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Court of Appeals
Division I
State of Washington

No. 76545-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ZYLSTRA,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and violated Mr. Zylstra's rights under the Sixth and Fourteenth Amendments and article I, sections 3 and 22 when it denied his motion to dismiss the charge for government mismanagement on November 30, 2016. RP 607-18, 688-703, 744-62.

2. The trial court abused its discretion and violated Mr. Zylstra's rights under the Sixth and Fourteenth Amendments and article I, sections 3 and 22 when it denied his motion to dismiss the charge for government mismanagement on January 30, 2017. CP 366-383; RP 1971-78.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Under CrR 8.3(b), dismissal of charges is appropriate where government mismanagement compromises a defendant's right to be represented by counsel who has had sufficient opportunity to adequately prepare his defense. Here, government mismanagement resulted in 911 recordings, police reports, and other evidence not being disclosed to the defense until more than three years after the incident and more than two-and-a-half years after Mr. Zylstra was charged. Some of the late-disclosed evidence revealed facts that undermined the

State's theory of the case. Did the trial court abuse its discretion in denying Mr. Zylstra's multiple motions to dismiss the charge for government mismanagement?

C. STATEMENT OF THE CASE

1. In June of 2013 Mr. Zylstra and his friends engage in target practice and a young woman tragically dies after being struck by a stray bullet.

Nicholas Zylstra is a lifelong Whatcom County resident. CP 403. When he was growing up, he apprenticed with his grandfather's construction business, and as a young adult, he started his own company. CP 403, 406. In his free time, he collected guns and engaged in target practice.

In June of 2013, Mr. Zylstra, his fiancée, and three acquaintances met at the home of Douglas Quiding. RP 1335. The group went to the Nooksack River with several guns and practiced shooting at various targets. RP 1338-40; CP 374. This is a common occurrence in the area, and there was another group shooting at a nearby location at the same time. RP 878, 1338, 1374, 1467; CP 375.

Most of the bullets that were fired were stopped by a berm across the river, but a few went above the berm and into an adjacent neighborhood. RP 901, 1553; CP 374, 376. Tragically, one errant shot

struck and killed a young woman outside a house on Gadwa Road. RP 871, 888, 1055; CP 366.

Mr. Zylstra and his companions had no idea this occurred until they were later confronted by police officers. RP 1355. Although they had heard sirens toward the end of their target practice, they were stunned to hear the officers' allegations, and did not believe it possible that their shots had injured anyone. RP 1385.

One of the officers, Detective Francis, recognized Douglas Quiding. Quiding was a felon who had worked with Francis for years as a confidential informant. CP 367; RP 1369, 1377. He was not permitted to possess weapons in light of his criminal history. RP 1369; CP 375.

Although it was not his original assignment, Francis insisted on interviewing Quiding. CP 367. Quiding reenacted the group's activities for Francis, and claimed that Mr. Zylstra was firing unsafely and everyone else was firing responsibly. RP 1350, 1359-60, 1367, 1389-95. He also claimed he never fired the lethal weapon, an AK-47, but other participants told police Mr. Quiding had fired that gun. RP 1383, 1418, 1471, 1529; CP 375-76. Everyone agreed that the other men also

fired the AK-47, and that Ms. Shinpaugh did not fire it. RP 1345, 1501; CP 375.

Like Mr. Quiding, Robert Lee (who was Quiding's stepson) said that Mr. Zylstra fired in an inappropriate manner, holding the AK-47 at his hip and firing rapidly. RP 1335, 1459; CP 375. But Mr. Quiding said that Robert Lee also aimed too high, and that in fact he aimed higher than everyone else. CP 376; RP 1375.[1] Robert Lee was on Department of Corrections supervision at the time he was firing weapons with the group. RP 1452.

Kyle Buck, who was dating Quiding's stepdaughter, also claimed Mr. Zylstra engaged in "quick firing" from the hip, but he did not say this until his second interview. CP 375; RP 1336, 1509-10, 1521.

2. The State charges Mr. Zylstra with manslaughter but commits numerous discovery violations, resulting in a delay of over two and a half years before trial starts.

On February 12, 2014 the State charged Mr. Zylstra with first-degree manslaughter. CP 1-2. His attorney, Robert Butler, filed a Notice of Appearance and demand for Discovery on February 20, 2014.

[1] Quiding later retracted this statement. RP 1549.

