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

STATE OF WASHINGTON,

Plaintiff,

vs.

DILLON PATERSON,

Defendant.

CAUSE NO. XZC000022

**COURT’S FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: DEFENDANT’S MOTION TO
DISMISS UNDER CrRLJ 8.3(b) and
FAILURE TO PRESERVE
EXCULPATORY EVIDENCE**

THIS MATTER having come on before the Honorable Judge Claire Sussman, in the above entitled court, for a Motion to Dismiss under 8.3(b) on March 2, 2021, the defendant having been present and represented by attorney Shelby Winters of the Department of Assigned Counsel, and the State being represented by Deputy Prosecuting Attorney Jacqueline Shopbell. The court having considered the following pleadings:

- Defendant’s Motion to Dismiss, including attached Exhibits 1-11
- State’s Response, including attached Exhibits 1-8
- Defendant’s Reply
- Defendant’s Exhibit “A” Admitted at Motion Hearing
- State’s Supplemental Brief
- Defendant’s Supplemental Brief
 - Attachment 1 – Letter dated 3/11/2021 by Dr. Peterson

- Attachment- 3 Correspondence dated 2/9/2021 between WSP Tox Lab and Pierce County Prosecutor's Office
- Note: Attachment 2- Notification of recall of grey top tubes not considered by the court for this motion as it raises a new issue that would require additional evidentiary hearing.

The court having heard the testimony of the witnesses and the arguments of counsel and being duly advised in all matters, the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

1. The procedural history of Mr. Paterson's case is as follows:
 - a. On January 27, 2020, Defendant was arraigned.
 - b. On March 16, 2020, Defendant appeared pro se for pre-trial conference. The pre-trial was continued to May 11, 2020. The defendant signed a speedy trial waiver setting a commencement date for speedy trial of May 11, 2020 and a speedy trial expiration at August 9, 2020. The docket entry indicates that case was continued due to public health emergency and to hire counsel. The docket further indicates speedy trial expires August 9, 2020 and speedy trial will be tolled when emergency order is issued.
 - c. On May 11, 2020, pre-trial was not held due to court closure during the pandemic. Defendant was sent a summons to appear July 27, 2020.
 - d. On July 27, 2020, defendant appeared for pre-trial. Department of Assigned Counsel was appointed to represent defendant. A Stipulation and Order was signed that continued the next court date until August 31, 2020. The Speedy trial waiver of the Stipulation and Order is crossed out. Instead, the judge indicated that speedy trial expiration is November 30, 2020 due to an excluded period from March 18, 2020 to September 1, 2020. This excluded period is consistent with Pierce County District Court General Order 2020-08.¹
 - e. On July 31, 2020, a Notice of Appearance was filed by Department of Assigned Counsel with Discovery Demand.
 - f. On August 7, 2020 the State discloses Potential Impeachment Evidence, notifying defense of potential environmental methamphetamine contamination at the State Toxicology Lab.
 - g. On August 31, 2020, defendant appeared with counsel and court dates were set: Motion on October 13, 2020, Readiness Hearing on October 21, 2020, and Jury Trial on October 28th, 2020.

¹ "The time between March 17, 2020 and September 1, 2020 shall be Excluded when calculating time for trial. CrRLJ 3.3(e)(8) Pierce County District Court General Order 2020-08 signed June 1, 2020.

1 h. On October 12, 2020, an off the record Order and Notice of Case Setting for
2 Continuance was submitted and signed by a judge pro tem. New dates were set:
3 Motion 12/1/2020, Readiness 12/10/2020 and Jury Trial 12/16/2020. The Order
4 and Notice of Case Setting further indicates that speedy trial expires March 1, 2021
5 and that "Defendant acknowledges agreement with these dates."

6 i. Motion, Readiness, and Jury Trial have been re-set and case was re-assigned to a
7 different trial department. Currently Jury Trial is scheduled for April 5, 2021, with
8 parties in agreement that speedy trial expires May 19, 2021.

