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STATE OF WASHINGTON  
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DEPUTY

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

NO. 41130-0-II

STATE OF WASHINGTON,

Respondent,

vs.

JOHNATHON LAINE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 10-1-00013-4

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**BRIEF OF RESPONDENT**

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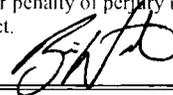
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I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 26, 2011,  
at Port Angeles, WA



pm 1-26-11

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**I. COUNTERSTATEMENT OF THE ISSUES:**

1. Did the trial court err when it denied the defendant's motion to dismiss the charges for want of a "speedy trial" when (1) the trial occurred within six months of the arrest, (2) the defense requested/agreed to several continuances, and (3) the State's single request for a continuance was supported by good cause?
2. Did the sentencing court err when it refused to impose a prison DOSA when (1) the defendant would not receive a full 12.75 months of treatment while held in confinement, and (2) the defendant was a poor candidate for an alternative sentence because he had a lengthy history of failing to comply with previous drug treatment efforts?
3. Did the defendant receive ineffective of counsel when his attorney failed to remind the court that her client would remain under community supervision for 12.75 months after his release from confinement?

**II. STATEMENT OF THE CASE:**

Underlying Facts:

Kenya Montgomery resides in Port Angeles, Washington. RP (7/19/2010) at 51, 58; RP (7/20/2010) at 48. He is a young man who suffers from paranoid schizophrenia. RP (7/19/2010) at 72; RP (7/20/2010) at 40, 50, 151; CP 6. As a result, he does not have a driver's license and requires others to drive him around the community. RP (7/19/2010) at 54, 71-72; RP (7/20/2010) at 40; CP 6.

Montgomery's mother, Teresa Crane, is the registered owner of a 2004 Ford Mustang (the Mustang).<sup>1</sup> RP (7/19/2010) at 53-55, 96-97; RP (7/20/2010) at 39-40, 145; CP 6. In an effort to accommodate her son's needs, Crane allowed Montgomery to use the Mustang<sup>2</sup> provided he had a designated driver. RP (7/20/2010) at 40, 42, 46-50, 54-55; CP 6. Crane always required Montgomery and his designated drivers to follow strict rules whenever they used her vehicle. *See* RP (7/20/2010) at 40-41, 46, 55; CP 6.

On January 3, 2010, Johnathon Laine (the defendant) agreed to drive Montgomery around Port Angeles. RP (7/20/2010) at 143. At the end of the day, the two returned to the residence of Montgomery's aunt, Marta Hester, to stay the night. RP (7/19/2010) at 52. Montgomery paid Hester the \$350 rent he owed, and Hester placed the money in her purse. RP (7/19/2010) at 58-59. Hester placed her purse alongside a chair in her living room. RP (7/19/2010) at 59. Laine was able to see where Hester placed the money. RP (7/19/2010) at 59; RP (7/20/2010) at 145.

Later that evening, Hester received a phone call from Crane. RP (7/19/2010) at 55, 57; RP (7/20/2010) at 43-44; CP 6. Crane asked Hester

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<sup>1</sup> At the time of the incident, Crane was still making payments on the vehicle to the First Federal Savings and Loan. RP (7/19/2010) at 97; RP (7/20/2010) at 41.

<sup>2</sup> Montgomery is neither a registered owner, nor an insured driver for the vehicle. RP (7/20/2010) at 41, 55.

to instruct Montgomery not to take the Mustang. RP (7/19/2010) at 57; CP 6. Hester called Montgomery and Laine into the kitchen where she conveyed Crane's instructions. RP (7/19/2010) at 56, 84; RP (7/20/2010) at 14; CP 6. Both Montgomery and Laine said they understood. RP (7/19/2010) at 56-57; CP 6. Laine then gave Hester the vehicle's keys. RP (7/19/2010) at 54, 56; CP 6. Hester placed the keys on the table. RP (7/19/2010) at 56; CP 6.