CP 368; Supp. CP ___ (Sub no. 7A). On March 5, 2014, he filed Defendant's Request to the State of Washington for Disclosure of Exculpatory Evidence, asking "that the State of Washington produce any evidence within its control or by which, by the exercise of reasonable diligence may be obtained, that is favorable to or exculpates defendant in any way, that tends to establish a defense in whole or in part to the allegations in the Information." CP 368; Supp. CP ___ (Sub no. 11).

The State was intransigent and dilatory in producing discovery. CP 377-78 (court's findings on motion to dismiss). Because of ongoing issues with missing and late discovery, trial was continued 14 times and did not begin until the end of November, 2016 – more than two and a half years after the State filed the charge and more than three years after the incident. CP 368; RP 2-106, 355-87.

On September 2, 2015, the court granted Mr. Zylstra's motion to compel discovery, and ordered the State to produce certain items by certain dates. CP 15-16, 368-69; RP 2-34.

Over a year later, discovery problems continued. Detective Francis and Mr. Quiding had refused to answer questions during defense interviews, so Mr. Zylstra filed a motion to compel them to

comply. Supp. CP ___ (sub no. 87). The court granted the motion, and ordered both Detective Francis and Mr. Quiding to "answer truthfully, all questions posed by defense counsel." Supp. CP ___ (sub no. 96). The court also mandated that "Whatcom County Prosecutor's Office shall follow the rules of discovery and shall not impede defense investigations in accordance with CrR 4.7." *Id.*; CP 369.

On November 28, 2016, the court conducted a hearing on a motion to suppress statements under CrR 3.5 and also addressed motions in limine. CP 369; RP 160-352. The defense informed the court that the State still had not complied with an important part of the court's discovery order from over a year earlier: Defense counsel still had not received any materials regarding the nature of the agreement between the State and Mr. Quiding, who had agreed to testify for the prosecution and was not charged in the homicide. CP 370.

The next day, November 29, 2016, defense counsel informed the court that the State had just provided the 911 calls from the day of the shooting. CP 370; RP 358. The defense was unaware that the recordings existed because they are usually destroyed within 90 days of the event in question. CP 370. But the State discovered they were still available and that their agencies had had them for over three years. The

prosecution stated it wanted to use them at trial. CP 370. Defense counsel asked the court to exclude the recordings due to the extraordinarily late disclosure. The court granted the motion. CP 82, 370; RP 387.

That same day, defense counsel alerted the court that the State had just disclosed the existence of additional officers who responded to the scene over three years earlier. RP 357, 363-77. Sergeant Davis filed a report noting that he, Officer Healy, and Officer Vanderyacht all responded to the scene. CP 372, 377. The defense did not receive that report until the first day of trial. CP 372.

The prosecutor said, "we were not aware that there were any other police reports. These were things that were done by another agency, Ferndale. And when counsel asked for it, I understand that Detective Roff went out and was able to find the police reports from Ferndale and provided them to counsel." RP 366. The court responded:

> [T]he problem that I'm having with these late disclosures is twofold. First of all, I don't think there's any way that I could look at this to say anything other than these are late disclosures. I understand, Mr. Richey, and I believe that, you know, you're turning things over as you get them. But it is not my problem, nor is it the defense's problem, that the various agencies you're working with aren't giving you stuff.

RP 382-83; *see also* CP 377-78.

The next day, November 30, 2016, the State gave the defense another police report that had not been disclosed previously, a report by Sergeant Crisp. RP 694; CP 377. This occurred despite the fact that a day earlier the prosecution promised there would be no more surprises and that all police reports had been given to the defense. CP 370.

The prosecutor said, "Somehow he found his report today when he was looking, and there's no explanation as to why it wasn't turned in." RP 696. The court was incredulous:

> THE COURT: You know, this is maddening to me.
>
> MR. RICHEY: Well, and –
>
> THE COURT: We've had multiple discovery hearings over the last year plus and, you know, I have ordered the State repeatedly to comply. And, you know, what is my remedy at this point? They're completely hamstrung if they're getting bits and pieces of information. There are other things we've talked about it's like "okay. I can understand why that might be, you know, right at the deadline or even after" but police reports?
>
> MR. RICHEY: Right.
>
> THE COURT: There's no excuse for them to be coming in three days into trial. It's – I'm speechless.

RP 696.

3. The court denies Mr. Zylstra's motion to dismiss and trial begins on November 30, 2016.

Mr. Zylstra moved to dismiss the charge pursuant to CrR 8.3(b). RP 698; CP 370.

