NO. 31165-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES GREGORY CASTILLO,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The court improperly denied appellant's request to proceed pro se.
2. The court improperly denied appellant's motion to dismiss due to violations of appellant's right to a speedy trial.
3. The court improperly limited Appellant's ability to present a defense by excluding testimony of a proposed witness.
4. The persistent offender classification should be proven as an element.
5. The finding by the court that appellant had a prior qualifying conviction for persistent offender violated appellant's right to a trial by jury.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court properly initially denied appellant's equivocal request to proceed pro se.
2. Appellant's speedy trial rights were not violated.
3. The court did not improperly limit Appellant's ability to present a defense.
4. Persistent offender status is not an element of the crime charged.
5. The appellant's right to a trial by jury was not violated when the court found appellant had a prior qualifying conviction.

II. STATEMENT OF THE CASE

The substantive and procedural facts are rather convoluted and will be better presented in the argument section below. The State will supply a synopsis of what occurred so that the court will have a "road map" with which to review the following argument. This section will primarily

pertain to the claim by Castillo that he was improperly denied his right to act pro se.

Appellant was charged on July 2, 1998 with one count of Rape in the Second Degree. (CP 1) A search warrant was issued for the home of appellant and his wife in an attempt to locate the defendant and possible evidence of this crime. (CP 7-20) (Appellant was still married to his wife at the time of the two trials.) The defendant could not be found at the home he occupied with his wife. (RP 02.06.12 pgs 245-47)[1] There was an arrest warrant issued when the officers received information that the appellant was living in California with his sister. (CP 36, RP 258-260)

Appellant had been convicted of a prior sex offense, Attempted Rape in the Second degree; he was required to register his residence address in this and any other state where he might live. After the rape occurred in this case Appellant never registered his change of address again. (RP 1.13.12 pg 220-21, 222-23) Castillo admitted that he had a duty to register as a sex offender nor did he refute the fact that he had never registered after he left Yakima County. (RP 1.13.12, pg 225, CP 78-9) Officer Sperle testified that when they entered Appellant's residence there three cars one was registered to Castillo's wife, one they could not get the plate and the third was registered to both Castillo and his wife.

[1] Appellant has set forth a system to reference the VRP, the State shall attempt to use those same designations.

When they entered the home there were items of dominion and control such as bills and other items with Castillo's name on them. There where mens clothes and when asked "did it look like somebody just packed up and left, the officer answered "Yeah, it looked like someone –" (RP 573) Officer Sperle further testified that he went back "...to see if anyone had returned...but there was no activity of anyone living there at that time." (RP 506, 574) Attempts were made to locate the defendant on several occasions after he fled Yakima County. (CP 79-85)

Appellant was subsequently arrested in Nevada and transported to Yakima County. (Vol. 1 – Various Hearing, Pg 11-2) He made his first appearance and was arraigned on July 9, 2010. (1RP 1, 10) Appellant agreed to and signed off on one continuance. (1RP 37)

By October 5, 2010 Appellant was complaining about his first attorney Mr. Kelley. (1RP 10-12, 15) The complaining did not cease from that day forward. (It would be impossible to list the number and nature of the complaints, they are endless and address judges, prosecutors and of course and especially his own attorneys.) On December 10, 2010 Castillo addressed his concerns to the court. He complaints regarding discovery and the lack of communication by his attorney and requests another attorney. Castillo states that he "wrote a letter to the Bar Association" regarding Mr. Kelley. Castillo states that Mr. Kelley is

"ineffective for me in this case." 1RP 37-40 The court denies the request by Castillo for new counsel. 1RP 52. After that denial Castillo again states that he does not want Kelley as his attorney.

At the time of the second trial Castillo had been appointed four attorneys to represent him or to act as standby counsel for this charge and the pending Failure to Register as a Sex Offender charge. (RP 230)

Appellant was appointed Mr. Kelley initially as counsel. Mr. Kelley was forced to withdraw after numerous complaints and threats by appellant the last of which included a formal complaint to the Washington State Bar Association which Mr. Kelley was required to respond to.

Mr. Raber was the next attorney appointed to represent Appellant. 1RP 9-13, 65-75 On January 6, 2011 the court warns Castillo that according to the order entered by Judge Gavin, which indicated that Castillo had created the conflict with his last attorney. This sitting judge, Judge Reukauf, indicates that Castillo if he once again starts "creating issues" that he will be required to stick with Mr. Raber. The Court also raises the question of whether Castillo wants to represent himself that he should be very careful with that decision. 1RP 75-6.

On June 14, 2011 Castillo states the following;

> MR. CASTILLO: ... And I was told by one of your judges, one of your -- one of the other judges in this county that -- well, first of all, I was taken in front of her by myself without

> representation, and I was told that if I did not get along with the next lawyer I had, which I didn't know who it was at the time, who it was going to be, that I would be left on my own.
>
> I take that as a threat, I see it as a threat, and I still feel it was a threat. But it also is scary because **I'm not a lawyer. I am nowhere near a lawyer. The only reason why I crack open a law book to try to study anything is to defend myself because I don't feel I'm getting adequate defense from our counsel, neither now or before .** (1RP 118-19, Emphasis mine.)

Castillo then agrees to allow the continuance of his trial to August 22 to allow Mr. Raber time to file a motion to dismiss for delay. 1RP 130

By July 13, 2011 a month after he agrees to allow his attorney time to work on what was agreed to be the major issue in the case and a month before the next trial date, Castillo is again filing motions on his own, on this date two were heard by the court. The main motion was to "fire" his attorney. Mr. Raber joins in the motion.

The court dismisses Mr. Raber as counsel for Appellant. The court once again the court addressed whether Appellant wished to proceed pro se;

> THE COURT: Okay. Very well. The Court will allow Mr. Raber to withdraw. Now my next question is, I can appoint another attorney for you, **I'd be happy to do that, or you indicated, I think, in a kind of a indirect way that you might represent yourself. What do you want to do here?** 1RP 138 (Emphasis mine.)
>
> Castillo then addresses the statement of a prior judge:
>
> MR. CASTILLO: **No**, I was told by January 6th by a

> different judge, Judge Reukauf, that if I didn't get along with this gentleman here -- this is before I met him -- that I would be left on my own. (Emphasis mine.) 1RP 138

Castillo again specifically states that he does not want to proceed pro se:

> THE COURT: Okay. Well, you're in front of a different judge now. **This judge would be willing to appoint another attorney for you. Do you want that to happen?**
> **MR. CASTILLO: Yes, sir.** 1RP 139 (Emphasis mine.)

It must be noted that from the time of initial "conflict" with Mr. Kelley that Appellant also voiced and ongoing "conflict" with Mr. Fessler, who is the director of the Office of Assigned Counsel, the public defender's office for Yakima County for example 1RP 142, 159-160.

On July 20, 2011 after the dismissal of Mr. Raber, Mr. Fessler approached the court indicating that it was going to be very difficult to find competent counsel who would take Appellant's case. 1RP 142-44

The court then states the following in its discussion with Castillo;

> THE COURT: Mr. Castillo, I made it clear to you the last time, and lucky for you, you ended up with Judge Lust, who gave you a little more latitude. But there's absolutely becoming no question in my mind that you are very sophisticated in delaying these proceedings, that you continue, knowing that if you file Bar complaints against attorneys, that that's going to get them off your case, and you just continue to play games, is my humble opinion.
> **...**
> THE COURT: But I've made an observation to you,

Mr. Castillo, that I was suspicion-ing (sic) that the next attorney that was appointed, we would run into a similar situation. And what a shock, we have, because – 1RP 145

...

THE COURT: Well, I'm going to point out, Mr. Castillo, that, you know, there starts becoming a commonality to the issue of which isn't the attorneys, it's you. 1RP 146

...

THE COURT: My comments are that you continue to shop around, Mr. Castillo. So here's what I'm going to do. I'm going to set this over a week. I'm going to tell you that if you meet with Mr. Fiander and you think that is all warm and fuzzy up front and then two weeks into it or a month or however long it takes you to decide otherwise, that this should go through a full-blown hearing. Because I think that the record will support a finding -- I think we're getting very close to that, that you are waiving your right to be represented by an attorney based upon your own conduct, which if we have a formalized hearing that that finding then gets made, you're going to be representing yourself Mr. Castillo, whether you want to or not, because of your behavior. So I'm going to continue to encourage you – that would be a horrible idea. Let me just tell you that. I am going to encourage you that when we get this next gentleman on board that you figure out a way to make this work.

So -- you know, I'm just saying we're running out of options, Mr. Castillo. And you continue like you said, you want this to go forward and you don't like being here in jail, and yet that's exactly where we're at right now. You're going to continue to be housed here until we get this figured out. So I'm just saying, clean slate – 1RP 147-7

...