On January 4, 2010, Hester woke up around 8:00 a.m. RP (7/19/2010) at 60. When she exited her bedroom, she noticed Laine was no longer sleeping on the living room couch. RP (7/19/2010) at 53, 66. When Montgomery exited his bedroom he looked outside one of the apartment windows. RP (7/19/2010) at 60. Montgomery quickly became agitated and angrily asked, "Where [] the f--- is my car?" RP (7/19/2010) at 60-61, 79, 81, 84.

Shortly after Montgomery noticed the Mustang was no longer outside, Hester found her purse in the bathroom. RP (7/19/2010) at 62. When she looked inside the purse, she discovered the \$350 dollars Montgomery paid her the night before was missing. RP (7/19/2010) at 62. Hester also noticed several rings that she had placed on the bathroom counter were also gone. RP (7/19/2010) at 61-62, 64, 83. Hester called the police to report the theft. RP (7/19/2010) at 60, 146.

On January 6, 2010, Trooper Eric Tilton observed a silver Mustang parked outside the Lake Pleasant Grocery in Beaver, Washington. RP (7/19/2010) at 89, 99. Trooper Tilton ran the license plate number and learned the vehicle was registered to Crane, and that she reported it stolen several days earlier. RP (7/19/2010) at 89-91. Trooper Tilton contacted Laine and placed him under arrest. RP (7/19/2010) at 91-92.

After Trooper Tilton advised Laine of his constitutional rights, the defendant claimed he recently purchased the Mustang from his “best friend” for \$500.<sup>3</sup> RP (7/19/2010) at 91-92, 97-98, 105-06. However, Laine did not know the name of the friend who allegedly sold him the vehicle. RP (7/19/2010) at 92. Laine said a sales receipt was inside the glove compartment, but a search of the vehicle produced no such document. RP (7/19/2010) at 95, 98-99, 108-09.

At the Clallam County Jail, Deputy Ken Oien conducted a recorded interview with Laine. After being advised of his constitutional rights, Laine said he purchased the Mustang from a friend named “Kenna or Kenya Montgomery, or something like that.” RP (7/20/2010) at 21-22. Laine explained he made a \$150 down payment, with a promise to pay an additional \$350 sometime in the future. RP (7/20/2010) at 22; CP 6. Laine

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<sup>3</sup> The estimated value of the 2004 Mustang was \$10,000. RP (7/19/2010) at 94. However, the trial court’s findings/conclusions read the value of the car was \$8,000. CP 6.

said he knew the alleged price was a bargain, but believed Montgomery wanted to help him out. RP (7/20/2010) at 25. Laine had \$1500 on him at the time of his arrest. RP (7/20/2010) at 23. However, he denied stealing the car or any jewelry. RP (7/20/2010) at 34-37.

When Crane and Montgomery reclaimed the vehicle, Montgomery became depressed when he saw the damage to the Mustang's front bumper. RP (7/20/2010) at 56. He then stated, "[o]h my God, there's my baby."<sup>4</sup> RP (7/20/2010) at 56.

#### Procedural History:

The State charged Laine with three felony counts: (1) taking a motor vehicle without permission, (2) second-degree theft, and (3) making false statements to a law enforcement officer. CP 160-61, 180-81.

On January 7, 2010, Laine first appeared before the Clallam County Superior Court. CP Supp. (Minutes 1/7/2010). On January 12, he entered a plea of "not guilty." CP Supp. (Minutes 1/12/2010). The superior court subsequently scheduled a trial date for March 10.<sup>5</sup> CP 155; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 1/12/2010).

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<sup>4</sup> The vehicle sustained damage to the front bumper after Laine made a fast turn and collided with the guard rail. RP (7/19/2010) at 92-93.

<sup>5</sup> The time for trial period expired on 3/13/2010. *See* CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 1/12/2010).

On February 19, 2010, the defense moved the superior court to continue the trial date.<sup>6</sup> CP 155; CP Supp. (Minutes 2/19/2010). The State did not oppose this request. CP Supp. (Minutes 2/19/2010). The superior court rescheduled the trial for March 22.<sup>7</sup> CP 155, 179, 210; CP Supp. (Minutes 2/19/2010); (Order Setting Schedule and Directing Pretrial Procedure 2/19/2010).