> MR. BUTLER: The remedy, Your Honor, is 8.3. And that is to say, you know what? No fault of maybe any particular person, but this has been litigated so many times over the last two years that this is clear evidence of mismanagement. I mean to have a detective sergeant or sergeant detective find a report 30 something months after; to have Ferndale be trickling in reports. This is information that we would have integrated into a strategy. Going back to what ruling you already made, the 911 tapes, just as an example.
> …
> [Y]es, we knew -- you know, we anticipate officers write reports. We thought we had everything because we were told we had everything pursuant to the year ago's order. "Forty-five days before trial you must have" now we're in trial a year later, and we're still getting reports. I don't know how it can be excused, especially under the case law where if one knows they all know. I think this case should be dismissed based on mismanagement and put everybody out of their misery on this.

RP 697-98.

The court stated it would contemplate the motion to dismiss during a recess. RP 699. It stated that in the meantime it would enter an order compelling the State to produce the reports of the newly disclosed responding officers. RP 700.

The court reviewed materials over lunch, and determined that there were four newly disclosed police officers that were not on prior witness lists. RP 751. It also noted that one of the late-disclosed police reports revealed that there were other people shooting guns at the same time, and although those shooters were using guns of a different caliber, they were firing in the same area. RP 751. The court said it was "stunned by being handed a police report that I was told an hour ago didn't exist." RP 752.

The court nevertheless denied the motion to dismiss on the basis that late-disclosed evidence was not material. RP 752. The court offered to continue the case, but that remedy was inadequate for Mr. Zylstra. RP 753. Defense counsel explained, "He's the sole breadwinner; he's building homes for people. People are expecting their home to be finished. He took this time off with those buyers, to be here. And we're three days in, and we haven't even gotten a jury yet because of the State's stuff." RP 754.[2]

Following the denial of the motion to dismiss, the parties proceeded to select a jury and present opening statements. RP 763-811.

[2] Defense counsel later "withdrew" the motion to dismiss, but this was after the motion had already been denied and the court had offered a continuance instead. RP 758-59.

The State called the decedent's relatives and friends as witnesses. RP 867-977. They testified that they were having a barbecue in the backyard when bullets started flying overhead. RP 876-77, 900, 940. They called 911, tried to ascertain where the shots originated, and yelled for the shooters to stop. RP 883, 901-04, 942-46. After a break in the shooting, the group heard shots being fired again; some people sat down to avoid the bullets and others ran toward the house. RP 886, 901, 946. Ms. Smith screamed and said she had been hit. RP 888, 906. Officers responded and started caring for her. RP 889.

One of the barbecue attendees testified that shots "kept coming" after Ms. Smith was hit. RP 950. However, both Ms. Smith's father and her fiancé testified that they did not remember any shots being fired after Ms. Smith was hit. RP 889, 907.

The other shooters who were with Mr. Zylstra on the day in question testified that Mr. Zylstra was the last to shoot the AK-47 and that he fired it in a careless manner. RP 1335-36, 1350, 1376, 1459. But Mr. Quiding admitted that in exchange for his testimony against Mr. Zylstra the prosecution dismissed a charge of unlawful possession of a firearm and agreed to recommend only electronic home monitoring for the remaining charge. RP 1386. Also, although Mr. Quiding told the

jury that Mr. Zylstra was the last to fire the AK-47, he admitted he had previously told officers that Mr. Lee was the last to shoot. RP 1375-77.

Ms. Shinpaugh testified that either Mr. Lee or Mr. Buck shot the AK-47 last, but she acknowledged that she had earlier told detectives that either Mr. Quiding or Mr. Zylstra was last to shoot. RP 1429-31. Ms. Shinpaugh testified that she believed the men were still shooting after they all heard sirens. RP 1427.

Mr. Lee testified that Mr. Zylstra was the last to shoot the AK-47. RP 1459. He admitted that he originally told police it was either Mr. Zylstra or Mr. Quiding, but at trial he insisted Mr. Quiding never fired the gun in question. RP 1472.

Mr. Quiding later returned to the witness stand to finish his testimony. On redirect examination, he emphatically stated that Nick Zylstra was the last person to shoot the AK-47. RP 1551.

While trial was ongoing, defense counsel interviewed the newly disclosed officers during recesses. CP 372. Officer Healy's recollection contradicted that of his colleague, Officer Davis. CP 372. Officer Healy indicated that bullets were still flying overhead as they attended to the wounded woman, and thus, whoever shot the AK-47 last was not necessarily the person who caused the death. CP 127-28, 132-33, 381.

