

No. 36266-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH L. CLARK,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 OCT 31 PM 4:03

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

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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 2

D. ARGUMENT ..... 5

    1. MR. CLARK’S CONSTITUTIONAL RIGHT TO SELF REPRESENTATION WAS VIOLATED WHEN THE COURT’S BELOW DENIED HIS TIMELY AND UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF ..... 5

        a. The right to self-representation is as fundamental as the right to counsel ..... 5

        b. Mr. Clark’s request to go *pro se* was consistent with the requirements set by the Washington courts ..... 7

            i. Mr. Clark’s request was knowingly and intelligently made ..... 7

            ii. Mr. Clark’s request was timely ..... 8

            iii. Mr. Clark’s request was unequivocal ..... 9

        c. The request to proceed to trial “pro se with the assistance of counsel” was not fatal to the exercise of the right to self-representation ..... 11

        d. The broader provisions of the Washington Constitution’s right to self-representation require relief ..... 13

        e. The denial of a proper request for self-representation requires reversal and new trial ..... 14

2. THE TRIAL COURT ERRED BY GRANTING A THREE-MONTH CONTINUANCE TO PROCURE A WITNESS FROM OUTSIDE THE COUNTRY, AND THEREBY VIOLATED APPELLANT'S RIGHT TO A SPEEDY TRIAL .....	15
a. Mr. Clark had a right to a speedy trial.....	15
b. Mr. Clark was denied a speedy trial .....	16
c. Prejudice to the right to a speedy trial requires reversal .....	17
D. CONCLUSION.....	18

TABLE OF AUTHORITIES

**WASHINGTON SUPREME COURT**

<i>Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	11
<i>State v. Hahn</i> , 106 Wn.2d 885, 726 P.2d 25 (1986).....	11
<i>Richmond v. Thompson</i> , 130 Wn.2d 368, 922 P.2d 1343 (1996)..	14
<i>State v. Mack</i> , 89 Wn.2d. 788, 576, P.2d 44 (1978).....	16
<i>Seattle v. Crockett</i> , 87 Wn.2d 253, 551 P.2d 740 (1976) .....	16
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986) .....	13, 14
<i>State v. Williams</i> , 85 Wn.2d 29, 530 P.2d 225 (1975).....	16

**Washington Constitution**

Art. 1, §22.....	6, 15
------------------	-------

**WASHINGTON COURT OF APPEALS**

*State v. Breedlove*, 79 Wn.App. 101, 90 P.2d 586 (1995).....7, 8

*State v Buelna*, 83 Wn. App. 658, 922 P.2d 1371 (1996)..... 8

*State v. Carlyle*, 84 Wn.App. 33, 925 P.2d 635 (1996)..... 16

*State v. Fritz*, 21 Wn.App. 354, 585 P.2d 173 (1979),  
review denied, 92 Wn.2d 1002 (1979) .....7, 8

*State v. Hegge*, 53 Wn.App. 345, 766 P.2d 1127 (1989) ..... 8

*State v. Ross*, 98 Wn. App 1, 981 P.2d 888 (1999)..... 16

*State v. Silva*, 107 Wn. App. 605, 27 P.3d 691 (2001) ..... 10, 13, 14

*State v. Silva*, 72 Wn. App. 80, 863 P.2d 597 (1993) ..... 17

*State v. Teems*, 89 Wn.App. 385, 948 P.2d 1336 (1997),  
review denied, 136 Wn.2d 1003 (1998) ..... 17

*State v. Tolliver*, 6 Wn. App. 531, 494 P.2d 514 (1970) ..... 17

*State v. Vermillion*, 112 Wn.App. 844, 51 P.3d 188 (2002) .....8, 14

*State v. Warren*, 96 Wn. App 306, 979 P.2d 915 (1999) ..... 17

**COURT RULES**

CrR 3.3..... 16, 17

**UNITED STATES SUPREME COURT**

*Adams v. United States ex rel McCann*, 317 U.S. 269,  
63 S.Ct. 236, 87 L.Ed. 268 (1942) .....6

*Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525,

45 L.Ed.2d. 562 (1975).....	5, 6
<i>Illinois v. Allen</i> , 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).....	11
<i>Martinez v. Court of Appeal of California</i> , 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000).....	6
<i>McKaskle v. Wiggins</i> , 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).....	11
 <b>United States Constitution</b>	
Fourteenth Amendment.....	5, 15
Sixth Amendment.....	5, 11, 15

A. ASSIGNMENTS OF ERROR

1. Kenneth Clark was denied his state and federal constitutional right to appear *pro se* and with the assistance of counsel.