9 2. On January 1, 2019, Trooper Madden arrested the defendant Dillon Paterson for Driving
10 Under the Influence after the Trooper observed Mr. Paterson's driving and after the
11 Trooper's roadside DUI investigation. Pursuant to search warrant for defendant's blood,
12 two vials of defendant's blood, vial 'A' and vial 'B' were drawn. Both vials were sent for
13 analysis to the WSP Toxicology Laboratory (hereinafter WSP Tox Lab).

14 3. On October 18, 2019, the WSP Tox Lab completed a toxicology report for vial 'A' of
15 defendant's blood and recorded toxicology results as positive for Methamphetamine 1.1
16 mg/L, Amphetamine 0.16 mg/L, and positive for THC with recordings as THC 4.7 +/- 1.2
17 ng/ml and carboxy-THC as 34 ng/ml.

18 **METHAMPHETAMINE CONTAMINATION AT THE WSP TOX LAB**

19 4. In March of 2018, the WSP Tox Lab expanded their lab space and moved into laboratory
20 and office space that was previously occupied by the WSP Crime Lab. The area that was
21 previously occupied by the WSP Crime Lab has been termed 'the annex.'

22 5. Unbeknownst to the WSP Tox Lab, the WSP Crime Lab had previously used a portion of the
23 annex to produce/synthesize methamphetamine for training purposes. This information
24 was not provided to the WSP Tox Lab until after possible methamphetamine contamination
25 was discovered by the WSP Tox Lab.

- 1 6. Dr. Brianna Peterson WSP Tox Lab Manager testified for the State. Dr. Peterson holds a
2 Master of Science in Forensic Science, and a Bachelor of Science in Chemistry. She has
3 worked for the WSP Toxicology Lab since 2013. Dr. Peterson was qualified as an expert
4 witness in the subject matter of this hearing.
- 5 7. Ms. Janine Arvizu was called as a witness by the defense. She is a chemist and works in the
6 field of lab quality auditor. She has a Bachelor of Science in Chemistry. She has been
7 qualified as a quality assurance expert in court in more than 250 cases. Ms. Arvizu was
8 qualified as an expert witness on the subject matter of this hearing.
- 9 8. A diagram of the main lab and the annex was admitted as Defendant's Exhibit A.
- 10 9. The main lab and annex are on one floor and have a centralized HVAC system. The WSP Tox
11 lab has certain hoods that isolate air space for a work area. Air flows into the hood, out of
12 the room and into the central duct system. The duct work connects to multiple lab ports
13 and multiple hoods. In this lab setting, hoods are designed to draw large amounts of air
14 from the work environment and out. The main lab and annex are separated by a corridor.
15 Entry between the main lab and annex occurs through vestibule doors.
- 16 10. The WSP Tox Lab uses confirmatory testing such that whenever a positive drug result is
17 detected and meets reporting criteria a second test is conducted to confirm the presence of,
18 and often the amount of, the drug in a case sample. In the testing process, known samples,
19 identified as controls, are used to aid the instruments in identifying the substances present
20 in the unknown blood samples. Controls may be positive or negative. Use of controls ensure
21 the instrument is correctly identifying both negative and positive samples.
- 22 11. When a sample tests positive for methamphetamine, amphetamine may also be present as
23 it is a metabolite of methamphetamine.
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25

