NO. 45755-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GARY COLE,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court violated the defendant's statutory right to a speedy trial when it unreasonably granted a state's motion to continue the trial date.

2. The trial court's refusal to instruct the jury on unwitting possession denied the defendant his right to present a defense under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's statutory right to a speedy trial if it grants a state's motion to continue a trial based upon a police officer's vacation schedule known to the state at the time the court originally set the trial?

2. Does a trial court's refusal to instruct a jury on unwitting possession deny a defendant the right to present a defense under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when the evidence presented at trial supports an inference that the defendant did possess the controlled substance in question but was unaware of that fact at the time of possession?

STATEMENT OF THE CASE

According to Gray's Harbor County Sheriff's Deputy Robert Wilson, on January 11, 2013, he was on routine patrol on State Route 109 near Moclips when he saw the defendant Gary Cole standing next to a vehicle parked off the roadway. RP 29-32.[1] At the time Deputy Wilson knew that there was an outstanding misdemeanor warrant for the defendant's arrest on a minor traffic matter. *Id.* As a result, deputy Wilson stopped his vehicle, approached the defendant, placed him in handcuffs, and escorted to the front of the patrol car. RP 32-34. He then called in and confirmed the existence of the warrant. *Id.* Based upon that confirmation he told the defendant he was under arrest and began searching him incident to arrest. *Id.* While searching the defendant Deputy Wilson found a small, unmarked pill bottle in the front of the defendant's pants pocket. *Id.* The bottle had one oblong tablet in it and five round tablets. RP 34-35. Later analysis confirmed that the oblong pill contained hydrocodone and the five round pills contained oxycodone. RP 20-25. Both hydrocodone and oxycodone are controlled substances. *Id.*

The defendant's version of the events varied from that of Deputy

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[1]The record in the case at bar includes one continuously numbered volume of the verbatim reports of the hearing held in this case on 10/10/13, the jury trial held on 11/13/13 and the sentencing hearings held on 12/4/13 and 12/11/13. It is referred to herein as RP [page #].

Wilson. RP 40-56. According to the defendant, when the Deputy first approached, he accused the defendant of committing a burglary. RP 40-42. The deputy then placed him under arrest, put him in handcuffs and took him to the area behind the patrol vehicle. *Id.* At that point the deputy began searching him. *Id.* During this search the deputy put five tablets on the hood of the patrol vehicle. *Id.* However, the defendant denied that the Deputy pulled them or the bottle out of his pocket. *Id.* Rather, the defendant claimed that the Deputy must have already had the pills in his possession because the defendant had never seen them before. RP 43-44.

Based upon the Deputy's claims, the Grays Harbor County Prosecutor charged the defendant with one count of possession of controlled substances. CP 1-3, 37. The defendant appeared for arraignment on August 7, 2013, following his first appearance two days previous. *See* Minute Sheet and Notice of Trial date Setting, Documents 7 and 9 from the Supplemental Designation of Clerk's Papers. At the time of the first appearance the court set bail at $0 since the defendant was in custody on another matter for which he had not made bail. RP 3-11. At arraignment the court set the defendant's trial date for October 22, 2013, which was 76 days from arraignment. *See* Minute Sheet and Notice of Trial date Setting, Documents 7 and 9 from the Supplemental Designation of Clerk's Papers. On Tuesday, October 2, 2013, the state put the matter on for a motion to continue. CP 15-16. The basis for

this continuance was given as follows:

> The State has received word that the State's material witness, Deputy Bob Wilson, will be on prescheduled vacation until October 28, 2013. Deputy Wilson has had this vacation scheduled for some time. Deputy Wilson is one of only two witnesses that State intends to call and the person who witnessed the defendant possessing the contraband. The State is unable to proceed without the testimony of Deputy Wilson.

CP 16.

At the hearing on the motion the prosecutor informed the court that the previous Sunday he had first read an e-mail Deputy Wilson had sent late the previous Friday. RP 3-4. In that e-mail Deputy Wilson told him that "his long scheduled annual vacation leave extends until the 28th of the month, trial being set for the 22nd of this month." RP 3-4. The trial court granted the motion over the defendant's objection and set a new trial date for November 13, 2013, which was 108 days from arraignment. RP 9-10.

During the trial the state called Deputy Wilson and the laboratory technician who had tested the pills as its only witnesses. RP 18, 29. The defendant then took the stand as the only witness for the defense. RP 40. Following brief rebuttal by Deputy Wilson, the court instructed the jury. RP 52-54. However, the court refused to give the defendant's requested instruction on unwitting possession. *Id.* This proposed instruction was taken from WPIC 52.01 and stated as follows:

> A person is not guilty of possession of a controlled substance if

> the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 42.

