulted and pressured by defense counsel. Leading up to defense counsel asking the victim to sign the medical release, defense counsel insulted the victim, the victim asked to end the interview, and then defense counsel insinuated to the victim that he could be charged with a crime based on his responses in the interview. *See* Appendix A, pg. 21- 25; Appendix C, "Interview of Bryan Covey Pt. 1" at 29:03 – 30:09; Appendix C, "Interview of Bryan Covey Pt.2" at 0:07 – 3:35. When reviewing the actual record of what occurred at the interview, the State's actions were aimed at preventing the victim from being pressured into signing a medical release after having been insulted and threatened by defense counsel. There was no intent to deny the defendant access to any potential exculpatory material. Also, the victim was not willing to sign a medical release for the defendant's attorney at the interview. *See* Appendix A, pg. 25, Appendix C, "Interview of Bryan Covey Pt.2" at 3:21 – 3:35. The actions by the State do not amount to misconduct, especially in the context of the interview itself where the State arranged it as a convenience to the defendant, not as a snare to allow defense counsel to intimidate a victim into signing a medical release form. This lack of prejudice is highlighted by the fact, as argued above, that the defendant was free to acquire these records by other means. Based on the above

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cited case law and a complete review of the record, the State did not commit misconduct under CrR 8.3(b). The defendant's claim fails.

B. There was no actual prejudice to the defendant justifying a dismissal with prejudice under CrR 8.3(b).

Even if this Court finds there is sufficient misconduct or arbitrary action under CrR 8.3(b), actual prejudice must result from those actions to warrant the extraordinary remedy of a dismissal with prejudice. *Koerber,* 85 Wn. App. at 5-6. However, the required showing of prejudice is lacking in this case. "To justify dismissal, the defendant must show actual prejudice; the mere possibility of prejudice is insufficient." *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010) (citing *State v. Stein,* 140 Wn. App. 43, 56, 165 P.3d 16 (2007), *review denied,* 163 Wn.2d 1045, 187 P.3d 271 (2008)). Misconduct prejudices a defendant, and warrants a dismissal, when a defendant is forced to choose between their speedy trial rights and their right to effective counsel who has had the opportunity to adequately prepare a material part of the defense. *Brooks*, 149 Wn. App. at 387. "The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights." *Id.* (quoting *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Dismissal is only appropriate when the prejudice materially affects a Defendant's right to a fair trial, and that prejudice cannot be remedied by granting a new trial. *State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970). "Mere expense and inconvenience, or additional delay within the speedy trial period, do not meet (the test for actual prejudice); the misconduct must interfere with the defendant's ability to present his case." *City of Seattle v. Clewis*, 159 Wn.App. 842, 851,

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247 P.3d 449 (2011). It is an abuse of discretion to dismiss a case without finding actual prejudice. *Koerber*, 85 Wn. App. at 6.

The defendant has failed to establish any misconduct on the part of the State, but if there was the defendant still cannot show that the State's actions have caused him actual prejudice under CrR 8.3(b). While the defendant has claimed he is being forced into waiving his right to a speedy trial because of the lack of time to review the victim's VA medical records, as argued above, the State did not force the defendant into making this choice. The State was not in possession of these records and did not prevent the defendant from subpoenaing them under CrR 4.8(b). The defendant's failure to acquire these records through the normal course of trial preparation is not the State's fault. While the defendant's failure to obtain these records himself appears to strengthen his argument in the CrR 8.3(b) context, it was not the fault of the State. As such, the defendant's own actions cannot amount to State caused prejudice under CrR 8.3(b) so his claim fails.

Furthermore, the State provided the VA medical records to the defendant with ample time left in his speedy trial window. The defendant effectuated a speedy trial waiver on November 1, 2018 with the 90 day time for trial window expiring on January 30, 2019. The victim's VA medical records were provided to the defendant on November 29, 2018. There were 61 days remaining on the defendant's speedy trial clock when he received the records. The defendant claims he only received them on December 4, 2018, but that still left 57 days on the speedy trial clock. The defendant has the burden to prove that the actions on the part of the State have prejudiced his right to a fair trial, and he has failed to carry this burden. This is because the defendant has had enough time to review these medical records as he was provided them with two months remaining on his speedy trial clock. This is unlike the examples of prejudice from

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Brooks and *Sherman* where discovery and witness information was disclosed on the eve of trial or at trial. Furthermore, the six page disability award letter was provided with 49 days remaining in speedy, which also is more than enough time for the defendant to review it. The defendant was not forced into waiving his right to a speedy trial, because the State provided the medical records to the defendant with sufficient time remaining in his speedy trial clock to review them. There was no actual prejudice to the defendant's right to a speedy trial and his claim fails.

