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NO. 101234-9
COA NO. 83054-6-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARTIN MORA-LOPEZ,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

In *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), this Court affirmed dismissal where a prosecutor's late disclosure forced the defendant to choose between a prepared attorney and a speedy trial. The trial court dismissed the charges against Martin Mora Lopez based on *Michielli* when the prosecution withheld its witness list until the eve of trial.

But the Court of Appeals turned *Michielli* on its head. It held delay is not prejudice under CrR 8.3(b) unless the court cannot grant a continuance under CrR 3.3. It also held *Michielli* is no longer good law. The Court's misreading of CrR 8.3(b) limits the rule's scope and insulates misconduct from review.

The Court of Appeals also held the trial court miscalculated Mr. Mora Lopez's speedy trial deadline, when in fact the Court of Appeals misread CrR 3.3.

B. IDENTITY OF PETITIONER

Petitioner Martin Mora Lopez asks for review of the decision reversing the superior court's order to dismiss the charges against him under CrR 8.3(b).

C. COURT OF APPEALS DECISION

Mr. Mora Lopez seeks review of the published opinion in *State v. Mora-Lopez*, No. 83054-6-I (Wash. Ct. App. Aug. 1, 2022).

D. ISSUES PRESENTED FOR REVIEW

1. In *Michielli*, this Court recognized that the prosecution's late discovery merits dismissal under CrR 8.3(b) if it forces a charged person to choose between a prepared attorney and a trial within the speedy trial period. The Court of Appeals dismissed *Michielli* as no longer good law and reasoned misconduct does not cause prejudice unless the trial court cannot grant a continuance in compliance with

CrR 3.3. This Court should grant review and remind the Court of Appeals that its decisions are binding.

2. Under CrR 3.3, the excluded period for a trial continuance begins to run on the day the court enters an order granting the continuance. Applying the rule correctly results in a speedy trial date of July 6, 2021, days after the prosecution disclosed its witness list. The Court of Appeals erroneously reasoned the excluded period began on the *old trial date*, not the date the court granted the continuance, resulting in a speedy trial date of July 28. This Court should grant review and clarify how to calculate excluded periods.

E. STATEMENT OF THE CASE

Bellingham police arrested Mr. Mora Lopez on April 10, 2021. CP 5, 65 FF 1.[1] The prosecution charged

[1] "CP 65 FF 1" refers to the trial court's Finding of Fact 1, on page 65 of the designated clerk's papers.

him with one count each of second-degree assault and felony harassment. CP 1–2, CP 65 FF 2.

1. **The prosecution provides Mr. Mora Lopez with discovery materials that mention many potential witnesses.**

The prosecution emailed Mr. Mora Lopez's counsel a sheaf of police reports on April 21, 2021. CP 90. It later provided a surveillance video. CP 92.

Also on April 21, the prosecution submitted a "Demand for Discovery" that said its "Witness List will include all those named or referenced in Discovery [sic] provided to the defendant." CP 8–9, 66 FF 4.

According to the police reports, unnamed "staff" at a Bellingham homeless shelter called 911 to report a fight. CP 76. Employee Adrian Hartup told police officer Michael Shannon that Mr. Mora Lopez swung a knife at Jacob Moye. CP 75–76, 80. Mr. Hartup said "a

few people tried" to intervene. CP 76. Mr. Moye gave a similar account. CP 72, 81.

Employee Adam Estrada showed Officers Shannon and Dale Wubben surveillance footage of the incident. CP 76, 81.

Mr. Hartup said Mr. Mora Lopez left the shelter when staff called 911. CP 76. Unnamed "[o]fficers" looked for Mr. Mora Lopez in the area. CP 76. "A short time later," "[o]fficers," unnamed except for Officer Marty Otto, arrested him. CP 76, 84.

Officer Shannon took a knife from Mr. Mora Lopez's backpack. CP 76. Fellow officer Claudia Murphy later checked the knife out for photographs. CP 23, 88. Officer Eric Kingery said unnamed people at the "CSI laboratory" took the pictures, and Kingery returned the knife to evidence. CP 88.

Officer Wubben reported unnamed "[e]mployees" called earlier to ask the police to notify Mr. Mora Lopez he was not permitted at the shelter. CP 81. After Mr. Mora Lopez's arrest, Officer Wubben filled out a lifetime trespass notice. CP 81, 86. The notice said Officer Wubben acted "on the request of the property owner/manager," but did not name that person. CP 86.

2. **The trial is set for June 28, 2021, with a correctly calculated speedy trial deadline of July 6.**

The superior court arraigned Mr. Mora Lopez on April 23. CP 11, 66 FF 5. The court set the trial for June 14. CP 11, 66 FF 5. Because Mr. Mora Lopez was in jail, his speedy trial deadline was 60 days after this date, or June 22, 2021. CrR 3.3(b)(1)(i), (c)(1). The court delayed the trial by one week to June 21, 2021. CP 13.

On May 27, 2021, the court again entered an order delaying the trial by one week, to June 28. CP 15, 66 FF 8. The speedy trial period excluded the seven

days from the date of this order to June 3. CrR 3.3(e)(3). The speedy trial deadline became the date 30 days after this excluded period, or July 3. CrR 3.3(b)(1)(ii), (b)(5). Because July 3 was a Saturday and July 4 was a legal holiday, the deadline was the next court day, July 6. RCW 1.16.050(1)(g), (5)(a). This is the deadline the trial court calculated. RP 6.[2]

3. The prosecution does not disclose the witnesses it intends to call to the defense until 18 days after the due date and four business days before trial.

