

**TO PLEAD OR NOT TO PLEAD**

**SESSION:** **Pushing Back- Getting What You Need to Prepare**

**Your Case** f**or Plea or Trial. Presented by Sheri Oertel**

**And Victoria Blumhorst. December 16, 2022.**

**CITED AUTHORITIES AND RESOURCES**

**PLEASE NOTE:** Some of these resources are older, and there may be updates. Please check citation validity with either Shepard (Lexis Nexus) or KeyCite (West Law Next – Automated under West Check or Quick Check) prior to using the listed authorities.

**Cited Authorities**:

RPC 1.1 Competence

RPC 1.3 Diligence

RPC 3.2 Expediting Litigation

[*State v. Linden*, 89 Wn. App. 184, 947 P.2d 1284](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997246387&pubNum=0000661&originatingDoc=N9B05FEC09D8A11DAA688FED05A9C725C&refType=RP&originationContext=notesOfDecisions&contextData=%28sc.Search%29&transitionType=NotesOfDecisionItem&ppcid=9a86599ffb3745debb5ac7800e1495b3) (1997), *reconsideration denied, review denied* [136 Wn.2d 1018, 966 P.2d 1277](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998219508&pubNum=0000661&originatingDoc=N9B05FEC09D8A11DAA688FED05A9C725C&refType=RP&originationContext=notesOfDecisions&contextData=%28sc.Search%29&transitionType=NotesOfDecisionItem&ppcid=9a86599ffb3745debb5ac7800e1495b3) (discovery requirements apply to impeachment and rebuttal evidence too).

*State v. Jones*, 183 Wn.2d 327, 352 P.3d 776 (2015)(finding to discharge his or her duty to provide effective assistance, trial counsel must investigate the case, including by interviewing witnesses); citing. U.S.C.A. Const.Amend. 6.

* If there is a strategic decision to not interview certain witnesses, that may not be ineffective assistance of counsel.

*In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004)(finding defense counsel's duty to investigate does notnecessarily require that every conceivable witness be interviewed).

*State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507, 512 (1976)(defendant has a right to compulsory process including pretrial interviews).

*State v. Daniels*, 153 Wn. App. 1030 (2009)(unpublished, too old to cite)(cites *State v. Hofstetter*, 75 Wn. App. 390, 397, 402, 878 P.2d 474 (1994))(compulsory right to interview for defendant co-exists with the witness’ right to refuse to be interviewed).

*State v. Clark,* 53 Wn. App. 120, 124, 765 P.2d 916 (1988)(a right to an interview does not mean a right to a successful interview).

*State v. Hofstetter*, 75 Wn. App. 390, 397, 402, 878 P.2d 474 (1994), *3.1.*

* State cannot advise witnesses not to speak to defense without prosecutor present.
* ABA Standards for Criminal Justice “a prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel.

*State v. Mankin*, 158 Wn. App. 111, 123–24, 241 P.3d 421, 427 (2010)(a witness gets to choose the conditions of an interview).

* Depositions in a criminal case have requirements to be met before allowed.

*State v. Wilson*, 108 Wn. App. 774, 776, 31 P.3d 43 (2001); See also *Hofstetter*; and *State v. Zhao*, 157 Wn.2d 188, 205 P.3d 835 (2006).

* The state has a duty to assist scheduling interviews with state witnesses.
* Witness who refuses to be interviewed is subject to being deposed, which they cannot refuse.

*State v. D.K.,* 21 Wn. App.2d 342, 344, 507 P.3d 859, 860, *review denied*, 516 P.3d 376 (2022)(as long as testimony is reliable, and the jury and the witness can see each other, video testimony is authorized, even with the victim, and does not violate the Sixth Amendment right to confrontation).

\*\* Video testimony in trial is allowed, under some conditions.

*In Lord v. Wood,* 184 F.3d 1083, 1095 (9th Cir. 1999)(held a witness’ testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty, or biased and testifies to X may persuade the jury that not-X is true. Counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story).

\*\*Use to request in person interviews and testimony.

*State v. Boyd*, 160 Wn.2d 424, 158 P.3d 54 (2007)(pretrial discovery should be as full and free as possible).

*State v. Vavra*, 33 Wn. App. 142, 652 P.2d 959 (1982)(although court rules indicate discovery is not due until “no later than the omnibus hearing, discovery is also due upon demand).

