No. 31165-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES GREGORY CASTILLO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable David A. Elofson

BRIEF OF APPELLANT

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2. Mr. Castillo's Sixth Amendment right to a speedy trial was violated when he was prosecuted for second degree rape 12 years after the information was filed, where he had no idea criminal charges had been filed against him, he was openly living in Las Vegas, Nevada, and the State presented no evidence to justify the delay.

3. The trial court violated Mr. Castillo's right to due process and denied his right to present a defense when it refused to allow his witness to testify.

4. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. Castillo's right to equal protection.

5. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding

of a qualifying prior conviction violated Mr. Castillo's rights to a jury trial and due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a right under the United States and the Washington Constitutions to the assistance of counsel. A defendant may waive this right to counsel and instead represent himself where a request to do so is timely and unequivocal. Here, Mr. Castillo made a pretrial unequivocal request to represent himself. Nevertheless, the trial court found Mr. Castillo's request to be untimely and denied his request. Is Mr. Castillo entitled to reversal of his conviction where the trial court violated his timely-asserted constitutionally protected, right to represent himself?

2. A defendant's Sixth Amendment right to a speedy trial is violated where the length of the delay is extraordinary, the State presents no evidence that the delay is the defendant's fault, and the defendant asserts his right in the trial court. Here, the State waited 12 years after filing the information to prosecute Mr. Castillo for second degree rape, and the State presented no evidence for the reasons for the delay. Mr. Castillo was openly living in Las Vegas, Nevada, was detained and fingerprinted by federal authorities when returning to the

United States during this 12-year period, did not know an information had been filed against him until 12 years after the incident, and immediately and continually asserted his right to a speedy trial. Did the trial court violate Mr. Castillo's constitutional right to a speedy trial when it allowed the prosecution to proceed over his objection?

3. As part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence on his behalf. Here, the trial court excluded the testimony of Jose Blanco, the wife of N.B., despite the fact the evidence was necessary for Mr. Castillo's defense. Did the trial court's exclusion order prevent Mr. Castillo from presenting a defense, thus entitling him to reversal of his conviction?

4. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the

Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and where the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

5. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Castillo's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had a prior most serious offense, thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

C. STATEMENT OF THE CASE

On July 28, 1998, the State filed an information charging James Castillo with one count of rape in the second degree and a warrant was issued for his arrest. CP 1. On May 2, 2010, twelve years after the filing of the information, Mr. Castillo was arrested in Nevada and extradited to Washington. CP 27-28, 79. Mr. Castillo repeatedly asserted his right to a speedy trial.

Following a jury trial, Mr. Castillo was found guilty as charged. CP 291; 2RP 645.[1] At sentencing, the trial court found that Mr. Castillo had a qualifying prior conviction, and found him to be a persistent offender. CP 323; 10/15/2012RP 19-20. Based upon this finding, the trial court sentenced Mr. Castillo to life imprisonment without the possibility of parole. CP 323.

[1] Mr. Castillo was convicted following his second trial. The first trial ended in a mistrial when the jury was unable to reach a verdict. CP 120.

D. ARGUMENT

1. THE TRIAL COURT'S UNJUSTIFIED DENIAL OF MR. CASTILLO'S DEMAND TO REPRESENT HIMSELF REQUIRES REVERSAL OF HIS CONVICTION

On January 13, 2012, just prior to the hearing on the motion to dismiss the information for a violation of his right to a speedy trial, Mr. Castillo unequivocally moved to represent himself, citing the Washington Constitutional provision. CP 91-93; RP 212. The trial court told Mr. Castillo that the motion would proceed with counsel representing him since it was a purely legal issue and denied his motion to represent himself. 1RP 212-13.[2]

Immediately following the hearing, Mr. Castillo again unequivocally moved to represent himself, again citing the specific state constitutional provision. RP 227, 233. On this occasion, the court conducted a colloquy with Mr. Castillo at the conclusion of which it again denied his motion. 1RP 227-40.

