No. 31465-1

COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

MICHAEL L. SHEMESH, Appellant

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

THE HONORABLE JUDGE CARRIE RUNGE

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# BRIEF OF APPELLANT

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B. The trial court erred when it failed to enter written findings of fact and conclusions of law to support its decision to impose an exceptional sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Both the State and Federal Constitutions guarantee the right to a speedy trial. Where the unreasonable delay resulted from a systemic breakdown in the public defender system, has appellant established a violation of his right to a speedy trial?

2. The sentencing statute requires the trial court to enter written findings of fact and conclusions of law supporting its decision to impose an exceptional sentence. Where the trial court fails to enter such findings, should the case be remanded for entry of findings of fact and conclusions of law?

II. STATEMENT OF FACTS

Michael Shemesh was charged by information on August 4, 2009, with two counts of rape of a child in the first degree and one count of

sexual exploitation of a minor. (CP 1-2). He was assigned an attorney in District Court, but was appointed new counsel at arraignment on August 12, 2009. (RP 3-4)[1]. The trial was set for September 28, 2009. (CP 7).

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[1] The Report of Proceedings spans over 3 years and was compiled by different court reporters. For purposes of this brief, the volumes are designated as follows:
The following hearing dates will be designated as RP page no. 8/12/09, 1/6/10, 1/13/10, 2/17/10, 3/3/10, 4/7/10, 10/20/10, 11/17/10, 2/9/11, 5/4/11, 5/18/11, 6/22/11, 8/3/11, 8/17/11, 8/24/11, 1/11/12.
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The following hearing dates will be referenced as 3RP page no. 11/4/2009, 11/25/09, 1/27/10, 3/31/10, 6/16/10, 6/30/10, 3/16/11, 10/12/11
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The following hearing dates will be referenced as 5RP page no. 4/28/10, 6/2/10, 8/18/10, 8/25/10, 12/1/10, 1/5/11, 1/19/11, 2/23/11, 3/2/11, 7/6/11, 2/29/12, 4/11/12, 8/22/12
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Hearing date 11/30/12 will be referenced as Vol. 7 RP page no.
Hearing date 12/3/12 will be referenced as Vol. 8 RP page no.
Hearing date 12/4/12 will be referenced as Vol. 9 RP page no.
Hearing date 12/5-6/12 will be referenced as Vol. 10 RP page no.
Hearing date 12/7-11/12 and 1/31/13 will be referenced as Vol. 11 RP page no.
Hearing date 2/26/13 will be referenced as Vol. 12 RP page no.

Over the next 39 months, 87 pretrial hearings were held. (See Report of Proceedings, footnote 1). Mr. Shemesh was assigned and reassigned five different criminal attorneys. ( CP 7, 5RP 2, 2RP 10, RP 20, 3RP 27). He was twice evaluated for competency to stand trial and hospitalized for medical reasons once. (CP 19-27; 50; 1RP 10). The charging information was amended three times. (CP 10, 15, 180). Mr. Shemesh's fifth assigned attorney made two motions to dismiss based on speedy trial violations, mismanagement by the Office of Public Defense, and inability to obtain discovery from the State. Both motions were denied. (Vol. 2RP 153 -311; Vol. 11 RP 1838- 1858).

1. First Appointed Attorney: August 12, 2009 through April 28, 2010.

Mr. Shemesh was assigned counsel by the Superior Court on August 12, 2009. (CP 7). On August 20, the State filed its first amended information, adding a count of child molestation in the first degree. (CP 10). The following day, a stipulation and agreed protective order regarding image and audio evidence on DVDs was entered into. (CP 13). Defense counsel signed the order. On September 23, 2009, five days before trial, an ex parte order was entered for Mr. Shemesh to undergo a mental health evaluation. (CP 19-27). Defense counsel requested a two-week continuance. (1RP 4). The proceedings were stayed. Prior to the

stay, fifty one days had passed and the speedy trial date was set to expire on October 2, 2009.

On November 4, 2009, defense counsel asked for another two-week continuance to have time to obtain the already completed mental health evaluation. (3RP 3). The evaluation was filed on November 12, 2009. (CP 28). The order of competency was entered November 25, 2009. (CP 47). Accounting for the stay of proceedings, there were 9 days left under speedy trial, a date of December 3, 2009. The trial was instead reset to January 13, 2010. (3RP 6).