* The purpose of discovery requiring the state to disclose promptly upon demand is to ensure a fair trial, and among other things so that rebuttal and impeachment testimony may be obtained without going beyond speedy trial.

*State v. Brush*, 32 Wn. App. 445, 648 P.2d 897 (1982)(state must furnish any evidence intended to use as rebuttal to defense “at the moment of discovery or confirmation, even when such occurs during trial”).

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

* Dumping large amounts of discovery too close to trial is government mismanagement, sufficient to dismiss the case under CrR 8.3(b)).
* It doesn’t matter if law enforcement or another government agency held the discovery, the state has an affirmative duty to get discovery from government agencies under CrR 4.7(a)).

*State v. Martinez*, 121 Wn. App. 21, 86 P.3d 1210 (2004)(evidence produced mid-trial, defense motion for outrageous conduct granted, and upheld upon appeal).

*Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

* Simple mismanagement is sufficient, no need for evil or dishonest nature by the state.
* Whether the mismanagement is on the part of law enforcement, the prosecution or both, intentional or unintentional, it is governmental misconduct and prejudices the defense*.*
  + *See e.g. State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993).
  + *State v. Koerber*, 85 Wn.App. 1, 4, 913 P.2d 904 (1996).

*State v. Michielli*, 132 Wn.2d 229, 243, 937 P.2d 587 (1997)(ruled that “governmental mismanagement satisfies the ‘misconduct’ element [of 8.3(b)].”

* HELD: “Defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial.” *Id*. at 244.
* The Court indicated that speedy trial time limits were mandated as a matter of public policy, with a failure to meet speedy trial limits requiring dismissal with prejudice of the charges against a defendant.
  + *Michielli* citing *State v. Duggins,* 68 Wn.App. 396, 399–400, 844 P.2d 441 (1993).

*State v. Sherman*, 59 Wn.App. 763, 769, 801 P.2d 274 (1990)(can’t force Hobson’s choice)(see also *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

*State v. Martin*, 94 Wn.2d 1, 4, 614 P.2d 164, 165 (1980)(finding there is no constitutional right to plead guilty at arraignment but the right has been conferred by court rule, CrR 4.2(a)).

* See also CrR 4.5(c)(vi).
* Neither the state nor the court can prevent a defendant from pleading guilty when it is made knowingly, competently, voluntarily, unconditionally (as charged), unequivocally, and on the advice of counsel; “unhampered by a prosecuting attorney’s opinions or desires.
  + In this case that included the state alleging they were about to file death penalty notice, but had not yet filed it. Defendant had the right to plead guilty. The state had no right to request a continuance, and the court had no authority to grant one.

*State v. Linden*, 89 Wn. App. 184, 947 P.2d 1284 (1997), *reconsideration denied, review denied* 136 Wn.2d 1018, 966 P.2d 1277 (discovery requirements apply to both rebuttal and impeachment evidence).

*State v. Youde*, 174 Wn.App. 873, 301 P.3d 479 (2013).

* If the state doesn’t assist obtaining discovery from other government agencies, ask for a court order.
* Show materiality of the needed information to prevent being overturned.

*State v. Martin*, 94 Wn.2d 1, 4, 614 P.2d 164, 165 (1980)(a defendant has a right to be informed of the consequences of his/her plea before a plea is accepted).

*U.S. v. Morris*, 470 F.3d 596 (2006)(the prosecutor has a duty to provide accurate information about the consequences of forgoing a plea).

**Resources**:

**Link & motions and practice advisories on WDA Website:**

**Motion to compel an in person witness interview or deposition**

<https://defensenet.org/resources/motion-to-compel-in-person-interview-or-deposition-3-2020/>

**Practice Advisory for obtaining privileged records, other than CPS (2015)**

<https://defensenet.org/resources/obtaining-privileged-records-other-than-cps-7-2015/>

**Motion to obtain CPS records (2016)**

<https://defensenet.org/resources/motion-for-cps-records-2016/>

**SDT for CPS records**

<https://defensenet.org/resources/sdt-for-cps/>

**Motion for Discovery Violation Sanctions – 2 Arguments (attached motions)**

**Attorney General Procedure for Obtaining CPS Records (attached)**

**Defense Motion To Dismiss For Violations of Speedy Trial (attached)**

**Motion to Interview a Witness Prior to Trial (2014)(attached)**

Speedy Trial Motion