On January 31, 2012, Mr. Castillo unequivocally stated his continued desire to represent himself. 2RP 8-11. The court again

[2] There are three groups of transcripts. The four-volume set containing miscellaneous hearings and the second trial will be referred to as "1RP." The six-volume set containing the first trial will be referred to as "2RP." The sentencing transcript will simply be referred to as "10/15/2012RP."

engaged Mr. Castillo in a colloquy regarding the risk of self-representation. 2RP 17-39. At the conclusion of the colloquy, this time the court agreed to allow Mr. Castillo to represent himself. 2RP 39.

a. Mr. Castillo had a constitutionally protected right to represent himself. The Sixth Amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967). In addition, the Sixth and Fourteenth Amendments to the United States Constitution as well as article I, section 22 of the Washington Constitution allow criminal defendants to waive their right to the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The right to counsel may be waived, but the waiver must be knowing, voluntary, and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Recognizing the serious nature of the inquiry into the

waiver of the right to counsel, the United States Supreme Court has admonished that "courts [should] indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The right to proceed *pro se* is neither absolute nor self-executing. *State v. Woods,* 143 Wn.2d 561, 586, 23 P.3d 1046, *cert. denied,* 534 U.S. 964 (2001). When a defendant requests to represent himself, the trial court must determine whether the request is unequivocal and timely. *State v. Stenson,* 132 Wn.2d 668, 737, 940 P.2d 1239 (1997), *cert. denied,* 523 U.S. 1008 (1998). Absent a finding that the request was equivocal or untimely, the trial court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy. *Faretta,* 422 U.S. at 835; *State v. Stegall,* 124 Wn.2d 719, 881 P.2d 979 (1994).

> This presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption in *Turay* does not go so far as to eliminate the need for any basis for denying a motion for pro se status. Were it otherwise, the presumption could make the right itself illusory.

> A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. Similarly, concern regarding a defendant's competency alone is insufficient; if the court doubts the defendant's competency, the necessary course is to order a competency review. *In re Fleming,* 142 Wn.2d 853, 863, 16 P.3d 610 (2001); RCW 10.77.060(1)(a).

Madsen, 168 Wn.2d at 504-05. The unjustified denial of this right requires reversal. *Id.* at 503; *Stenson,* 132 Wn.2d at 737.

b. Mr. Castillo's request was unequivocal and timely.

Mr. Castillo moved to represent himself well before trial and his motion was unequivocal. 1RP 212 ("I want to exercise my – my state constitutional right to defend myself – please under Article 122 [sic], section 22.").

"If the demand for self-representation is made . . . well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self representation exists *as a matter of law*." *State v. Barker,* 75 Wn.App. 236, 241, 881 P.2d 1051 (1994) (emphasis added). "Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the

Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice." *Madsen*, 168 Wn.2d at 509.

Here, Mr. Castillo demanded to exercise his right to represent himself unequivocally, citing the Washington constitutional provision. This was a clearly unequivocal invocation of the right to represent himself. *See Madsen,* 168 Wn.2d at 506 ("Madsen *explicitly* and repeatedly cited article I, section 22 of the Washington State Constitution - the provision protecting Madsen's right to represent himself." (emphasis in original)). Further, given Mr. Castillo's unequivocal request, he had the right to represent himself prior to the hearing *as a matter of law. Barker,* 75 Wn.App. at 241.

"Closely related to timeliness is the concern that a defendant will invoke the right to self-representation to obstruct or delay the administration of justice." *Madsen* 168 Wn.2d at 509. The trial court ruled that Mr. Castillo was attempting to delay the matter, particularly the hearing on the motion to dismiss. It must be remembered, however, that a criminal defendant's right to pro se status cannot be denied simply because affording the right will be a burden on the efficient administration of justice. *Faretta,* 422 U.S. at 834, 95 S.Ct. 2525;

Madsen, 168 Wn.2d at 509; *State v. Vermillion,* 112 Wn.App. 844, 850-51, 51 P.3d 188 (2002), *review denied,* 148 Wn.2d 1022 (2003). Here, Mr. Castillo demanded to represent himself and did not accompany the request with a motion to continue the hearing. Given these two factors, the trial court was required to allow him to represent himself at that time, not sometime in the future as it did here.

c. The unjustified denial of Mr. Castillo's motion to represent himself requires reversal of his conviction. Where a defendant's motion for pro se status was erroneously and unjustifiably denied, the defendant is entitled as a matter of law to reversal of his conviction and remand to allow him to defend in person as guaranteed by the Washington Constitution. *Madsen,* 168 Wn.2d at 510.

Mr. Castillo unequivocally requested to represent himself prior to the hearing on the motion to dismiss. The request was not accompanied by a request to continue the hearing. The trial court's refusal to allow Mr. Castillo to represent himself at that time was unjustified and his conviction must be reversed.