On March 22, 2010, due to court congestion, the parties agreed to reset Laine's trial date. CP 156, 201-03; CP Supp (Minutes 3/22/2010). The court asked if the parties had any preferred dates for the pending trial. CP 156, 202. The defense said it did not. CP 156, 202. The State informed the court that its assigned deputy was unavailable during April 14-16 and April 21-23. CP 156, 202. The superior court asked if May 17 would be an acceptable trial date. CP 156, 202. The defense answered affirmatively. CP 156, 202. The superior court then scheduled trial for May 17.<sup>8</sup> CP 202-03, 209; CP Supp. (Minutes 3/22/2010); (Order Setting Schedule and Directing Pretrial Procedure 3/22/2010). Laine did not oppose this re-

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<sup>6</sup> The trial court's findings/conclusions regarding the motion to dismiss incorrectly provide that the motion was made on 2/17/2010. CP 155.

<sup>7</sup> The time for trial period expired on 4/12/2010. CP 210; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 2/19/2010).

<sup>8</sup> The time for trial period expired on 6/16/2010. CP 209; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 3/22/2010).

scheduling and willingly signed the order continuing the trial date. CP 156, 209.

On March 23 or 24, 2010, without the assistance of counsel, Laine filed a motion to dismiss the charges against him alleging a violation of his “speedy trial” right. CP 156, 167-68, 207-08. However, neither the defendant nor his attorney noted the matter for a hearing until May 21. *See* CP 156, 162-74

On April 19, 2010, without the assistance of counsel, Laine filed a second motion to dismiss the charges against him, alleging violations of his discovery and “speedy trial” rights. CP 163-66, 175-78. Again, neither the defendant nor his attorney noted the matter for a hearing until May 21. *See* CP 162-74.

On April 29, 2010, the State moved to continue the trial date because the arresting officer, Trooper Tilton, would be on scheduled leave between May 8 and May 26. CP 206; CP Supp (State’s Response to Motion to Dismiss at 2). Thus, he was unavailable for trial on May 17. CP 206; CP Supp. (State’s Response to Motion to Dismiss at 2).

On May 7, 2010, the superior court heard the State’s continuance motion. RP (5/7/2010) at 2; CP Supp. (Minutes 5/7/2010). Despite Laine’s objection, the superior court found the arresting officer’s absence was good cause to continue the trial date under CrR 3.3(f)(2). RP (5/7/2010) at

2-3; CP Supp (Minutes 5/7/2010); (Order Setting Schedule and Directing Pretrial Procedure). The court rescheduled the trial for June 1, a date within the previously set time for trial period. CP 205; RP (5/7/2010) at 3. Laine signed the order setting June 1 as his new trial date. CP 205.

On May 28, 2010, the parties argued whether there had been a violation of Laine's constitutional right to a "speedy trial." CP 197. *See also* CP Supp (State's Response to Defendant's Motion to Dismiss). The superior court found there was no violation of the "time for trial rule" (CrR 3.3) or the constitutional right to a "speedy trial" because (1) he failed to make timely objections to any scheduling orders, and (2) his right to a fair trial was not prejudiced by the ensuing delay. CP 157, 197.

The defense promptly asked the trial court to continue the trial date. CP 197, 200. The State agreed to the reset. CP 197. The court set June 14 as the next trial date.<sup>9</sup> CP 199; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 5/28/2010). Laine voluntarily signed the new scheduling order. CP 199.

On June 14, the superior court advised the parties it needed to reset the trial date due to court congestion. CP 195. The court made a record that Clallam County had only three judges, two of whom were on

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<sup>9</sup> The time for trial period expired 7/13/2010. CP 199; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 5/28/2010).

vacation. RP (6/14/2010) at 2. This left one judge to handle the criminal and civil calendars, and there were no pro tempore judges available to share the burden. RP (6/14/2010) at 2-3. The court also recognized Laine's time for trial did not lapse for another month. RP (6/14/2010) at 2, 4. Thus, the court reset the trial date for June 28. CP 196; RP (6/14/2010) at 4. The defense did not object. RP (6/14/2010) at 3-4.