On December 23, 2009, defense counsel requested and was granted a continuance to review the evidence against Mr. Shemesh. (4RP 21). On January 6, 2010, defense counsel again requested a week's continuance to look at the evidence videos. (RP 8). On January 13, 2010, defense counsel still had not looked at the evidence. (RP 9). Mr. Shemesh signed a waiver of speedy trial, with a new commencement date of January 13, 2010. A trial date was set for February 1, 2010. (CP 48; RP 9). By January 27, 2010, counsel represented to the court she had viewed the videotape evidence and was in the process of a plea negotiation. (3RP 10). Trial was reset for February 16, 2010.

On February 3, 2010, after six months of confinement, Mr. Shemesh asked the court to appoint a new attorney for him. (1RP 5). He

cited differences in the way the case was being handled and his concern he had not seen any discovery or any information against him. Defense counsel stated, "Your Honor, I don't feel there is a conflict personally." Without further inquiry, the court denied his request. (1RP 5). The court set March 1, 2010 for trial. (1RP 7).

On February 17, 2010, Mr. Shemesh again signed a waiver of time for trial, consenting to a date of March 29, 2010. (CP 49). By March 3, 2010, defense counsel asked for another order for a competency evaluation. (CP 50). The proceedings were once again stayed.

The evaluation was received by March 31, 2010, but defense counsel was not available until April 7, 2010. (3RP 13). The evaluation was in the court file on April 5, 2010, but an order was not entered. (CP 56-64). On April 7, 2010 defense counsel said she had the report and had yet to set up an interview with a witness. Additionally, there would be a substitution of counsel. (RP 17). The case remained stayed. A week later, the order still had not been entered, and counsel again requested and was granted a two-week continuance. (1RP 9). In a later hearing, counsel reported her contract with the Office of Public Defense (OPD) ended on March 15, 2010. (Vol. 2 RP 165-66). OPD did not have her write any summary for the case. (Id.).

2. Second Appointed Attorney: April 28, 2010 through May 5, 2010.

On April 28, 2010, new counsel requested a continuance because a third attorney was going to be assigned. (5RP 2). In a later hearing, Eric Hsu, the indigent defense coordinator for Franklin/Benton County testified he was aware that Mr. Sant had been appointed to take over for the first appointed attorney. (Vol. 2RP 264-65). Because Mr. Sant requested an hourly payment, Mr. Hsu assigned the case to someone else, Mr. Swanberg. (Vol. 2 RP 179; 266)

3. Third Appointed Attorney: May 5, 2010 through October 20, 2010.

On May 5, 2010, Mr. Swanberg, the third appointed attorney, requested a two -week continuance. (2RP 9-10). The State had the order of competency prepared, but no one signed it. (Id). The proceedings remained on stay. On May 19, 2010, Mr. Shemesh was hospitalized for medical reasons. (1RP 10). Mr. Swanberg later testified he made a "tactical decision" to not enter the order of competency on either June 2 or June 9, 2010. (Vol. 2 RP 196-197). Between June 9, 2010 and July 14, 2010, Mr. Swanberg asked for continuances to discuss the possibility of a resolution. The order of competency was entered on July 14, 2010. (CP 65). The proceedings had been stayed for 134 days.

At the same hearing counsel raised the problem, for the first time, that he did not have a complete file. Additionally, he had not meet with Mr. Shemesh to review the video evidence with him. (2RP 10-13).

By August 11, 2010, counsel had only seen part of one tape that was going to be used at trial. He requested continuances from August 4, 2010 through September 22, 2010. (4RP 22; 5RP 6-8; 1RP 13-14). A new trial date of October 25, 2010 was set. (CP 67). On September 1, 2010, Mr. Shemesh again signed a waiver of speedy trial. (CP 67).

On September 22, 2010, a month before trial, counsel brought up the fact that he had not seen all the DVDs the State intended to use. Because previous counsel had not returned all the DVDs that were under the protective order, the State refused to issue another copy. (1RP 14). On October 16, 2010, the State brought a motion to compel the first assigned attorney to return all the DVDs. (2RP 14). First counsel stated she did not have the DVDs and believed she had returned everything. No sanctions were imposed. (4RP 23).

On October 20, 2010, Mr. Shemesh made a motion requesting new counsel. He was very concerned that nothing had been done to move his case forward and his attorney was still not up to speed on the evidence. (RP 20). The court appointed a fourth attorney and set trial for December 6, 2010. (RP 30).