THE COURT**:** Right. And I'm saying, Mr. Castillo, I'll give you the clean slate with Mr. Fiander. But I'm starting to hear a lot of similarities in your criticisms of the attorneys. You had some of the same criticisms with Mr. Kelley.

...

But I'm just indicating with Mr. Fiander, if something -- first of all, one, he's got to agree to take you. I'm not sure he's gonna. But if he does, I'm going to tell you if we burn through another one and you're unhappy with him in, you know, a month or six months,

> we're starting to, I think, be very close to the point of you representing yourself by your own conduct. So I'm just -- Mr. Castillo, you and I have been very blunt with each other all the way through this, and that's not changing. I'm just saying that's what we're getting close to. So I'm encouraging you to understand that that's what we're up against and to, again, make every effort, as you indicate you are, to make this work. 1RP 148-9

By October 28th 2011 Mr. Castillo is once again complaining the trial court that Mr. Fiander, his third attorney, is not or did not meet with him fast enough. He claims that Mr. Fiander is not meeting with him as he wishes and has not given him what he defines as discovery. Apparently Mr. Fiander discussed the case with Castillo but Castillo now claims that because Mr. Fiander says that he is capable and ready to go to trial in 11 days this has "made me lose a lot of confidence in him." 1RP 161

Castillo then states regarding this third attorney:

> MR. CASTILLO: I do not wish to have his counsel. At this time I wish to -- I don't think I'm qualified – I know I'm not qualified, but I wish to defend myself. I feel this is the only way I'll be able to get discovery and see information that's against me. If this motion takes 30 days to do by this counsel and this information -- I received it on September 17th, over a month ago, that motion could have been heard today or last week when my mandatory appearance was -- for triage was set, which was canceled. And I asked Mr. Fiander why was my trial -- triage canceled for last week and he said he didn't know. 1RP 163

On this occasion the judge indicates that because of this request there needs to be a review of the "Christianson factors," this is still during

the hearing on October 28, 2011. During this hearing the court told Castillo that it believed that he would soon be pro se:

> THE COURT: -- what I told you was going to happen here very quickly is you're going to get your wish to represent yourself. And sometimes the old adage about be careful what you wish for could play itself out rather quickly. 1RP 168

Castillo continued to complain about Mr. Fiander in this hearing Mr. Fiander indicates it is his belief that Castillo is making a record for appeal. (1RP 169. Fiander indicates he is pretty much the last lawyer on the list and that he would stay on the case but he would "be happy to get off the case." 1RP 170

After the court explains how "far over your head you are" and Castillo agrees, he once again is faced with the real probability that he will have no lawyer he then changes his mind once again and states; "Ma'am, if -- excuse me. I'm willing to try to make this work." 1RP 172

It is during this hearing that the court discusses at length the fact the upcoming hearing, the one that occurs on the 13th, is one of great importance and it is not merely showing up in court with the papers that Castillo wants the court to see. That this type of hearing is why you would want to have a lawyer with Mr. Fiander's history to present it. 1RP 173-5

Just three pages later in the transcript, during the same hearing, Castillo appears to change his mind again and the judge states on the record it is because he is "waffling";

> MR. CASTILLO: So you're not allowing me to defend myself?
> THE COURT: No, not --
> MR. CASTILLO: Is that what you're --
> THE COURT: -- right now I'm not.
> MR. CASTILLO: -- saying.
> THE COURT: Because you keep waffling on it. So first you're telling me you want -- to see -- make this – you know it's a bad idea. And I'm saying --
> MR. CASTILLO: Well --
> THE COURT: -- let's try to make this work. 1RP 176

At the next hearing there appears to be a possible problem with having Mr. Fiander stay on the case. The case is set for an attorney status and Mr. Castillo again indicates that he has filed another motion. The court again addresses the possibility of Castillo acting pro se and states; "Mr. Castillo, here's where we're at. You keep wanting to act as your own attorney and yet not." 1RP 187

On December 15, 2011 t this status hearing the court very candidly discusses the past conflicts, that;

> "Mr. Castillo has kind of on again, off again, you know, made comments about wanting to represent himself...
> And so this Court has certainly had dialogue in the past with Mr. Castillo that, you know, one, I am not in any way, shape or form going to encourage him to represent himself. I think it would be a huge mistake, even though he has perhaps more knowledge than most about the criminal justice system and his ability to navigate it, but it's never a good idea if you do

> not have legal training, in my humble opinion, to represent yourself. Mr. Castillo up to this point has continued to loosely agree with me. I think that's -- that's a fair representation. I think he acknowledges that he wants to be represented. 2RP 191-2

Mr. Fiander makes it clear on the record that his believes that he is working with and can continue to work with Mr. Castillo. He indicates he has completed the briefing on the motion to dismiss for undue delay and he is prepared to proceed. Mr. Castillo agrees that the motion must be heard and he agrees that Mr. Fiander should remain as his lawyer and present that motion. The following discussion then occurs;

> THE COURT:...All right. Mr. Castillo, are you -- I mean, let me just cut to the chase. If you're in agreement with what -- everything that Mr. Fiander says, we don't have an issue today. We'll set this as he's requesting on a briefing schedule, get this set up for a hearing, and keep plugging away on this. But again, you've kind of been all over the board here.
> MR. CASTILLO: I thank you for allowing me to speak, ma'am. I don't think I've been all over the board. I think I've been pretty straightforward with my wishes and demands of my proceedings. Am I in agreement with everything? No. But I do want this motion heard. I don't want to interfere with the process.
> THE COURT: Okay.
> MR. CASTILLO: So --
> THE COURT: So you're willing to continue --
> MR. CASTILLO: I'm will -- for this time, yes, I'm very willing to continue to allow --
> THE COURT: Okay.
> MR. CASTILLO: -- this motion to be heard by the Court.
> THE COURT: And understand that Mr. Fiander's --
> MR. CASTILLO: And --
> THE COURT: -- going to be the one arguing the motion to the Court, not you.

> MR. CASTILLO: I do understand that.
> ...
> THE COURT: -- Mr. Fiander. I'm being very clear with Mr. Castillo, because I'm very familiar with him, he's not going to play pseudo attorney in this deal. You are his attorney. He certainly has a right to consult with you and testify, if that's the decision the two of you reach, but I'm communicating this for Mr. Castillo's benefit that he's not going to be sitting at counsel table offering up arguments. Mr. Fiander is going to be the attorney, is the attorney. Are we clear, Mr. Castillo?
> MR. CASTILLO: Yes, ma'am. 2RP 196-8

On January 13, 2012, the date set by the court for the hearing regarding the motion to dismiss Castillo is again wants to "fire" his attorney and once again Mr. Castillo has changed his mind about whether he wants to represent himself:

> MR. FIANDER: And, actually, Mr. Castillo wants to come out in a moment and fire me again. So.
> THE COURT: Oh, great.
> MR. FIANDER: Yeah. 2 RP 207
> ...
> THE COURT: All right. Mr. Castillo is out. This matter is set for triage this morning on the two cause numbers that have already previously been read into the record. Mr. Boswell is here on behalf of the State. Mr. Fiander is here on behalf of the Defense. We are set this afternoon on a noted motion docket for the speedy trial arguments that was previously set up last time we were in court. We currently have a trial date of Tuesday, the 17th. And again everybody's briefing -- at least, I saw that there was briefing in the files. So, as far as I'm concerned, that matter is on our docket this afternoon scheduled to be heard. Mr. Castillo, Mr. Fiander is indicating that you wish to be heard on an issue regarding him. After I special set this for that type of hearing, and you indicated that you were fine with him continuing in his representation of you, that somehow that apparently has changed now?

MR. CASTILLO: Yes, ma'am. If I recall, I did say I was fine with him --
THE COURT: Oh, Mr. Castillo --
MR. CASTILLO: -- representing me.
THE COURT: -- you did say --
MR. CASTILLO: I stated that I wanted him --
THE COURT: -- you were fine --
MR. CASTILLO: -- to present the motion that he showed me
2RP 207-8
....

Mr. Fiander responds initially as follows;

MR. FIANDER: -- court ordered, appointed to be his counsel. Mr. Fessler personally requested, uhm, I be on this case. I see this as just one more delaying tactic. Because I was in court, we had the motion, represented to the Court that he was satisfied and would continue forward. We even did that at the last one.
Now, just prior to this hearing -- every time we start to get closure, he has an issue. And I guess the other issue is, you know, fortunately, because, you know, I only pick up my mail about once a week or so, Mr. Castillo filed a Bar complaint, just as he did on Mr. --
THE COURT: Oh, yes. He's become very sophisticated --
MR. FIANDER: -- Mr. Kelley.
THE COURT: -- in that. (2RP 210-11 Emphasis mine.)