But the parties were already well into trial by the time this information was uncovered, so Officer Healy did not testify. The defense also learned later that one of the 911 calls would have supported Officer Healy's recollection of the timeline of events. RP 1957.

In closing argument, Mr. Zylstra argued that the State did not prove beyond a reasonable doubt that he was the person who fired the fatal shot. RP 1864, 1876. Among other things, he reminded the jury there was conflicting testimony about whether additional shots were fired after Ms. Smith was hit, and therefore the State did not show that the last person to shoot the AK-47 fired the bullet that struck Ms. Smith. RP 1876. The prosecution's closing argument countered that the testimony showed Mr. Zylstra fired recklessly and was the last to shoot, and therefore must have fired the bullet that struck the victim. RP 1818, 1891.

The jury found Mr. Zylstra guilty of second-degree manslaughter. CP 440.

4. After Mr. Zylstra is convicted of manslaughter, the court denies his renewed motion to dismiss but emphasizes the State committed "myriad" material discovery violations.

Post-trial, Mr. Zylstra renewed his motion to dismiss for government mismanagement. CP 206-30, 366-83; RP 1931-78. The court heard argument on the motion on January 10 and issued its ruling on January 30, 2017. RP 1931-78. The court ruled the State violated the discovery rules and court orders and that the violations were material. CP 378-81; RP 1975. But it denied the motion to dismiss, ruling that Mr. Zylstra waived his right to make the motion because he did not renew it during trial after it was denied on November 30. RP 1977-78; CP 381-83. The court also ruled that because Mr. Zylstra "was not up against the running of speedy trial," the appropriate remedy would not have been dismissal, but only a continuance. CP 382-83.

The court emphasized, however, that the denial "in no way excuses the State's handling of this case." CP 383. The court found the State "failed in its discovery obligations in a myriad of ways[,]" CP 378, and "[t]here is no excuse for the repeated discovery failures on the part of the State, regardless of whether the failure is the failure of the police or the Prosecutor's office." CP 383. The judge concluded:

> If the Court and the defense cannot rely upon the State to provide complete discovery by the deadlines set by the Court in both rules and written and oral orders, the Court cannot ensure that the defendant is assured his right to due process and a fair trial, the underlying reason for the existence of the discovery rules in the first place.

CP 378.

Mr. Zylstra was sentenced to 63 months in prison followed by 18 months of community custody. CP 441-42. He timely appeals. CP 467.

D. ARGUMENT

The conviction should be reversed and the charge dismissed for government mismanagement.

1. Dismissal of the charge is appropriate where the accused shows that government mismanagement prejudiced his right to a fair trial.

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.

This Court has recognized that the rule imposes two requirements. A defendant must show: "(1) arbitrary action or governmental misconduct

and (2) prejudice affecting the defendant's right to a fair trial." *State v. Barry*, 184 Wn. App. 790, 797, 339 P.3d 200 (2014).

As to the first prong, a defendant need not show intentional malfeasance; "simple mismanagement is sufficient." *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). As to the second prong, a defendant demonstrates prejudice by showing the mismanagement adversely affected his 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." *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); *accord Barry*, 184 Wn. App. at 797; *see also State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976) (dismissal appropriate where State impeded defense counsel's ability to investigate alibi witnesses, because defense has a "right to make a full investigation of the facts and law applicable to the case" prior to trial). When the State's mismanagement prevents counsel from being adequately prepared, it violates the defendant's rights under the Sixth and Fourteenth Amendments and article I, sections 3 and 22. *Burri*, 87 Wn.2d at 180; *State v. Martinez*, 121 Wn. App. 21, 34-35, 86 P.3d 1210 (2004); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

Courts have ruled that dismissal is an appropriate remedy when the State's failure to comply with discovery rules and orders compromises the defendant's right to a fair trial. *Dailey,* 93 Wn.2d at 459-60; *Martinez,* 121 Wn. App. at 23-24; *State v. Sherman,* 59 Wn. App. 763, 768, 801 P.2d 274 (1990); *Barry,* 184 Wn. App. at 796; *see also* CrR 4.7(h)(7)(i) ("if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may … dismiss the action …"). In addition to having a duty to comply with discovery rules and court orders, the prosecution has a constitutional obligation to disclose "favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); U.S. Const. amend. XIV.

2. <u>In several cases, courts have dismissed charges for discovery violations in circumstances less egregious than those presented here</u>.