4. Fourth Appointed Attorney: October 20, 2010 through October 12, 2011

The speedy trial date was moved forward another 60 days with the appointment of new counsel. (Vol. 2 RP 276). Trial was set for December 13, 2010. (2RP 21). On December 8, 2010, newly assigned counsel Metro moved for an extension of time. Mr. Shemesh signed the waiver for a speedy trial, and a new trial date of December 27, 2010 was set. (1RP 16; CP 81). On December 15, 2010, the State argued the case had already been set for trial 16 times previously. (1RP 18). Mr. Shemesh again signed the waiver for a speedy trial, with a new trial date of February 4, 2011. (CP 82).

Between January 5, 2011 and April 27, 2011, defense counsel had still not looked at all the discovery. (5RP 14; 16;18 22; 3RP 22; 2RP 20; RP 35). On April 27, 2011, counsel told the court he had not gone to the police station to review the videos because he was under the belief that he could only review them with both a police officer and a prosecuting attorney present. The inability to coordinate schedules had delayed the review of the DVDs for 24 weeks. (2RP 21; Vol. 2 RP 256). On March 18, 2011, counsel requested another continuance to hire experts. (RP 37-39). Mr. Shemesh signed a waiver thru July 18, 2011. (CP 84).

By June 22, 2011, counsel reported he was still waiting for authorization from OPD to hire an expert and was still conducting discovery. (RP 42). By July 6, 2011, an expert had still not been authorized. (5RP 24-25). Eric Hsu later testified that the first request he had for an expert from Metro was dated August 2, 2011. (Vol. 2 RP 275). Mr. Shemesh had been confined at the jail for over 24 months.

On August 17, 2011, defense counsel reported that OPD had rejected all the experts he had requested. The court kept the trial date of September 12, 2011. (RP 47). On August 31, 2011, Mr. Shemesh signed another waiver of speedy trial, consenting to a trial date of October 3, 2011. (CP 91). By September 21, 2011, the State made another plea offer and defense counsel requested a two weeks extension. The court granted the extension despite the State's objection that the case had gone on for over two years and the defense was just now authorized to have an expert to interview the complainants. (1RP 23).

5. Fifth Appointed Attorney: October 12, 2011 through February 26,2013.

On October 12, 2011, defense counsel Metro was replaced by defense counsel Kevin Holt. (3RP 27). In a later hearing, Eric Hsu testified the reason Mr. Metro was removed from the case was because defense attorneys on the Thursday docket complained about their high

caseloads. To balance out the caseloads, Mr. Hsu moved Mr. Metro to Thursday. As a result, his caseload was reassigned. (Vol. 2 RP 276-278). Mr. Metro testified he had no input about what cases should be transferred. (Vol. 2 RP 221-222).

On October 26, 2011, Mr. Shemesh signed another waiver, through January 23, 2012. (CP 92). On November 17, 2011, Mr. Holt signed the protective order for the DVDs. The court instructed the State to make another copy and directed Mr. Metro to return his copy to the State. (CP 94-95; 2RP 35).

On January 11, 2012, Mr. Shemesh signed another waiver of speedy trial rights, with a trial date of April 28, 2012. (CP 96). Because of counsel's schedule, trial was set out to May 7, 2012. (5RP 35). On April 25, 2012, the State represented that if the latest plea agreement was not taken, new charges would be added to Mr. Shemesh's information. (2RP 47).

On May 8, 2012, counsel requested more time for trial preparation. Mr. Shemesh signed another speedy trial waiver, setting the trial out to July 16, 2012. (4RP 32-35; CP 98). On July 20, 2012, the trial was reset to September 4, 2012. (4RP 37).

On August 22, 2012, the State made another plea offer. (5RP 37). The final amended information, filed on August 30, 2012, charged Mr.

Shemesh with three counts of first degree child rape, with aggravating circumstance allegations of a pattern of sexual abuse and position of trust, two counts of possession of depictions of a minor engaged in sexually explicit conduct, and one count of first degree child molestation with aggravating circumstances of a pattern of sexual abuse and position of trust. (CP 180-184).

A CrR 3.5 hearing was held on October 30, 2012. (4RP 66-149). The court ruled all statements were admissible. (4RP 149). No findings of fact or conclusions of law were entered.