Castillo also asks for a continuance of the hearing to dismiss which is denied by the court.

MR. CASTILLO: Well, I would like to hold on this matter.
HE COURT: Yeah. I'm denying that request. This speedy trial argument, which is a purely -- I'm going to finish -- is a purely legal argument, Mr. Castillo, will happen this afternoon. I find that your behavior in this case has been very consistent from the standpoint of intentionally delaying this matter.
2RP 212-3 (Emphasis mine.)

The actual hearing regarding dismissal occurs the very same day; it was a "special set." That hearing was before Judge Sparks who for the second time on January 13th denied or delayed granting Appellant's request to proceed pro se stating "There's too many issues in here that are complicated. I mean you don't have to like your attorney, you guys don't have to get along, but Mr. Fiander will remain counsel." 2RP 240, CP 87 Judge Sparks was a visiting judge who only sat for the one hearing where the Motion to Dismiss based on unreasonable delay was considered and ruled on. Judge Sparks is from Kittitas County and only his only connection with this case was this one occasion. 1RP 206, CP 86-87 Judge Sparks questioned Castillo regarding representing himself. 2RP 225-40

Prior to the hearing to dismiss for delay held on January 13, 2011, this lengthy statement was made by Appellant's third attorney candidly and completely addresses the actions of appellant with regard to his request to act in a pro se capacity;

> MR. FIANDER: Certainly, your Honor. As far as Mr. Castillo's motion to disqualify me as his court appointed counsel, I think if you took that in isolation, you know, you might give it some merit because admittedly my style isn't for everybody. I don't tolerate whining or complaints. I don't give a lot of face time. I do work on the case.
>
> I think what destroys the credibility is these are the very same complaints that were leveled at Mr. Raber and Mr. Kelley. I believe that of all of us in this room,

Mr. Castillo is perhaps the most cleaver. I believe this is just another delaying tactic on his part.

His case primarily, I think, because it's a 98 case, his best issue was the legal issue of the speedy trial, whether there was a lack of diligence by the state in pursuing the prosecution. That's on record. That's preserved for the appeal. I believe that's why Judge Reukauf retained me on the case because that was a case -- a purely legal issue.

Other than that, I believe Mr. Castillo is creating a situation which is just going to result in messing up the trial and creating another appeal issue. If you look at the situation he's engineered by putting bar grievances both on Mr. Kelley, you know, who I've known for a dozen years and is hardworking and integrity, and on myself, I think he's created an issue where, under the circumstance of this case, he has a right to appear pro se under the state constitution.

He's putting the court in a situation where, if you deny his motion to appear pro se under circumstances where he's filed bar grievances and complaints to the court about his counsel and refuses to speak to his counsel, where he's not facing a capital offense and where everything that he's filed and everything he said in court demonstrates his competency, he's just creating another appeal issue that you've denied my constitutional right to appear pro se. You've forced me to appear with counsel that I don't want and won't work with me. So you're creating another ineffective assistance of counsel argument. That's what he's engineering, and I have no interest in being a subject of that.

I guess I would say at this stage, I was drawn into this case at the end of the summer, after Mr. Paul Kelley had had it. Mr. Fessler called me, and I'm his difficult client guy. I'm the last man on the list when someone is on the last -- the fourth or fifth counsel.

I believe even his legal issues have been briefed now. That's his best issue. He clearly has demonstrated his competency. You can see what he writes. You can hear him speak. You can see how he's engineered a record for appeal. I have no objection to being off the case. I have no interest in being the topic of an appeal.

I don't know if Mr. Boswell wants to weigh in on this. He's kept out of it so far. (2RP 11-13)

Castillo claims that his invocation was unequivocal however even during the colloquy on the 13th of January Castillo still clearly is unsure. This Court must read this entire hearing to be fully apprised of how unequivocal Castillo actually was. He continues to complain about lawyers in general and then the following conversations occurs;

> THE COURT: I understand. I understand your argument. Very good, Mr. Fiander. Appreciate that. Mr. Castillo, you said you -- or you wished to say something earlier. Did you have a question about these proceedings so far?
> MR. CASTILLO: Yes.
> THE COURT: Okay. Here's the way I understand it.
> Mr. Fiander is attempting to get your charges dismissed.
> MR. CASTILLO: Yes, sir.
> THE COURT: Do you want him to do that?
> MR. CASTILLO: Well, of course, sir.
> THE COURT: Okay.
> MR. CASTILLO: But --
> THE COURT: So what do you want to know?
> MR. CASTILLO: Well, this is the thing. I think the presentation -- I'm not trying to sound like a know-it all, but I think it could have been better well presented if he would have got -- informed me, at least had a meeting with me at some time or another in the last five and a half months.
> THE COURT: Uh-huh.
> MR. CASTILLO: He never has. I've tried to get rid of him as my attorney, and I have been forced by other judges to keep him. I sent him a letter. I sent the Court a letter, notarized each, telling him he's terminated.
> Nobody wants to honor this. Uhm, I -- effective counsel, I would assume his communication, according to the RPCs anyway, his communication is a major key to that and I have no confidence in him. Although I think he's done an adequate job today --
> (1.13.12 pg 225-7)

. . .
MR. CASTILLO: Well, this is the thing, sir. The person that assigns attorneys to me, we have a well established conflict of interest documented. He talks to me and his little room's about two other defendants. I do not want an attorney by this director or Assigned Counsel's office. And if that means I have to defend myself, then I will do it.
THE COURT: You want an attorney, you just don't want an attorney that's assigned through the office of --
MR. CASTILLO: I don't want a Yakima attorney at all.
THE COURT: Okay. All right.
(1RP 230-1)(Emphasis mine.)

Even as the second trial was beginning the trial court again sets forth the actions of the defendant and the ramification of those actions;

> The Court:...It is impossible to not make note of the efforts of Mr. Castillo, and it is primarily his concern or complaint that the attorneys do not respond to him as he wants them to. That would include, Mr. Kelley, Mr. Raber, Mr. Fiander and, frankly, Mr. Fessler, who he had, again, disparaging remarks for. He has accused either all or various lawyers of lying to him, of lying to the court.
>
> It looks to me like there has been a very determined attempt by Mr. Castillo to manipulate the court and the attorneys that have been involved. He has alleged conspiracies.
>
> He has for each of the attorneys had the same type of behavior. He has alleged that he doesn't like the way they talk to him. He wants to control where the conferences occur. He wants certain kinds of telephone conferences, which we are led to believe that if they occurred he wouldn't have a complaint, but I'm not sure that's true because it appears to me that the lawyers have, in fact, met with him. His complaint from the beginning has been he doesn't like to meet with them following a hearing.
>
> I think, interestingly, in his September 7th statement to the court, Mr. Castillo, which was filed -- it had been sent to the superior court judge. So it had been filed and a notice had been sent back to Mr. Castillo informing him

> that it was an ex parte contact. It was filed on September 20th. In that letter he speaks at least with some enthusiasm that Mr. Fiander is involved and said he is ready to go to trial. It is not a complex case, and he is prepared to go to trial.
>
> Approximately one month later, on October 5th, Mr. Castillo then submits another statement, castigating Mr. Fiander for being -- making a statement that he is ready to go, without indicating who he's talked to, but that he's checked with other lawyers around Yakima and the state and that there is no way anybody could be ready for this trial.
>
> It appears very clearly to me that Mr. Castillo has, in fact, been manipulating the court and the attorneys in this case to avoid this trial, to delay the trial itself.
>
> 2RP 101-2

It is clear from this statement that he still wants an attorney however he continues to demand that court give him a lawyer from out of the county. This is not an "unequivocal" assertion of his right to proceed pro se. By the end of this hearing Castillo is once again stating that he wants to represent himself and that he will "fire" Mr. Fiander. 2RP 237, 241

There where no hearings between the time of the two denials by the two judges that occurred on January 13, 2012 and the pre-trial hearing which occurred on January 31, 2012 at which time the motion to proceed pro se was held. Castillo did file several documents between the January 13 and 31st hearings. CP 88-94.

III. ARGUMENT.

1. RESPONSE TO ASSIGNMENT OF ERROR ONE - PRO SE.

The alleged error occurred on January 13, on January 31 with no intervening hearings or actions in or by any court or any party, the court granted Castillo's request to represent himself. Castillo represented himself throughout the first trial which resulted in a hung jury. The State retried Castillo on the same charges. Castillo was pro se throughout the pretrial and the entire second trial.