2. The trial court abused its discretion in finding that Mr. Clark's request to proceed *pro se* was not timely or unequivocal.

3. Kenneth Clark was deprived of his constitutional and rule-based right to a speedy trial.

4. The trial court abused its discretion in finding good cause to continue the trial for three months in the absence of a substantial showing of due diligence in more promptly procuring the presence of the witness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Clark made a timely and unequivocal request to appear *pro se* both orally to the court and in writing beginning approximately two weeks after his arraignment. Did the trial court err in denying Mr. Clark's request to appear *pro se*? (Assignments of Error 1, 2)

2. Mr. Clark has a constitutional, as well as a rule-based, right to a speedy trial. The court granted a three month continuance for the prosecution to obtain a witness then residing

out of the country that unreasonably delayed the trial. Was Mr. Clark denied his right to a speedy trial? (Assignments of Error 3, 4)

C. STATEMENT OF THE CASE.

Mr. Clark was initially charged by information, filed on September 16, 1994, in Thurston County Superior Court. CP 4-5. Because Mr. Clark's whereabouts were unknown, an arrest warrant was issued, but he was not arraigned until November, 2006.

11/8/06RP 3.

By motion filed on December 7, 2006, Mr. Clark asserted his right to represent himself "pro se – with the assistance of counsel." CP 8-9. In his supporting declaration, Mr. Clark noted that he was assigned counsel despite having advised counsel at the time of arraignment that he wanted to proceed in the matter *pro se*.

Nevertheless, counsel had been assigned. *Id.*; 11/8/06RP

At the December 21<sup>st</sup> hearing Mr. Clark requested to "proceed pro se with the assistance of counsel." 12/21/06RP 4-5.

Judge McPhee undertook a brief colloquy and then noted an absence of a right to "hybrid or co-counsel where an accused is representing himself and is also represented by counsel."

12/21/06RP 5-7. Judge McPhee also outlined the potential role of "standby counsel" to assist him in certain areas "that do not infringe

upon the defendant's right of self-representation." 12/21/06RP 8-9.<sup>1</sup>

The colloquy then devolved into a discussion of the nuances of self-representation and the scope of any responsibilities of standby counsel. 12/21/07RP 12-18. The judge then explained,

I do not want to have you placed in the position of coming up to trial and finding that your own preparation has been inadequate and then complaining to the court that the role that you imagined for Mr. Jefferson is different than the role that he has been permitted to undertake by the court. That's where I'm coming from.

12/21/06RP 18. Judge McPhee then denied Mr. Clark's request to waive his right to counsel and proceed *pro se*. 12/21/06RP 18.

Mr. Clark renewed his request to discharge his attorney and appear *pro se* at a status conference before Judge Chris Wickham on March 28, 2007. 3/28/07RP 4-5. The matter was set over to the following day at which time Mr. Clark clearly reiterated his desire "to fire Mr. Jefferson and to proceed *pro se*." 3/29/07RP 5. Mr. Clark noted that he had a college degree and had represented himself recently represented himself in Mason County Superior Court on related charges. 3/29/07RP 14-15. Nevertheless, Judge Wickham

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<sup>1</sup> Mr. Clark noted at the hearing that he was not dissatisfied with the representation provided by appointed counsel, Mr. Jefferson, and sought to correct a misstatement to that effect in his previously filed declaration. 12/21/06RP 11.

denied Mr. Clark's request because "for him to proceed in that way would place him at a disadvantage." 3/29/07RP 27. Judge Wickham then added that,

even if he were [capable of representing himself], for this court to allow hum [sic] to represent himself at this stage would in my mind necessitate a continuance of the trial because I can't see that that he could prepare himself adequately in the next three days to present – to participate in jury selection and then the evidence phase and closing argument of the trial that's to begin on Monday.