- 1 12. The presence of amphetamine can also be consistent with amphetamine usage alone, and
2 not necessarily a metabolite of methamphetamine.
- 3 13. Dr. Peterson testified that the first case of a false positive for methamphetamine at the WSP
4 Tox Lab occurred in October of 2018, and at that time no root cause for the false positive
5 was identified.
- 6 14. On June 5, 2019 a second case of a false positive for methamphetamine occurred and the
7 WSP Tox Lab decided it needed to determine if there was environmental contamination.
- 8 15. The WSP Tox Lab took sample swipes and sent them for testing.
- 9 16. Ultimately, the WSP Tox Lab identified the company Bio Clean to sample lab and office space
10 and contracted with them to clean the lab.
- 11 17. Bio Clean uses a threshold of $0.030\mu\text{g}/100\text{cm}^2$ in making a determination that
12 methamphetamine is present in a testing sample, such that any test samples that show
13 $0.030\mu\text{g}/100\text{cm}^2$ or greater of methamphetamine is considered positive for the presence
14 of methamphetamine.
- 15 18. Initial testing of the annex by Bio Clean showed the presence of methamphetamine on
16 samples from surfaces throughout the annex, to include the annex lab and office space,
17 ceiling fan, hallway, floor and the vestibule door.
- 18 19. There was only one location in the main toxicology lab where methamphetamine was found
19 above a threshold of $.030\mu\text{g}/100\text{cm}^2$. That location was Hood 1.
- 20 20. In the main laboratory, Hood 1 was discontinued for use on June 9, 2019, the day after
21 environmental testing was performed in Hood 1 and it was determined that six cases had
22 inconsistent methamphetamine results.
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1 21. On June 19, 2019, WSP Tox Lab stopped using the annex, while the Tox Lab prepared for a
2 Bio Clean, to decontaminate the area.

3 22. No forensic testing was conducted in the annex after June 19, 2019, and personnel were
4 relocated.

5 23. In discussing the extent of the contamination, Dr. Peterson testified that there was a total
6 of nine cases in which the test results were inconsistent for methamphetamine. In each of
7 these cases, there had been a false positive for methamphetamine in an initial test, but a
8 negative result for methamphetamine in a subsequent test.

9 24. Dr. Peterson testified that due to the WSP Tox Lab's system of confirmatory testing, no
10 Toxicology Test Reports went out with false results; instead the internal quality controls
11 used by the WSP Tox Lab identified the false positives before official reports were authored.
12

13 25. The employees that conducted testing or occupied office space in the annex were:

14 Dawn Sklerov, Rebecca Flaherty, David Nguyen, Robyn Wiseman and Alexis Tillman.
15

16 26. The employees that did not conduct testing or occupy space in the annex were:

17 Asa Louis, Brandi Artz, and Dr. Naziha Nuwayhid.
18

19 27. Ms. Arvizu testified that based on common practice throughout the industry it is wholly
20 inappropriate for a lab that conducts trace level methamphetamine analysis to operate in
21 an area where methamphetamine had been synthesized.

22 28. Ms. Arvizu testified that when a lab moves into a new space, especially a lab that does trace
23 level measurements, it is due diligence for the lab to assess the environment and evaluate
24 past practices to ensure the environment is not creating an adverse impact to the testing.
25

1 29. There is no indication that 'the annex' was assessed for the presence of contaminants prior
2 to the WSP Tox Lab moving into the space or that the WSP Tox Lab decontaminated the
3 annex before occupying it.

4 30. To identify cases of potential methamphetamine contamination, the WSP Tox Lab, reviewed
5 cases in which there were inconsistent test results for methamphetamine from a single
6 sample.

7 31. Ms. Arvizu opined that it is possible for methamphetamine contamination to occur even
8 where an initial test and a confirmatory test both indicate methamphetamine because if a
9 sample is contaminated during the initial opening of the sample, that contamination can
10 carry through to subsequent tests of the sample.
11

12 32. Ms. Arvizu opined that given the HVAC system and hood design that the tiny particulates
13 associated with methamphetamine contamination could very likely be moved from the
14 original environment of contamination to another location depending on how the air is
15 moving.

16 33. Ms. Arvizu stated that other sources of contamination could be through physical transfer by
17 touch which could be primary or secondary. An example of primary being contamination
18 that is spread from glove to pen, and secondary would be transfer that occurs if someone
19 picks up the contaminated pen referenced in the prior example.
20

21 34. Ms. Arvizu testified that in reviewing materials from the WSP Tox Lab, methamphetamine
22 contaminants were found in the lab and offices of the annex, as well as Hood 1 in the main
23 lab. Contaminants were also found on the vestibule door handle that connects the annex to
24 the main lab.
25

1 35. The WSP Tox Lab disclosed the possible methamphetamine contamination to their
2 accreditation board, ANSI-ASQ Accreditation Board (ANAB) on July 25, 2019.