On November 9, 2012, a hearing was held to dismiss all charges due to a violation of Mr. Shemesh's speedy trial rights and mismanagement by OPD. (4RP 155-311). Testimony was taken from each of the attorneys who had been assigned the case from its inception, as well as Eric Hsu. Lt. Guerrero from the jail testified that Mr. Shemesh was in protective custody by request. (Vol. 2 RP 294). He had little or no knowledge about Mr. Shemesh's his food allergies or his inability to practice his Jewish faith of eating kosher meals. (Vol. 2 RP 296-297).

After a jury trial, Mr. Shemesh was found guilty on all counts. (CP 557;571-578). On December 11, 2012, defense counsel filed a second motion and supplemental declaration and offer of proof in support of his

earlier CrR 8.3 motion. (CP 498-505; Vol. 11 RP 1837- 1863). The court denied the motion to dismiss. (Vol. 11 RP 1860).

The court imposed sentence on February 26, 2013. The standard range of confinement was 240 to 318 months. The trial court imposed a 600- month sentence based on the aggravating circumstances found by the jury. (CP 557). The court did not enter written findings and conclusions of law as required under RCW 9.94A.535. Mr. Shemesh filed a timely notice of appeal. (CP 580).

## III. ARGUMENT

### A. Mr. Shemesh's Constitutional Right To A Speedy Trial Was Violated Where The Unreasonable Delay Resulted From A Systemic Breakdown In The Public Defender System.

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend.VI. A Sixth Amendment speedy trial claim is reviewed de novo and the analysis is identical with Article 1 §22 of the Washington State Constitution. *State v. Iniguez,* 157 Wn.2d 273, 280, 217 P.3d 768 (2009).

The constitutional right to a speedy trial is not violated at the expiration of a fixed time, but rather, the expiration of a reasonable time. *State v. Monson,* 84 Wn.App. 703, 711, 929 P.2d 1186 (1997). The

Supreme Court has crafted a test to assist in evaluating whether an unconstitutional delay has occurred, weighing the conduct of both the prosecution and the defendant. *Barker v. Wingo,* 407 U.S. 514, 522-530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Among the factors to be considered are the length of the delay, the reasons for the delay, whether the defendant complained about the delay, and any resulting prejudice to the defendant. *Id.* at 530. While these factors assist in determining whether a particular defendant has been denied his right to a speedy trial, none is sufficient or necessary to a violation. *State v. Ollivier,* 178 Wn.2d 813, 827, 312 P.3d 1 (2013).

In order to prevail on a claim of an alleged violation of the constitutional rights to a speedy trial, the defendant must ordinarily establish actual prejudice from the delay to the ability to prepare a defense, and the exception is when the delay is so lengthy that prejudice to the ability to defend must be conclusively presumed.

*Id.* at 826.

In *Olliver,* the State conceded and the Court agreed that a 23-month delay between accusation and trial was sufficient to trigger the *Barker* analysis. *Id.* at 828. In *Iniguez,* the Court found an eight month delay was presumptive and sufficient to trigger the *Barker* analysis. *Iniguez,* 167 Wn.2d at 288-292. The length of delay in this case crosses

the line from ordinary to presumptively prejudicial: Mr. Shemesh was confined in the Benton County jail for the full 38 months between accusation and trial.

Reviewing the reasons for the delay, courts are necessarily compelled to adopt an ad hoc balancing test in speedy trial cases. *Iniguez,* at 283. The reviewing court examines the conduct of both the State and the defendant and engages in a balancing test to determine whether speedy trial rights have been denied. *Id.* The question is one that looks at fault: who is to blame for the delay, that is, whether the government or the defendant is more to blame. *Barker,* 407 U.S. at 530.

Similar to the issue of delay in this case, in *Vermont v. Brillion,* 556 U.S. 81, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009), the Supreme Court considered the issue of delay caused by failure of assigned counsel to move the defendant's case forward, which resulted in a three year delay between accusation and trial. The Court held that the Vermont Supreme Court erred in treating assigned counsel as state actors, attributing their failure to move the case forward as chargeable to the State rather than the defendant. *Id.* at 92. The Court reasoned that assigned counsel, like retained counsel, act on behalf of their clients and delays sought by defense counsel are ordinarily attributable to the defendants they represent. *Id.* at 90-91.

The Court also pointed out that the lower court had neglected to consider that Brillon had fired three of his attorneys and was assigned new counsel six times. *Id.* at 86-88. He also engaged in aggressive behavior, thus deliberately attempting to disrupt the proceedings and hampering the trial from moving forward. *Id.* at 94. The Court went on to state,

> "The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system', 955 A.2d at 111, could be charged to the State." *Id.* at 94.