3/29/07RP 28. In summary the court noted,

Looking at all of that, I am not prepared to grant the motion for Mr. Clark to represent himself either with hybrid counsel, as was previously requested, or with standby counsel because of this court's belief that he is unable to adequately prepare or adequately represent himself following preparation at trial.

3/29/07RP 29.<sup>2</sup>

Because Judge Wickham's denial of Mr. Clark's request was based in large part on the belief a continuance would be necessary, he renewed his request but expressly vowed not to request a continuance. CP 69-71. This motion was heard by the trial judge, the Honorable Christine Pomeroy, prior to the parties' *in limine* motions and jury selection. TRP 5, 14.<sup>3</sup> Judge Pomeroy

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<sup>2</sup>The judge did go on to note that appointed counsel, Mr. Jefferson was both competent and ready to proceed trial. 3/28/07RP 30.

<sup>3</sup>The transcript of the trial proceedings, which began on April 2, 2007,

concluded that Mr. Clark's request was both untimely and not unequivocal because indicated at one point he felt "coerced into asking to represent [him]self..." TRP 13-14, 23.

The matter then proceeded to trial and on April 4, 2007, Mr. Clark was convicted. CP 123-26; TRP 313-14. He was subsequently sentenced within the standard range and now appeals. CP 171-86, 190-204.

#### D. ARGUMENT.

##### 1. MR. CLARK'S CONSTITUTIONAL RIGHT TO SELF REPRESENTATION WAS VIOLATED WHEN THE COURT'S BELOW DENIED HIS TIMELY AND UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF.

a. The right to self-representation is as fundamental as the right to counsel. The right to self representation is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as a derivative of the right to counsel. *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d. 562 (1975) (finding the right to defend is personal and "it is the defendant, therefore who must be free personally to decide whether in his particular case counsel is to his advantage."). The

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and concluded on April 4, 2007, is contained in three consecutively paginated volumes which will be cited as TRP.

Washington Constitution in fact expressly guarantees the right of the accused to defend oneself.

In criminal prosecutions the accused shall have the right to appear and defense in person, or by counsel....

Wash. Const. art. 1, § 22.

The historical basis for the right to self-representation is particularly applicable to Mr. Clark's case because it grew out of the "appreciation of the virtues of self-reliance and a traditional distrust of lawyers." Faretta, 422 U.S. at 826. As Justice Frankfurter noted, to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution." Adams v. United States ex rel McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is not more remarkable-and no more a basis for withdrawing the right-than is the fact that proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage. Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.

Martinez v. Court of Appeal of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring).

Mr. Clark initially sought to exercise the rights guaranteed to him by the United States and Washington Constitutions which each recognize both the right to self representation as well as the right to the assistance of counsel. Although he contends these rights are not mutually exclusive and can exist together, he ultimately made a clear and unequivocal request to proceed *pro se* which should have been respected.

b. Mr. Clark's request to go *pro se* was consistent with the requirements set by the Washington courts. Washington courts have set forth guidelines in determining when a right to appear *pro se* has been properly asserted.

The request or demand to defend *pro se* must be knowingly and intelligently made, it must be unequivocal and it must be timely, i.e., it may not be used to delay one's trial or obstruct justice.

*State v. Breedlove*, 79 Wn. App. 101, 106, 900 P 2d. 596, (1995) (*citing State v. Fritz*, 21 Wn. App. 354, 585 P 2d. 173 (1978)). Mr. Clark's request to proceed *pro se* was knowingly and intelligently made, and was both timely and unequivocal.