3 36. Dr. Peterson informed a Traffic Safety Resource Prosecutor at the Washington Traffic Safety
4 Commission of the methamphetamine contamination issue and the Washington Traffic
5 Safety Prosecutor indicated that they needed to do a Potential Impeachment Disclosure.
6 Although Dr. Peterson could not recall the date that she informed the Traffic Safety
7 Resource Prosecutor, of the methamphetamine contamination, the Traffic Safety
8 Prosecutor was quick to respond with the Potential Impeachment Disclosure.

9 37. Dr. Peterson testified that the delay that occurred for the WSP Tox Lab to inform the
10 Washington Traffic Safety Commission of the potential methamphetamine contamination
11 was because the WSP Tox Lab did not realize that the WSP Tox Lab had to make such a
12 disclosure. Dr. Peterson indicated that the WSP Tox Lab felt that they had identified the
13 issue, took a course of action to correct it and had already disclosed to their accreditation
14 board.
15

16 38. On August 7, 2020, over twelve months after the WSP Tox Lab informed their own
17 Accreditation Board of the possible methamphetamine contamination, the Washington
18 Traffic Safety Commission issued a Potential Impeachment Disclosure (PID) letter
19 regarding the WSP Tox Lab, attached to Defendant's Brief, as Exhibit 2. The letter describes
20 environmental contamination, defined as methamphetamine at levels exceeding those in
21 WAC 246-205-541. Further, the letter states that this environmental contamination
22 possibly contaminated some blood samples during the extraction process.

23
24 39. On August 19, 2020, Pam Loginsky, Staff Attorney at Washington Association of Prosecuting
25 Attorneys sent an email to WAPA Felony Traffic and WAPA District Court that provided a

1 list of cases that may have been 'most directly impacted by the environmental
2 contamination' referenced in the PID.

3 40. The only drug detected in the possible contamination at the WSP Toxicology lab was
4 methamphetamine, not cannabis or amphetamine. A possible contamination of
5 methamphetamine would not affect results for cannabis or amphetamine.

6 **TESTING OF DEFENDANT'S BLOOD SAMPLE**

7 41. Defendant's blood was never opened, processed, or tested in the annex.

8 42. Defendant's blood vial 'B' has never been opened or tested. All descriptions of testing of
9 defendant's blood are reference to blood from vial 'A'.

10 43. On April 25, 2019, the first test of Mr. Paterson's blood occurred in the main lab. Ms.
11 Brandie Artz screened a sample from vial 'A'. It is this test date that defendant argues
12 creates the potential for defendant's blood sample to have been exposed to
13 methamphetamine contamination at WSP Tox Lab.

14 44. Because the toxicologists share the use of Hood 1, it is possible that Ms. Artz used Hood 1 in
15 preparing the defendant's blood for testing.

16 45. It was disputed whether there was a confirmed contamination event on the date of April 25,
17 2019, the same date when defendant's blood sample was first opened. The Court is making
18 the finding for the purposes of this motion, that there was sufficient evidence that on the
19 date defendant's blood sample was initially opened, April 25, 2019, one of the nine cases
20 that had confirmed methamphetamine contamination was also opened.

21 46. On July 23, 2019 Asa Louis tested a sample from vial 'A' for cannabinoids which returned
22 with a positive result of 4.7ng/L. This testing was not performed in the annex.
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1 47. On September 24, 2019 Dr. Naziha Nuwayhid screened a sample from vial 'A' for drugs. This
2 test occurred in the main lab, utilizing Hood 9. Dr. Nuwayhid does not use Hood 1 in the
3 main laboratory; she uses Hood 9 which is assigned for her use. The blood test results were
4 positive for methamphetamine and amphetamine.