The court reasoned that since the defendant had denied possessing the pills, he was not entitled to the requested instruction. *Id.* Following instruction the parties presented their closing arguments and the jury retired for deliberation, eventually returning a guilty verdict. RP 61, 61-71, 73-75; CP 28-34. The court later sentenced the defendant to 12 months and one day in prison and ran the sentence concurrent with a sentence previously imposed on another matter. CP 69-79. The defendant thereafter filed timely notice of appeal. CP 83.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S STATUTORY RIGHT TO A SPEEDY TRIAL WHEN IT UNREASONABLY GRANTED THE STATE'S MOTION TO CONTINUE THE TRIAL DATE.

Under CrR 3.3(b), the time for trial for a person held in jail on the matter before the court is "90 days after the commencement date specified in this rule," or "the time specified under subsection (b)(5)." CrR 3.3(b)(1)(i)&(ii). The "initial commencement date" under CrR 3.3(c)(1) is "the date of arraignment as determined under CrR 4.1." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is "required in the administration of justice" and it will not prejudice the defendant. This section states:

> (f) Continuances. Continuances or other delays may be granted as follows:
>
> . . .
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the

> defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra,* a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the Court of Appeals first acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

> The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

In the case at bar, the state cited the decision in *State v. Grilley*, 67 Wn. App. 795, 799, 840 P.2d 903, 904-05 (1992), in support of its argument that the trial court had discretion to continue a trial date in order to

accommodate an officer's vacation schedule. *See* State's Argument at RP 7. Although the defense objected, the trial court agreed with the state's argument and granted the motion to continue. As the following explains, the trial court's reliance upon the decision in *Grilley* was misplaced.

In *Grilley* a District Court had granted a continuance beyond the time set for speedy trial in order to accommodate a police officer's vacation schedule. After stipulating to facts sufficient to convict, the defendant appealed and the Superior Court reversed, finding that the trial court had abused its discretion in granting the continuance. The Court of Appeals then accepted review and reversed, generally finding that the accommodation of a police officer's vacation schedule was valid grounds to grant a continuance beyond the time required under the speedy trial rule. However, the court specifically noted that its ruling was based upon a finding that there had been no mismanagement by the state.

The problem in the case at bar with the trial court's reliance upon the decision in *Grilley* is that in the case at bar the trial court ignored the state's mismanagement of the trial date in this case, a fact not present in *Grilley*. In *Grilley* the court noted:

> The right to a speedy trial is a significant right. However, if conflicts with previously scheduled vacations of investigating officers could never be considered as a proper basis for a relatively brief continuance beyond the speedy trial period, we doubt that some officer witnesses would ever be able to take vacations. Here, the State

> promptly moved for a continuance when it discovered the conflict, well within the speedy trial period. ***There is no indication in the record that the State failed to exercise appropriate case management responsibility, either in the original trial setting or in the timeliness of its motion for continuance.*** The rescheduled trial date did not cause an unreasonable delay, and no actual prejudice resulted.

State v. Grilley, 67 Wn. App. at 799 (emphasis added).

In contrast with *Grilley*, in the case at bar there is significant indication in the record that the State failed to exercise appropriate case management responsibility at the original trial setting. This conclusion follows from the following facts revealed in both the state's written motion as well as the state's oral arguments on the motion. These facts were that (1) the officer's "long scheduled annual vacation leave" (oral argument on motion) had been set "for some time" (written motion), and (2) that the state did not find out about the conflict until a few days before the October 2nd Motion to Continue. The conclusion to be drawn in this case is that at the arraignment on August 7, 2014, the state had no idea what the vacation schedule was for Deputy Wilson. This is significant evidence of mismanagement that did not exist in *Grilley*. It is not too much for this court to hold the state to a standard that requires it to be aware of the "long scheduled annual vacations" for the police officers who routinely testify for the prosecutor.

Were this a case in which the vacation schedule had been written

down incorrectly or had been changed without the knowledge of the prosecuting attorney then this court would probably be more sympathetic to the need for a continuance. However, the facts of this case are that the officer's vacation schedule had been "long scheduled" and set "for some time" and the prosecutor who appeared at trial setting was not aware of this schedule. Under these facts the trial court did abuse its discretion in granting a continuance to reset a trial date past the time required under the speedy trial rule. As a result, this court should reverse the defendant's conviction and remand for dismissal with prejudice.

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON UNWITTING POSSESSION DENIED THE DEFENDANT HIS RIGHT TO PRESENT A DEFENSE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Consequently, the trial

court's failure to instruct on a defense allowed under the law and supported by the facts violates due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989). In the case at bar the defense argues that the trial court violated the defendant's right to due process when it refused to give the defendant's proposed instructions on unwitting possession.

In evaluating whether the evidence is sufficient to support a jury instruction the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury. *State v. Williams*, 93 Wash.App. 340, 348, 968 P.2d 26 (1998), *review denied*, 38 Wash.2d 1002, 984 P.2d 1034 (1999). A valid instruction, improperly denied, constitutes reversible error. *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (1972).