An omnibus hearing took place on June 3. CP 18, 66 FF 9. The prosecution's witness list was due "by the end of the day." WCCrR 6.18(b)(3)[3]; CP 66 FF 9. The prosecutor did not file or serve a witness list on June 3. CP 67 FF 11.

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[2] The court's written findings say the deadline expired "no later than July 7, 2021." CP 69–70.

[3] Whatcom County Superior Court's local rules are available at https://www.whatcomcounty.us/DocumentCenter/View/569/Court-Rules-PDF.

On June 18, Mr. Mora Lopez's counsel sent the prosecution an email asking for assistance setting up an interview with Mr. Moye and several police officers. CP 44. Counsel later explained she sent the email "to prompt the State to provide a witness list" because she "didn't know who [she] needed to interview" and "had no idea who the witnesses were." RP 12. "Defense counsel never received a reply to that email and no witness interviews were scheduled." CP 67 FF 12.

The prosecutor did not file a witness list until June 21, 18 days after the deadline. CP 22, 67 FF 13. He served the list on the public defender's office on June 22. CP 30, 67 FF 13; RP 9.

The prosecution's witness list included eight people—the alleged victim, Mr. Moye; two Base Camp employees, Mr. Hartup and Mr. Estrada; and five

police officers, Shannon, Wubben, Otto, Kingery, and Murphy. CP 22–23.

Contrary to the prosecution's boilerplate notice, the list did *not* include all people "referenced" in the police reports. CP 9. For example, it omitted the "staff" who called 911, the "employees" and "property owner/manager" who requested a trespass notice, the "people" who tried to intervene in the alleged fight, the "officers" who participated in the arrest, or the officer who photographed the knife. CP 76, 81, 84, 86, 88.

4. **The trial court concludes the late witness list was prosecutorial mismanagement that prevented Mr. Mora Lopez from preparing for trial within the speedy trial period.**

Mr. Mora Lopez moved to dismiss the charges against him under CrR 8.3(b). CP 32, 67 FF 14. He argued the prosecution's failure to submit a witness list by the deadline was misconduct. CP 33. In turn, the absence of a witness list led the defense to believe the

prosecution intended to forgo calling many witnesses and rely on the surveillance video instead. RP 7, 36–37; *accord* CP 68 CL 2.[4] The late disclosure of the witnesses the prosecution planned to call left Mr. Mora Lopez unable to prepare within the time remaining for trial. CP 33–34, 67 FF 14, 68 CL 2–4; RP 5–6.

The superior court granted the motion to dismiss on June 24. CP 36; RP 15. The court noted Mr. Mora Lopez was waiting for his trial in jail and was entitled to expect the prosecution to "follow court rules" enacted to ensure timely preparation. RP 14. The prosecution's violation of those rules left Mr. Mora Lopez without "sufficient time to prepare a defense." RP 14–15; *accord* CP 67 FF 15, 68 CL 1–2.

[4] "CP 68 CL 2" refers to the trial court's Conclusion of Law 2, on page 68 of the designated clerk's papers.

The prosecution moved to reconsider. CP 37–51. The court denied the motion. CP 67 FF 16, 69; RP 49.

The trial court entered extensive findings of fact and conclusions of law. CP 65–69. It concluded the prosecution mismanaged the case by serving a late witness list. CP 68 CL 1. Citing *Michielli*, it further concluded the late disclosure prejudiced Mr. Mora Lopez by preventing his counsel from preparing for trial within the speedy trial period. CP 68 CL 2–5.

F. WHY THIS COURT SHOULD ACCEPT REVIEW

A trial court may dismiss criminal charges "due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial." CrR 8.3(b). The rule's purpose is to ensure a defendant is treated fairly. *State v. Michielli*, 132 Wn.2d 229, 245–46, 937 P.2d 587 (1997). "The trial

court [i]s in the best position to make a fair call" on a motion under CrR 8.3(b). *State v. Salgado-Mendoza*, 189 Wn.2d 420, 439, 403 P.3d 45 (2017).

The Court of Appeals correctly concluded the prosecution mismanaged the case by serving its witness list weeks after the deadline and only days before the trial. Slip op. at 7. However, the Court of Appeals concluded there was no prejudice because the trial court could have granted a continuance without violating CrR 3.3, and the speedy trial deadline was weeks later than the date the trial court calculated. This reasoning contradicts this Court's precedent and misapplies CrR 3.3. This Court should grant review.

1. **The Court of Appeals's reading of CrR 8.3(b) disregards this Court's binding precedent and insulates government misconduct from review.**

CrR 8.3(b) permits a trial court to dismiss criminal charges if government misconduct caused

actual prejudice. *State v. Martinez*, 121 Wn. App. 21, 29–30, 86 P.3d 1210 (2004). Appellate courts review a prejudice finding for abuse of discretion. *State v. Dailey*, 93 Wn.2d 454, 456–57, 610 P.2d 357 (1980).

This Court recognizes that the prosecution's disclosure of new information on the eve of trial may leave the defense without enough time to prepare effectively within the speedy trial period. *Salgado-Mendoza*, 189 Wn.2d at 432. The result is to compel defendants to choose between their constitutional right to an effective attorney and their right to a speedy trial under CrR 3.3. *Michielli*, 132 Wn.2d at 245. This forced choice between two important rights adds up to actual prejudice under CrR 8.3(b). *Id.*

In *Michielli*, the prosecution added four new felony counts to the information three business days before trial, despite having all the evidence it needed to

allege the additional charges months earlier. 132 Wn.2d at 243, 244–45, 246. When the prosecution added the surprise charges, one month remained in the speedy trial period. *See id.* at 243, 244 (information amended October 27, deadline November 30). The Supreme Court held the trial court could reasonably conclude the late amendment forced the defendant to choose between a prepared attorney and a speedy trial and affirmed dismissal under CrR 8.3(b). *Id.* at 245–46.