Courts dismissed charges because of prejudicial discovery violations in *Dailey, Martinez,* and *Sherman*.

In *Dailey,* the defendant was charged with negligent homicide following a head-on collision. *Dailey,* 93 Wn.2d at 455. The charge

was filed on August 12, 1977. *Id.* at 456. At the omnibus hearing on September 23, the court ordered the State to provide the defendant with certain information, including laboratory reports and names and addresses of all witnesses. *Id.* at 455. A little over a month later, on October 28, the State provided all of the information ordered a month earlier, but also indicated it would provide a supplemental witness list. *Id.* at 455-56.

On November 3, the State dismissed the charge against Dailey's co-defendant who was also in the car, and made clear it was proceeding on the theory that Dailey was the driver. *Id.* at 456. On November 4, the Friday before the Monday trial start date, the State provided the supplemental list of witnesses. *Id.*. The supplemental list increased the number of expected State's witnesses from five to 16. *Id.*

The defendant moved to dismiss and the trial court ruled that either the State could try the case with the original five witnesses or the court would dismiss the charge. *Id.* The State claimed it could not proceed without the additional witnesses, so the court dismissed the case. *Id.* The trial judge explained:

> Based on the whole record, the affidavits and materials provided by Mr. Rothschild (defendant's attorney) when the motion was originally heard, together with this late list of witnesses furnished

> Friday afternoon … I think the whole thing has become a farce.
>
> So, I think simply, there's got to be a denial of due process in the way this whole thing had been handled, and I'll issue an order dismissing it.

Dailey, 93 Wn.2d at 458.

The judge also denied the State's motion for reconsideration, stating:

> Upon going over the entire record, I am still of the opinion that the State has disregarded the fundamental constitutional guidelines as well as the criminal court rules … and, I might add, even the order of this Court.

Id.

The Supreme Court held the dismissal was proper. *Id.* at 459. It reiterated the rule that a defendant need not show evil intent but only simple mismanagement. *Id.* at 457. It noted, "the State violated applicable court rules and specific trial court orders throughout the course of the proceedings." *Id.* at 459. Even though less than three months had passed between the filing of the charge and the ruling on the motion to dismiss, the Court excoriated the State for its "dilatory" compliance with orders, motions, and court rules. *Id.* It concluded, "Without question the record amply supports the trial court's dismissal

of the criminal prosecution under CrR 8.3(b)." *Dailey*, 93 Wn.2d at 459.

Dismissal was also the right remedy in *Martinez*, 121 Wn. App. at 23-24. There, the defendant was charged with being an accomplice to assault, burglary, kidnapping, and robbery, after he allegedly masterminded a home-invasion robbery carried out by others. *Id.* at 24. As in Mr. Zylstra's case, the timeline was critical. The co-defendants alleged that in March of 2001 Martinez gave them the two guns they later used to commit the crimes. *Id.* Officers determined one of the guns was reported stolen on October 31, 2000. But another person, a Ms. Reinmuth, told police that Mr. Martinez showed her two guns similar to those used in the crime in December of 1999. *Id.* at 25. Although she wasn't absolutely sure it was 1999 and not 2000, she believed it was 1999. *Id.*

The State did not reveal to the defense that the gun was reported stolen in October of 2000 until trial was underway. *Id.* at 26. Also, it was not until Ms. Reinmuth testified at trial that the defense heard her state that Mr. Martinez showed her two guns in 1999. *Id.* at 27. After the jury could not agree on a verdict, the court declared a mistrial and

the State filed an amended information. *Id.* at 29. The defense then filed a motion to dismiss under CrR 8.3(b). *Id.*

The trial court granted the motion, and this Court affirmed. *Martinez*, 121 Wn. App. at 29-36. This Court noted that the failure to disclose two critical pieces of evidence before trial violated both the discovery rules and due process. *Id.* at 30-34. And even though the defense received all of the evidence before the close of the State's case, the disclosure "did little to diminish the prejudicial effect of surprising the defense with it at such a late date." *Id.* at 32.

This Court endorsed the trial judge's conclusion that a continuance would have been insufficient to remedy the violation because the parties had already presented their respective theories of the case in opening statements and other testimony. *Id.* at 34. Moreover, "late discovery compromised defense counsel's ability to adequately prepare for trial[.]" *Id.* Finally, dismissal was appropriate because lesser sanctions would be unlikely to deter such misconduct in the future. *Id.*at 35-36.

