No. 93573-4
Court of Appeals No. 45724-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

SIDNEY POTTS,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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REPLY TO ISSUES PRESENTED

1. The court of appeals properly applied the appropriate caselaw, reviewed the constitutional issues *de novo* as required and thus there are no conflicts with existing caselaw, so the petition should be denied.
2. The trial court properly applied the factors indicated in *Robinson* and the decision to declare a mistrial was based on manifest necessity. There is no conflict with *Robinson*, so the petition should be denied.
3. The court of appeals properly applied the relevant caselaw, including *Harris*, and no conflict exists between the opinion below and any existing caselaw, so the petition should be denied. The petition should be denied.
4. The court of appeals properly affirmed the trial court's finding of waiver and no conflict exists between the opinion below and any requirement in of *Fuentes.* The petition should be denied.
5. The court of appeals applied the proper legal standard and no conflict exists between the opinion below and any existing caselaw. The petition should be denied.
6. The court of appeals appropriately found that the State had presented sufficient evidence to support the guilty verdict and this issue bears no significant public interest as the caselaw and requirements for sufficiency are straightforward and clear. The petition should be denied.
7. The court of appeals appropriately found that the jury instruction on leading organized crime was adequate and in conjunction with the limitation in the accomplice liability instruction regarding its application to only the predicate crimes, there could be no prejudice from any perceived violation. Nor does this issue raise a claim of substantial public interest. The petition should be denied.
8. The prosecutor conceded misconduct, but there was no prejudice as the opinion below accurately points out that the State immediately changed tact, referred the jury to the instructions and did not argue further anything to do with the misconduct. Additionally, there is no issue of substantial public interest here, as it is a straightforward misconduct claim

that can be resolved easily with existing caselaw. The petition should be denied.

9. The opinion below properly interpreted RCW 9.94A.535(e) in a manner consistent with the plain language and meaning of the statute, thus no issue of substantial public interest exists and the petition should be denied.
10. The court of appeals properly resolved Petitioner's claims regarding the privacy act violations using existing caselaw and created no conflicts with other caselaw. The issues of substantial compliance, specificity of dates and times, and scope of the authorizations are all well settled and there is no substantial public interest in accepting review in this issue. The petition should be denied.
11. There was no violation of Petitioner's speedy trial right. As the court of appeals noted there was no actual allegation of prejudice, if such a violation were to have occurred. The trial court's determination of a constructive arraignment date, within the existing rules, was not an abuse of discretion, and there was no actual speedy trial violation. Additionally, this issue is based on a hyper-technical articulation of the speedy trial rules and its resolution is not of substantial public interest. The petition should be denied.
12. The State will not be using any evidence seized during the execution of the search warrants, so further review is unwarranted.
13. There are no issues raised within the Statement of Additional Grounds that are appropriate for review and the petition should be denied.

I. FACTS

The State generally accepts Petitioner's recitation of facts, except where noted within argument or where they conflict with the facts as presented by the court of appeals in the opinion below.

II. ARGUMENT

a. The court of appeals properly applied *de novo* analysis to the double jeopardy claim, while using the abuse of discretion standard for the claim that the mistrial declaration was Improper

There is no conflict with either *Jones* or *Iniguez*. In each instance referenced by the Petitioner, the Court of Appeals correctly pointed out that violations of constitutional rights are reviewed *de novo*. Petitioner's claim here attempts to collapse two separate inquiries for the purpose of creating a legal a novel legal issue. Caselaw has long-recognized the deferential standard applied to trial court's decisions regarding a mistrial. *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982), *citing Arizona v. Washington*, 434 U.S. 497, 509, (1978); *State v. Brunn*, 22 Wnd.2d 120, 145, 154 P.2d 826 (1945); *State v. Bishop*, 6 Wn.App. 146, 150, 491 P.2d 1359 (1971). This has been the standard for decades. There is nothing within that caselaw that holds constitutional violations should be reviewed at less

than a *de novo* standard, because the inquiries are different steps in an overall decision.