The Court of Appeals agreed with Mr. Mora Lopez that the late witness list introduced new information into the case that prevented him from effectively preparing for trial. Slip op. at 7. Under *Michielli*, the trial court did not abuse its discretion in finding the infusion of new information only days before the speedy trial deadline was prejudicial enough to dismiss the charges. 132 Wn.2d at 245.

However, rather than reach the same straightforward conclusion the trial court did, the Court of Appeals dismissed *Michielli* as "inapposite." Slip op. at 11 n.5. The Court concluded the 2003 amendments to CrR 3.3 rendered *Michielli*'s reasoning obsolete. *Id.* The Court of Appeals is wrong.

In 2003, this Court amended CrR 3.3 to provide, "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." CrR 3.3(h); *State v. George*, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007). "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." CrR 3.3(a)(4).

The Court of Appeals read CrR 3.3(h) not only to make the rule the exclusive means of determining whether a trial was timely, but also to supersede any other rule allowing for dismissal based on prejudicial delay, including CrR 8.3(b). Slip op. at 11 n.5. As the Court of Appeals would have it, CrR 8.3(b) does not allow dismissal for a prosecutor's late disclosure of information unless the trial court cannot grant a continuance without violating CrR 3.3. *Id.* Accordingly, the Court reasoned, *Michielli* is no longer binding. *Id.*

On the contrary, there is no reason to believe this Court intended the 2003 amendments to CrR 3.3 to limit the grounds on which a trial court can find prejudice under CrR 8.3. CrR 3.3's plain terms make clear its exclusive remedy provision applies *only* when a party seeks dismissal "for time-to-trial reasons." CrR 3.3(h). Nothing in the text of the rule suggests that it

constrains a trial court's authority to dismiss a case for "governmental misconduct" reasons. CrR 8.3(b).

This Court did not amend CrR 8.3(b) at the same time it amended CrR 3.3. CrR 8.3(b) continues to provide government misconduct is grounds for dismissal "when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial." Nor did the Time-for-Trial Task Force recommend any changes to CrR 8.3. Time-for-Trial Task Force, Discussion of Consensus Recommendations, Final Report (2002) [hereinafter "CrR 3.3 Task Force Report"].[5]

Not only did the task force *not* mention CrR 8.3 in its recommendations, but the reasons for the 2003 amendments make clear it did not intend an effect on

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[5] Available at https://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportDisplay&fileName=Consensus.

the application of other rules. The task force added subsections (a)(4) and (h) to overturn what it perceived as an "expan[sion]" of CrR 3.3 by judicial interpretation and to make clear the rule "covers the necessary range of time-for-trial issues." *George*, 160 Wn.2d at 737 (quoting CrR 3.3 Task Force Report). The task force's report does not suggest it intended the rule to change how other rules account for trial delay.

The Court of Appeals's grafting CrR 3.3(h) onto CrR 8.3(b) not only contravenes the rule and the drafters' intent, but it sharply curtails CrR 8.3(b)'s scope. Except in extreme cases where a witness becomes unavailable, a prosecutor's 11th-hour disclosure can always be cured by additional preparation time. This Court nonetheless recognizes delay is prejudicial because forcing a charged person to give up their speedy trial date by withholding facts

until the eve of trial "would appear unfair to any reasonable person." *Michielli*, 132 Wn.2d at 245–46.

If delay is not prejudicial unless a continuance under CrR 3.3 is impossible, dismissal will disappear as a remedy for even the most flagrant prosecutorial sandbagging. Trial courts have broad discretion to grant continuances in the interest of justice. CrR 3.3(f)(2); *State v. Flinn*, 154 Wn.2d 193, 199–200, 110 P.3d 748 (2005). Because trial preparation "is a valid basis for continuance," courts may always find good cause for delay where prosecutors belatedly disclose key facts. *Flinn*, 154 Wn.2d at 200. And whenever a trial court grants a continuance, the delay is automatically excluded from the speedy trial period, pushing the deadline into the future. CrR 3.3(e)(3).

This Court already rejected the notion a continuance is adequate where the prosecution drops

new information on the defense only days before trial. *Michielli*, 132 Wn.2d at 245–46. That is precisely what the prosecution did when it revealed the witnesses it planned to call for the first time only four days before the scheduled trial date and eight days before the speedy trial deadline. CP 67 FF 11, 13, 68 CL 2. This Court should grant review and remind the Court of Appeals that *Michielli* is binding. RAP 13.4(b)(1).

2. In holding the late witness list did not prevent effective trial preparation within the speedy trial period, the Court of Appeals misapplied CrR 3.3.

The Court of Appeals held the trial court abused its discretion in finding actual prejudice because it miscalculated the speedy trial deadline under CrR 3.3. Slip op. at 8. According to the Court of Appeals, the correct deadline was July 28, not July 6 as the trial court determined, leaving time for Mr. Mora Lopez to interview the prosecution's witnesses before the

deadline elapsed. *Id.* at 9–10. On the contrary, the trial court's calculation was correct, and the Court of Appeals misread CrR 3.3.

A person held in jail, like Mr. Mora Lopez, must "be brought to trial" within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). Any delay of the trial date is excluded from the 60-day period if it results from a continuance "pursuant to section (f)." CrR 3.3(e)(3).

If the court excludes time, it must add 30 days to "the end of that excluded period." CrR 3.3(b)(5). If the resulting date is later than the 60-day deadline, it becomes the new deadline. CrR 3.3(b)(1)(ii). Otherwise, the deadline does not change. *See* CrR 3.3 Task Force Report part II.B (discussing subsection (b)(5)).