i. Mr. Clark's request was knowingly and intelligently made. To knowingly and intelligently request to proceed *pro se* a defendant must understand the risks of

proceeding *pro se* and the nature and seriousness of the charges against him. *State v. Vermillion*, 112 Wn.App. 844, 856-57, 51 P.3d 188 (2002). The preferred method of assuring that the defendant comprehends the risks involved in appearing *pro se* is a colloquy on the record. *State v Buelna*, 83 Wn. App. 658, 660, 922 P.2d 1371 (1996). The record demonstrates that Mr. Clark made a knowing and intelligent request. Mr. Clark was cautioned in great length about appearing *pro se*. 12/21/06RP 5-9; 3/29/07RP at 12, 17. Mr. Clark was also asked if he understood the charges against him and the possibly penalties to which he answered in the affirmative. 3/29/07RP 15, 16. Furthermore, Mr. Clark had represented himself in trial before so he clearly made a knowing decision. 3/29/07RP 15.

ii. Mr. Clark's request was timely. As a matter of law, a court generally has no discretion to deny a motion to proceed to trial *pro se* if the request is made well before trial, unaccompanied by a request for a continuance. *State v. Hegge*, 53 Wn.App. 345, 348, 766 P.2d 1127 (1989); *see also* *State v. Breedlove*, 79 Wn.App. at 106; *State v. Fritz*, 21 Wn.App. at 358-64. A request to appear *pro se* "may not be used to delay one's trial." *Breedlove*, 79 Wn.App. at 106. The courts discretion to grant

or deny a request to appear *pro se* corresponds to the timeliness of the request. *Id.*

Mr. Clark made his first request to appear *pro se* in December 2006, shortly after his arraignment. This request was made over three months before his trial began and was far from a last minute attempt to avoid trial. 12/18/06RP 15. Obviously, Mr. Clark was not attempting to delay his trial. In fact, when Mr. Clark made his initial request to appear *pro se* he stated that he was ready to proceed with trial at that time. 12/18/06RP 8. Although his subsequent request did not occur until shortly before trial, his attorney explained that this was as a result of the direction received from Judge McPhee and due to no fault of Mr. Clark's. 3/29/07RP 26. Ultimately, Mr. Clark indicated he was prepared to proceed with trial and that he would request no continuance. TRP 8, 20-21. Under these circumstances, the trial court abused its discretion in finding his request was not timely.

iii. Mr. Clark's request was unequivocal. Mr. Clark clearly stated that he wanted to appear *pro se* both verbally during court proceedings and by filing motions to the court. CP 8-9, 69-71, 157-59. Although his initial request included a call for the assistance of counsel and a subsequent request did include an

acknowledgement that a continuance would be desirable, Mr. Clark's ultimate underlying request was to represent himself.

In asking initially to appear *pro se* with the assistance of counsel, Mr. Clark was asking for the assistance of counsel guaranteed to him by the United States Constitution. Mr. Clark described the type of assistance he wanted as a passenger in the car with himself being the driver. 12/21/06RP 13-14. Mr. Clark was simply asking for an attorney to serve in the role described by the Court of Appeals in *Silva*, i.e., "one of alerting the accused to matters *beneficial to him and providing the accused with legal advice* or representation upon request." *State v. Silva*, 107 Wn. App. 605, 629, 630, 27 P.3d 691 (2001) (emphasis added).

To that end, Mr. Clark noted that he was very comfortable using computers and had previously done legal research. 12/26/06RP 14, 15. Mr. Clark was merely asking for *advice* and guidance to a specific area to research which might be *beneficial* to him. 3/29/07RP 8.

When a defendant asks to represent herself, the trial court must conduct a comprehensive examination of the defendant to elicit responses sufficiently detailed to allow it to determine the reasons for the waiver of counsel. *Bellevue v. Acrey*, 103 Wn.2d

203, 211, 691 P.2d 957 (1984); State v. Hahn, 106 Wn.2d 885, 896 n.9, 726 P.2d 25 (1986). The colloquy may not, however, be used as a trap for the unwary and where there is a knowing and intelligent waiver it “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

c. The request to proceed to trial “pro se with the assistance of counsel” was not fatal to the exercise of the right to self-representation. If some deficiency in Mr. Clark’s legal preparations existed, it certainly could have been overcome by the limited assistance of counsel. This would still preserve his right to self-representation so long as the attorney’s participation did not “seriously undermine” the “appearance before the jury” that the defendant is representing himself. McKaskle v. Wiggins, 465 U.S. 168, 187, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