In this case, as in the majority of other cases dealing with alleged violations of constitutional rights, there are multiple steps in the analysis. Regarding the mistrial, the court of appeals indicated that a "double jeopardy claim" was reviewed "*de novo.*" Op. 10. Regarding the right to counsel claim, the court indicated that it would review the denial of the 8.3 motion under the abuse of discretion standard, but then indicated that it would review the denial of the Sixth Amendment right claim that was the basis for the 8.3 motion under the *de novo* standard. *Op.* 13. There is nothing within the written opinion that suggests the court did otherwise and this holding does not actually conflict with *Jones* or *Iniguez*. *State v. Iniguez*, 167 Wn.2d 273, 217 P.3d 768 (2009). Because there is no actual conflict, the court should deny the petition for review.

b. There is no conflict between the opinion below and *Robinson*, nor is there any significant question of constitutional law

There is no conflict with *Robinson*, since the court of appeals followed the so-called *Robinson* factors. The *Robinson* factors are actually more accurately described as the *Arizona v. Washington*

factors, since they first appeared in that case. 434 U.S. at 509. Both the court of appeals in the opinion below and the opinion in *Robinson* cite *Melton*, which cites *Arizona v. Washington*, for the "factors." *State v. Melton*, 97 Wn.App. 327, 333, 983 P.2d 699 (1999), *citing Arizona v. Washington*, 454 at 515-16.

Robinson cited the exact same law the opinion below cites, but came to different conclusions based on the various facts in that specific case. This does not create a legal conflict warranting review. For instance, for "acting precipitately" the *Robinson* court found that 8 minutes of unprepared oral argument was not enough to thresh out the issue. *State v. Robinson,* 146 Wn.App. 471, 480, 191 P.3d 906 (2008). This is in stark contrast to the several days and multiple oral arguments of considerable length the trial court in this case gave to the Petitioner. Op. 11. It is thus unsurprising that the court of appeals in this case came to a different conclusion than the *Robinson* court regarding the respective trial court's "precipitate" action, but that does not mean there is a conflict between the two.

Petitioner's point by point analysis under *Robinson* just retreads the same argument made at the court of appeals under the guise of a conflict between the opinion below and *Robinson*, but there

is no conflict and this court should not accept review. Nor does it actually raise a significant question of constitutional law.

c. There is no conflict between the opinion below and *Orange* or *Hughes*

The court of appeals relied on *State v. Harris*, which this court has already declined to review. 167 Wn.App. 340 (2012), *review denied* 175 Wn.2d 1006 (2012). As the court of appeals correctly pointed out, Petitioner's argument about conflict only goes so far because it ignores the other significant part of the analysis regarding legislative intent. Op. 13. The analysis regarding legislative history is completely in line with existing caselaw, including *Hughes* and *Orange*, which Petitioner purports conflict with *Harris* and the instant case. Yet in *Hughes*, this Court also engaged in analysis of evidence of legislative intent in answering the merger question. 166 Wn.2d 675, 685-686, 212 P.3d 558 (2009). This Court did the same in *In Re Orange*, 152 Wn.2d 795, 819, 100 P.3d 291 (2004). There is no actual conflict. The court below simply looked at different aspects of the same *Blockburger* test that was used in all of the cited cases. The Court in *Orange* specifically acknowledged that in order to achieve a just result, the Court could render a decision consistent with existing caselaw, but applied differently. *Id.* at 820, 100 P.3d 291.

d. There is no conflict between this case and *Fuentes*, nor is this an issue of substantial public interest

There is no conflict with *Fuentes*, because the trial court properly determined that the Petitioner had waived his right to counsel. Any interpretation of *Fuentes* still requires a violation of the Petitioner's right to counsel, but because the trial court found that the right was waived and the court of appeals based their decision on that finding, *Fuentes* simply does not apply. The court of appeals noted this in the opinion at n.13.