CrR 3.3(e) makes clear that an excluded period begins on the day of the event that introduced the delay. For example, an excluded period due to

competency proceedings begins "on the date when the competency examination is ordered." CrR 3.3(e)(1). When the court dismisses a charge and the prosecution later refiles it, the excluded period begins with the order of dismissal. CrR 3.3(e)(4). When an assigned judge is disqualified, the excluded period begins on the day of the disqualification order. CrR 3.3(e)(9).

Likewise, in the event of a trial delay, the excluded period begins the day the court "granted" the continuance and ends after a period equivalent to the length of the delay. CrR 3.3(e)(3). Consistent with this reading of the rule, the Court of Appeals held in a published decision that the excluded period began the day the defendant agreed to a continuance, not the new trial date. *State v. Iniquez*, 143 Wn. App. 845, 852–53, 180 P.3d 855 (2008), *rev'd on other grounds*, 167 Wn.2d 273, 217 P.3d 768 (2009).

The trial court arraigned Mr. Mora Lopez on April 23, 2021. CP 11, 66 FF 5. Because he was in custody, his original speedy trial deadline was 60 days after this date, or June 22. CrR 3.3(b)(1)(i), (c)(1). On May 27, the trial court continued the trial from June 21 to June 28, resulting in excludable delay of seven days. CP 13, 15; CrR 3.3(e)(3).

Correctly running the excluded period from the day of the order that introduced the delay results in a speedy trial deadline of July 6. The seven-day period ran from May 27, the day of the order, to June 3. Adding 30 days to June 3 results in a date of July 3, 2021, a Saturday. CrR 3.3(b)(5). Because July 4 was a legal holiday that fell on a Sunday, the next court day was July 6, 2021, the deadline the trial court calculated. RP 5–6; RCW 1.16.050(1)(g), (5)(a); *State v. Wilks*, 85 Wn. App. 303, 306, 932 P.2d 687 (1997).

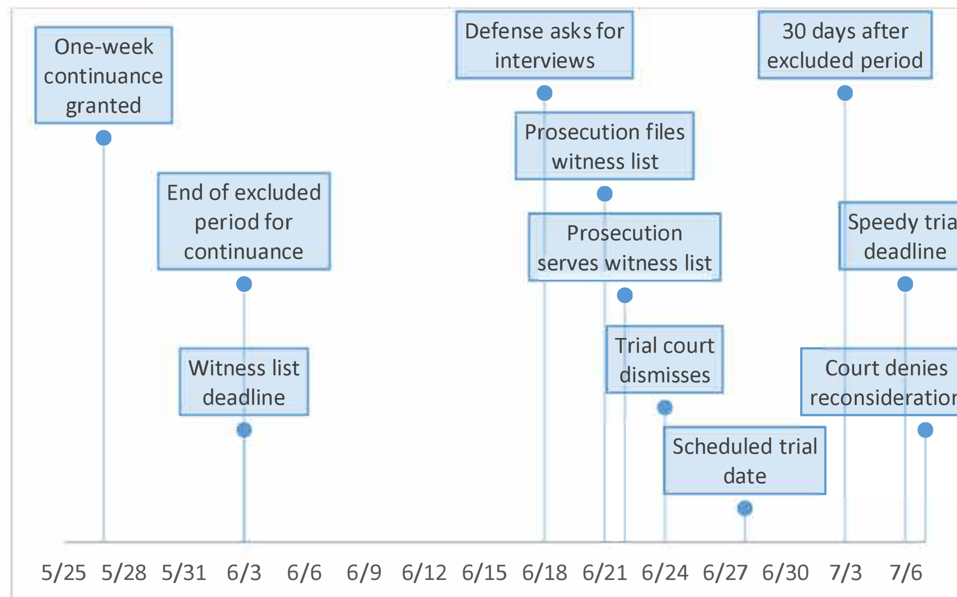


Figure 1. Timeline of key dates.

Rather than count the excluded period from the event that introduced the delay, the Court of Appeals ran it from the old trial date, June 21, to the new trial date, June 28. Slip op. at 8–9. The Court arrived at this reading of the rule based not on section (e), which governs excludable delay, but section *(f)*, which governs trial continuances. As the Court noted, CrR 3.3(f)(2) permits a trial court to "continue *the trial date* to a specified date." *Id.* at 8.

Looking to CrR 3.3(f) rather than CrR 3.3(e) to determine when to begin the excluded period was not only error, but it contradicted the Court of Appeals's own precedent. *Iniquez*, 143 Wn. App. at 852–83.

The Court of Appeals's reading is also inconsistent with the purpose of the 30-day buffer in CrR 3.3(b). The task force proposed this provision to "provide adequate time for preparing and trying cases" when "an excluded period of time runs out shortly before" the deadline. CrR 3.3 Task Force Report part II.B. To effectuate this purpose, courts should read the rule to add the buffer only when the event introducing delay is less than 30 days before the deadline.

Read in light of the 30-day buffer's purpose, excludable delay begins on the day the court grants a trial delay, not on the original trial date. Otherwise, a trial continuance would result in a 30-day extension of

the speedy trial period even if the court ordered the continuance more than 30 days before the deadline, leaving the parties plenty of time to prepare.

A hypothetical example illustrates the problem with the Court of Appeals's reading. Imagine an in-custody defendant is arraigned on January 1, with a 60-day trial deadline of March 2. CrR 3.3(b)(1)(i), (c)(1). Imagine further that the original trial date is February 22. On January 2, the trial court grants a one-week continuance until March 1. The one-week delay is excluded from the speedy trial period, and the new deadline is March 9, unless the 30-day buffer results in a later date. CrR 3.3(b)(1), (b)(5), (e)(3).