On June 15, 2010, the defense moved to continue the trial date. RP (6/15/2010) at 2-3. CP Supp. (Minutes 6/15/2010). The State did not oppose the request. CP Supp. (Minutes 6/15/2010). The defense initially asked the court to reset the trial within the existing time-period. RP (6/15/2010) at 3. However, the defense said it was willing to accept a date that was two weeks beyond the time for trial period. RP (6/15/2010) at 4. The court confirmed that this was Laine's intent, to which the defendant responded "yeah." RP (6/15/2010) at 4. *See also* RP (6/15/2010) at 5-6. The court subsequently set July 19 as the new date for trial.<sup>10</sup> RP (6/15/2010) at 5-6; CP 194; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 6/15/2010). Laine signed the continuance order. CP 194.

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<sup>10</sup> The time for trial period expired on 7/27/2010. CP 194; CP Supp. (Order Setting Schedule and Directing Pretrial Procedure 6/15/2010).

On July 19, 2010, trial commenced. The State's witnesses testified in accordance with the events described above. The trial court dismissed the charge of making a false statement to a police officer at the close of the State's case. RP (7/20/2010) at 58-60, 64-65.

Laine provided a different version of events. According to Laine, he met Montgomery at a New Year's Eve party. RP (7/20/2010) at 72. At the party, the two friends smoked methamphetamine. RP (7/20/2010) at 73. Afterwards, the two friends decided to pick up the Mustang. RP (7/20/2010) at 74-77. Laine proceeded to drive Montgomery around the Port Angeles area next few days. RP (7/20/2010) at 77-100. The two often made stops to purchase methamphetamine. RP (7/20/2010) at 79-80, 86-87, 94-95. After smoking methamphetamine, Laine noticed Montgomery behaved strangely. RP (7/20/2010) at 81-82, 85-87. At some point, Montgomery allegedly offered to sell the Mustang to Laine. RP (7/20/2010) at 88.

While Laine knew Montgomery suffered from various mental problems, *see* RP (7/20/2010) at 116, he believed Montgomery wanted to sell the vehicle to help out his "best friend." RP (7/20/2010) at 89, 91. Even though Laine knew Montgomery could not drive, the defendant believed Montgomery owned the Mustang. RP (7/20/2010) at 109. After

Laine allegedly paid Montgomery \$150,<sup>11</sup> the defendant told his friend he could now begin looking for work. RP (7/20/2010) at 89-90, 99-100.

At Hester's residence, Laine claimed he told Montgomery's aunt that he would leave the next morning to look for work in Silverdale, Washington. RP (7/20/2010) at 101. However, Laine admitted he could not remember if Hester told him not to drive the Mustang because he was under the influence of drugs and alcohol. RP (7/20/2010) at 109. Laine assumed Montgomery told his aunt that he had purchased the vehicle. RP (7/20/2010) at 101.

After the defense rested its case, the jury found Laine guilty of taking a motor vehicle without permission (count 1), but acquitted him of the charge of second-degree theft (count 2). RP (7/21/2010) at 2; CP 15, 54-55.

On July 30, 2010, the defense asked that Laine be evaluated for a residential DOSA. RP (7/30/2010) at 2; CP 191-93. The sentencing court denied the request. RP (7/30/2010) at 2; CP 191. The court reasoned Laine was ineligible for a residential DOSA with an offender score of 9+ points. RP (7/30/2010) at 3. The court further explained it was familiar with Laine's inability to comply with previous drug treatment efforts. RP

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<sup>11</sup> Laine testified that the remaining \$1000 to \$1500 he had on his person were cash advances he needed to survive on and pay credit card debts. RP (7/20/2010) at 89.

(7/30/2010) at 3. However, the court said it might be amenable to a prison DOSA, but such an alternative sentence would depend on his offender score. RP (7/30/2010) at 4.