Nor is the question addressed one of substantial public interest, as the caselaw regarding waiver of a constitutional right is well-established. Since the court of appeals did not get past the question of waiver, there is no substantial public interest in the question. Where an individual is told by the phone system that his call is being recorded, the person who received the call is told the same thing, and both are required to specifically acknowledge the recording by pressing a button on the phone, there is no real public or legal interest in the outcome. The finding of waiver in this case was uncontroversial, consistent with the evidence presented, and no review is necessary.

e. There is no conflict between the opinion below and *James*, *Fuentes*, or *Zerbst*

The opinion below did not establish any holdings that were contrary to *James*, *Fuentes*, or *Zerbst.* While Petitioner may argue that the outcome of the case was not consistent with their interpretation of those cases, there is no legal conflict, nor does the opinion below create any new law that is contrary to the alleged cases. The argument regarding conflict for each of these cases is essentially that they could not possibly have applied them correctly because it found against the Petitioner. This is not an actual conflict for purposes of review. This Court should deny review because there is no actual conflict between the opinion below and *James*, *Fuentes*, or *Zerbst.*

f. The question of sufficiency of the evidence regarding Leading Organized Crime is not a significant constitutional issue that is of substantial public interest

The elements of leading organized crime are well settled and there is no controversy about the evidence necessary to prove the crime beyond a reasonable doubt. The issue of sufficiency is not an issue of substantial public interest. The court of appeals in the opinion below accurately and succinctly summarized the evidence and caselaw related to this issue. Additionally, the State would point out that Petitioner specifically "financed" Velasquez, since Velasquez

was staying in a home rented by Petitioner as noted in the opinion below. Op. 33. That fact alone, taken in the light most favorable to the State, would be sufficient. There is no compelling public interest in this issue, there is no conflict of cases on this issue and the petition for review should be denied.

g. The court of appeals properly found the jury instructions adequate and there is no conflict between the opinion below and *Kyllo*

The elements of leading organized crime are well settled and the jury instruction used in the case, as noted in the opinion below, accurately stated those elements. There is no conflict between the opinion below and *Kyllo*. The proposed conflict is simply that the instruction in this case did not make it "manifestly apparent" enough to satisfy *Kyllo*, which does not actually mean there is a split of authority requiring review. The court of appeals below accurately analyzed the issue, noting the elements in the instruction, the manner in which the instruction was used, and the fact that the accomplice instruction in the case was specifically limited to the predicate crimes. Op. 39. There is no conflict and the jury instruction for leading organized crime was adequate, thus the petition for review should be denied.

h. There is no constitutional issue of substantial public interest related to the prosecutorial misconduct allegation

The misconduct at issue was conceded, but as the court of appeals noted in the opinion below, the State took immediate steps to refocus the argument on the actual conduct of Petitioner. Op. 36. There is no novel legal analysis to be applied here, just a straightforward misconduct claim that resulted in the court finding that based on all the information available, there was no actual prejudice and so the claim failed. There is no issue of substantial public interest necessitating review and the court of appeals properly applied the relevant caselaw. The petition should be denied.

i. The opinion below properly construed the exceptional sentence statute and no review is necessary

The court of appeals correctly interpreted RCW 9.94A.535(e) and this court should decline review. The court of appeals relied on a plain language in interpretation of the statute and found that leading organized crime could be a major violation of RCW 69.50 when its predicate acts, the facts that underlie the crime, constituted a major violation of RCW 69.50. This is within the plain text of the statute. The petition should be denied.

j. The opinion below regarding the RCW 9.73 intercepts is completely consistent with existing caselaw and presents no issue of constitutional magnitude with a substantial public interest

There are no conflicts between the opinion below and any reported cases in Washington and the court's opinion is entirely consistent with reasonable interpretation of existing caselaw. Ultimately, this issue involves the detective's failure to 1) provide a disposition sheet for intercept on the August 10th controlled buy and 2) provide sufficient specificity the location and nature of the contacts in each of the intercepts. The court of appeals accurately noted that with substantial compliance, there was no need to suppress the entirety of the evidence relating to the August 10th controlled buy and that the trial court properly excluded only the intercept. Op. 44. The court of appeals also accurately explained the vagaries applied to drug transactions and the difficulties of picking specific times and locations for intercepts to occur, especially in this case because vehicles were used. Op. 44. The opinion below presented a reasonable analysis and accurate representation as to the state of the law for the various issues raised and so the State asks this court to deny the petition for review as to this issue.

