WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON, Respondent, vs. RODNEY S. MITUNIEWICZ, Appellant.	Case No. 43110-6-II MOTION FOR ACCELERATED REVIEW OF SAG FOR ADDITIONAL BRIEFING

I. IDENTITY OF MOVING PARTY

The Appellant, Rodney Steven Mituniewicz (hereinafter Mituniewicz) asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT.

Mituniewicz moves the court for an accelerated review pursuant to RAP 18.12, 1.2(c), 18.8(a), "shorten the time within which an act must be done in a particular case in order to serve the ends of justice" under RAP 10.10(f), "request additional briefing from counsel to address issues raised in the" SAG.

III. FACTS RELEVANT TO MOTION.

Mituniewicz wrote two prior letters to Ms. Tabbut addressing the time for trial rule of CrR 3.3(a)(3)(v) cannot be applied by the trial court after the release from DOC Order of Confinement (Defense Exhibit #1, 1/5/12) and sent Ms. Tabbut a copy of computer sheet that, Honorable Barbara Johnson may have been viewing

on November 10,2011. Plus a copy of Clark County Jail and Good Time Certification as both attached and incorporated by reference as if fully set forth herein.

As such, Indigent-Defense-Counsel (hereinafter IDC) Theresa Lavallee's motion to continue the trial date (CP @ 11, 11/10/11).

First, it is procedurally time barred under CrR 3.3(d)(3) IDC Lavallee's failure to object after September 29, 2011, arraignment when Deputy-Prosecuting-Attorney (hereinafter DPA) Dodds raised Mituniewicz's violated DOC community custody supervision and Honorable Scott Collier's schedule order in-custody 60 day under CrR 3.3(b)(1)(i).

Second, IDC Lavallee's motion (CP @ 11, 11/10/11) lacks authority based on excluding 60 days of DOC sanction, it is no longer applicable under the plain means language of CrR 3.3(a)(3)(v).

Third, IDC Lavallee's motion to continue raised issues on limits to the plain language of CrR 4.5(e). However, IDC Lavallee must first file an omnibus application under CrR 4.5(I) to authorize a continuance of CrR 4.5(e).

Fourth, Honorable Barbara Johnson's authority is limited to a 30-day buffer period under CrR 3.3(b)(5),

or her honor abuse of discretion for the court excludes 60 days of DOC sanction and finds good cause for continuance under CrR 3.3(e)(3)-(f)(2).

Finally, Mituniewicz's objection (CP @ 15) under CrR 3.3(d)(3)-(h), Mituniewicz again wrote Ms. Tabbut on June 20, 2012, letter as attached at Exhibit #1, her answer dated August 16, 2012, and another dated April 17, 2013, as attached and incorporated by reference as if fully set forth herein.

IV. GROUND FOR RELIEF AND ARGUMENT.

Assignment of Ground for Relief No. 1:

Mituniewicz is currently being denied effective assistance of appellate counsel violating RAP 10.10(f), Article I, §§ 3, 22, of the Washington State Constitution, and Amendments VI and XIV of the United States Constitution.

The U.S. Supreme Court in Evitis v. Lucey, held that:

> "[R]ecognizing the right to counsel on a first appeal as of right and the cases recognizing that the right to counsel at trial includes a right to effective assistance of counsel--are dispositive of respondent's claim. In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that--like a trial--is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as

> of right--does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."

469 U.S. 387, ___, 105 S. Ct. 830, 837-38, 83 L.Ed.2d 821, 53 USLW 4101 (1985)(Mituniewicz "claimed that, although represented in name by counsel, [he] had not received the type of assistance constitutionally required to render the appellate proceedings fair"). Mituniewicz "bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonablness and, if so (2) that counsel's poor work prejudiced him." State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010)(citing Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)).

> **Ms. Tabbut's failure to raise the merits of: (1) IDC Lavallee's failed to object within 10 days of Honorable Collier set trial date; (2) IDC Lavallee's motion to continue the trial date caused Honorable Johnson's abuse of discretion implementing an unlawful excluded 60 days of DOC sanction; (3) Mituniewicz's written objection within 5 days of Honorable Johnson's notice schedule order of trial date by pro-se motion for dismissal with prejudice; and (4) Honorable Stahnke abuse of discretion from lack of authority over the case to reset the trial date. By Ms. Tabbut's failure to raise the time for trial issues actually prejudiced Mituniewicz's constitutional rights to a fair review.**

In re of PRP of Maxfield, held that:

> "in order to prevail on an appellate ineffective assistance of counsel claims, petitioners must show that the legal issue which appellate counsel failed to raise had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue."

133 Wn.2d 332, 344, 945 P.2d 196 (1997); In re of PRP of Dalluge, 152 Wn.2d 772, 788, 100 P.3d 772 (2004).

1. Ms. Tabbut's failure to raise the merit of IDC Lavallee's failed to object within 10 days of arraignment when Honorable Collier set trial date, and by Ms. Tabbut's failure to raise the time-for-trial issue, actually prejudiced Mituniewicz's constitutional right to a fair review.