Mr. Shemesh argues that the delay in bringing him to trial was delay resulting from a systemic breakdown in the public defender system, which should be charged to the State. Unlike Brillon, Mr. Shemesh did not attempt to disrupt or delay the proceedings and only one attorney was fired for failure to perform over the course of over five months.

The Office of Public Defense unilaterally reassiged counsel to Mr. Shemesh causing numerous extended delays in the case. After eight months as his attorney, the first assigned counsel was removed from the case when her contract was not renewed. OPD did not direct her to write a case summary or discuss the case with newly assigned counsel to ease the transition.

The next assigned counsel was quickly dismissed by OPD for financial reasons. Counsel felt the case was sufficiently complex to require hourly compensation rather than the regular contract amount.

The third counsel assigned by OPD on May 5, 2010, did not realize he did not have a complete file until July 14, 2010. By October 16, 2010, (a few days before the scheduled trial) and five months after appointment, counsel had still not seen all the DVDs the State intended to use. At Mr. Shemesh's request, the court appointed new counsel.

The fourth counsel assigned by OPD appears to have been hamstrung in his efforts to move the case forward. Assigned on October 20, 2010, he reported that on August 17, 2011, OPD had just approved and authorized payment for needed experts. On October 12, 2011, approximately one month before trial, OPD again unilaterally replaced defense counsel with yet a fifth counsel. The stated reason was to balance the caseload between defense attorneys on different dockets.

The financial considerations and unilateral decisions of OPD substantially and adversely affected Mr. Shemesh's right to a speedy trial. Each time OPD replaced an attorney an automatic extension of 60-day speedy trial occurred. This cannot be attributed to Mr. Shemesh, and the State should be charged with the delay where the State agency made unilateral decisions.

Each time a new attorney was assigned to the case, the process of discovery was begun anew. DVDs had to be located and viewed, witnesses needed to be interviewed or re-interviewed, and each attorney was required to build from the ground up, once again.

In *Michielli* the State delayed adding four quite serious charges until three days before trial, without any justification. The Court found the defendant was prejudiced in his right to a fair trial because he was forced to choose between waiver of his speedy trial right and his right to effective assistance of counsel. *State v. Michielli,* 132 Wn.2d 229, 245, 937 P.2d 587 (1997). Similarly, Mr. Shemesh was put in the unenviable position of either asserting his right to a speedy trial or accepting the likelihood he would receive ineffective assistance of counsel because of lack of preparation.

Moreover, even if Mr. Shemesh had asserted his right to a speedy trial, it is very likely the court would have simply found justification for a continuance based on the need for effective assistance of counsel. Given the vast number of continuances allowed over the years, often for no documented reason, asserting a right to a speedy trial would have likely been futile.

A second reason for delay was the dilatory entry of the second order of competency for the time period of March 3, 2010 through July 17,

2010. Because mental incompetence at the time of trial is a bar, where there is reason to doubt a defendant's competency, the court must order an expert evaluation of the defendant's mental condition. RCW 10.77.060(1)(a). An order for such an evaluation automatically stays the criminal proceedings until the court determines the defendant is competent to stand trial. CrR 3.3.

Ultimately, it is the responsibility of the trial court to ensure a trial in accordance with CrR 3.3. *State v. Jones,* 49 Wn.App. 398, 402, 743 P.2d 276 (1987), *aff'd,* 111 Wn.2d 239, 759 P.2d 1183 (1988). Under CrR 3.3, all proceedings relating to the competency of a defendant to stand trial are stayed until the time the court enters a written order finding the defendant to be competent. Here, the psychologist report finding Mr. Shemesh competent to stand trial was in the court file months before the order of competence was entered.

The first assigned attorney had requested the evaluation and was then removed from the case. Mr. Shemesh was left in a state of limbo, waiting for one of the next two assigned attorneys to become familiar enough with the record and evidence to submit the order to the court. Failure to enter the competency order, added 108 days to Mr. Shemesh's jail time. This should not be charged to Mr. Shemesh.

The third reason for the delay was the understanding between the State and defense counsel with regard to viewing the DVD evidence. The original order set forth the conditions regarding the use and distribution of the DVD recordings. (CP 13). At one point, defense counsel tried for 24 weeks to arrange to view the DVD evidence, believing he could only view it with a police officer and the prosecuting attorney present. The State's attorney appears to have agreed with that understanding; in a November 9, 2012 hearing, telling the assigned counsel, "In fact, I sent you an e-mail on Tuesday, February 15, 2011, at 10:02 am, and advised you that Detective Benson has taken over handling of the case. Would you please send in available dates, so we can coordinate the viewing of the tapes?" (Vol. 2 RP 255-56).