The plain language of the Sixth Amendment expressly provides for the “assistance of counsel.” U.S. Const. Amend. 6.<sup>4</sup>

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<sup>4</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the

Nothing in this clear language indicates or implies that this provision of counsel or self-representation are “all or nothing” propositions. Certainly, the most fundamental principle in determining the scope of legislative enactments, and constitutional provisions are not any different, is to look at the plain meaning. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). It is hard to imagine what could be more unambiguous than this provision of the Sixth Amendment, particularly when examined in conjunction with the State constitutional provision expressly providing the right to appear in person.

Mr. Clark also noted, since a person of sufficient “financial means could hire a lawyer to assist him in defending himself *pro se* if he so desired,” that right should not be denied an indigent defendant. Mr. Clark was, therefore, entitled to proceed *pro se* based upon his repeated assertions of the right and his further request for the assistance of counsel did not compromise the validity of his request, since it was only necessary in order to ensure due process of law.

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Assistance of Counsel for his defence.

d. The broader provisions of the Washington Constitution's right to self-representation require relief. When reviewing the provisions of the Washington Constitution to determine whether the protections are broader than those contained in the United States Constitution, *Gunwall* requires an examination of six factors. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

In examining *Gunwall* factors one and two, the language in the state constitution and the differences between the state and federal provisions, Washington courts have determined that the the Washington Constitution provides a *pro se* defendant greater protection than the United States Constitution. *Silva*, 107 Wn. App. at 609, 622 (finding Art 1, § 22 protects the rights of *pro se* defendants to have “access to state-provided resources that will enable him to prepare a meaningful *pro se* defense”).

In examining the third *Gunwall* factor, the constitutional history, the *Silva* Court again found that the state provision provided greater protection. The Court found the framers of the Washington Constitution use of language from other state constitution, rather than that in the federal Bill of Rights, indicated an effort to provide broader protection. *Id.* at 619.

With regard to the fourth *Gunwall* factor, preexisting state law, the *Silva* Court little help because it merely codified existing federal constitutional requirements. *Id.* at 621.

As to the fifth factor, structural differences, the differences in structure “inherently support independent review of our state constitution.” *Id.* citing *Richmond v. Thompson*, 130 Wn.2d 368, 382, 922 P.2d 1343 (1996).

Finally, the sixth factor, matters of particular state or local concern, have been traditionally seen in rights of the accused. *Id.*

Like the defendant in *Silva* Mr. Clark’s request to proceed pro se deserved even greater protection under the Washington Constitution.

e. The denial of a proper request for self-representation requires reversal and new trial. “The right to self-representation is either respected or denied; its deprivation cannot be harmless.” *State v. Vermillion*, 112 Wn. App. 844, 851, 51 P.3d 188 (2002) (citing *McKaskle v. Wiggins*, 465 U.S. at 177 n.8). Mr. Clark made a timely and unequivocal request to appear *pro se*. By denying Mr. Clark’s right to appear *pro se* the trial court denied Mr. Clark of his constitutional right. Therefore, this Court must reverse his conviction and remand for a new trial.

2. THE TRIAL COURT ERRED BY GRANTING A THREE-MONTH CONTINUANCE TO PROCURE A WITNESS FROM OUTSIDE THE COUNTRY, AND THEREBY VIOLATED APPELLANT'S RIGHT TO A SPEEDY TRIAL.

On December 18, 2006 a continuance was granted with no trial date set until a review hearing was held three days later.