5 48. On October 11, 2019, Dr. Nuwayhid tested a sample from vial 'A' for amphetamines. This
6 test occurred in the main lab, utilizing Hood 9 with results of Methamphetamine present at
7 1.1 mg/l and Amphetamine present at .16mg/l.

8 49. Dr. Peterson opined that the levels of drugs reported on Defendant's final toxicology report
9 are true and accurate.

10 50. After the Motion Hearing on March 2, 2021, Dr. Peterson authored a letter on March
11 11,2021 indicating that a case was identified with discrepant results for methamphetamine,
12 yet no root cause for the discrepancy has been identified. The letter further states that the
13 lab has begun the process of contracting with Bio Clean again to perform further
14 environmental testing.
15

16 **APPLICABLE LAW**

17
18 1. CrRLJ 8.3 (b) provides: "[t]he court, in the furtherance of justice after notice and hearing,
19 may dismiss any criminal prosecution due to arbitrary action or governmental misconduct
20 when there has been prejudice to the rights of the accused which materially affect the
21 accused's rights to a fair trial."

22
23 2. In order for a court to dismiss charges under CrRLJ 8.3(b), "the defendant must show by a
24 preponderance of the evidence both (1) arbitrary action or governmental misconduct, and
25 (2) actual prejudice affecting the defendant's right to a fair trial." *State v. Martinez*, 121

1 Wash. App. 21, 29, 86 P.3d 1210 (2004). The government’s misconduct need not be of an
2 evil or dishonest nature; simple mismanagement is sufficient. *State v. Sherman*, 58 Wash.
3 App. 763, 767, 801 P.2d 274 (Div.1 1990).

4 3. The movant also bears the burden of showing prejudice affecting the defendant’s right to a
5 fair trial. *State v. Salgado-Mendoza*, 189 Wash. 2d 420, 431, 403 P.3d 45 (2017). A party
6 cannot meet this burden by generally alleging prejudice to his fair trial rights, a showing of
7 actual prejudice is required. *Id.* The mere possibility of prejudice resulting from
8 governmental misconduct is not sufficient to meet the burden of showing actual prejudice.
9 *State v. Nordby*, 122 Wash. 2d 258, 264, 858 P.2d 210 (1993).

10
11 4. In considering the standard of actual prejudice under CrRLJ 8.3(b), “[s]uch prejudice
12 includes the right to a speedy trial and right to be represented by counsel who has had
13 sufficient opportunity to adequately prepare a material part of his defense.” *State v.*
14 *Michielli*, 132 Wash.2d 229, 240, 937 P.2d 587 (1997) quoting *State v. Price*, 94 Wash.2d
15 810, 814, 620 P.2d 994 (1980). “A defendant may be impermissibly prejudiced if a late
16 disclosure compels him to choose between his right to a speedy trial and his right to be
17 represented by adequately prepared counsel.” *State v. Salgado-Mendoza*, 189 Wash.2d 420,
18 436, 403 P.3d 45 (2017)

19
20 5. To comply with due process, the prosecution has a duty to disclose material exculpatory
21 evidence to the defense and a related duty to preserve such evidence for use by the defense.
22 *State v. Wittenbarger*, 124 Wash.2d 467, 475, 880 P.2d 817 (2017).

23
24 6. In order to be considered exculpatory evidence, (1) the evidence must possess an
25 exculpatory value that was apparent before it was destroyed; and (2) be of such a nature

1 that the defendant would be unable to obtain comparable evidence by other reasonably
2 available means. *Id.*

- 3 7. Before blood alcohol test results can be admitted into evidence, the State must present
4 prima facie proof that the test chemicals and the blood sample are free from any
5 adulteration which could conceivably introduce error to the test results. *State v. Clark*, 62
6 Wash. App. 263, 814 P.2d 222 (1991)