V. CONCLUSION

Dismissal with prejudice under CrR 8.3(b) is an extraordinary remedy that should only be used as a last resort. The State's actions at the pretrial interview do not constitute misconduct under the rule. Even if the State's actions are found to be misconduct, the defendant has failed to meet his burden to prove he suffered actual prejudice. For the reasons stated above, the State respectfully asks this Court to deny the defendant's motion to dismiss.

Dated this 26 of December, 2018.

RESPECTFULLY SUBMITTED,

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HON. JOHN FAIRGRIEVE

CLARK COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF, vs. JAMIE KERLEY, DEFENDANT.	No. 18-1-00998-7 JAMIE KERLEY'S REPLY BRIEF ON MOTION TO DISMISS (12/14/18)

REPLY

The State's response to Mr. Kerley's motion actually demonstrates the flagrant nature of its error, and why dismissal is appropriate in this case. The State also provides no response to the issue regarding the filing of a major felony with only 15 days remaining in speedy trial.

The State has taken exception to portions of the transcript of the interview prepared by Judy Adams and offers in the body of its memorandum 'corrected' portions of the transcript, but does not identify who prepared such corrections. A review of the audio shows that, due to individuals speaking over one another (which occures in conversation) the 'corrected' portions are debatable.[1] That is to say, resonable persons could listen to the disputed portions and find either transcript as accurate as the other.

However, for purposes of this motion, Mr. Kerley will accept the 'corrections' as provided

[1] Different recording devices may have picked up different voices better due to differing locations of the recording devices during the interview. It therefore stands to reason that the prosecutor's recorder picked up the prosecutor's voice better than the defense recorder.

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by the State, as they support his position, not the State's. In fact, the 'corrected' portions display the flagrant nature of the error at issue here and make clear the assigned prosecutor belives the State has authority to interfere with a defense interview and believes that a complaining witness is the State's.

FACTS

(THESE FACTS ARE UNDISPUTED AND TAKEN AS PROVIDED BY THE STATE)

Mr. Covey admitted to regularly taking several drugs at the time period relevant the accident, including gabapentin or neurontin, and morphine. State's Exhibit A, Page 18. On the day of the accident he was regularly taking 60 milligrams of morphine three times a day. Id., at 19. Mr. Covey confirmed that the morphine prescription bottle provided a warning against driving while taking the medication. Id., at 21.

> AL: Does the morphine prescription have a warning on the bottle that says don't drive when you take this medication?
>
> BC: Yes, it does.

State's Response, Page 3.

Morphine is a narcotic analgesic derivative of opium. Drug Recognition Experts (DREs) in Washington investigate and arrest drivers who are under the influence of these substances. Attached as Exhibit A to this Reply is the Narcotic Analgesics page of the Drug Evaluation and Classification (Preliminary School) Instructor Guide (2015). According to the DRE Instructor Guide, "heroin, morphine and codeine are natural derivatives of opium." "Persons under the influence of Narcotic Analgesics often pass into a semi-conscious type of sleep or near sleep." Id. "…they produce euphoria, drowsiness, apathy, lessened physical activity and sometimes impaired vision." Id.

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After Mr. Covey, (1) admitted to driving while under the influence of substances he had been warned not to take before driving, and (2) having driven his car on the shoulder of the freeway, and (3) thereby being involved in an accident, defense counsel offered Mr. Covey the opportunity to reschedule the interview so he could be assisted by counsel, as Mr. Covey ran the risk of incriminating himself.

AL: Uh, do you want to reschedule so you can get an attorney?

BC: No I'm fine at this time.

State's Response, Page 4.

It was deputy prosecutor who sought for the interview to go forward. According to the declaration of the deputy prosecutor, he "spoke with the [alleged] victim off the record in an attempt to get him to continue with the interview." Declaration of Kelly Ryan, Page 1.