In a prosecution for unlawful possession under RCW 69.50, the State must establish two elements to sustain a conviction: the nature of the substance as a controlled substance and the fact of possession by the defendant. *State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982). Possession is defined in terms of personal custody or dominion and control. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The State is not required to prove either knowledge or

intent to possess, nor knowledge as to the nature of the substance in a charge of simple possession. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). Once the State establishes prima facie evidence of possession, the defendant may, nevertheless, affirmatively assert that the possession of the drug was unwitting. *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). The defense of unwitting possession may be supported by a showing that the defendant did not know he was in possession of the controlled substance. *Cleppe*, 96 Wn.2d at 381. The defendant may also show that he did not know the nature of the substance he possessed. *Staley*, 123 Wn.2d at 799. If the defendant affirmatively establishes that "his 'possession' was unwitting, then he had no possession for which the law will convict." *Cleppe*, 96 Wn.2d at 799.

For example, in *State v. Buford*, 93 Wn. App. 149, 152-53, 967 P.2d 548 (1998), the defendant was convicted of possession of cocaine residue scraped from a pipe the police found under the defendant's hat. At trial, the defendant requested an unwitting possession instruction based upon his argument that the amount of drugs was so small that his possession of the drugs was unwitting. The trial court refused to give the instruction and the jury convicted. The defendant then appealed arguing error from the trial court's refusal to give the requested instruction.

In reviewing the denial of the unwitting possession instruction, the

court of appeals noted that the only evidence that Buford unwittingly possessed the cocaine was that the amount of cocaine seized was small and actually had to be scraped with a scalpel from the crack pipe. Given the limited facts, the court felt that an unwitting possession instruction invited the jury to engage in speculation or conjecture. The court stated:

> Without receiving some basic facts – such as where did the defendant get the pipe, how long had he been carrying the pipe, did he express dismay that he possessed the pipe, why was he carrying the pipe under his hat, did he know what the pipe was used for, and did he know what cocaine looked like – the jury could not have properly utilized [Buford's proposed unwitting possession] instruction.

Buford, 93 Wn. App. at 153.

In the case at bar the defendant proposed a written instruction on unwitting possession from WPIC 52.01. This proposed written instruction stated:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 42.

However, the trial court refused to give this instruction based upon the defendant's testimony that (1) he did not believe he was in possession of the

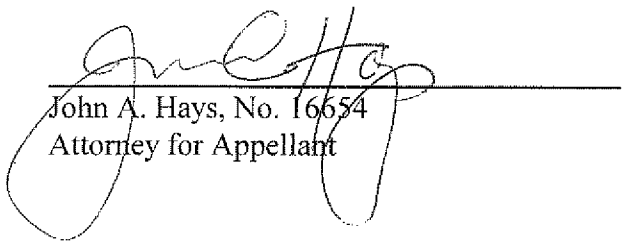
pills the officer said he found in the defendant's pocket, and (2) he believed that the officer had planted the pills. The problem with this ruling is that it fails to look at the evidence as a whole and contemplate an alternative possibility that is congruent with both the officer's testimony that he took the pills out of the defendant's pocket and the defendant's testimony that he did not have pills in his pocket and the officer must have planted them. This alternative is that the defendant unknowingly had the pills in his pocket. In other words, the conflicting facts presented at trial are also explained as an unwitting possession. Thus, in the case at bar, the facts do support an argument for unwitting possession. As a result the trial court erred when it refused to give the defendant's proposed instruction. Consequently this court should reverse the defendant's conviction and remand for a new trial in which the court properly instructs the jury on the defense of unwitting possession.

CONCLUSION

The trial court denied the defendant his statutory right to speedy trial when it granted a continuance based upon the state's mismanagement of its case. As a result this court should reverse and remand with instructions to dismiss with prejudice. In the alternative, this court should vacate the defendant's conviction and remand for a new trial based upon the trial court's erroneous refusal to give the defendant's proposed instruction on unwitting possession.

DATED this 17th day of July, 2014.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

CrR 3.3

(a) General Provisions.

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

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

(3) Definitions. For purposes of this rule:

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

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

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

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

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

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

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

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

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

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

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense

attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

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

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

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

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

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

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

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on

the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

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

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

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

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

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

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

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

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

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

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

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such

continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

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

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

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **GARY COLE,** **Appellant.**	**NO. 45755-5-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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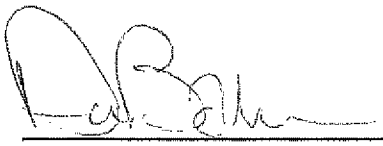
   Washington State Penitentiary
   1313 North 13th Avenue
   Walla Walla, WA 99362

Dated this 17th day of July, 2014, at Longview, Washington.



Donna Baker

HAYS LAW OFFICE

July 17, 2014 - 1:53 PM

Transmittal Letter

Document Uploaded: 457555-Appellant's Brief.pdf

Case Name: State vs. Gary R. Cole
Court of Appeals Case Number: 45755-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

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