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9 **CONCLUSIONS OF LAW**

10 CrRLJ 8.3(b)- GOVERNMENTAL MISMANAGEMENT

- 11 1. The failure of the WSP Tox Lab whether by inquiry or by its own testing to determine
12 that the annex was free from methamphetamine contaminants prior to engaging in
13 forensic testing of samples amounts to governmental mismanagement under CrRLJ
14 8.3(b).
- 15 2. The WSP Tox Lab's performance of forensic methamphetamine testing in an area that
16 the WSP Crime Lab had used to synthesize methamphetamine amounts to gross
17 governmental mismanagement under CrRLJ 8.3(b).
- 18 3. The 12-14 month delayed disclosure by the WSP Tox Lab to prosecuting authorities,
19 such as the Washington Traffic Safety Commission or Washington Association of
20 Prosecuting Attorneys amounts to governmental mismanagement under 8.3(b). The
21 WSP Tox Lab moved out of the annex June 19, 2019 to prepare the annex to be
22 decontaminated; the WSP Tox Lab informed its own accreditation board July 25, 2019
23 of possible contamination; but the WSP Tox Lab did not inform prosecuting authorities
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1 until a date close to August 7, 2020, over 12 months later. While the late disclosure, may
2 have been due to a lack of understanding of the need to disclose, the timely need to
3 disclose remained.

4 CrRLJ 8.3(b) – ACTUAL PREJUDICE

5
6 4. Several case-specific factors converge that do amount to actual prejudice in the defense
7 being adequately prepared for a trial date of April 5, 2021 as follows:

- 8 a. Defendant's own sample indicates the presence of methamphetamine.
- 9 b. Defendant's sample was opened on the same day as a confirmed case of
10 methamphetamine contamination.
- 11 c. Defendant's blood sample A was potentially open in Hood 1, a confirmed area of
12 methamphetamine contamination at a time when the WSP Tox Lab was unaware
13 of methamphetamine contamination at the lab.
- 14 d. The late issuance of the Potential Impeachment Disclosure.
- 15 e. The recent letter of March 11, 2021 indicating the WSP Tox Lab is again in the
16 process of contracting with BioClean for further environmental testing due to
17 discrepant methamphetamine results for which the Tox Lab is unable to identify
18 the root cause of the discrepancy places the defense in a position of having
19 insufficient time to be adequately prepared for trial on April 5, 2021.
- 20 f. This case has been continued numerous times already. It appears that the
21 sample referenced in the March 11, 2021 letter was first identified as a sample
22 that contained a discrepancy for methamphetamine as early as February 9, 2021.

23 FAILURE TO PRESERVE EXCULPATORY EVIDENCE

24 5. Regarding failure to preserve exculpatory evidence due to the potential
25 contamination of the defendant's blood sample in this case, there is insufficient
evidence that the sample was exculpatory *prior to being opened* at the WSP Tox Lab

1 or would have been exculpatory. Moreover, an additional sample of defendant's
2 blood is available; vial 'B' taken at the same time as vial 'A' has never been opened
3 and is available for testing.

4 The Court having made its Findings of Fact and Conclusions of law, it is HEREBY ORDERED AS
5 FOLLOWS:

- 6
- 7 1. Under CrRLJ 8.3(b), due to governmental mismanagement and resulting prejudice as it
8 relates to this case, the Court is suppressing all blood results from Vial "A" of defendant's
9 blood sample.
 - 10 2. Defendant's Motion to Dismiss due to Failure to Preserve Exculpatory Evidence is denied.
 - 11 3. Due to the Court's order of suppression under 8.3(b), the issue of the State being able to
12 meet its prima facie burden for admission of blood test results is moot.

13 DONE IN OPEN COURT this 19th day of March, 2021.

14 
15 _____
16 Judge Claire Sussman

17
18 Approved as to Form:

19 _____
20 Jacqueline Shopbell
21 WSBA #

22 Approved as to Form:

23 _____
24 Shelby Winters
25 Attorney for Defendant
WSBA #