The majority of the statement of the case of this brief addresses the facts pertaining to the issue of whether Castillo's rights were violated by the trial court when for 18 days he was denied the right to represent himself pro se. McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) indicates;

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

Nothing occurred during this 18 day period. The State took no action on the case, the defense attorney took no action on the case, Castillo filed documents acting on his own and, the court took no action on the case from the time the two judges denied this request to the date that Castillo's request to self-represent was granted.

Castillo argues that on the 13th "he demanded to represent himself and did not accompany that request with a motion to continue the hearing"

that is incorrect. (Appellant's brief at page 11) While Castillo does not state he wants a "continuance" he does state;

> MR. CASTILLO: Well, I would like to hold on this matter.
> THE COURT: Yeah. I'm denying that request. This speedy trial argument, which is a purely -- I'm going to finish -- is a purely legal argument, Mr. Castillo, will happen this afternoon. I find that your behavior in this case has been very consistent from the standpoint of intentionally delaying this matter. 2RP 212-3 (Emphasis mine.)

The courts denial was not "unjustified." It was clear to all parties present in the courtroom that Castillo was and had been attempting to delay his case, as stated by the trial court judge; I find that your behavior in this case has been very consistent from the standpoint of intentionally delaying this matter.

Castillo has not addressed the fact that he was allowed proceed pro se from January 31, 2012, pretrial for the first trial, through the entire pretrial period preceding the second trial and the entire second trial. Nor has he indicated how this second trial does not satisfy his demand for a "new trial." he was allowed to proceed pro se, throughout this second trial. To remand this matter to the trial court for a "new" trial because of an allege violation that allegedly occurred before the first trial and where this defendant was allowed this "new" trial would be an absurd result and is clearly not what was intended by any of the courts that have ruled on this issue.

A defendant has the right to self-representation as set forth in State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (Wash. 2010);

> Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. WASH. CONST. art. I, § 22 ("the accused shall have the right to appear and defend in person"); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. Faretta, 422 U.S. at 834, 95 S.Ct. 2525; State v. Vermillion, 112 Wash.App. 844, 51 P.3d 188 (2002). "The unjustified denial of this [pro se] right *requires* reversal." State v. Stenson, 132 Wash.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added).

The very next paragraph from Madsen then sets out the standard of review:

> However, both the United States Supreme Court and this court have held that courts are required to indulge in "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." **As a request for pro se status is a waiver of the constitutional right to counsel, appellate courts have regularly and properly reviewed denials of requests for pro se status under an abuse of discretion standard**. Discretion is abused if a decision is manifestly unreasonable or "rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id* at 503 (Emphasis mine, citations omitted.)

Appellant's argument fails because the court determined Castillo's request was equivocal. Two separate jurists, on the same day, saw, questioned – in many respects interrogated- Mr. Castillo in person and they both came to the same conclusion that Mr. Castillo should not be

allowed to represent himself. The determination by Judge Sparks is very telling in that he had not been associated with the case, that is clear from the record, and yet he too determined, for different reasons, that Castillo should have Mr. Fiander continue as his counsel of record. Not often will this court review a case where two judges sitting on the same case, on the same day come to the same conclusion when addressing a discretionary ruling on the same issue. The "outside" perspective of Judge Sparks lends credence to the decision of Judge Reukauf earlier in the day.

The mere statement that appellant made his request in an "unequivocal" manner does not automatically require the trial court to grant that request. This court can see from the facts set forth above that on numerous occasions throughout this case Appellant was equivocal about his desire to proceed pro se and the court stated that appellant had been equivocal.

Once again the challenged actions occurred before the first trial began. After the second set of denials there were only eighteen days between the time the court denied pro se status and the final grant of pro se status, during this period the third of four attorneys, Mr. Fiander was able to brief and present argument on one of the main issues in this appeal, and all of this occurred before appellant's **first** trial.

Appellant conducted the second trial completely as a pro se

litigant. He was also granted stand-by counsel, the fourth attorney assigned to either represent or help appellant, to assist him in the second trial. Appellant states that the alleged improper decision on the part of the trial court to denying Castillo pro se status when he first requested it requires that he be granted a new trial. Through the vagaries of this judicial system, in this instance the hung jury and mistrial, appellant was afforded a second trial or in this instance the "retrial" he now demands.

The facts are clear Mr. Castillo was allowed to act pro se before his first trial and the entirety of his second trial. The allege violation of his rights even if it occurred had no effect on his rights in the second trial, the trial that determined his guilt.

This Court stated the following when reviewing whether the trial court in State v. Lawrence, 166 Wn.App. 378, 271 P.3d 280 (Div. 3 2012) had abused its discretion in a matter where the court had both granted and denied Lawrence's requests to self-represent:

> Judge Frazier once found that Mr. Lawrence was capable of representing himself without counsel, and one time determined that he was not. Just as none of these decisions settled the issue once and for all, none of these prior rulings establish that Judge Acey erred in permitting self-representation in April 2010.

The court in State v. Thompson, 169 Wn.App. 436, 290 P.3d 996, 1013-15 (Wash.App. Div. 1 2012) when faced with an unruly defendant who constantly interrupted the proceedings by various means stated:

> Thompson next contends he was denied his right under the Sixth Amendment and article I, section 22 to represent himself at trial. We review the denial of a request for pro se status for abuse of discretion. "The *unjustified* denial of this right requires reversal." (Footnotes omitted, emphasis in original.)
>
> State v. Stenson, 132 Wn.2d 668, 740-1, 940 P.2d 1239 (Wash. 1997)

addresses the conundrum faced by trial judges such as was faced by both judges in this case:

> To protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant's request to proceed pro se must be unequivocal. While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal. (Citations omitted.)

In light of the totality of the record before this court there can be little doubt that the actions of Appellant did not meet the tests set forth in Stenson, Thompson and Madsen. These rulings, both occurring on the same day, by different judges, are supported by the record, were factually based and were not an abuse of discretion.

As quoted so often from State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (Wash. 1971):

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion

> manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.
>
> Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other. (Citations omitted.)

Castillo's request to self represent from the record before this court was not unequivocal, nor was it timely. It is clear from the record made by the numerous judges before whom Castillo came that his actions were an attempt to manipulate the system; it was part of a game or in the words of his own attorney;

> I believe that of all of us in this room, Mr. Castillo is perhaps the most cleaver. I believe this is just another delaying tactic on his part.
>
> ...
>
> Other than that, I believe Mr. Castillo is creating a situation which is just going to result in messing up the trial and creating another appeal issue. If you look at the situation he's engineered by putting bar grievances both on Mr. Kelley, you know, who I've known for a dozen years and is hardworking and integrity, and on myself, I think he's created an issue where, under the circumstance of this case, he has a right to appear pro se under the state constitution. He's putting the court in a situation where, if you deny his motion to appear pro se under circumstances where he's filed bar grievances and complaints to the court about his counsel and refuses to speak to his counsel, where he's not facing a capital offense and where everything that he's filed and everything he said in court demonstrates his competency, he's just creating another appeal issue that you've denied my constitutional right to appear pro se. You've forced me to appear with counsel that I don't want and won't work with me. So you're creating another

> ineffective assistance of counsel argument. That's what he's engineering, and I have no interest in being a subject of that.

As predicted here we are, this court reviewing an appeal because Castillo now claims that he was not allowed to represent himself. This court should not allow this manipulation to continue.

The facts in Thompson, supra, are very similar to those in this case, that court took all of the actions of Thompson into account when it determined that the request by Thompson was not unequivocal. Thompson at 290 P.3d 1013-15 The court stated:

> "The right of self-representation is not a license to abuse the dignity of the courtroom." The court " may deny pro se status if the defendant is trying to postpone the administration of justice" and may "terminate pro se status if [he] is sufficiently disruptive or if delay becomes the chief motive. "Faretta, 422 U.S. at 834 n. 46, 95 S.Ct. 2525. Madsen, 168 Wash.2d at 509 & n. 4, 229 P.3d 714; see also Vermillion, 112 Wash.App. at 851, 51 P.3d 188 (courts may deny a request for self-representation that is made "for the purpose of delaying the trial or obstructing justice").
> (290 P.3d 1014-5)(Footnotes omitted.)

Castillo has not demonstrated to this court that his request to represent himself comports with the law. Castillo's very actions were the primary cause of the trial courts denials as well as the court subsequently granting that request.

Appellant had made it clear throughout this extensive record that for reasons known only to him his goal was to delay this trial as long as

possible all the while professing, demanding, his right to a speedy trial. Appellant made it impossible for any attorney to work for him or with him and therefore he finally got his wish, he tried his case pro se and lost just as many of the attorneys and judges had predicted. He should not be allowed now to use his manipulations to win a new trial.