Mr. Covey was later questioned regarding pre-existing conditions and he repeatedly offered, without prompting, that the defense could look at his medical records. As the State's 'corrected' transcript shows, the deputy prosecutor then blatantly obstructed.

> BC: Um, I can refer you to my medical records if you'd like to look at my medical records. I can tell you which ones I recognize, and uh, if you want to look at my medical records, that's fine by me. I have no problem with that.
> AL: Okay, so that's great. So did you, um, have you ever signed a medical records release to the department of administrations. I've brought one so that you can release your medical records to me through the-
> KE: So I'm going to stop you right now Mr. Lee. Were not going to have him sign any kind of release of records to you. So-
> AL: Are you seriously interfering with my interview? **And telling him what to do or what not to do?**
> KR: **If you want to call it interference. I'm stopping this as your handing my victim a medical release record. So' we're not going to have that happen at this interview right now.**

State's Response, Page 5 (emphasis in origional). The State has admitted in briefing that the State "prevented" the defendant from presenting Mr. Covey a medical release after Mr. Covey had

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stated "if you want to look at my medical records, that's fine by me. I have no problem with that." State's Response, page 5 & 9 (emphasis added).

"A review of the record and the attached appendices show that the State prevented the defendant's attorney from having the [alleged] victim sign a medical release during an interview." State's Response, Page 9.

The deputy prosecutor now declares that "[t]he defendant's attorney then asked the victim to sign a medical release form. At this point, I intervened and said we were not going to have the victim sign a medical release to the defendant's attorney at this time." Declaration of Kelly Ryan, Page 2 (emphasis added).

The State eventually requested and received the medical records on November 15, 2018, and held them for 13 additional days to conduct redactions that are not mandated under the discovery rules. Id., at 2.

The State has provided no information as to when or how they actually requested the records, despite a written request for such records. The State has provided no information as to when they obtained a signed release form from Mr. Covey. Without this information being presented by the State, the State cannot establish the actual length of the delay it created by stopping the defense from obtaining a signed release and submitting it to the Department of Veterans Affairs shortly after the interview on August 27, 2018.

ARGUMENT

A. MISCONDUCT

The State now argues that the above was not misconduct, but provides no authority in support of the proposition that a deputy prosecutor may stop defense counsel from offering a release form to a witness after that witness had repeatedly stated that the defense could review the

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records. Arguing that the State did not error, is the same as arguing that the State acted appropriately. The State's failure to appreciate how inappropriate it is to stop defense counsel from handing a document to a witness suggests that if not corrected it will happen again.

According to the 'corrected' transcript, the deputy prosecutor said "[i]f you want to call it interference. I'm stopping this as your handing my victim a medical release record." State's Response, Page 5 (emphasis added). There is no denying that Mr. Covey was offering up his medical records until the deputy prosecutor obstructed, and 'stopped' defense counsel. Now, it is clear that the deputy prosecutor asserts that Mr. Covey is 'his victim.' It is simply egregious to obstruct in this way, and even more so to assert that the witness belongs to the State. CrR 8.3.

The State argues now that it did not error because they allege that Mr. Covey would not have signed the release. This is belied by (1) the fact that Mr. Covey made very clear he was just fine with the defense accessing his medical records, and (2) the State's action of "stopping" the form from being given to Mr. Covey. If Mr. Covey was not going to sign the form, then why did the deputy prosecutor feel the need to say "call it interference. I'm stopping this as your handing my victim a medical release record." State's Response, Page 5.

It is well established that the prosecutor may not obstruct an attempt by opposing counsel to communicate with a prospective witness, or access evidence. WSBA Advisory Opinion 1020 (1986). "The violation of defendant's constitutional right to counsel and the right to compulsory process is presumed to be prejudicial. It is nonetheless prejudicial even if the prosecutor believed his conduct lawful" *State v. Burri*, 87 Wash. 2d 175, 181(1976).[2] It is "the State's burden to show

[2] The State's argument that it acted in good faith is not persuasive. In reality, the State has an incredibly weak case and appears to have been motivated by a desire to block the production of evidence showing that the injuries claimed were pre-existing. Counsel, on behalf of Mr. Kerley, asked questions relevant to the nature of causality of the injury and causality of the accident. Mr.