2. THE 12-YEAR DELAY BETWEEN CHARGING AND TRIAL VIOLATED MR. CASTILLO'S CONSTITUTIONALLY PROTECTED RIGHT TO A SPEEDY TRIAL

Mr. Castillo settled into life in Las Vegas, Nevada, obtaining a driver's license in his own name, working under his own name, and paying taxes under his own name. CP 27-28, 44-46. On December 26, 2007, Mr. Castillo was reentering the United States from Mexico when he was detained by United States Customs and Border Patrol agents. CP 37-43. While detained, the federal agents discovered the warrant for his arrest for the underlying offense, but claimed it was not extraditable. CP 43. The agents released Mr. Castillo. CP 43.

Prior to trial, Mr. Castillo moved to dismiss the information for a violation of his constitutionally protected right to a speedy trial. CP 27-77. In its response to Mr. Castillo's motion, the State alleged it had received information that in July 1998, Mr. Castillo was in Sacramento, California. CP 79. A search of the address where Mr. Castillo was alleged to be was made but Mr. Castillo was not there. *Id.*

The State also alleged that in 2001, contact was made with the United States Marshall's office to attempt to locate Mr. Castillo. CP

79.[3] The Marshall's office ran Mr. Castillo's name in a federal database without success. *Id.* The State noted that Mr. Castillo's name and identifying information was published in the Crime Stopper's Flyer without success, but the State did not identify where these flyers were circulated. CP 79. Finally, the State alleged that in April 2009, it received information from the United States Marshall that Mr. Castillo was living in Las Vegas. CP 79. The warrant was sent to the Las Vegas Police, who arrested Mr. Castillo on May 2, 2010. CP 79.

On January 13, 2012, a hearing was held on Mr. Castillo's motion to dismiss for a violation of his constitutionally protected right to a speedy trial. 1RP 216-26. Without discussing its rationale or reasoning, the trial court summarily denied the motion to dismiss. CP 86; 1RP 226.

a. Mr. Castillo had a constitutionally protected right to a speedy trial. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U .S. Const. amend. VI. The right to a speedy trial "'is as fundamental as any of the rights secured by the Sixth Amendment.'"

[3] The State also alleged that as a person who had a prior sex offense, Mr. Castillo was required to register as a sex offender and that he failed to notify Washington officials he had moved to Las Vegas, nor did he notify Las Vegas authorities that he was residing there. CP 78-79.

Barker v. Wingo, 407 U.S. 514, 516 n. 2, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), *quoting Klopfer v. North Carolina,* 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Washington Constitution article I, section 22 requires the same analysis as the federal Sixth Amendment. *State v. Iniguez,* 167 Wn.2d 273, 290, 217 P.3d 768 (2009).

To determine whether a delay in bringing a defendant to trial impairs the constitutional right to a speedy trial, courts examine the four factors in *Barker. Iniguez,* 167 Wn.2d at 282-84. As a threshold matter, however, a defendant must show that the length of delay "crossed a line from ordinary to presumptively prejudicial." *Iniguez,* 167 Wn.2d at 283.

This is necessarily a fact-specific inquiry dependent on the circumstances of each case. *Iniguez,* 167 Wn.2d at 283, *citing Barker,* 407 U.S. at 530-31. Thus, the constitutional speedy trial right cannot be quantified into a specific time period. *Iniguez,* 167 Wn.2d at 283, *citing Barker,* 407 U.S. at 523. The federal courts have held that generally postaccusation delay of more than one year is "'presumptively prejudicial.'" *Doggett v. United States,* 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); *United States v. Mendoza,* 530 F.3d 758, 762 (9th Cir. 2008).

Here, the State filed charges against Mr. Castillo in July 1998, initiating Mr. Castillo's right to a speedy trial under the Sixth Amendment. Mr. Castillo was finally arrested in May 2010. Twelve years passed between the charging and the arrest. Additionally, the charges against Mr. Castillo were not complex, and eyewitness testimony was needed regarding the charge. Mr. Castillo's pretrial delay was presumptively prejudicial and met the threshold.

b. A weighing of the *Barker* factors compels the conclusion that Mr. Castillo's right to a speedy trial was violated. Once the defendant demonstrates presumptive prejudice, the court considers the *Barker* factors to determine whether a defendant has been deprived of his constitutional right to a speedy trial. *Iniguez.* at 283. The court balances the conduct of the State and the defendant when considering the following four *Barker* factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Iniguez,* 167 Wn.2d at 283, *citing Barker,* 407 U.S. at 530.

i. Length of delay. This factor is not considered in the same manner as the threshold presumptive prejudice analysis. *Iniguez,* 167 Wn.2d at 293. The length of the delay focuses on "'the extent to which the delay stretches beyond the bare minimum needed to trigger'" the *Barker* analysis. *Iniguez,* 167 Wn.2d at 293, *quoting Doggett,* 505 U.S. at 652. A longer pretrial delay compels a court to give a closer examination into the circumstances surrounding the delay. *Iniguez,* 167 Wn.2d at 293.