2. RESPONSE TO ASSIGNMENT OF ERROR TWO – SPEEDY TRIAL.

Once again this is a very fact specific issue, when this court looks at the facts in the record clearly Appellant was the cause of this delay.

There can be no doubt that the standards set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), Doggett v. United States, 505 U.S. 647, 648-50, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (Wash. 2009) are applicable to this case. It is equally clear that the factors set forth in Barker, Doggett and Iniguez have not been satisfied by Appellant.

1) Length and reason for the delay. While the twelve year "delay" would presumptively meet the standard set forth in Doggett, Baker and Iniguez, and the State conceded at the trial court level that the twelve year period was sufficient to trigger review this court must look at the reasons for the delay. In this instance the delay was clearly due to the fact that Castillo absconded. Appellant has presented nothing that would

support his claim that he was amenable for service until 2009. And it would appear from the record that at that time he was in fact placed on notice that there was an outstanding warrant. Apparently the warrant had restrictions on the geographical area that the State was able to arrange extradition. There was neither negligence nor bad faith on the part of the State in its actions to apprehend Castillo.

Castillo was married at the time of this offense. At the hearing on the motion to suppress Mr. Fiander stated the following;

> But I believe from the officer accompanying that, that was stipulated to, he was no longer there. **He spoke with Ms. Castillo; they were separated**. Basically after that, to my knowledge from everything looking at the State's submitted, they put him in the computer system, NCIC and the WACIC and left it at that. If it is true, there was -- they have a local newspaper, The Penny Press, where if someone FTAs, he put a notice in that.

There was never any dispute that the person he was married to at the time of the rape was the same person when he was taken into custody in Nevada.

> THE COURT: And you were married; is that correct, or are married?
> MR. CASTILLO: Yes, sir.
> THE COURT: And you were living with your wife in Las Vegas?
> MR. CASTILLO: Yes, sir.
> THE COURT: And you're still in contact with her?
> MR. CASTILLO: Yes, sir. 1RP 314-5

It is clear that while the officers did not make personal contact with Mr. Castillo they apparently spoke with his wife. It is hard to conceive that a wife who was with the defendant in Yakima at the time of the rape, live with appellant in Las Vegas, and was obviously with Castillo through two trials and sentencing would neglect to tell her husband that she spoke to officers about this rape. Just as it is inconceivable that Appellant's wife did not inform him that the police were looking for him it is also inconceivable that when his sister's home in Sacramento was raided by the police that he was not told by his sister that this had occurred.

The testimony of the actions taken by the State are set forth in Appendix A. That testimony is from the second trial and is the testimony of Officer Sperle on direct and cross examination regarding actions taken to find defendant.

This court addressed a very similar fact pattern in State v. Monson, 84 Wn. App. 703, 929 P.2d 1186 (1997), review denied at 133 Wn.2d 1015 (1997). Monson, like Castillo, had a legal obligation to report to the State, in Monson's case he was on probation. Regarding a Constitutional claim that his speedy trial rights had been violated this court stated the following:

> The reasons for the lengthy delay in bringing Mr. Monson to arraignment were his unamenability to arrest and the difficulty in tracing his whereabouts. The record supports the

> inference that his relatives informed him there were warrants out for his arrest. At no time during the decade after the informations were filed did he attempt to contact his probation officer or assert his right to speedy trial. Furthermore, his claim that the long delay will make it difficult to find witnesses for the defense is not persuasive. The State has also had difficulty tracking down its chief witnesses and is sure to be hampered by the long delay. In any event, prejudice is not an essential factor in determining whether the constitutional right to a speedy trial has been violated. Moore v. Arizona, 414 U.S. 25, 26, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973); Higley, 78 Wn. App. at 185. Under the facts of this case, the delay in bringing Mr. Monson before the court was reasonable and no violation of his constitutional speedy trial rights.

This Court recently addressed delay State v. Burton, 269 P.3d 337, 165 Wn.App. 866 (Div. 3 2012) stating:

> Lovasco recognized that any demonstration of actual prejudice arising from delay in criminal proceedings makes a due process claim concrete and ripe for adjudication, but does not make the claim automatically valid. The due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. 431 U.S. at 789-90, 97 S.Ct. 2044.

This case was filed on July 2, 1998; the warrant of arrest was filed on the same date. Castillo was arraigned on July 9, 2010, the first trial occurred on January 31, 2012 and the second trial occurred on July 19, 2012 and he was found guilty on July 25, 2012. The period of actual incarceration ran from July 2010 to July of 2012

The complaint here must be separated into two parts. The delay that was caused by Castillo's own actions after he raped the victim and the time that he spent incarcerated after his arrest in Nevada. His complaint

lumps that time together and yet there is no challenge based on the time he was in jail. The allegation raised only addresses the period of time that passed between the rape and arrest. Therefore regarding the period of actual incarceration it must be presumed that as Doggett stated "by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness." Doggett at 2690-1

Doggett is also factually distinguishable, there the defendant's whereabouts were known to the government. The United States chose not to move for his removal and return after having been specifically told where Doggett was. In Castillo's case the State entered the warrant in the data bases that it has access to and then pursued the defendant where and when it had information that he was located.

Here the State had only limited knowledge of the location of Castillo and as the record reflects the State did act when it was given information. Initially the State searched the defendant's home in an attempt to locate him. According to Castillo's own attorney Castillo's wife was contacted here in Washington. When the State found information that Castillo had fled to California the State attempted to have him arrested there, they had his sister's house raided by local police. 2RP 346-7 The State continued to attempt to locate Castillo and was informed

in 2001 that he had fled the United States. The State contacted the United State Marshall's office in an attempt to locate Castillo. CP 79 In 2002 Castillo's information and photograph were published in a Crime Stoppers Flyer. In 2009 when stopped by The Border Patrol the warrant was found however it was not set up to allow for extradition from the location of the stop therefore he was allowed to leave. Eventually Appellant's physical location was determined to be in Las Vegas this occurred in 2009 and in 2010 he was arrested on the outstanding warrant and returned to this State. CP 79.

Castillo makes light of the fact that he had a legal obligation to report to any jurisdiction he address. Monson, supra addressed the fact that this type of legal obligation is a factor to be considered by the court when addressing a claim of improper delay. The record is devoid of any indication that he complied with that requirement after he fled the county after the rape. (CP 79) The entire time that he did not report he was committing an ongoing felony. He supplied information that he was living in Nevada and yet he did not register his address with the Nevada Sex Offender Registry. CP 82 This is further evidence of Castillo's attempt to hide from the law. Mr. Castillo left his home in Washington in what appeared to be a hurried state and the fact that he never registered anywhere after fleeing this State. The information that Castillo supplied

to the court that indicated he was living in the open is dated no earlier than 2009. Taken at face value that would appear to indicate that prior to 2009 Castillo was not able to supply proof to the trial court that he was living in the open and was therefore amenable to service. The trial court having been apprised of all of the facts could reasonably determine and did determine that there was no basis for dismissal of the charges for delay.

The Court in Doggett states;

> Thus, in this case, if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense."
>
> The Government concedes, on the other hand, that Doggett would prevail if he could show that the Government had intentionally held back in its prosecution of him to gain some impermissible advantage at trial. That we cannot doubt. *Barker* stressed that official bad faith in causing delay will be weighed heavily against the government, and a bad-faith delay the length of this negligent one would present an overwhelming case for dismissal.
>
> Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred, and, on the facts before us, it was reversible error.

The State acted with due diligence throughout the period of time that Appellant had absconded. Other than presenting information that he

was living "in the open" in Las Vegas, Nevada there is nothing else in the record that would allow this court to conclude that the appellant could be found or was amenable to process. To presume that because you have a bank account or that you have a cable bill or even that you travel from the USA does not therefore impute that information to the law enforcement in this State. All of the records submitted by Castillo trial court show the first instance of crossing the border "openly" did not occur until 2007 a full eight years after the charges were filed. All other documents supplied to show that he was living openly were from 2009-10, eleven years after the rape. It would appear from CP 43 that Castillo was placed on notice in 2008 that there was a warrant for his arrest. That document indicates that the warrant was not "extraditable." This is after he knew there was a warrant for his arrest. In Doggett the court addressed the Governments contention that Doggett had knowledge of the charges against him as follows..."Were this true, *Barker's* third factor, concerning invocation of the right to a speedy trial, would be weighed heavily against him." Id at 2691.

Castillo supplied the trial court with nothing that would show that he was amenable for service for the years 1998 through 2008. He was finally arrested in 2010.