k. The opinion below correctly determined that dismissal was not warranted for any perceived violation of the speedy arraignment provisions of CrR 3.3

The opinion below correctly pointed out that Petitioner never actually alleged any sort of prejudice from the alleged speedy arraignment violation. No prejudice was ever alleged or established. In addition, the original basis for the trial court's determination that no dismissal was warranted was reasonable and not an abuse of discretion. The trial court properly set a constructive arraignment date and did not violate Petitioner's right to a speedy trial. If the Petitioner was not arraigned in a timely fashion, the remedy under CrR 4.1(b) is for the court to "establish and announce the proper date of arraignment." Since the rule requires that arraignment take place within 14 days of the filing of the information, the court properly announced the date as August 29th, 2012. This date represents that date of arraignment for all purposes, under both CrR 3.3 and CrR 4.1.

To be clear, there is no allegation that any of the trial dates set by the court violated the Petitioner's time for trial rights, i.e. that he receive a trial within 60 days of the date of commencement per CrR 3.3(b)(1). Rather, the argument went that because a trial date was not set within 15 days of the date of the "actual arraignment," there

was a violation of the speedy trial rules as written and therefore the case should be dismissed. This is simply not the case.

The arraignment date established by the trial court pursuant to CrR 4.1 is the only arraignment date; it is both constructive and actual for purposes of CrR 3.3. CrR 4.1(b) specifically states that the constructive arraignment date is "the arraignment date for purposes of CrR 3.3." The commencement date under CrR 3.3(c)(1), the date from which all speedy trial calculations begin, is "the date of arraignment as determined under CrR 4.1." So, for purposes of speedy trial calculation, the constructive arraignment date established pursuant to CrR 4.1 is the only arraignment date. Because of this explicit reference by both rules, the only reasonable interpretation is that **the** arraignment date for purposes of either CrR 3.3 or CrR 4.1 is the constructive arraignment date.

The arraignment date established by the court pursuant to CrR 4.1 is the only arraignment date, constructive or otherwise, because CrR 3.3 specifically defines "arraignment" as "the date determined under CrR 4.1(b). CrR 3.3(a)(3)(iv)." The citation of the CrR 4.1 section that addresses whether a constructive arraignment date needs to be set, by the definitions section of CrR 3.3, is dispositive of this

issue. The "arraignment" for purposes of CrR 3.3, including CrR 3.3(d)(1), is "the date determined under CrR 4.1(b). CrR 3.3(a)(3)(iv).

Because the constructive arraignment date is the only applicable date, there was no violation of CrR 3.3(d)(1). The Petitioner points to the language in CrR 3.3(d)(1) and the inclusion of the word "actual" to suggest that the constructive arraignment date set in CrR 4.1 is not the date for purposes of determining when a trial date must be set. The use of the word actual in this case is irrelevant since the only arraignment date, actual or otherwise, for purposes of CrR 3.3, is the date established by the court pursuant to CrR 4.1(b). The date that CrR 3.3(d)(1) is referring to must be the constructive arraignment date established by the court.

Even if this court were to find that there was a violation of CrR 3.3(d)(1), the remedy is not a dismissal. A plain reading of CrR 3.3(h), the provision upon which Appellant rests their dismissal request, shows that it simply does not apply. CrR 3.3(h), in relevant part, reads "a charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." There is no allegation that the actual trial occurred outside the allowable period under CrR 3.3. The only allegation is that the initial trial date was set more than

15 days before the "actual" arraignment. The speedy trial commencement date is the date established pursuant to CrR 4.1. The only reference to "actual" is the reference in "Initial Setting of Trial Date," which ultimately has nothing to do with whether or not a "charge" was brought to trial "within the time limit determined under this rule." CrR 3.3(h).