If the court correctly counts from the day it "granted" the continuance, the excluded period begins on January 2 and ends on January 9. CrR 3.3(e)(3). Thirty days after January 9 is February 8. In turn,

February 8 is earlier than the speedy trial deadline of March 9, and the 30-day buffer does not result in a later deadline. CrR 3.3(b)(1), (b)(5).

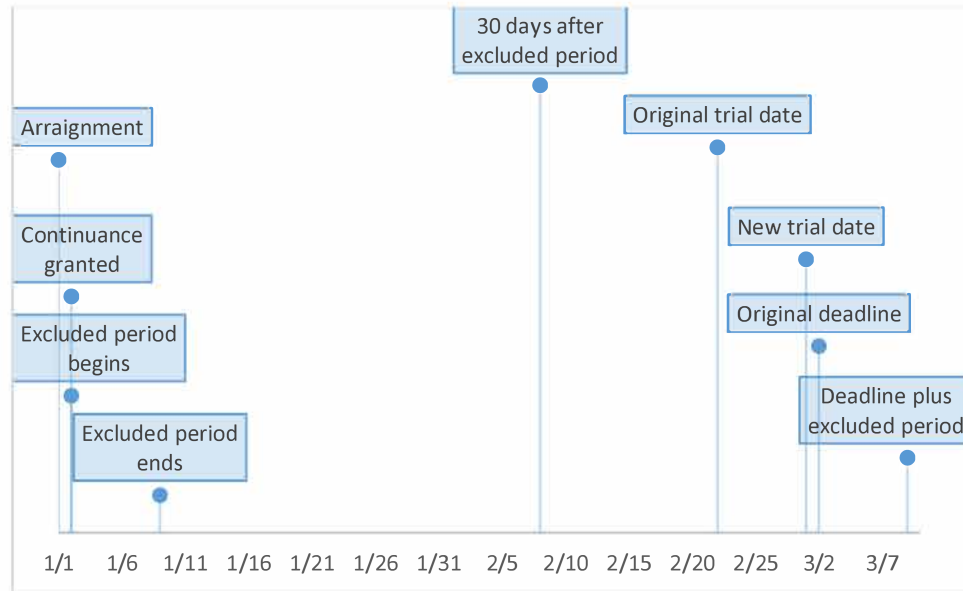


Figure 2. If the excluded period begins on the day the trial court granted the continuance, the 30-day buffer does not affect the speedy trial deadline.

If the court counts the excluded period as the Court of Appeals did, from the original trial date to the new trial date, it will exclude the seven days from February 22 to March 1. Slip op. at 8–9. Thirty days after March 1 is March 31, weeks after the deadline calculated without the buffer. CrR 3.3(b)(5). And this

22-day delay would result even though the parties have almost two months' notice of the continuance and no need for extra time to prepare for it.

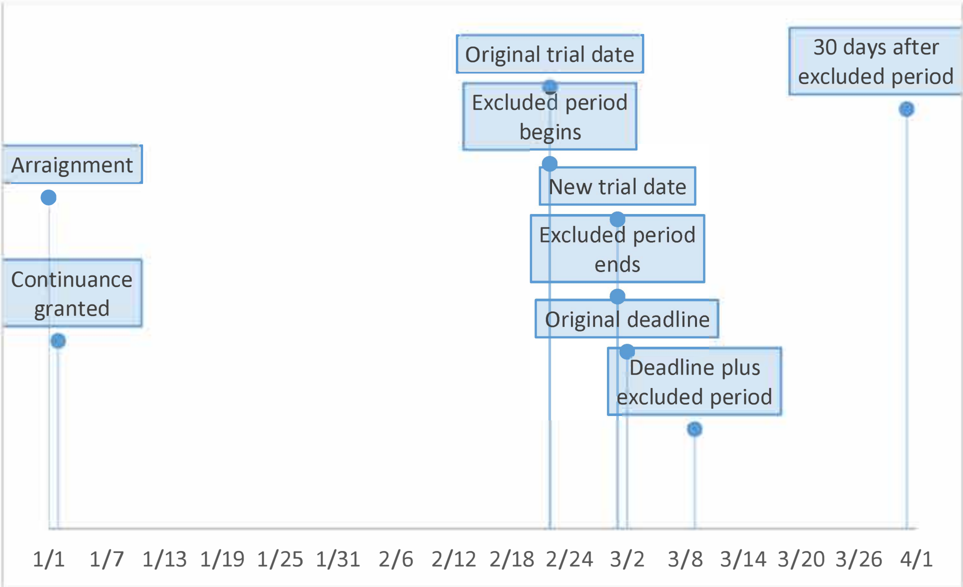


Figure 3. Reckoning the excluded period from the original trial date results in an extension of the deadline of over three weeks, though the parties have almost two months' notice of the continuance.

The Court of Appeals's reading of CrR 3.3 is contrary to the text of the rule and the purpose of the 30-day buffer provision. The Court of Appeals's interpretation also clashes with its published precedent, leading to confusion over how trial courts

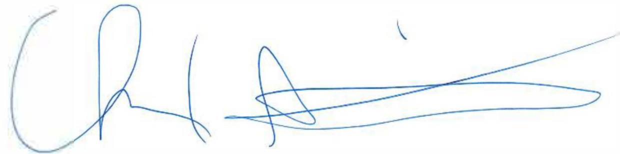
should apply the rule. *Iniquez*, 143 Wn. App. at 852–83. This Court should grant review and clarify that trial courts must count an excluded period from the day a continuance is ordered. RAP 13.4(b)(2), (b)(4).