The evidence was within the control of law enforcement and could only be viewed with a State's attorney present. It is the responsibility of the State to make evidence reasonably accessible and it was not Mr. Shemesh's burden to show the restrictions were unworkable. *State v. Grenning,* 169 Wn.2d 47, 56, 234 P.3d 169 (2010). The resultant 24 week delay cannot be charged to Mr. Shemesh and must be charged to the State.

The lion's share of the reasons for delay was the result of a systemic breakdown in the public defender system. This should not be

charged against Mr. Shemesh. Additionally, the restrictions on access to discovery were also not chargeable to Mr. Shemesh.

One factor the reviewing court must consider is the frequency and force of a defendant's objections and give strong evidentiary weight to a defendant's assertion of his speedy trial right. *Iniguez,* 167 Wn.2d at 295, quoting *Barker,* 407 U.S. at 531-21. Mr. Shemesh signed 12 waivers of his right to a speedy trial. At first blush, this factor weighs against Mr. Shemesh; however, considering the imposed changes of attorneys effected by OPD decisions, the need for each attorney to become familiar with the evidence, and the difficulty defense counsel had obtaining access to the DVD evidence, objection to the requested extensions was largely not in his best interest nor likely to be heeded.

Lastly, the prejudice to Mr. Shemesh because of the unreasonable delay was significant. In *Doggett* , the court defined prejudice as involving the (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) possibility that the defense will be impaired by loss of exculpatory evidence and dimming memories of witnesses. *Doggett v. United States*, 505 U.S. 647, 654,112 S.Ct. 2686,120 L.Ed.2d. 520 (1992).

In an affidavit Mr. Shemesh laid out for the trial court some of the oppression he experienced during his pretrial incarceration. (CP 145-147). Mr. Shemesh stated that due in part to the diet and medications he

received from jail staff, his duodenal ulcer ruptured and he was hospitalized. (CP 145). Mr. Shemesh also suffered from severe migraine headaches and continually asked for acetaminophen. He was unable to tolerate aspirin, ibuprofen or any opiates. He reported he was given both methadone and aspirin by the jail medical staff. (CP 155).

Mr. Shemesh also averred that various defense counsel had told him they were unprepared and "this made my options as being either sign the waiver or put myself in detriment as there could be no defense." (CP 146). Mr. Shemesh stated he had been told by two of his attorneys they were not to share any discovery with him; he was not allowed to read or review police reports and had never seen his arrest warrant. He stated he had been "warned that if I did not sign the waivers for speedy trial I would be put back into a stay of proceedings, "For my own good." (CP 146).

Mr. Shemesh also had great difficulty practicing his religion while incarcerated: he was not allowed to wear a Yarmulke or have a prayer shawl. (Vol. 2 RP 293-294). Furthermore, out of the over 3,000 meals he had been served at the jail, there were only a few that he could actually eat based on religion and health requirements. Specifically, Mr. Shemesh was unable to eat a substituted meal of a kosher peanut butter. He was highly allergic to one of the ingredients. (2RP 34-35). Lastly, Mr. Shemesh reported that because he was incarcerated he was unable to necessarily be

in his cell at the time when the sun was setting, on the day he was to begin Shabbath. (CP 230).

The Supreme Court held that a defendant is not required to substantiate actual prejudice to his ability to defend himself because 'excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. Courts presume this prejudice intensifies over time. *Doggett,* 505 U.S. at 652, 655.

Mr. Shemesh respectfully asks this Court to find that his state and federal constitutional rights to a speedy trial were violated. He respectfully requests dismissal on all counts.

### B. The Trial Court Erred When It Failed To Enter Written Findings of Fact and Conclusions of Law To Support Its Decision To Impose An Exceptional Sentence.

If a jury unanimously finds the facts alleged by the State in support of an aggravated sentence, the court may impose a sentence that exceeds the standard range, if it determines that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6); *State v. Hyder,* 159 Wn.App. 234, 259-60, 244 P.3d 454, *rev. denied,* 171 Wn.2d 1024 (2011). By statute, whenever a sentence

outside the standard range is imposed, the trial court is required to set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." *In re Pers. Restraint of Breedlove,* 138 Wn.2d 298, 311, 979 P.2d 417 (1999). The Court of Appeals reviews de novo whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling. *Hyder,* 159 Wn.App. at 262.