The information supplied by the State which was not disputed by Appellant is contained at CP 78-85. This information along with the briefing and documents supplied by Appellant by Judge Sparks from

This court must take great note of the fact that Castillo has not challenged the "delay" in getting his case to trial once he was in custody. There is little doubt that this period was not challenged because the delay was obviously caused by Castillo just as the delay in finding and arresting Mr. Castillo was cause by his fleeing his home the day after the rape occurred. By analogy the court in State v. Roman, 94 Wn. App. 211, 216-7, 972 P.2d 511 (1999) addressed the actions of the parties in a speedy trial situation under CrR 3.3 as follows:

> A delay is "unnecessary" if, while it was occurring, the defendant was amenable to process and the State failed to exercise due diligence to bring him or her before the court. The defendant should have the burden of proving amenability, for he or she knows what he or she was doing during the relevant period; the State should have the burden of proving due diligence, for it knows what it was doing during the relevant period....a defendant is not amenable to process while at large in another state. In that situation, then, the State is not required to exercise due diligence.

Assertion of the right.

While it is clear the after Appellant was arrested he did assert his right to a speedy trial. He was also the cause of the vast majority of the actual delay that occurred after his arrest. His actions are set forth above.

His own attorney predicted that Appellants actions would result in the issues now before this court. As is also stated above Castillo has not challenged a single minute of the "delay" that occurred after he was arrested. It is the State's contention that the delay before arrest in this case is no different than the delay after arrest, it was caused by Castillo. It is inconceivable that Castillo was not put on notice by his wife, sister or the United States Border Patrol. The circumstantial evidence presented at trial was that he had absconded immediately after the rape. He was never seen again in Yakima. He has supplied no explanation as to why he suddenly left his home the day of the rape. The court in Doggett discussed the fact that Doggett "is not to be taxed for invoking his speedy trail right only after his arrest" because the court found that he was ignorant of the charges. The evidence before the trial court demonstrates that Castillo was not "ignorant" of the charges and in fact fled to avoid the consequences of his actions. This factor weighs against Appellant.

Prejudice.

Castillo fails to present on single word of how this alleged delay prejudiced his case. He simply states that it "prejudice must be presumed." The reason that he does not set forth facts that support this claim is that there are not facts which would support this argument.

This case was very simple. There were only two "fact" witnesses, one DNA expert and several officers who participated in the investigation of which only Officer Sperle gave significant testimony. The victim had positively identified Castillo at the time of the rape, she was in fairly constant contact with Officer Sperle over the intervening years and it was clear from her testimony, at both trials, was still clear in her mind. The victim was able to identify Castillo as the person who raped her at trial. The physical evidence with the DNA samples had been properly stored and after Castillo's arrest test samples were taken from both the victim and Castillo. That DNA was tested prior to Appellant's first trail with the result indicating to an extraordinarily high degree that the spermatozoa found on the towel at the scene of the rape was left there by Castillo.

There was absolutely no prejudice caused by the delay in bringing Castillo to trial. The court in State v. Rafay, 168 Wn.App. 734, 771-2, 285 P.3d 83 (2012) addressed the "prejudice factor" as follows:

> In assessing the prejudice factor, a court looks to the effect of the delay on the interests protected by the right to a speedy trial, including preventing harsh pretrial incarceration, minimizing a defendant's anxiety and worry, and limiting impairment to the defense. Because of the difficulty of proof, a defendant need not show actual impairment to establish a speedy trial violation, and a court will presume that such prejudice "intensifies over time." Nonetheless, there will be a "stronger case" for a speedy trial violation if the defendant shows such prejudice.
>
> Here, the defendants rely solely on the presumption of prejudice and do not allege that the delay impaired their defense. A claim

> of presumptive prejudice alone, without regard to the other Barker criteria, is insufficient to establish a Sixth Amendment violation.
>
> Although the length of the delay in this case was significant, a consideration of all of the factors in this case shows no constitutional speedy trial violation. (Footnotes omitted.)

The State is not tasked with the duty to leave no stone unturned in the attempt to locate a fugitive. The very fact that this is a very large country with a large population base would make such efforts impossible. The actions taken by the State meet the due diligence required. The Court in Doggett stated the following when addressing the "role that presumptive prejudice should play in the disposition of Doggett's speedy trial claim"; "Thus, in this case, if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense." *Id* at 2693

3. RESPONSE TO ASSIGNMENTS OF ERROR THREE - BLANCO

The following is the statement by Appellant as when questioned by the trial court as to why he was calling Mr. Blanco, husband of the victim;

> MR. CASTILLO: Yeah, I think so. I wanted to know if he had any knowledge in his head or suspicion of a relationship that me and his wife may have been having. Again, sir, I just -- my questions for her were prepared, so I'd like to review the -- you know, a few hours (inaudible) to prepare, sir. I'm not making excuses, I'm

> Just telling you, you know, my opinion of the situation (inaudible), you know. So that's all I have to use right now to try to (inaudible).
> ...
> MR. CASTILLO: Well, if he knew or suspected, well, then, that would establish there was no rape. Or at least I think that it would establish that.

The victim had not been asked by Appellant whether she and Castillo had had some sort of relationship. (RP 616) Castillo told the court that he was not going to testify immediately prior to this statement regarding his intent and basis for calling Mr. Blanco. (RP 614) There was the real possibility that there was a marital privilege could be asserted. (RP 617) It is apparent basis for this line of questions was to somehow demonstrate that the rape that he was accused of had been a consensual act of sex. All of this information was discussed by Castillo, counsel for the State and the judge.

After this discussion the court stated;

> THE COURT: Well, I'm actually going -- obviously the issue is whether or not -- you're attempting to establish consent, and the person with whom you would have had the consensual relationship was not asked the question and it's not testified that there was any consensual relationship. You're indicating -- and I guess I'd treat it also as an offer of proof that you're not going to testify that there was consent, so in fact Mr. Blanco -- the best he can do, even if there is a relationship, he can't testify as to whether there was consent on this particular occasion because that would be hearsay. There's also an issue about what he would know about that would have been communicated to him by her, and she has the

> right and the State has indicated that that marital privilege would be asserted.
> ...
> THE COURT: 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 Mr. Boswell 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 than it would be probative, all right? (RP 616-18)

Appellant alleges that the trial court improperly restricted his ability to present a defense. There is no argument that Appellant has the right under both the sixth amendment to the United States Constitution and article I, section 22 of the Washington Constitution to obtain witnesses and present a defense. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). The right to present a complete defense does allow a defendant to introduce whatever evidence he wishes. To admit evidence suggesting another person committed the crime, the defendant must lay an adequate foundation; that is, Castillo must establish a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v.

Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Evidence of possible motive alone is insufficient to establish this nexus. State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933); State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). The defendant has the burden of showing that "other suspect" evidence is admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). As previously noted a trial court's decision to admit or refuse evidence is addressed to its sound discretion and is reviewable only for manifest abuse of that discretion. Thomas, 150 Wn.2d at 856.

On appeal Castillo states that the court assumed that the reason for the admission of testimony from Mr. Blanco was to show there was consent. It was not an assumption on the part of the court this was the purpose stated by Castillo at trial. "MR. CASTILLO: Well, if he knew or suspected, well, then, that would establish there was no rape. Or at least I think that it would establish that." There is no need to "interpret" the reason that Castillo wanted this testimony in. It simply was to show that there had been some type of relationship between the victim and Castillo and therefore this was consensual sex not a rape. There is not even a hint in the record before this court that Castillo ever even considered that the information would or could be used as in the manner now presented in his

appeal, that "there were admissible alternative bases for allowing Mr. Blanco's testimony

What need would there have been for the victim to cover-up a relationship that was completely unknown to her husband or so the record would reflect as there is once again not one single word in the record that would even hint that this was a valid claim? Further, the victim's physical and emotional appearance at the time she fled her home for help and at the time of her initial contact with police would belie this claim. Castillo never made an offer of proof and more specifically as addressed by the court he did not ask these questions of the victim. There was never a question asked by Castillo to the victim to determine her answer to this question. Castillo might have had a basis to challenge or impeach if there had been questions asked of the victim regarding this alleged affair it is impossible to "impeach" someone without having elicited testimony that could be impeached by other witnesses.

This case is factually similar to State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) here Castillo offered nothing more than the one very qualified reason for the admission of the testimony of Mr. Blanco.