G. CONCLUSION

This Court should grant Mr. Mora Lopez's petition for review.

Pursuant to RAP 18.17(c)(10), the undersigned certifies this petition for review contains 4,032 words.

DATED this 31st day of August, 2022.



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APPENDIX

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. MARTIN OSCAR MORA-LOPEZ, Respondent.	)	No. 83054-6-I DIVISION ONE PUBLISHED OPINION

MANN, J. — Martin Oscar Mora-Lopez was charged with assault in the second degree and felony harassment after an alleged incident outside a homeless shelter in Bellingham. The trial court dismissed the charges with prejudice under CrR 8.3(b). The State appeals and argues that the trial court abused its discretion in finding government mismanagement, and that Mora-Lopez was prejudiced because of potential violation of his time-for-trial right under CrR 3.3.

The trial court did not abuse its discretion in determining that the State's late filing of its witness list amounted to government mismanagement. The trial court erred, however, in finding that Mora-Lopez was actually prejudiced because of a potential violation of his time-for-trial right. We reverse.

Citations and pin cites are based on the Westlaw online version of the cited material.

FACTS

On April 10, 2021, Mora-Lopez was arrested in Whatcom County and held in the county jail in lieu of bail. According to the affidavit of probable cause, after being denied entry to the Base Camp homeless shelter, Mora-Lopez confronted Jacob Moye. Mora-Lopez used his shoulder to bump Moye with enough force to knock him back. Mora-Lopez then pulled a knife from his pocket and took several swings at Moye. It was later discovered that the jacket Moye was wearing had two large, clean cuts on the left sleeve. Mora-Lopez was charged with one count of assault in the second degree with a deadly weapon and one count of felony harassment.

On April 16, 2021, Mora-Lopez's counsel filed a notice of appearance and demand for discovery. The discovery requests included a request for the "names and addresses of persons [the State] intends to call as witnesses at hearing or trial, any written or recorded statements . . . and the substance of any oral statements of such witnesses."

On April 21, 2021, the State filed and served its demand for discovery. The demand included a statement that the "State's Witness List will include all those named and referenced in Discovery provided to the defendant, including any necessary custodian of records required for proof of chain of custody, certification or authentication." That same day, the State provided Mora-Lopez's counsel with discovery materials that referenced several named and unnamed individuals, including: an unnamed Base Camp staff member that called 911 to report the altercation, Base Camp employee Adrian Hartnup who described the altercation to Officer Michael Shannon, Base Camp employee Adam Estrada who showed Officers Shannon and

Wubben surveillance footage of the incident, Officer Marty Otto, Officer Eric Kingery, an unnamed Based Camp staff, and unnamed CSI laboratory photographers.

On April 23, 2021, Mora-Lopez was arraigned and entered a plea of not guilty to both counts. A status/omnibus hearing was set for May 19, 2021, and a trial for June 14, 2021. On May 19, the parties agreed to continue the trial date from June 14, 2021, to June 21, 2021. On May 26, 2021, the court delayed the status/omnibus hearing for one day so that Mora-Lopez could be present.

On May 27, 2021, Mora-Lopez's counsel requested a one-week continuance without objection. The court scheduled a new status/omnibus hearing for June 3, 2021, with a new trial date of June 28, 2021. During the June 3 omnibus hearing, both parties confirmed the June 28, 2021, trial date. Consistent with Whatcom County Criminal Rule (WCCrR) 6.18(b)(3), the trial court directed the parties to submit witness lists by the end of the day.[1] An omnibus order was prepared and signed by both parties and filed at the end of the day on June 3. The omnibus order instructed both parties to file a witness list "2 weeks prior to trial," which conflicted with the trial court's oral instruction that the lists be provided by the end of the day. The State did not file a witness list on June 3 or two weeks prior to trial.

On June 18, 2021, Mora-Lopez's counsel e-mailed the State's attorney informing them that they had been unsuccessful in locating the alleged victim and sought

[1] WCCrR 6.18(b)(3) requires:

> The parties must file a witness list by the end of the day on which the Omnibus Order is entered. Both parties must immediately contact their witnesses to confirm availability for trial. If a witness is not available, the party shall immediately notify the opposing party and file a motion to continue the trial date or make any other arrangement the Court may order, noting the motion for hearing on the next regular motion calendar, or as a special set with leave of the court. The Court will waive the 5-day notice requirement for a motion based on unavailability of a witness.

assistance setting up an interview. The e-mail also requested interviews with the police officers identified in the State's April 21, 2021 discovery responses. The State did not reply to the e-mail and no witness interviews were scheduled.

On June 21, 2021, the State served its witness list on the public defender's office—four business days before the scheduled trial. The State's list named eight witnesses—the alleged victim, Moye, Base Camp staff members Hartnup and Estrada, and police officers Shannon, Wubben, Otto, Kingery, and Murphy. The list did not include others referenced in the April 21, 2021, discovery.

On June 23, 2021, Mora-Lopez moved to exclude witnesses, or alternatively, to dismiss pursuant to CrR 8.3(b). Mora-Lopez argued that the State's failure to submit a witness list by the deadline was misconduct, and that the absence of the list led him to believe that the prosecution intended to forgo calling witnesses and rely on a surveillance video instead. Mora-Lopez also asserted that he was left with insufficient time to prepare for trial.