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its error was harmless, *i.e.*, that defendant was not deprived of an opportunity to adequately prepare for trial." *Id.* at 182.

B. PREJUDICE TO PREPERATION

Prejudice has occurred in this case, and the State has not proven otherwise. First, the State created a delay in the production of a high volume of records. Then, the State created an additional delay when it held the records for an extra two weeks to make redactions it was not required to make under any rule. There is no telling exactly how long the total delay in production created by the misconduct is, because the State has not disclosed when it actually made the request for records. As the burden is on the State, any inference on this point should be against the State.

In this case a key issue for trial will be that of injury causality. Prior to the witness interview, the issue of substantial bodily harm had already been litigated in a motion for a bill of particulars. An expert witness is needed for the defense to (1) testify at trial, and (2) to assist defense counsel (not a trained medical expert) in reviewing and understanding the medical records, and (3) assisting defense counsel in preparation for defense interviews of the seven medical professional the State has listed as expert witnesses.

For the defense expert to be of assistance to defense counsel as outlined above, and so that defense counsel can provide effective assistance, the expert must review all the records *prior to not only trial, but defense interviews of the State's experts*. This takes time, especially when there

---

Kerley's right to confrontation also compels defense counsel to explore what agreements, if any, had been made not to prosecute Mr. Covey. This is especially true when it has become clear that a witness has engaged in criminal activity (DUI). For the State to suggest that Mr. Covey, who had admitted to driving on the shoulder of I-205, while on multiple drugs, could not face charges of DUI is laughable. Defense counsel did not in any way insult or pressure the alleged victim. In fact, defense counsel made clear the interview could be rescheduled. It was the State who sought the have the interview continue.

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are approximately 2,500 pages of records to review. This is precisely why defense counsel sought a release of medical records when Mr. Covey asserted that he was fine with the defense reviewing his records. Had Mr. Covey been allowed to release the records, the defense would have obtained them without delay and could have started to the process outlined above and completed the same in time for trial.

However, the State obstructed the defense efforts to obtain records and created a delay in the process outlined above, thereby making it impossible for the defense expert to review the material in advance of the defense interviews of the State's experts or in advance of the current speedy trial expiration. In fact, the defense has already been forced to conduct an interview of one State's witness (Dr. McElhaney) without the aid of an expert review of the medical records.

As the delay in production of records has made it impossible for the defense expert to review the material so that (1) he can prepare for the speedy trial deadline, but also (2) before defense interviews of expert witnesses, Mr. Kerley will be forced to waive his speedy trial or go to trial unprepared. This is prejudice in fact and the State has not established otherwise.

C. PREJUDICE TO INTERVIEW ITSELF

Further, there the State's obstruction undoubtedly impacted Mr. Covey's willingness to be fully forthcoming with information in the defense interview. This fact alone is grounds for dismissal.

> nor can we determine the extent of the prejudicial inhibitory effect of the prosecutor's actions upon the witnesses, nor the claimed harmless character of the interference with defendant's constitutional right to counsel and compulsory process as those rights have been construed.

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Burri, at 182 (emphasis added). As stated in *State v. De LaCruz*, it is "a fatal error to preclude the defendant the privilege of conferring with his own witnesses in preparation for trial." No. 35107-2-II, 2008 Wash. App. LEXIS 228, at *14 (Ct. App. Jan. 29, 2008).

D. LATE FILING OF MAJOR FELONY

Mr. Kerley's motion argued that the State mismanaged the case by filing a major felony against a pro se defendant with only 15 days of speedy trial remaining, citing to *State v. Teems*, 89 Wn. App. 385, 948 P.2d 1336 (1997). The State has not responded to the argument. The State's silence is telling.

CONCLUSION

Mr. Kerley respectfully requests this court dismiss this action due to prosecutorial mismanagement and willful interference with defense investigation that has resulted in actual and demonstrable prejudice to Mr. Kerley's right to an effective defense.

The burden is on the State to establish that the error has not prejudiced Mr. Kerley at all. The State has failed to do so, and has failed to even disclose to this court when it finally sought to secure the very records in question.

DATED this Tuesday, January 1, 19.

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