It is undisputed that DPA Dodds raised Mituniewicz serving a sanction for non-compliance with requirements of a prior sentence that was violated in regards to his supervision by the Depart of Corrections. State v. Bobanhouse, 143 Wn.App. 315, 329, 177 P.3d 209 (Div. III, 2008); State v. Johnson, 132 Wn.App. 400, 411-12, 132 P.3d 727 (Div. II, 2006), review denied, 159 Wn.2d 1006 (2007) (VRP @ 4, lines 13-17, 9/29/11, VRP @ 828, lines 3-16, 2/13/12, VRP @ 832, lines 2-7, 2/13/12, Attached letter dated: 7/20/12 @ P.1-2, SAG @ 3-4, 2/11/13). The Honorable Collier didn't take it into consideration set an in-custody trial date 11/14/11, 46 days elapsed, readiness date 11/10/11. (VRP @ 2-6,

9/29/11, CP @ 6). IDC Lavallee didn't object; therefore, it's procedurally time barred. It's time barred because IDC Lavallee didn't object within ten-days. Bobanhouse, 177 P.3d at 213, affirmed on other grounds, 166 Wn.2d 881, 214 P.3d 907 (2009). Ms. Tabbut's failure to raise the merit under professional and ethical standards, falls below an objective standard of reasonableness.

> "As the fundamental principles of professional conduct put it: The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights, because subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible. Lawyers, as guardians of the law, play a vital role in the preservation of society. RPC, Fundamental Principle of Professional Conduct."

A.N.J., supra., at Fn. 2. Likewise, "past experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." State v. Stricker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976).

Furthermore, the duties and responsibilities of

counsel states:

> "The legal representation plan shall require that defense services be provided to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, applicable state bar association standards, the Rules of Professional Conduct, case law, and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. Counsel's primary and most fundamental responsibility is to promote and protect the interests of the client."

WSBA Standards for Indigent Defense Services Std. 2 (July 3, 2011); "[A]nd certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel." A.N.J., 168 Wn.2d at 110-11.

The presumable prejudice arising from Ms. Tabbut's failure to establish the issues of 2003 amended CrR 3.3 incorporate a standard of due diligence within different provisions of the rule. TASK FORCE, FINAL REPORT § II.C. (1), at 23-24. "An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." Correll v. Ryan, 539 F.3d 938, 949 (9th Cir. 2008). Thereby, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

2. Ms. Tabbut's failure to raise the merits of

IDC Lavallee's motion to continue the trial date caused Honorable Johnson abuse of discretion excludes 60 days of DOC sanction and finds good cause to continuance; By Ms. Talbut's failure to raise time-for-trial rules issues actually prejudiced Mituniewicz's constitutional rights to a fair review.

The major dispute, in the case at bar, is a point of law on November 10, 2011, Honorable Johnson authorization of: "the court excludes 60 days of DOC sanction and finds good cause for continuance." (CP @ 12). The three consequences established: (1) the trial court excludes 60 days of DOC sanction; (2) the trial court finds good cause for continuance; and (3) the trial court abuse of discretion.

Excludes 60 days of DOC sanction under CrR 3.3(a)(3)(v), "interpretation involves question of law" review de novo, "In construing a statute, the court's objective is to determine the legislature's intent." State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)(citations omitted). The legislative bills were introduced in 2001 (HB 2228) and 2002 (HB 2704) proposing revisions to the time-for-trial standards. The task force fashioned the new rules to incorporate a standard of due-dilligence within different provisions of the rule. TASK FORCE, final REPORT, supra.

On November 10, 2011, Honorable Johnson excludes

60 days of DOC sanction (CP @ 12, VRP @ 12, lines 7-9, 11/10/11), judge ruling the DOC sanction ended on October 24, 2011. (VRP @ 13, lines 13-17, VRP @ 14, line 2, VRP @ 15, line 4, 11/10/11). This was unlawful under CrR 3.3(a)(3)(v) which, "excludes any period" 60 days of DOC sanction which ended 10/24/11 because Mituniewicz "[was not] being held in custody on an unrelated charge [nor was he] serving a sentence of confinement." CrR 3.3(a)(3)(v). "The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. If after that examination, the provision is still subject to more reasonable interpretation it is ambiguous. If a statute is ambiguous, the rule of lenity requires [the court] to interpret the statute in favor of the defendant absent legislative intent to the contrary." Jacobs, 154 Wn.2d at 601-602. (SAG @ 26, lines 16-26).

The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law. State v. Williamson, 100 Wn.App. 248, 257, 996 P.2d 1097

(2000)(Mituniewicz's letter to Ms. Tabbut @ P. 3, SAG @ 34, lines 14-25).

Finds good cause for continuance under CrR 3.3(e)(3).