This court should deny this petition for review because the opinion below was a reasonable interpretation of the law and is not in conflict with any other caselaw. Moreover, the trial court properly established a constructive arraignment date within the rules as written. Finally, there is no claim that the Petitioner suffered any prejudice as a result of the setting of a constructive arraignment date. This issue is hyper-technical and is not an issue of substantial public interest. The petition for review should be denied.

l. Should a retrial be necessary, the State will not seek admission of any of the evidence seized during the execution of the various search warrants
m. There is no reasonable basis for review in any of the Petitioner's statement of additional grounds and the petition for review should be denied

III. CONCLUSION

This Court should deny the Petition for Review. As is abundantly clear from the record before this Court, this case has been

the subject of a tremendous amount of litigation and turmoil. Forests were destroyed in the litigation of this case and the Court should not consider the relative brevity of this reply as anything other than an attempt to crystalize the relevant issues from amongst the thousands of pages of transcripts, motions, petitions, writs, briefs and affidavits that have been generated by this case. There is little doubt that no matter the court's decision in accepting review, there will yet be more. In spite of all of that litigation, the court of appeals was able to resolve the various issues before it on existing caselaw and generated no real conflict in its application. The Respondent respectfully requests that this Court deny the petition for review.

Respectfully submitted this 21st day of November, 2016.

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APPENDICES

RCW 9.94A.535

Departures from the guidelines.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following

factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the

commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of

his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the

time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

RULE CrR 4.1
ARRAIGNMENT

(a) Time.

(1) Defendant Detained in Jail. The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) Defendant Not Detained in Jail. The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

(b) Objection to Arraignment Date---Loss of Right to Object. A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. That date shall constitute the arraignment date for purposes of CrR 3.3. A party who fails to object as required shall lost the right to object, and the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shallbe assigned by the court, unless otherwise provided.

(d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes.

Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) Name. Defendant shall be asked his or her true name. If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) Reading. The indictment or information shall be read to defendant,unless the reading is waived, and a copy shall be given to defendant.

RULE 3.3
TIME FOR TRIAL

(a) General Provisions.

(1) *Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime

(2) *Precedence Over Civil Cases.* Criminal trials shall take precedence over civil trials.

(3) *Definitions.* For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) *Construction.* The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) *Related Charges.* The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) *Reporting of Dismissals and Untimely Trials.* The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or
(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.
(1) *Defendant Detained in Jail.* A defendant who is detained in jail shall be brought to trial within the longer o
(i) 60 days after the commencement date specified in this rule, or
(ii) the time specified under subsection (b)(5).
(2) *Defendant Not Detained in Jail.* A defendant who is not detained in jail shall be brought to trial within the longer of
(i) 90 days after the commencement date specified in this rule, or
(ii) the time specified in subsection (b)(5)

(3) *Release of Defendant.* If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.
(4) *Return to Custody Following Release.* If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.
(5) *Allowable Time After Excluded Period.* If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period

(c) Commencement Date.
(1) *Initial Commencement Date.* The initial commencement date shall be the date of arraignment as determined under CrR 4.1.
(2) *Resetting of Commencement Date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.
(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement

date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.
(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.
(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.
(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.
(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.
(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification

(d) Trial Settings and Notice--Objections--Loss of Right to Object

(1) *Initial Setting of Trial Date.* The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known

address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) *Resetting of Trial Date.* When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) *Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) *Competency Proceedings.* All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) *Proceedings on Unrelated Charges.* Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) *Continuances.* Delay granted by the court pursuant to section (f).

(4) *Period between Dismissal and Refiling.* The time between the dismissal of a charge and the refiling of the same or related charge.

(5) *Disposition of Related Charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge

and the defendant's arraignment in superior court on a related charge.

(6) *Defendant Subject to Foreign or Federal Custody or Conditions.* The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) *Juvenile Proceedings.* All proceedings in juvenile court.

(8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) *Disqualification of Judge.* A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) *Motion by the Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.