This Court similarly approved of dismissal in *Sherman*, 59 Wn. App. at 768. There, the State charged the defendant with theft after she allegedly stole from her employer. *Sherman*, 59 Wn. App. at 765. The

trial court entered an order requiring the State to provide the defendant with certain items not later than two weeks before trial. *Id.* Three months later, the State moved to amend the information to add several counts of theft. *Id.* Two days after that, the defense alerted the court that the State still had not provided two items from the omnibus order: IRS records and an updated witness list. *Id.* at 766. That day the State also moved to expand the witness list to include a handwriting expert.

The defendant moved to dismiss the charges, and the trial court granted the motion. *Sherman*, 59 Wn. App. at 766. This Court affirmed and concluded that the failure to produce the IRS records in a timely manner was sufficient in itself to warrant dismissal. *Id.* at 768.

The State protested that it made good-faith attempts to procure the records more quickly but that the records were not in its control and the defendant could have obtained them independently. *Id.* at 768-69. This Court rejected that argument because the omnibus order required the State to obtain the records, and the records were in the control of its complaining witnesses. *Id.* at 769. This court noted that a continuance would have been an inappropriate remedy because the speedy-trial expiration date was set to expire the next day. *Id.* Additionally, the State's mismanagement effectively deprived the defendant of her

constitutional right to the effective assistance of counsel, because it "compromised defense counsel's ability to adequately prepare for trial[.]" *Id.* at 772.

As these cases demonstrate, dismissal is the appropriate remedy when government mismanagement prejudices a defendant's constitutional right to have a fair trial with adequately prepared counsel.

3. The trial court properly found the State made "myriad" material discovery violations. Accordingly, this Court should reverse and remand for dismissal of the charge.

In light of the dismissals in *Dailey*, *Martinez*, and *Sherman*, dismissal is the only appropriate remedy in this case. In *Dailey* and *Sherman*, the charges were dismissed based on discovery violations only a few weeks or months after the courts entered orders requiring production of certain materials. Here, *years* passed before the government disclosed relevant evidence to the defense – including police reports filed three years before disclosure, 911-call recordings saved three years before disclosure, and cooperation agreements the court had ordered disclosed more than a year before the State finally did so. The discovery violations were more extensive and egregious

here than in the cases discussed above. Indeed, the trial judge herself emphasized, "*It is clear to this Court that the Prosecuting Attorney's office failed in its discovery obligations in a myriad of ways.*" CP 378 (italics in original).

The trial judge's thoughtful ruling was erroneous only in its failure to recognize the prejudice. The judge assumed there was no prejudice because – after Mr. Zylstra waived his right to a speedy trial and trial was continued 14 times due to these discovery issues – Mr. Zylstra was not technically "up against the expiration of his speedy trial rights." CP 381. The court thus reasoned a continuance was the appropriate remedy, not dismissal. RP 753; CP 381-82.

But Mr. Zylstra had *already* been forced to make the Hobson's choice of waiving his right to a speedy trial in order to obtain the discovery his attorneys desperately needed in order to defend him at trial. CP 368. He should not have been required to suffer yet another continuance because of the State's egregious mismanagement.

Mr. Zylstra proved prejudice warranting dismissal because the State's mismanagement "compromised defense counsel's ability to adequately prepare for trial[.]" *Martinez*, 121 Wn. App. at 334; *accord Michielli*, 132 Wn.2d at 240; *Burri*, 87 Wn.2d at 180; *Barry*, 184 Wn.

App. at 797. As in *Martinez*, the timeline in this case was critical. Although Mr. Zylstra was able to support his arguments by highlighting *some* conflicting testimony, *most* witnesses testified that the shots stopped after the victim was hit and that Mr. Zylstra was the last to fire. The defense learned too late that one responding officer and one 911 caller would have supported the minority testimony that shots continued to fly after the victim was hit, and that therefore the last shooter was not necessarily the one who fired the fatal bullet. Thus, there can be no doubt that the "rolling discovery" prejudiced Mr. Zylstra's constitutional right to a fair trial with adequately prepared counsel. Mr. Zylstra accordingly asks this Court to reverse his conviction, and remand for dismissal of the charge with prejudice.

E. CONCLUSION

For the reasons set forth above Mr. Zylstra asks this Court to reverse his conviction and remand for dismissal of the charge with prejudice.

Respectfully submitted this 10th day of October, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 76545-1-I
	)	
NICK ZYLSTRA,	)	
	)	
APPELLANT.	)	

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