First, IDC Lavallee never requested a subpoena regarding a key and necessary witness, informant Jennifer Coleman, to impeach detectives testimony in this case with regard to Count 1, which is a Class A Felony. (VRP @ 9-10, 11/10/11). Second, no omnibus application violated RPC 3.4(d) "in pretrial procedure, make a frivolous discovery request." (CP @ 11, VRP @ 9, lines 22-23, 11/10/11). Third, Mituniewicz did not have effective assistance of counsel when IDC Lavallee violated RPC 1.2(a) which states that she, "shall abide by a client's decisions concerning the objectives of representation" to proceed on Monday, November 21, 2011, (VRP @ 9, lines 20-21, 11/10/11, CP @ 40 & 61), IDC Lavallee violated RPC 3.2: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Mituniewicz certainly will not waive his right to a speedy trial under the court rule. (VRP @ 11, lines 6-8, 11/10/11). Finally, no request for an investigator. Honorable Johnson's authority to consider a continuance for good

cause is not shown. The contexts have construed the term 'good cause' "to require a showing of some external impediment that did not result from self-created hardship." State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). Omnibus application filed on 1/5/12. (CP @ 25), Request for investigator filed on 1/6/12, (CP @ 27), "attorney oversight is not 'good cause.'" State v. Johnson, 96 Wn.App. 813, 818, 981 P.2d 25 (1999). (Mituniewicz's letter to Ms. Tabbut @ p. 4, SAG @ 27, lines 1-19).

Abuse of discretion under CrR 3.3(f)(2)

"Trial courts should tread carefully and provide adequate explanation before granting a continuance when defense counsel moves for a continuance for [frivolous discovery] and the defendant objects to a continuance that will delay trial-that the State agrees to such a continuance does not relieve the trial court of it's burden. CrR 3.3(f)(2); see CJC[2.15(B)]; RPC 1.2(a), [3.2, 3.4(d)], 8.4(a),[(d)]." State v. Saunders, 153 Wn.App. 209, 237 fn. 9, 220 P.3d 1239 (2009)(emphasis added). The facts that Mituniewicz, on November 10, 2011, was not serving a DOC sanction there upon only in-custody for the pending charges of PCS w/intent Count 1, and UPF 2nd Degree Count 2; and IDC Lavallee's

failures: (1) to subpeona; (2) no omnibus application for discovery; and (3) no request for investigator. "[A] clear showing [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)(quoting State ex Rel Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). (Mituniewicz's letter to Ms. Tabbut @ p.3-6, SAG @ 7, lines 3-16).

Ms. Tabbut's failure to raise the merits, (her opening brief @ p. 2-3), under professional and ethical standards, this falls below an objective standard of reasonableness. Ms. Tabbut's ethical breaches under RPC 1.2(a) state, in relevant part:

> "[A] lawyer shall abide by a client's decisions concerning the objective of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

"RPC 1.2(a)('In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea[ding].' (emphasis added)." A.N.J., 168 Wn.2d at 112.

"Yet if a petitioner can show that his appellate counsel failed to raise an issue with underlying merit, then the first prong of the ineffective assistance test

is satisfied." In re of PRP of Dalluge, 152 Wn.2d at 788.

3. Ms. Tabbut's failure to raise the merits of Mituniewicz's written objection within 5 days of Honorable Johnson's notice schedule order of trial date by pro se motion for dismissal with prejudice and by Ms. Tabbut's failure to raise the time-for-trial issues actually prejudiced Mituniewicz's constitutional rights to a fair review.

It is undisputed that Mituniewicz wrote an objection log-in-jail legal mail program GR3, and post-stamped 11/15/11 in accordance with CrR 3.3(d)(3), (CP @ 15), of Honorable Johnson's schedule order trial date. (CP @ 12).

"The 2003 revised version of CrR 3.3 has not altered the burden on defendants, to file a written objection within 10 days of the notice of the trial date." State v. Chavez-Romero, 285 P.3d 195, 202-203 (2012). While Mituniewicz did not specifically title it as an objection, Mituniewicz's initial motion to dismiss served as a written objection ID. (SAG @ 21, lines 1-8). Shift the burden to bring incarcerated Mituniewicz before the court to DPA St. Clair, "[b]y failing to act, the State also thwarted the trial courts ability to meet its ultimate duty to see that the matter was tried within the speedy trial period."

State v. Jenkins, 76 Wn.App. 378, 383, 884 P.2d 1356 (1994)(SAG @ 24, lines 16-20).

First, 117-days after Mituniewicz arrest and incarceration on January 9, 2012, IDC Lavallee received TDu agents Thomas, Yoder and Sofianos Incident Reports of September 14, 2011, at Informant Jennifer Coleman's Apt. G-15 at 11412 NE 49th Street, Vancouver USA, Washington. (VRP @ 205, lines 11-13, 1/9/12). Second, 119-days after Mituniewicz's arrest and incarceration on January 11, 2012, IDC Lavallee received WSP-Laboratory Forensic Scientist Dunn's Heroin Analysis Report dated 1/10/12 (Clerk's Minutes Exhibit List, VRP @ 210-220, 1/11/12). Third, 128-days after Mituniewicz's arrest and incarceration on January 20, 2012, IDC Lavallee received WSP-Laboratory No Latent-Print Report and No-DNA-Testing (VRP @ 221-223, 1/20/12). "CrR 3.3 makes no allowance for the nature and complexity of the case. Whether an incarcerated defendant is charged with [Count 1: Possession of a Controlled Substance with intent to Deliveer, School Zone Enhancement, Firearm Enhancement, and Persistent Offender; and Count 2: Unlawful Possession of a Firearm in the Second Degree or] with failing to register as a sex offender or charged with one count of aggravated