The trial court heard Mora-Lopez's CrR 8.3(b) motion to dismiss on June 24, 2021. The court concluded that the State's late filing of its witness list constituted government mismanagement and resulted in actual prejudice to Mora-Lopez's ability to prepare the case for trial. In support of its conclusion that Mora-Lopez was prejudiced, the trial court calculated the CrR 3.3(b) time-for-trial date as no later than July 7, 2021. As a result, the court concluded that the State's late disclosure left insufficient time for defense to prepare prior to the expiration of the time for trial. The trial court granted Mora-Lopez's CrR 8.3(b) motion and dismissed the case with prejudice. The trial court

denied the State's motion for reconsideration and entered findings of fact and conclusions of law supporting its decision.

The State appeals.

ANALYSIS

The State argues that the trial court abused its discretion in dismissing the charges against Mora-Lopez under CrR 8.3(b). The State asserts that the trial court erred both in determining that there was government mismanagement and that Mora-Lopez was actually prejudiced. We disagree with the State and agree with the trial court that the State committed government misconduct. We agree with the State, however, that Mora-Lopez was not actually prejudiced.

A. Dismissal under CrR 8.3

CrR 8.3(b) addresses dismissal of criminal charges based on arbitrary government acts or misconduct:

> The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

"The dismissal of charges under CrR 8.3(b) is an 'extraordinary remedy.'" State v. Kone, 165 Wn. App. 420, 432, 266 P.3d 916 (2011) (quoting State v. Rohrich, 149 Wn.2d 647, 658, 71 P.3d 638 (2003)). A trial court may only dismiss charges under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. Rohrich, 149 Wn.2d at 654. "Governmental misconduct need not be evil or dishonest. Simple mismanagement is sufficient." Kone, 165 Wn. App. at 433. The

defendant, however, "must show actual prejudice, not merely speculative prejudice affected his right to a fair trial." Kone, 165 Wn. App. at 433.

When we review a trial court's dismissal of charges under CrR 8.3 we "must ask whether the trial court's conclusion that both elements were satisfied was a 'manifest abuse of discretion.'" Rohrich, 149 Wn.2d at 654 (emphasis added) (quoting State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). A trial court's decision is an abuse of discretion if it is "manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is untenable "if it results from applying the wrong legal standard or is unsupported by the record." State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017).

B. Government Mismanagement

The State first raises several arguments in support of its claim that the trial court erred in concluding that there was government misconduct.

After reviewing the evidence, the trial court concluded that the State had committed government misconduct. The court stated:

> Government misconduct need not be of an evil or dishonest nature; simple mismanagement is enough. Here, the State mismanaged its case by failing to file and serve a witness list in a timely manner as required by CrR 4.7, CrR 4.5, Whatcom County Local Court Rule WCCrR 6.18(b)(3), and the oral ruling of the court; failing to communicate with its witnesses regarding trial availability in a timely manner; and failing to attempt to make its witnesses available for defense interviews.

We agree with the State that substantial evidence does not support the trial court's conclusion that the prosecutor admitted that he had not communicated with the alleged victim-witness. The prosecutor did not make this admission. Rather, he stated,

"so I'm ready to go on this case. I've subpoenaed all of my witnesses, I believe most everyone is available, but I'm prepared to go to trial Monday." Thus, the record supports that the prosecutor had in fact communicated with the victim-witness. We also agree with the State that the trial court's conclusion that had the State contacted the victim-witness earlier, Mora-Lopez would have had sufficient time to prepare for trial, was speculative. But even without these statements, the trial court's conclusion that the State mismanaged the discovery process was supported by substantial evidence and not an abuse of discretion.

The State failed to file and serve its witness list until four business days before trial. In doing so the State violated CrR 4.7,[2] WCCrR 6.18(b)(3), the trial court's oral ruling during the omnibus hearing requiring the parties to provide witness lists by the end of the day, and the agreed written omnibus order for disclosure two weeks before trial. While the State argues that its initial discovery included all the names ultimately included on its witness list, the witness list contained only a subset of the individuals identified in its discovery materials. Moreover, the identifications included in the initial discovery did not comply with the requirements of CrR 4.7(a)(1)(i), including addresses and substance of statements. The State's failure to submit its witness list on time interfered with Mora-Lopez's ability to conduct witness interviews or preparing a defense prior to the scheduled trial date. The trial court did not abuse its discretion in concluding that the State mismanaged discovery. Thus, the first element for dismissing charges under CrR 8.3 was satisfied.

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[2] CrR 4.7(a)(1)(i) requires the State to provide its witness list, including names, addresses, along with any written or recorded statements and the substance of any oral statements. The list must be filed no later than the omnibus hearing.

C. Time for Trial

Next we consider whether the second element for dismissing charges under CrR 8.3—prejudice affecting the defendant's right to a fair trial—was satisfied. The State contends that the trial court predicated its decision on an erroneous calculation of Mora-Lopez's remaining time for trial. We agree.

The time-for-trial rule, CrR 3.3, was amended in 2003 based on a recommendation from the Washington Court's Time-For-Trial Task Force. State v. George, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007). Under the revised CrR 3.3, a defendant must be brought to trial within 60 days of arraignment if they are detained on a pending charge, "or the time specified under subsection [3.3(b)(5)]."

Under CrR 3.3(b)(5), the time-for-trial clock tolls during nine specified "excluded periods" identified in CrR 3.3(e). One of the allowed excluded periods under CrR 3.3(e)(3) is for continuances granted under CrR 3.3(f). CrR 3.3(f)(2) allows the trial court to continue the trial dated based on motion of the court or 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.

(Emphasis added).

Thus, where a trial date has been continued, the time between the continuance and the new trial date is an excluded period under CrR 3.3(b)(5). Under CrR 3.3(b)(5), the new time for trial excludes this time, and "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period."