The 12-year lapse between charging and arrest was extremely lengthy. On its face, the delay appears to be excessive, making this factor weigh in favor of Mr. Castillo.

ii. Reason for the delay. Different weight should be assigned to different reasons for the delay. *Iniguez,* 143 Wn.App. 845, 856, 180 P.3d 855 (2008), *rev'd on other grounds by* 167 Wn.2d 273, *quoting Barker,* 407 U.S. at 531. The State has "some obligation" to pursue a defendant and bring him to trial. *United States v. Sandoval,* 990 F.2d 481, 485 (9th Cir.), *cert. denied,* 510 U.S. 878 (1993). Central to this analysis is whether the State's actions were diligent. *United States v. Aguirre,* 994 F.2d 1454, 1457 (9th Cir. 1993). If the

actions of the State are diligent, the court looks to whether the State or the defendant is more to blame for the delay. *Id.*

In *Doggett,* the United States Supreme Court determined that the Government's negligence in failing to diligently pursue Mr. Doggett was the reason for the eight and one-half year delay between indictment and arrest. *Doggett,* 505 U.S. at 652-53. For the first two and one-half years after filing charges, the Government was unable to arrest Mr. Doggett because he was living out of the country and a formal extradition attempt would have been futile. *Id.* at 649-50.

Eventually, Mr. Doggett moved back to the United States, passing freely through customs. *Id.* He lived openly for nearly six years before the Government located him through a simple electronic credit check. *Id.* At the time of arrest, Mr. Doggett was unaware of the charges against him. *Id.* at 653. The court decided that for the last six years of the delay, the Government acted negligently by failing to diligently test their assumption that Mr. Doggett was living abroad. *Id.* at 653-54. "[I]f the Government had pursued [Mr.] Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail." *Id.* at 656.

Here, the reasons for the delay are virtually indistinguishable from *Doggett.* The reason for the delay in *Doggett* involved the Government's failure to diligently search for Mr. Doggett while he was subject to United States jurisdiction. Similarly, here, Mr. Castillo was living openly in Nevada and did not attempt to hide where he was living. CP 27-28. Mr. Castillo registered his car in Nevada, had a Nevada driver's license, and paid his taxes, all in his true name. CP 44-46. In 2007, while crossing the United States border, Mr. Castillo was detained by the Department of Homeland Security, fingerprinted, then released. Under the circumstances, the State acted negligently for failing to diligently pursue Mr. Castillo while he lived openly in Nevada.

The State's reliance on the fact Mr. Castillo was required to register as a sex offender and never did following this incident as somehow excusing its failure to locate him is misplaced. Certainly had Mr. Castillo registered it may have made the State's task easier, but that did not excuse its failure to locate him in Las Vergas given the fact he was living openly there. The failure to register was a separate offense for which Mr. Castillo was charged and convicted. But his failure in no

way was the reason for the State's delay in bringing Mr. Castillo to trial.

iii. *Assertion of the right.* A defendant's assertion of his right to a speedy trial is entitled to strong evidentiary weight when determining whether deprivation of the right is present. *Barker,* 407 U.S. at 531–32. The court considers the extent to which a defendant demands a speedy trial as well as the reasons behind the demand. *Iniguez,* 167 Wn.2d at 294-95. However, when a defendant is unaware of the charges against him, the fact that he did not assert his right will not be weighed against him. *Doggett,* 505 U.S. at 653.

The evidence at the hearing failed to show that Mr. Castillo was aware of the charges against him until he was arrested 12 years after the arrest warrant was issued, so this period cannot be weighed against him. Mr. Castillo first found out about the Washington charges in 2010 when he was arrested in Nevada. This factor again weighs in Mr. Castillo's favor.

iv. *Mr. Castillo suffered prejudice from the unjustified delay.* Whether prejudice will be assumed depends on whether it is the defendant or the State who is responsible for the delay. *Aguirre,* 994 F.2d at 1456. If the State is negligent in pursuing the

defendant, prejudice is presumed. *Doggett,* 505 U.S. at 657. On the other hand, if the State fulfills its obligation to pursue a defendant with reasonable diligence, the defendant must show specific prejudice to his or her defense. *Id.* at 656. Prejudice should be assessed in light of the defendant's interest in (1) preventing pretrial incarceration, (2) minimizing anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Barker,* 407 U.S. at 532.