murder with more bodies being disentombed daily from his backyard, the rule requires that trial commence within 60 days." Saunders supra. at fn. 11. "The rules were intended 'to cover all the reasons why a case should be dismissed under the rule' and no reasons should be read into the rule beyond those that are expressly stated. TASK FORCE, FINAL REPORT § I.B. 1 at 6." Chavez-Romero, 285 P.3d at 200. "That is especially true here where the speedy trial rule was violated by the State's oversight." State v. Raschka, 124 Wn.App. 103, 112-13, 100 P.3d 339 (2004)("The defendant's responsibility does not include rectifying errors in the management of the court's calendar."). So September 29, 2011, arraignment date, sixty days in custody, for 11/14 trial date is 46 days elapsed, so 11/28/11 is the Sixtieth day. (VRP @ 28, lines 11-14, 1/5/12). Under professional and ethical standards, this falls below an objective standard of reasonableness. Ms Tabbut breaches ethical RPC 1.1 which states:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

"RPC 1.1 ('A lawyer shall provide competent representation to a client. Competent representation

requires ... thoroughness and preparation reasonably necessary for the representation.')." A.N.J., 168 Wn.2d at 111-12.

Mituniewicz demonstrates actual prejudice from Ms. Tabbutt by "showing that a particular non-frivolous issue was clearly stronger than issues that counsel did present." Smith v. Robbins, 528 US 259, 289, 120 S.Ct. 746, 767, 145 L.Ed.2d 756 (2000).

4. Ms. Tabbut's failure to raise the merit of: Honorable Stahnke's abuse of discretion lack authority over the case to reset trial date, by Ms. Tabbut's failure to raise the time-for-trial issues actually prejudiced Mituniewicz's constitutional rights to a fair review.

It is undisputed that Honorable Stahnke had two pro se CrR 3.3(h) dismiss motions. (VRP @ 18, lines 16-17, 1/5/12). Mituniewicz's affidavit of mailing states December 25, 2011. It's an amended motion absolutely." (VRP @ 20, lines 12-14, 1/5/12). the trial court needs to look at the speedy-trial issues (VRP @ 22, lines 16-17, 1/5/12). Mituniewicz that only built in the continuance that IDC Lavallee was asking for, because the continuance is only for 30 days. And the 30 days would be less than 60 days. (VRP @ 27, lines 11-15, 1/5/12). Judge Johnson has the authority, to continue a trial based on good cause. (VRP @ 35, lines 15-18,

1/5/12). Judge Stahnke when Mituniewicz no longer held. According to the rules. (VRP @ 36, lines 22-25, 1/5/12). Judge Stahnke: "But once good cause is found, Mituniewicz, doesn't that trump the date? Once good cause is found, then whatever is outside that excluded period triggers a 30-day trial set, I thought?" Mituniewicz: "Based on that, it triggers a 30 day it doesn't trigger a 60 day." (VRP @ 37, lines 12-20, 1/5/12). "But under CrR 3.3 once the 60 day time for trial expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case. CrR 3.3(b), (f)(2)-(h). The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trials. CrR 3.3(a)(1)-(2)." Saunders, 153 Wn. App. at 221. (Mituniewicz's letter to Ms. Tabbut @ p. 4, SAG @ 28-29).

Mituniewicz "claims the trial court abused its discretion because it failed to enforce the requirements of the rule. Failure to enforce the requirements of rules can constitute an abuse of

discretion." State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 492 (1996). The Supreme Court has described the abuse of discretion standards in State v. Dixon where it held that:

> "The reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take' and arrives at a decision 'outside the range of acceptable choices.'"

159 Wn.2d 65, 75-76, 147 P.3d 991 (2006)(quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). (VRP @ 44-45, 1/5/12, SAG @ 36-37).

Ms. Tabbut's failure to raise the merits (her opening brief at p. 3-4), under professional and ethical standards, this falls below an objective standard of reasonableness. Ms. Tabbut's ethical breaches under RPC 8.4(c), "It is professional misconduct for a lawyer to engage in conduct involving ... misrepresentation"; and RPC 4.1(a), "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person;" also see RPC 3.3(a)(1). Ms. Tabbut 'is

an officer of the court. As such, "[s]he owes it a duty of frankness and honesty." State v. White, 94 Wn.2d 498, 502, 617 P.2d 998 (1980).

"Under the second prong of the ineffective assistance of appellate counsel test, [supreme] court has required that the petitioner show that he was 'actually prejudiced by the failure to raise or adequately raise the issue." In re of PRP of Dalluge, 152 Wn.2d at 789. "The judiciary should accept no shortcuts when it comes to discharging its constitutional obligation to appoint effective attorneys to represent indigent criminal defendants. If no such attorney is to be found because adequate funding is not available, then no attorney should be appointed and the case dismissed." A.N.J., 168 Wn.2d at 122-23 ("it is up to the jjudiciary to facilitate a fair proceeding with effective appointed counsel if there is to be one.")