Here, the trial court did not enter any written findings of conclusions. The preprinted boilerplate language on the judgment and sentence was checked as follows:

2.4 [X] Exceptional Sentence. The court finds that substantial and compelling reasons exist which justify an exceptional sentence:
[x] above the standard range for Counts I, II, III and VI.
[x] Aggravating factors were …[x] found by a jury by special interrogatory.
Findings of fact and conclusions of law are attached in Appendix 2.4 [x] Jury's special interrogatory is attached.
The prosecuting attorney [x] did …recommend a similar sentence.
(CP 560).

No findings of fact or conclusions of law were attached as an appendix. The court's oral ruling was as follows:

> "You have a standard sentencing range as is set out on Page 4 of your judgment and sentence that would be in front of you. Ms. Long set out the sentencing ranges. The jury did find aggravating factors beyond a reasonable doubt. Based on that, the court finds it appropriate to follow the request of the prosecutor and sentence you to the term of 600 months on Counts 1, 2, and 3…"

(Vol. 12 RP 38).

After Blakely, the legislature intended that once the jury found an aggravating fact, the sentencing court must then decide whether the factor is a substantial and compelling reason to impose greater punishment. LAWS of 2005 ch. 68 §1. A trial court is not required to impose an exceptional sentence merely because the jury finds the aggravating factor has been proved. Rather, the court may sentence a defendant to an exceptional sentence if it determines that the facts found are substantial and compelling reasons justifying such an exceptional sentence. *State v. Williams,* 159 Wn.App. 298, 314, 244 P.3d 1018 (2011).

An exceptional sentence may only be reversed if the reviewing court finds (a) either the reasons supplied by the sentencing court are not supported by the record, or that those reasons do not justify a sentence

outside the standard range for that offense; or (b) the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.585(4).

On appeal, where the appellant is afforded the right to challenge an exceptional sentence, the appellate court uses a three prong analysis, with different levels of scrutiny, in its review. First, whether the record supports the jury's special verdict, a factual inquiry; second, the trial court's reasons are reviewed de novo to determine whether those reasons for imposing an exceptional sentence are substantial and compelling, a legal inquiry; and lastly, whether the trial court abused its discretion in imposing a sentence that is clearly excessive or lenient. *State v. Fowler,* 145 Wn.2d 400, 405-406, 38 P.3d 335 (2002); *Hyder,* 159 Wn.App. at 262. In instances where the trial court does not follow the statutory mandate and the precedent of the Washington Supreme Court, the reviewing court is left with nothing to review under any standard.

Mr. Shemesh argues that the checking of a box on a preprinted boiler plate form and a perfunctory explanation by the trial court for imposition of the exceptional sentence, does not amount to a record that can be reviewed by the higher court. In the absence of written findings of fact and conclusions of law, an appellate court should not uphold a trial court's reliance on an aggravating factor said to support an exceptional sentence. *State v. Batista,* 116 Wn.2d 777, 789, 808 P.2d 1141 (1991). In

the alternative, Mr. Shemesh requests this court follow the prescribed remedy of *Breedlove*: remand for entry of written findings of fact and conclusions of law. *Breedlove,* 138 Wn.2d at 311. The findings and conclusions must be based only on evidence already taken. *State v. Head,* 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). Further, Mr. Shemesh respectfully asks this court o order an allowance for supplemental briefing to challenge and all findings of fact and conclusions of law. *State v. Hale,* 146 Wn.App. 299, 304, 189 P.3d 829 (2008).

## IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Shemesh respectfully asks this Court to grant the requested relief of dismissal of all charges for violation of his constitutional speedy trial rights; or in the alternative, remand for entry of written findings of fact and conclusions of law regarding the exceptional sentence.

Respectfully submitted this 14th day of April 2014.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Michael L. Shemesh, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the brief of appellant was sent by first class mail, postage prepaid on April 15, 2014 to: Michael L. Shemesh, DOC 362748, Washington Corrections Center, PO Box 900, Shelton, WA 98584; and by email per agreement between the parties to: prosecuting@co.benton.wa.us : Andrew K. Miller, Benton County Prosecuting Attorney, 7122 W. Okanogan Pl. Kennewick, WA 99336.

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