As previously stated, the reason for the delay was the State's failure to act with good faith and diligence in its pursuit of Mr. Castillo. Therefore, prejudice must be presumed. *Doggett,* 505 U.S. at 657.

c. Mr. Castillo is entitled to reversal of his conviction with prejudice for the violation of his right to speedy trial. When a defendant's constitutional speedy trial right is violated, the remedy is to dismiss the charges with prejudice. *Iniguez,* 167 Wn.2d at 282. Here, the unjustified 12-year delay in bringing him to trial violated Mr. Castillo's constitutionally protected right to a speedy trial. Mr. Castillo is entitled to reversal of the conviction.

3. THE EXCLUSION OF JOSE BLANCO'S TESTIMONY VIOLATED MR. CASTILLO'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE

Mr. Castillo sought to call as a witness in his defense case-in-chief the husband of N.B., Jose Blanco, regarding whether he was aware Mr. Castillo and N.B. were having an affair. 1RP 613-15. The State objected to Mr. Blanco's testimony on the basis that it was not relevant and was prejudicial. 1RP 615. The trial court sustained the State's objection and barred the testimony of Mr. Blanco:

> I'm not going to – based on what you've represented, Mr. Castillo, I'm not going to allow the testimony. And we don't need to hear from Mr. Blanco because even if he says, as [the prosecutor] indicated, yes, I think she had a relationship, it doesn't mean that this event was consensual. And it is – so I'm going to exclude it. I don't believe it is appropriate.
>
> I think whether or not he says yes is irrelevant. The issue isn't about relationship because that area has not been probed and you have indicated you're not going to testify that it was in fact consensual. So that would render his testimony irrelevant, and I think to allow it would be more prejudicial that it would be probative, all right?

1RP 617-18.

a. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present witnesses in one's defense is a fundamental element of due process of law. *United States v. Whittington,* 783 F.2d 1210, 1218 (5th Cir., 1986), *citing Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis,* 136 Wn.2d 498, 527, 963 P.2d 843 (1998). This right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord Washington,* 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

Washington defines the right to present witnesses as a right to present material and relevant testimony. Const. art. I § 22; *State v.*

Roberts, 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The right to present a defense is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324-25, *citing United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), *quoting Rock v. Arkansas,* 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

The evidence sought to be admitted by the defendant need only be "of at least minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *quoting State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, the burden shifts to the

State to prove "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.*

b. The exclusion of Mr. Blanco's testimony denied Mr. Castillo the right to present his defense. The trial court assumed Mr. Blanco's testimony would be used by Mr. Castillo to attempt to prove the sexual act was consensual. 1RP 617-18. There were admissible alternative bases for allowing Mr. Blanco's testimony, primarily to impeach N.B.'s testimony by showing she had a motive to fabricate the rape to cover up a relationship she was having with Mr. Castillo.

"The credibility of a witness may be attacked by any party[.]" ER 607. Evidence of bias and interest is relevant to a witness's credibility. ER 401; *State v. Lubers,* 81 Wn.App. 614, 623-24, 915 P.2d 1157, *review denied,* 130 Wn.2d 1008 (1996), *citing State v. Whyde,* 30 Wn.App. 162, 165-66, 632 P.2d 913 (1981). When a case depends essentially on whether the jury believes one witness, that witness's credibility must be subject to close scrutiny. *State v. Smith,* 130 Wn.2d 215, 227, 922 P.2d 811 (1996).

"Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy while the witness

was testifying." *State v. Dolan,* 118 Wn.App. 323, 327–28, 73 P.3d 1011 (2003). A defendant enjoys more latitude to expose the bias of a key witness. *Darden,* 145 Wn.2d at 619. Extrinsic evidence of acts or conduct may be introduced to prove a witness's bias without first calling such acts or conduct to the witness's attention. *State v. Wilder,* 4 Wn.App. 850, 855, 486 P.2d 319 (1971).

Here, N.B.'s credibility was the issue at trial, thus Mr. Castillo had a right to test or attack her credibility. If N.B. was having an affair with Mr. Castillo, it might have given her a motive to fabricate the rape allegation in order to deny the affair to her husband, Mr. Blanco.