Thank you for your consideration in this matter.

Respectfully submitted this 13th day of May, 2013.

Rodney Steven Mituniewicz
DOC# 912672, I-A-19-1
Coyote Ridge Corrections Center
PO Box 769/1301 N. Ephrata Ave
Connell, WA 99326

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON, Respondent, vs. RODNEY S. MITUNIEWICZ, Appellant.	Case No. 43110-6-II DECLARATION OF MAILING

I, Rodney Steven Mituniewicz, declare that under the penalty of perjury the following is true and correct. I placed into the legal mail under GR 3.1 with Custody Officer's signature and dated on this envelope addressed to the parties as follows:

DPA Anne Mowry Cruser
Deputy Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

Lisa Elizabeth Tabbutt
Attorney at Law
P.O. Box 1396
Longview, WA 98632-7822

Honorable David C. Ponzohn
Appellate Court Clerk
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

I deposited into this envelope the document of: Motion for Accelerated Review of SAG for Additional Briefing.

Respectfully submitted on this 13th day of May, 2013.

Rodney Steven Mituniewicz
DOC# 912672, I-A-19-1
Coyote Ridge Corrections Center
PO Box 769/1301 N. Ephrata Ave
Connell, WA 99326

ATTACHMENTS

Attached computer sheet of DOC sanction

Attached Jail and Good Time Certification

Attached Exhibit #1 State v. Mituniewicz, COA #43110-6-II

speedy trial rules violated letter dated July 29 2013

from Mituniewicz to Ms. Tabbut

Attached letter dated August 16, 2012,

from Ms. Tabbut to Mituniewicz

Attached letter dated April 17, 2013,

from Ms. Tabbut to Mituniewicz

Start Date	Jail Credit	# of Sanction Days	Loss of ERT Time	Additional Out Time	# Days Less Jail Credit
9/14/2011		60		0	60

		Days Granted	Days Served
Early Release Date (50% GCT)	10/14/11	30	30
Max Release Date	11/13/11	0	60
33% GCT Date	10/24/11	20	40
15% GCT Date	11/03/11	10	50
10% GCT Date	11/07/11	6	54

DOC#	NAME
912672	MITUNIEWICZ, RODNEY - CLARK 2/17/12

J&S gives GTS (cc)

OFFICE OF THE SHERIFF

Representing

Garry E. Lucas

Sheriff

The following information is being supplied to the Washington State Department of Corrections for the purpose of documenting local time served and earned early release credits for individual listed below.

JAIL AND GOOD TIME CERTIFICATION

NAME: **MITUNIEWICZ, RODNEY STEVEN**

LOCAL ID #: (CFN) **38511**

CHARGE	CASE NUMBER
POSSESSION OF CONTROLLED SUBSTANCE W/ INTENT TO DELIVER-HEROIN WHILE ARMED WITH A FIREARM	11-1-01530-1
UNLAWFULL POSSESSION OF FIREARM II	11-1-01530-1

DATE (S) OF JAIL CONFINEMENT:

09/14/11/ TO 02/17/12

DOC SANCTION 09/22/11

TIME SERVED CREDITS:

152	Credit per Judgment and Sentence
4	Days served prior to transfer
156	Total Time Served Eligible for Early Release Credit
23	Early Release Credit Based on Clark County 15% Policy*
0	Credit Lost for Misconduct
23	**Total Credit Authorized**

Clark County maintains a 15% Good Time Policy. Credit is based on "Total Imposed Sentence" consistent with State v. Williams 121 Wn.2nd 655 (1993).

Revised 8/2007

Clark County Sheriff's Office, Records Division

By: **JKW3932** Date: **2/17/2012**

707 W. 13th St. P.O. Box 410 Vancouver, WA 98666

360-397-2211

July 20, 2012

Rodney Steven Mituniewicz
DOC# 912672, G-A-1-1
Coyote Ridge Corr. Cntr.
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RE: State v. Mituniewicz, COA# 43110-6-II, Speedy Trial Rules Violated

Hey Doll:

Please read this letter all the way through. Now that I'm, over my madness at beautiful brown eyes. This 64 yrs. old man, will try to come-down to earth, and, get at the issues at bar.

ISSUE ONE: Does case law govern the DOC Order of Confinement applications to time for trial rules?

STANDARD OF REVIEW

Application of the time for trial rule to a particular set of facts is a question of law, subject to de novo review. *State v Kindsvogel, 149 Wn.2d 477, 480, 69 P.3d 870 (2003) LEXIS 440.*

On September 29, 2011, at 9:00 am, when DPA Dodds opened Pandora's Box releasing the evils of DOC Order of Confinement (Defendant's Exhibit #1) the machinery of the case law on CrR 3.3(a)(3)(v) the pending charges shall be brought to trial within 90 days. CrR 3.3(b)(2)(i). The time shall be at commencement and place shall be at arraignment court. CrR 3.3(c)(1). Division Three in State v. Bobanhouse, held that:

> "*Speedy Trial.* A defendant detained in jail must be brought to trial within 60 days after arraignment. CrR 3.3(b)(1)(i), (c)(1). But 'detained in jail' means in custody '*pursuant to the pending charge.*' CrR 3.3(a)(3)(v) (emphasis added). Any period of time when the defendant is held in custody on an unrelated charge or is serving another sentence is excluded. CrR 3.3(a)(3)(v). Mr. Bobenhouse was not detained in jail pursuant to the pending charges at any time within the meaning of the speedy trial rule. He was serving a sentence on unrelated charges. Consequently, the court had 90 days to bring him to trial. CrR 3.3(b)(2)(i)."