Mora-Lopez's commencement date, the date of his arraignment, was April 23, 2021. Under CrR 3.3(b)(1), Mora-Lopez's original time-for-trial date was June 22, 2021. On May 19, the trial court continued the trial to June 21, 2021.[3] Based on the plain language of CrR 3.3(e)(3), the end of the excluded period would have been June 21.[4] Under CrR 3.3(b)(5), because this date was within 30 days of Mora-Lopez's time for trial, it extended his time-for-trial date to July 21, 2021.

On May 27, 2021, Mora-Lopez's counsel requested a one-week continuance without objection. The court scheduled a new status/omnibus hearing for June 3, 2021, with an updated trial date of June 28, 2021. Again, based on the plain language of CrR 3.3(e)(3), the end of the excluded period would have been June 28, 2021. And because this date is within 30 days of Mora-Lopez's time for trial, under CrR 3.3(b)(5), the time-for-trial date was extended to no earlier than 30 days after the excluded period, or July 28, 2021. State v. Farnsworth, 133 Wn. App. 1, 11-12, 130 P.3d 389 (2006).

The trial court concluded that the State's mismanagement resulted in actual prejudice to Mora-Lopez, based on its assumption that the time-for-trial right under CrR

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[3] Mora-Lopez argues that the May 19, 2021 order continuing the trial to June 21, 2021, did not result in an exclusionary period because the trial court did not base it on CrR 3.3 (f)(1) or (2). This appears to be a scrivener's error, as the court did not check a box next to either reasoning for the continuance. The order also lacked Mora-Lopez's signature, but the Washington State Supreme Court had issued a fifth and revised and extended order pertaining to COVID-19 that approved the use of remote hearings and eliminating the requirement that the court obtain signatures on orders to continue. Fifth Revised & Extended Order Regarding Court Operations, No. 25700-B-658, In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, (Wash. Feb. 29, 2021). Regardless of either of these arguments, the subsequent continuance on May 27, 2021, still affects Mora-Lopez's time to trial date, leading to the same calculation whether or not the court factored in the earlier continuance.

[4] "Just as the construction of a statute is a matter of law requiring de novo review, so is the interpretation of a court rule." Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997). As with statutes, we must give effect to the plain meaning of a rule's language. Dep't of Licensing v. Lax, 125 Wn.2d 818, 822, 888 P.2d 1190 (1995).

3.3(b)(1)(i) expired no later than July 7, 2021—approximately two weeks after the State served its late witness list. The trial court explained:

> This mismanagement resulted in actual prejudice to the defendant. A defendant is prejudiced when delayed disclosure shortly before litigation, forces him to choose between his trial date and to be represented by an adequately prepared attorney.

The court continued:

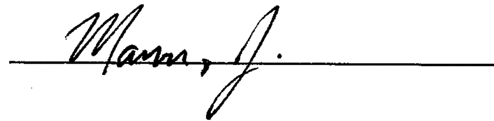
> The court has considered lesser remedies to dismissal and finds them inadequate in this case. While a continuance would have arguably allowed time for the defense attorney to prepare, it would have come at the expense of Mr. Mora-Lopez's right to a speedy trial and thus inadequate under State v. Michielli. With a Commencement Date of April 23, 2021, and accounting for excluded periods (written agreed continuance between May 19, 2021 and June 3, 2021), time for trial under CrR 3.3(b)(1)(i) would have run no later than July 7, 2021.

The trial court incorrectly calculated Mora-Lopez's time-for-trial dates based on the dates of the continuances, not the continued date of the trial itself. CrR 3.3(f) states that, upon written agreement or a motion by the court or a party, the court may continue the "trial date," not the date from the order of continuance.

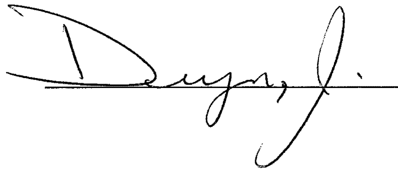
Thus, the trial court's calculation of Mora-Lopez's new time-for-trial deadline was incorrect. Instead of July 7, 2021, Mora-Lopez's time for trial was July 28, 2021—over a month after the State's filed its untimely witness list. Another continuance of Mora-Lopez's trial date to allow time for the defense to prepare after the State's witness disclosure would not have resulted in a violation of Mora-Lopez's CrR 3.3(b) time for trial. The trial court's conclusion that the State's mismanagement resulted in actual prejudice to Mora-Lopez was based on an incorrect legal standard and an abuse of discretion. Salgado-Mendoza, 189 Wn.2d at 427.

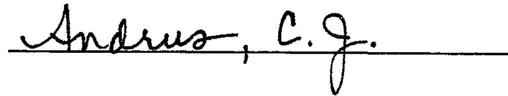
Under CrR 3.3(h), "[n]o case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution." Because Mora-Lopez's time-for-trial right under CrR 3.3 was not violated, dismissal of the charge under CrR 8.3 was error. State v. Kone, 165 Wn. App. at 436.[5]

Reversed.



WE CONCUR:





[5] The trial court relied in part on our Supreme Court's 1997 decision in Michielli. In that case, the court affirmed dismissal of charges under CrR 8.3 after the State added four new charges just before the scheduled trial date, thus forcing the defendant into either waiving his time-to-trial right or proceeding to trial unprepared. The trial court's reliance was misplaced. Michielli was decided before the 2003 amendment or CrR 3.3, which added both the CrR 3.3(b)(5) excluded periods and the restriction on dismissals under CrR 3.3(h) unless there has been a violation of CrR 3.3. Here, because the trial continuances were excluded under CrR 3.5(b)(5) and Mora-Lopez did not face a choice between violating his time-to-trial right or preparing for trial, Michielli is inapposite.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83054-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 31, 2022

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