The evidence in this case was overwhelming. Appellant never says that he did not have sex or even that his did not do the crime even in

his closing. The only thing that he extols the jury to do is look to the testimony. 1RP 361-65

Even if this court were to determine that the refusal by the trial court to allow the admission of this "evidence" was error this court would not need to reverse the finding of the jury. State v. Nelson, 131 Wn.App. 108, 125 P.3d 1008, 1014, (2006):

> But an erroneous evidentiary ruling is not grounds to reverse unless, within reasonable probabilities, it changed the outcome of the trial. State v. Christopher, 114 Wash. App. 858, 863, 60 P.3d 677, review denied, 149 Wash. 2d 1034, 75 P.3d 968 (2003); State v. Tharp, 96 Wash. 2d 591, 599, 637 P.2d 961 (1981).
>
> Mr. Nelson asserts the error was prejudicial but does not explain how. And we do not find the prejudice was so obvious that the record speaks for itself. The evidence that he assaulted his wife in the manner alleged by the State was overwhelming. The error was therefore harmless. State v. Davis, 154 Wash. 2d 291, 305, 111 P.3d 844 (citing State v. Guloy, 104 Wash. 2d 412, 426, 705 P.2d 1182 (1985)), cert. granted, --- U.S. ----, 126 S.Ct. 547 (2005).

The only basis that is before this court would be consent. There was nothing before the court at time it was offered and therefore these other alleged bases for introduction should not be considered by this court, they were not raised in the trial court. RAP 2.5 has not been raised and should not be

State v. Maupin, 128 Wn.2d 918, 924-5, 913 P.2d 808 (1996). . 2d 1086 (1992) "The right to present defense witnesses is not absolute as "a

criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." Hudlow, 99 Wn.2d at 15. See also, State v. Bell, 60 Wn. App. 561, 565, 805 P.2d 815 (1991) "We agree that a defendant has a right to present a defense. However, the evidence must be "'relevant and material to the defense.'" ...As noted above, Bell has failed to show that the evidence is either relevant or material."

Castillo did not have a valid reason which he presented to the trial court nor does his allegation on appeal explain why calling Mr. Blanco to answer questions about an alleged relationship that he either failed to ask the victim or purposefully did not ask the victim were relevant in by any means. These questions were not presented at any point in time prior to the time to call Mr. Blanco that the alleged incident almost a year after the fact was in any manner "relevant or material" to his defense. As was stated in State v. Roberts, 80 Wn. App. 342, 908 P.2d 892 (1996):

> Washington defines the right to present witnesses as a right to present material and relevant testimony. The defense bears the burden of proving materiality and relevance, i.e., that the defense has a "colorable need" for the witness....Roberts bears the burden of establishing the relevance and admissibility of the proposed testimony.

If there was a true attempt to admit a "prior relationship" between the defendant and the victim the calling of the victim's husband would

then appear to be a blatant attempt to avoid the requirements of RCW 9A.44.020.

The entire cross-examination of the victim by Castillo is covers a mere eight pages. In that testimony the only thing that approaches a "defense" strategy is are several attempts to "impeach" the testimony from the first trial as inconsistent and a couple questions that could be seen as an attempt to demonstrate that there was some form of prior relationship. This prior relationship is hinted at in the questions and Castillo never asks the victim about any prior physical relationship. Further, there was never any motion on the part of the defense to introduce information that would generally have been excluded by the so called rape shield law contained in RCW 9.94A.020. This statute has very specific procedures that must be followed prior to any attempt to have past consensual sexual acts admitted as a defense in order to show that the present act was consensual. RCW 9.94A.020(3). At no time during either trial or the numerous hearings did Castillo argue that this was a consensual act and that he should be allowed to address that in his case. He would not even give the court or the prosecution an idea as to why he had listed Mr. Blanco as a witness the alleged basis for calling Mr. Blanco was deferred until Mr. Castillo had had occasion to cross-examine the victim, Mrs. Blanco. The colloquy between the parties and the court regarding this testimony make it very

clear that Castillo was not challenging the credibility of the victim statements but that he was making a very feeble attempt at couching this rape in terms of a consensual act. (RP 613-618) Even in closing when Castillo attempts to introduce information about "I couldn't or wouldn't go into any relationship that we had because" is an obvious attempt to introduce through his own "testimony" that this was a consensual act. He next argued that the State had not proven there was forcible compulsion and that he was "not guilty... I cheated on my wife and I'm not proud of it...my sins are against...my wife...I did not rape anybody." (RP 634)

Once again if Castillo was going to challenge the credibility of the victim he had to question the victim about this relationship. Castillo asked the victim if they had known each other and where the interaction had occurred and it was very clear that nothing had occurred but for a few meetings at family functions and two other occasions were Castillo had come to the victim's home in the early morning when her husband was home.

The testimony of the independent witnesses, Officer Sperle and Mr. Garcia, made it clear that even if there was a previous relationship the sexual assault by Castillo was not consensual. Based on Castillo's very limited statement to the court as to why the testimony of Mr. Blanco the trial court most definitely did not abuse its discretion when it excluded this

speculative testimony about an alleged relationship that the witness may or may not have had knowledge of.

The evidence presented was overwhelming. Even if this court were to determine that the exclusion of the testimony of Mr. Blanco was an error based on what Castillo proffered that testimony to be, the facts still would have overwhelmingly support a finding of guilt, beyond a reasonable doubt. The testimony of the victim, Mr. Garcia – her uncle, Officer Sperle and the DNA expert were not contradicted. Mr. Castillo exercised his right to not testify and presented no other witnesses. Even if Mr. Blanco had testified that yes my wife was having an affair the fact that Castillo forced the victim to strip off her clothes, with her children present in the home, forced his penis into the victim's mouth so forcefully that she gagged and then masturbated to ejaculation on her face and head was sufficient to prove forcible compulsion and a non-consensual act of intercourse. The testimony of the emotional state of the victim when she was seen by her family members and the officer support this evidence.

State v. Dickenson, 48 Wn. App. 457, 470, 740 P.2d 312 (1987).

> A violation of the defendant's rights under the confrontation clause is constitutional error. Harrington v. California, 395 U.S. 250, 251-52, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969). A constitutional error is harmless if the appellate court is convinced that it is harmless beyond a reasonable doubt. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). However, constitutional error is presumed to be prejudicial and

> the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). In Washington the "overwhelming untainted evidence" test is used to determine whether constitutional error is harmless. Under this test the appellate court looks only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Guloy, at 426.

4. PERSISTENT OFFENDER (POAA) IS NOT AN ELEMENT OF THE CRIME OF RAPE WHICH MUST BE PLEAD AND PROVEN.

Castillo argues that due process was violated because the term "persistent offender" was classified as a sentencing factor rather than an element. He maintains that his due process rights were violated when the sentencing court imposed a persistent offender sentence based on a preponderance of the doubt rather than a reasonable doubt. Castillo argues that there is no rational basis for classifying the punishment for recidivist criminals as an "element" in certain circumstances and an "aggravator" in others.

This court initially addressed this very question in State v. Williams, 156 Wn.App. 482, 496, 234 P.3d 1174 (2010) and more recently again in State v. Powell, 290 P.3d 353 (Wash.App. Div. 3 2012) determining that this issue had no merit.

This Court in Williams stated "The equal protection clauses of the Fourteenth Amendment to the United States Constitution and of article 1, section 12 of the Washington Constitution guarantee that persons similarly

situated with respect to the legitimate purpose of the law must receive equal treatment. State v. Williams, 156 Wn.App. 482, 496, 234 P.3d 1174 (2010). Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification. *Id.* at 496-97.

Just as in Powell Castillo relies on State v. Roswell, 165 Wash.2d 186, 196 P.3d 705 (2008). But as this Court ruled "Roswell discussed a prior conviction that was used to prove an element of the charged crime. Id. at 189, 196 P.3d 705. In that instance, the State must prove the element of a crime beyond a reasonable doubt. Id. at 192, 196 P.3d 705." Powell at 356.

There is no doubt that the equal protection clauses of the Fourteenth Amendment to the United States Constitution and of article 1, section 12 of the Washington Constitution guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive equal treatment. State v. Williams, 156 Wn.App. 482, 496, 234 P.3d 1174 (2010). This court will review Equal protection claims under one of three standards based on the level of scrutiny required for the statutory classification. *Id.* at 496-97. Once again this court rejected a similar equal protection claim in Williams. In Williams this court noted that a defendant challenging the legislature's differing treatment of two classes

of defendants must show that the differing treatment rests on "'grounds wholly irrelevant to the achievement of legitimate state objectives.'" *Id.* at 497 (quoting State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)). The court in Williams found that the purpose of the POAA was "to protect public safety by putting the most dangerous criminals in prison, to reduce the number of serious repeat offenders, to provide simplified sentencing, and to restore the public trust in the criminal justice system." *Id.* at 498. Similarly, Division One of this court has rejected equal protection challenges to the POAA, holding "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense." State v. Langstead, 155 Wn.App. 448, 456-57, 228 P.3d 799 (2010). In view of this precedent, Mr. Castillo's equal protection challenge to the POAA must fail.