143 Wn. App. 315, 329, 177 P.3d 209 (2008) LEXIS 398

Division Two was the first published open in State v. Johnson, held that:

> "Because the burglary occurred on September 16, 2003, and the State filed charges on January 13, 2004, the new version of CrR 3.3, the speedy trial rule (effective September 1, 2003), governs this case. The court arraigned Johnson on January 27, 2004. Although the trial court was holding Johnson in jail on $ 30,000 bail for the burglary charge, because he was serving a sentence for another cause, apparently until sometime in June 2004, he was not "detained in jail" on the burglary charge as that term is defined at CrR 3.3(a)(3)(v). Therefore, the court had 90 days to bring Johnson to trial. CrR 3.3(b)(2)(i)."

132 Wn. App. 400, 411-12, 132 P.3d 737 (2006) LEXIS 300

The doctrine of an absolute right in Greenwood Rule:

> "CrR 1.1 is also relevant for our analysis of CrR 3.3. CrR 1.1 provides the criminal rules 'shall be interpreted and supplemented in light of . . . the decisional law of this state'".

120 Wn.2d 585, 596, 845 P.2d 971 (1993) LEXIS 28

DPA Dodds argued DOC Order of Confinement sanction end on October 24, 2011, Mituniewicz's release after serving DOC sanction without bail bond wont stop Mituniewicz's returning to his drug dealing again. Honorable Collier's Schedule Order notice trial date: November 14, 2011, (CP, 6), within 60 days in custody. CrR 3.3(b)(1)(i).

Mituniewicz "contends he was not effectively represented by his lawyer. He says that defense counsel failed to object to trail date[]" Bobanhouse ("Objections to a trial date on speedy trial grounds must be made within 10 days after notice of the trial date is given. CrR 3.3(d)(3). And any party who fails, for any reason, to move for a trial date within the time limits of CrR 3.3 loses the right to object. CrR 3.3(d)(3)."). 143 Wn. App. 315, 325, 329, 177 P.3d 209 (2008) LEXIS 398

STANDARD OF REVIEW

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." An appellate court "will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Downing,* 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) LEXIS. "A decision is 'manifestly unreasonable' if the

court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take' and arrives at a decision 'outside the range of acceptable choices'". State v. Dixen, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) LEXIS 894.

On November 10, 2011, defense counsel Lavallee's ignorance of the case law inexcusable, to this **strict rule** lies at the foundation of the administration of justice. The motion for continue the trial date, states, in relevant part:

> "On September 22, 2011, a sentence of 60 days was imposed by Department of Corrections for the violations of community custody in Clark County Cause No. 10-1-00077-1. CrR 3.3(a)(v) excludes from the speedy trial period pursuant to court rule, any custodial period where the accused is detained for an unrelated charge or is serving an unrwlated sentence."

(CP, 11). Such as where the mistaken belief was based on a decision of the Honorable Johnson.

Stricker Rule:

> ``[P]ast experience has shown that unless a **strict rule** is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved."

87 Wn.2d 870, 877, 557 P.2d 847 (1976) LEXIS 712 (emphises added).

Mituniewicz "claims the trial court abused its discretion because it failed to enfocre the requirements of the rule,. Fairure to enforce the requirements of rules can be constitute an abuse of discretion." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 LEXIS 555. The Honorable Johnson wrote: "The court excluded 60 days of DOC sanction and find good cause for continuance." (CP, 12). The range of discretionrary choices is a question of law and the judge abuses his or her discretion if the discretionrary decision is contrary to law State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (Div. III, 2000) LEXIS 586.

As the same time, the superier courts in Washington are bound to follow the timeframes established in CrR 3.3 . However, CrR 3.3's provbisions do not delineate the scope of the constitutional speedy trial right. Instead, CrR 3.3 is simply "a framework for the disposition of criminal proceedings." State v. Wierman, 19 Wn. App. 641, 644-45, 577 P.2d 154 (Div. I, 1`978) LEXIS 2150. Honorable Johnson's responisibility to ensure a trial is timely under the language of CrR 3.3. That time for trial rule provides that Mituniewicz who is detained in jail shall be brought to trial within the CrR 3.3(b)(1)(i) 60 days after the commencement date specified in (CP, 6) or CrR 3.3(b)(1)(ii) th time specified 30 days after the end of that excluded period. CrR 3.3(b)(5).