The trial court's claim that this was a collateral issue was misplaced. Where the credibility of the complaining witness is crucial, his or her possible motive to lie is not a collateral issue. *Lubers,* 81 Wn.App. at 623.

The trial court erred in excluding Mr. Blanco's testimony as it provided a valid basis for Mr. Castillo to test or attack the credibility of N.B.

c. The court's error in excluding Mr. Blanco's testimony was not harmless error. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Ritchie*, 480 U.S. at 58; *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Maupin,* 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

The trial court's error in excluding this evidence was not harmless. As noted, N.B.'s testimony was the only evidence presented at trial that a rape had occurred. Given the critical nature of her testimony, Mr. Castillo had a right to attack her credibility. The trial court erred in excluding the only admissible evidence Mr. Castillo possessed that attacked N.B.'s credibility. Thus, the trial court denied Mr. Castillo his right to present a defense and he is entitled to reversal of his convictions and remand for a new trial. *Id.*

4. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AS AN "ELEMENT," DEPRIVED MR. CASTILLO OF THE EQUAL PROTECTION OF THE LAW

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it "actually alters the crime that may be charged," and therefore

the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.* While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed "sentencing factors," is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said "merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). More recently the Court noted:

> *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed.2d 466 (2006). Beyond its failure to abide by the logic of *Apprendi*, the distinction *Roswell* draws does not accurately reflect the impact of the recidivist fact in either *Roswell* or the cases the Court attempts to distinguish.

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id.* at 191. The Court found that in the context of this and related offenses,[4] proof of a prior conviction functions as an "elevating element," i.e., it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92. Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. *See* RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the "maximum punishment" is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances "maximum penalty" is the top of the standard range. Indeed, a person

[4] Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. *Roswell*, 165 Wn.2d at 196, *discussing State v. Oster*, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002).

sentenced for felony CMIP with an offender score of 3[5] would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. *See* Washington Sentencing Guidelines Commission, *Adult Sentencing Manual 2008*, III-76. The "elevation" in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the *penalty* for the substantive crime. S*ee* RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in

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[5] Because the offense is elevated to a felony based upon a conviction of a prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have a score lower than 3.

classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thorne*, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. *Id.*

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act (POAA) as follows:

> to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an "element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable

doubt, even if the prior rape conviction is the person's only felony and thus results in a "maximum sentence" of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes." 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction, the prior offense merely alters the maximum punishment to which the person is subject. *Id.* So too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the

prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. The trial court violated Mr. Castillo's right to equal protection.

5. THE JUDICIAL FINDING THAT MR. CASTILLO HAD SUFFERED A PRIOR QUALIFYING CONVICTION WHICH RENDERED HIM A PERSISTENT OFFENDER VIOLATED HIS RIGHTS TO A JURY TRIAL AND TO DUE PROCESS

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77.

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. *Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge

to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id.* at 304-05; *see Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

More recently, the Supreme Court recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, ___ U.S. ___, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. *Blakely*, 542 U.S. at 304-05.

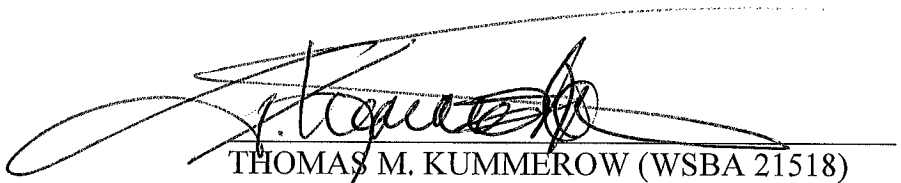
As noted above, the Washington Supreme Court has embraced this principle in *Roswell*: where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *Roswell*, 165 Wn.2d at 192. And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* and *Almendariz-Torres* does not apply. *Id.* at 193 n.5. Thus, under *Blakely, Apprendi* and *Roswell,* the judicial finding of Mr. Castillo's prior conviction and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.

E. CONCLUSION

For the reasons stated, Mr. Castillo requests this Court reverse his conviction and dismiss the matter for a violation of his right to a speedy trial. Alternatively, Mr. Castillo request this Court reverse his conviction and remand for either a new trial or resentencing to a standard range sentence.

DATED this 14th day of May 2013.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JAMES CASTILLO, Appellant.	)))))))))	NO. 31165-1-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MAY, 2013.

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