5. PERSISTENT OFFENDER – RIGHT TO JURY DECISION.

Mr. Castillo also asserts he has a constitutional right to a jury trial employing a reasonable doubt standard. In Powell, supra, Mr. Powell argued that the court violated his right to a jury trial by sentencing him to life without the possibility of parole absent proof beyond a reasonable

doubt. This court found "These arguments are without merit." Powell at 356

Mr. Castillo asks this Court to extend the ruling in Apprendi wherein Apprendi held that a jury must determine every element of the crime with which the defendant is charged. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged. But these protections do not apply to determining the existence of prior convictions. *See* Almendarez-Torres v. United States, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); Apprendi, 530 U.S. at 490 ("[*o*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added)). Our state Supreme Court has rejected the argument that a jury must determine the existence of prior convictions. State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). Therefore the court's imposition of the persistent offender sentence did not violate Mr. Castillo's Sixth Amendment or due process rights and this allegation must be denied.

IV. CONCLUSION

The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 26th day of August 2013,

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APPENDIX A

A. Okay. After that point, like I said, we already had identified Mr. Castillo by photo. At that point we started working on getting ready for a search warrant.
Q. Did you get a search warrant?
A. We did get a search warrant. I got a search warrant later that afternoon or early evening from Judge Gavin.
Q. What did you do with that?
A. That was for Mr. Castillo's residence that was on Yakima Valley Highway. We went and knocked and announced. No one was there. So we had to kick the door in. We were actually looking for Mr. Castillo and other evidence possibly that he had been wearing that day.
Q. No one was there, you said?
A. No one was there.
Q. Mr. Castillo wasn't present?
A. Mr. Castillo was not there.
Q. What did you do next?
A. I think this might have been the following day. We were getting information that Mr. Castillo lived in Sacramento. I got a warrant for Mr. Castillo's arrest through the prosecutor's office, Deputy Prosecuting Attorney Kevin Eilmes. We got the warrant for Mr. Castillo. We found out that he was possibly at his sister's house in Sacramento.
Q. So you got a warrant?
A. We got an arrest warrant.
Q. And do you know if Mr. Castillo was -- when he was apprehended on that?
A. That warrant there, I contacted the Sacramento Police Department. They said they had a team that went out in the evening and they would go to his sister's residence. We had the address. I don't recall what it is in Sacramento. They would search for Mr. Castillo. We got word back from the team at the Sacramento Police Department, their warrant team. They said they apparently just missed Mr. Castillo.
Q. Was Mr. Castillo eventually apprehended?
A. He was eventually apprehended.
Q. Do you know when that was?
A. I don't know exactly. It's been, I believe, since 2010. I wasn't aware that he was apprehended, but I found out.
Q. He was apprehended in 2010?
A. I believe that's when he was. My understanding is it was in Nevada.
1RP Pg 247
...

CROSS BY CASTILLO
Q. What efforts did you take to locate Mr. Castillo.
A. Well, what the efforts were, like I said, we tried to get a warrant. We got warrant for his arrest. We presented that warrant when we found out that he may be at his sister's house in Sacramento. The warrant team in Sacramento PD, they raided the house or made contact and learned that Mr. Castillo had been there but had recently just left.
Q. That was in --
A. That was in 1998.
Q. 1998. What efforts have you made to conclude this case, as you said you wished to do, since then in the last 12 years since then, 13 years?
A. We got information that Mr. Castillo was in Tijuana, but we can't go to Tijuana and get him. You know, we had the warrant available, hoping that Mr. Castillo eventually made contact with law enforcement and would get picked up on the warrant and brought back to the state of Washington to stand trial. We were getting ready to put Mr. Castillo -- a request on Washington's Most Wanted and America's Most Wanted, as I had done with another subject. By that time I had learned that Mr. Castillo was already in custody. I've never forgot about the case.
Q. So you wanted to see him prosecuted?
A. Yes, I did.
Q. Now, you said that you initially got the warrant, had a team of Sacramento police officers go and search the defendant's sister's house for him?
A. I believe it was the sister. I'd have to go back and study a little bit. I believe it was the sister's house at that time.
Q. Then you said you were going to place the defendant's name on Washington's Most Wanted. Where does Washington's Most Wanted come from? How long has it been in existence?
A. It's been in existence --
Q. Roughly, sir.
A. Maybe two, three years. I started thinking about it and thinking about the case. That's when I decided -- I put one case on there. Then I decided I'm going to go ahead and see if I can get this case on there and also contact America's
Most Wanted and get it put on there.
Q. America's Most Wanted has been around for a while, correct?

A. Yes, it has.
Q. How come you didn't put his name on there ten years ago, twelve years ago, eight years ago?
A. I don't know. I was hoping that he would be caught under the circumstances through any contact with law enforcement where he would be picked up. It was a warrant out of Yakima County. It was a nationwide warrant for $50,000. There was also a warrant for failure to register as a sex offender.
1RP Pg 258-60

CASTILLO:...So I guess my first question would be, in your efforts to bring the defendant to justice, aside from the warrant, aside from the family search in California, the family's home search in California that you said you orchestrated or had come forth, what other efforts did you make in order to find the defendant?
A. Well, like I told you yesterday, we put our probable cause together. We did the search warrant on Mr. Castillo's residence. Mr. Castillo was not there. So we had the arrest warrant in order. One thing I didn't bring up yesterday, though, was that Mr. Castillo was put on Crime Stoppers in our bulletin that goes out. That wasn't me that did that. That was theYakima County Sheriff's Department that did that. Our pursuit was not greatly detailed. We are a small agency. We put the warrant in the hands of the Yakima County Sheriff's Department, as listed in the superior court warrant. We hoped that Mr. Castillo would be contacted by law enforcement and arrested and then returned to this jurisdiction to stand trial.
Q. Okay. You say you're a small agency. Your efforts, because you're a small agency, are probably a little less minimal than a bigger agency, correct? Would that be a fair assessment?
A. Well, we're limited. We can't go out and -- we don't have search warrant teams that travel around the country, anything like that. Most places don't. If we would have had an exact location where you were at, had intel that you were in a certain area, we would have gotten ahold of that jurisdiction and requested an attempt to locate.
Q. Okay. My next question is you said my information was on Crime Stoppers. Now, did you follow up to see that it was on Crime Stoppers every six months?
A. No, I didn't.
Q. Every year?
A. No, I did not.
1RP276

...
Q. Not even once a year. Once every two years?
A. No, I did not.
Q. Once every five years?
A. No, I did not.
Q. Once every ten years?
A. No, I did not. Like I said, we were getting ready -- in 2010 or just prior to that we were wanting to go with Washington's Most Wanted and America's Most Wanted, but Mr. Castillo had already been apprehended.
Q. So you felt the importance to bring the defendant to justice, as you say; is that correct?
A. That's correct.
1RP 277

Q -- that you executed the search warrant on. What did that entail?
A Well, may I look at my notes here? We basically went by the house, you know, get the description of the house, see if there's anyone home -- it wasn't dark -- and to get cars that are on the property to identify if that in fact is the residence where Mr. Castillo lived, or he had any dominion over that residence -- any control over that residence.
Q Were there cars?
A Yes, there was three.

A Yes, I did.
Q Who were they registered to?
A One of them we couldn't get a plate on. The other one we got a plate on came back to Mr. Castillo's wife, Donna Castillo. And then one came back registered to Mr. Castillo and Donna Castillo.
Q And then when you entered that residence, you said there was also items of dominion?
A Yes. There was bills, et cetera, other items with his name on it.
Q Men's clothing?
A There was men's clothing.
Q Did it look like somebody just packed up and left?
A Yeah, it looked like someone --
MR. CASTILLO: Objection to relevance.
THE COURT: Response?
MR. BOSWELL: Well, it goes to Mr. Castillo's raising an issue that he wasn't living there. So I'm going through the officer on what

basis he had to believe he was living there -- cars --
THE COURT: It's overruled. Limited inquiry.
Q So there were things there?
A Yes.
Q Bills and other documents –
A Yes.
Q -- with his name on them? And then you went back a couple of times after that, is that correct?
A At least one time that I know of, to see if anyone had returned. And I don't know the exact date, didn't log it, but there was no activity of anyone living there at that time.
Q Did you ever see Mr. Castillo again after that?
A No.
1RP 573-4

DECLARATION OF SERVICE

I, David B. Trefry, state that on August 26, 2013, be agreement of the parties, I emailed a copy of the Respondent's Brief to: Mr. Thomas M. Kummerow at wapofficemail@washapp.org and to James Castillo DOC 956817, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362-1065

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26th day of August, 2013 at Spokane, Washington.

s/ David B. Trefry
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