Authorized by CrR 3.3(e)(3) delay granted by the court must stated on the record or in writing the reasons for the continuance. CrR 3.3(f)(2). "An act must be construed as a whole, considering all provisions in relation to each other and harmonizing all to ensure proper construction of each provision." State v. Greenwood, 120 Wn.2d 585, 845 P.2d 971 (1993) LEXIS 28.

"[A] decision based on an erroneous view of the law constitutes an abuse of discretion." State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005) LEXIS 719. Honorable Johnson's material departure from CrR 3.3. "The court excluded 60 days of DOC sanction and find good cause for continuance" (CP, 12) evidenced by this record, does not constitute "good cause." . . . is not an excuse for violating mandatory rules. Mack, supra.

Division Two shown "good cause" procedures for continuance in Johnson Court:

> "The court timely set Johnson's initial trial date for March 10, 2004. On that date, over Johnson's objection, the court reset the trial to April 14, 2004, the 78th day. Johnson specifically argues an inadequate basis for this change, but since the new trial date was still within the applicable speedy trial period, we need not rule on his claim. On April 14, 2004, the court continued the trial date to May 3, 2004, over Johnson's objection, because the assigned deputy prosecutor was trying a different case on April 14.
>
> On May 3, 2004, the court again continued the trial, with agreement of both counsel, because the defense was raising a new pretrial motion to dismiss. The record is not clear as to whether Johnson personally agreed to the continuance; he later said that he had not agreed. The court set a new trial date of May 10, 2004.
>
> On May 10, 2004, the transcript of the hearing indicates that no courtroom was available for the trial. The lawyers wanted to set a date to hear a motion to dismiss, as well as a new and separate trial date. Johnson also wanted a date to hear that motion as well as his own pro se motions but objected to continuing the trial date. Over Johnson's objection, but at the request of his counsel, the court continued the trial date to June 9, 2004, and set a motion hearing date of May 26, 2004. The stated written reason for the continuance was to "secure separate motion date which could be dispositive." CP at 106.
>
> On June 9, 2004, the matter was "sent out" for trial and the parties made preliminary motions. The State learned that the investigating detective, who had prepared the photo montage and witnessed the victim's identification of Johnson as the burglar, would not be available. The State moved to continue the trial date, and the court granted the motion, over Johnson's objection. The court continued the trial date to June 16, 2004. Trial commenced on June 16, 2004.
>
> A continuance granted under CrR 3.3(f) is an "excluded period" under CrR 3.3(e)(3). The trial court made each continuance of Johnson's trial date under CrR 3.3(f). So long as those continuances met the requirement of the rule, then each period of continuance is "excluded in computing the time for trial." CrR 3.3(e). And when those continuances are excluded, the court tried Johnson on day 78, with 12 days still remaining in his 90-day period.

132 Wn. App. 400, 411-12, 132 P.3d 737 (Div. II, 2006) LEXIS 300.

On November 15, 2011, Mituniewicz's mailed (1) Notice for Motion Docket (CP, 13); (2) Affidavit of Mailing (CP, 14); and Motion of Objection/Dismissal with Prejudice (cp, 15). "Objection

to a trial date on speedy trail grounds must be made within 10 days after notice of the trial date is given. CrR 3.3(d)(3)." Bobanhouse, supra. "It is the State's burden to bring defendants to trial in a timely manner. That burden is heightened when the defendant is incarcerated and asserts his rights, and the delay extends." State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) LEXIS 965 (dissent).

On November 28, 2011, Mituniewicz's 60th day in custody after arraignment date: September 29th CrR 3.3(b)(1)(i). Honorable Johnson did not set Mituniewicz's trial date within the case law timely limits of CrR 3.3(a)(3)(v) DOC sanction 90 days from arraignment (CP, 6, 11 & 12) and, under CrR 3.3(h) mandated that the charges against Mituniewicz be dismissed with prejudice. Division Two held in State v. Saunders Court:

> "CrR 3.3 makes no allowance for the nature and complexity of the case. Whether an incarcerated defendant is charged with failing to register as a sex offender or charged with one count of aggravated murder with more bodies being disentombed daily from his backyard, the rule requires that trial commence within 60 days."

153 Wn. App. 209, fn. 11, 220 P.3d 1238 (2009) LEXIS 2866.

On December 28, 2011, Mituniewicz's 90 days in custody. Honorable Wulle transferred the case to the trial judge, Honorable Stahnke, for motions hearing. "[S]uch delays are contrary to the public interest in the prompt disposition of criminal cases." Mack, supra. Mituniewicz's mailed (1) Notice for Motion Docket (CP, __); (2) Affidavit of Mailing (CP, __); and (3) Amended Motion for Dismissal with Prejudice (CP, __). Stricker Rule:

> "A speedy trial in criminal cases is not only a personal right protected by the federal and state constitutions (Const. art. 1, 22), it is also an objective in which the public has an important interest.

87 Wn.2d 870, 876, 557 P.2d 847 (1976) LEXIS 1375.

On January 5, 2012, Mituniewicz's 98th day in custody. "There being no 'good cause' tojustify the delayed trial settings, appellant's motion to dismiss should have been granted under [CrR 3.3]." Mack, supra.