12/18/06RP 13-14. The continuance was granted based on the assertion that a necessary witness would be unavailable until the middle of March. 12/18/06RP. at 13-14.<sup>5</sup>

On December 21, 2006, the prosecutor informed the trial court that to obtain the out of country witness by subpoena the process would take two months, still the prosecution asked for a continuance for 3 ½ months later. 12/26/06RP 20-21. The court granted the continuance for April. *Id.*

a. Mr. Clark had a right to a speedy trial. A person accused of a crime in Washington has a right to a speedy trial. U.S. Const. Amend. 6, Amend 14; Wash. Const. Art. I, § 22. CrR 3.3 governs the timeliness of court proceedings and states a

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<sup>5</sup> At the same proceeding Mr. Clark's motion to represent himself "pro se with the assistance of counsel" was rescheduled because working copies were not provided to everyone even though the appropriate motions were filed. 12/18/06RP at 14-16. Mr. Clark's own attorney supported him going pro se and informed the judge that Mr. Clark had already been acting as his own counsel. 12/18/06RP at 14-15.

defendant in custody has the right to be brought to trial within 60 days of arraignment. "The purpose of the rule is to insure speedy justice in criminal cases insofar as is reasonably possible." *State v. Williams*, 85 Wn.2d 29, 32, 530 P.2d 225 (1975). The right to a speedy trial defined by CrR 3.3 is a fundamental right. *State v. Ross*, 98 Wn. App 1, 4, 981 P.2d 888 (1999). The trial court bears the responsibility to ensure that a speedy trial is held. CrR 3.3 (a) (1).

b. Mr. Clark was denied a speedy trial. A continuance may be granted so long as the defendant will not be prejudiced by such delay. CrR 3.3(f)(2). By delaying the trial well over a month longer than needed Mr. Clark was denied his guaranteed right to a speedy trial. Mr. Clark was prepared to go to trial and through appointed counsel stated that he was ready to go to trial and represent himself in December 2006.

The court rules are designed to protect the right to speedy trial, appellate courts review an order granting a continuance for abuse of discretion. *State v. Mack*, 89 Wn.2d. 788, 792, 576, P.2d 44 (1978); *Seattle v. Crockett*, 87 Wn.2d 253, 257-58, 551 P.2d 740 (1976); *State v. Carlyle*, 84 Wn.App. 33, 35-36, 925 P.2d 635 (1996); *State v. Warren*, 96 Wn. App 306, 309, 979 P.2d 915

(1999) (citing *State v. Silva*, 72 Wn. App. 80, 83, 863 P.2d 597 (1993)).

Where a party requests a continuance, they must show due diligence was made to secure the witness. *State v. Tolliver*, 6 Wn. App. 531, 533, 494 P.2d 514 (1970). In the present case the contact by the prosecution had with the out-of-country witness was limited apparently to email. 12/28/06RP 12, 13. There is little in the record to suggest that the prosecution had done anymore to achieve the timely presence of its witness.

c. Prejudice to the right to a speedy trial requires reversal. CrR 3.3 requires dismissal with prejudice for violation of the right to a speedy trial. *State v. Teems*, 89 Wn.App. 385, 388, 948 P.2d 1336 (1997), review denied, 136 Wn.2d 1003 (1998) (defendant need not show prejudice from denial of right to speedy trial). Thus, the failure to provide Mr. Clark with a speedy trial, in strict compliance with his constitutional and rule-based right requires dismissal.

D. CONCLUSION.

As a result of the failure to honor Mr. Clark's knowing, voluntary request to proceed to trial *pro se* and the violation of his right to a speedy trial, this Court must reverse his conviction and sentence; and remand for a new trial.

Respectfully submitted this 31<sup>st</sup> day of October 2007.

A handwritten signature in black ink, appearing to read "Donnan", written over a horizontal line.

David L. Donnan (WSBA 19271)  
Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	NO. 36266-0-II
RESPONDENT,	)	
	)	
v.	)	
	)	
KENNETH CLARK,	)	
	)	
APPELLANT.	)	

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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 31<sup>ST</sup> DAY OF OCTOBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES POWERS	(X)	U.S. MAIL
THURSTON COUNTY PROSECUTING ATTORNEY	( )	HAND DELIVERY
2000 LAKERIDGE DR SW	( )	_____
OLYMPIA, WA 98502		
[X] KENNETH CLARK	(X)	U.S. MAIL
897942	( )	HAND DELIVERY
STAFFORD CREEK CORRECTIONS CENTER	( )	_____
191 CONSTANTINE WAY		
ABERDEEN, WA 98520		

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF OCTOBER, 2007.

X \_\_\_\_\_ 

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