DPA St. Clair contends that Mituniewicz must show a violation of his constitutional right to a speedy trial pursuant to CrR 3.3(a)(4), nevertheless, by its own terms: "[i]f a trial is timely under the language of [CrR 3.3], or . . . , the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial." CrR 3.3(a)(4). It follows that there are two related-but not coextensive-inquiries concerning whether a criminal defendant received a sufficiently speedy trial. "[A] violation of [CrR 3.3] is not necessarily a violation of the constitutional right, just as a violation of that constitutional right may not be a violation of [CrR 3.3]." Mack, supra; Inquez, supra at P. 30.

"[T]he defendant can be prejudiced by delay, whatever the sources." Mack, supra. Honorable Johnson's abuse of discretion, there has been a material departure from CrR 3.3 case law of Bobanhouse, supra; and Johnson, supra, establishing CrR 3.3 provides a framework for the disposition of criminal time for trial rule proceedings standards (CP, 12). In addition, Honorable Stahnke's abuse of discretion there has been a material departure from CrR 3.3(c)(2): "The Date of Commencement 11/28/2011; Elapsed days 56." (CP, 24). CrR 3.3(c)(2) by its own terms: "[T]he elapsed time shall be reset to zero. . . . , the commencement date shall be the latest o9f dates specified in [CrR 3.3(c)(2)(i) through (vii)]." (CP, 12 & 24)"in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from [CrR 3.3]." W.E. Roche. Fruit Co. v. Northern P. Ry., 18 Wn.2d 484, 488, 139 P.2d 714 (1943) LEXIS 331. Furthermore, there "was not 'good cause' to warrant setting appellants' trial[] beyond the mandated 60 days. Absent "good cause" for the delay, dismissal is required." Mack, supra.

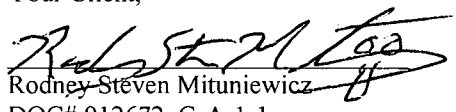
This problem should have been avoided by the While Rule:

> "The selection of a proper trial date is a mutual task with ultimate responsibility in the court. It is . . . , that counsel best serves both h[er] client and the adversary system by assuring compliance with the rule when trial dates are set."

94 Wn.2d 498, 503, 617 P.2d 998 (1980) LEXIS 1378.

That is why I think you should use the RPC and WDA Standards for Indigent Defense Services and RCW 10.101.030. Please schedule a time I may call you, and please send me a copy of transcripts & CD/Video.

Your Client,



Rodney Steven Mituniewicz
DOC# 912672, G-A-1-1
Coyote Ridge Corr. Cntr.
P.O. Box 769
Connell, WA 99326-0769

LISA E. TABBUT

ATTORNEY AT LAW

August 16, 2012

Rodney S. Mituniewicz/DOC#912672
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

CONFIDENTIAL/LEGAL MAIL

RE: State of Washington, Respondent, v. Rodney S. Mituniewicz, Appellant
Court of Appeals No. 43110-6-II
Clark County No. 11-1-01530-1

Mr. Mituniewicz:

Thanks for your letter of July 20. It looks like you have been hard at work in the law library. I appreciate you sending your typed thoughts on speedy trial. I will look at the issue closely once I get to work on your transcripts. By the way, you should have your copy of the transcripts by now.

Remember that this is a direct appeal and I cannot add anything to the record. If you want to add stuff about public defense standards and their application to Ms. Lavallee, you will likely need to do that via a personal restraint petition (PRP).

I did listen to your voice mail where you ask me to get certain things about Ms. Lavallee's caseload and public defense contract. I don't need that for appeal and don't have any better access to it than you do. If you want it, here is the contact information for the person who can likely get it for you.

Ann Christian
Clark County Public Defense Coordinator
P.O. Box 5000
Vancouver, WA 98666-5000

I put you on my calendar for a phone call on **Wednesday, September 5, at 1:30 p.m.** Please call me using the toll free number and access code.

Sincerely,

Lisa E. Tabbut
Attorney at Law

P.O. Box 1396 • Longview, Washington 98632 • Phone: (360) 425-8155 • Fax: (360) 425-9011

LISA E. TABBUT

ATTORNEY AT LAW

April 17, 2013

Rodney S. Mituniewicz/DOC#912672
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

CONFIDENTIAL/LEGAL MAIL

RE: State of Washington, Respondent, v. Rodney S. Mituniewicz, Appellant
Court of Appeals No. 43110-6-II
Clark County No. 11-1-01530-1

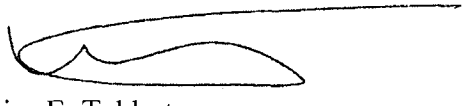
Mr. Mituniewicz:

It was nice talking to you yesterday. As per your request, a copy of Clerk's Paper 5, the Notice of Special Punishment Provision, is in this envelope.

I've reviewed your Statement of Additional Grounds for Review. It really is very well done. Good job.

As for my filing a reply brief, I have yet to decide that as I am in the middle of a bunch of other stuff right at the moment. I do have the May 3 reply brief due date on my calendar though.

Sincerely,



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