On August 4, 2010, the defense moved to continue the sentencing hearing so it could have additional time to prepare. CP Supp. (Minutes 8/4/2010).

On August 26, 2010, the court conducted a sentencing hearing. Based upon Laine's offender score (9+ points), the standard range sentence was between 22 and 29 months. RP (8/26/2010) at 13-14; CP Supp. (Minutes 8/14/2010). The defense requested a prison DOSA to address Laine's severe drug addiction. RP (8/26/2010) at 16-19; CP Supp. (Minutes 8/16/2010). However, both the defense and the court recognized that Laine had failed at all previous attempts to treat his drug addiction. RP (8/26/2010) at 22.

At the time of sentencing, Laine had already served eight (8) months in the Clallam County Jail. The sentencing court denied the request for a prison DOSA:

The most I could give him [Laine] is 12 months under the prison based DOSA and then he's only on supervision for another 3 or 4 months according to that scheme because you take half the standard range, you split it. So it's really not going to accomplish -- you know, if we were early in the process here, you know, that might be a consideration. But it's not going to work here. So it's

really not in my -- well, I guess it's in my ability to do but I don't think it's the proper thing to do here.

RP (8/26/2010) at 21. The court subsequently sentenced Laine to 26 months confinement. RP (8/26/2010) at 21-22.

Laine appeals.

### III. ARGUMENT:

#### A. THE DEFENDANT RECEIVED A SPEEDY A TRIAL.

Laine argues the 6 month and 13 day delay between his arrest and adjudication violated his right to a “speedy trial” under the federal and state constitutions.<sup>12</sup> See Brief of Appellant at 9-14. This argument fails because a balancing of the relevant factors under *Barker v. Wingo*<sup>13</sup> demonstrates there was no constitutional violation.

The Sixth Amendment reads: “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. The Washington Constitution provides: “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial.”<sup>14</sup> Art. 1, § 22. If a defendant’s constitutional right to a speedy trial is

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<sup>12</sup> Laine does not argue a violation of the time for trial period under CrR 3.3.

<sup>13</sup> 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)

<sup>14</sup> Washington’s “speedy trial” provision does not provide greater protection than its federal counterpart. *Iniguez*, 167 Wn.2d at 290.

violated, the remedy is dismissal of the charges with prejudice. *State v. Iniguez*, 167 Wn.2d 273, 282, 217 P.3d 768 (2009).

Appellate courts recognize that some pretrial delay is often “inevitable and wholly justifiable.” *Iniguez*, 167 Wn.2d at 282 (quoting *Doggett v. United States*, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). However, it is difficult to determine when “too much delay has occurred.” *Iniguez*, 167 Wn.2d at 282 (citing *Vermont v. Brillon*, --- U.S. ---, 129 S.Ct. 1283, 1290, 173 L.Ed.2d 231 (2009)). Thus, the right to a “speedy trial” is violated only after a reasonable – but not a fixed – time. *State v. Detrick*, 90 Wn. App. 939, 945, 954 P.2d 949 (1998). *See also Barker*, 407 U.S. at 521-22.

A “speedy trial” claim requires a balancing of several factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his constitutional right to a speedy trial, and (4) the prejudice to the defendant’s right to a fair trial. *Barker*, 407 U.S. at 530; *Iniguez*, 167 Wn.2d at 283, 290. These factors are not exclusive because other considerations may be relevant to the inquiry. *Iniguez*, 167 Wn.2d at 283-84 (citing *Barker*, 407 U.S. at 530). Nor are any of the factors necessary or sufficient by themselves. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 530).

This court reviews a “speedy trial” claim under a de novo standard. *Iniguez*, 167 Wn.2d at 280 (citing *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005); *United States v. Wallace*, 848 F.2d 1464, 1469 (9th Cir. 1988)).

1. The sixth month delay does not support a speedy trial violation.

The first factor in the inquiry is the length of the delay. As a threshold matter, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial.<sup>15</sup> This inquiry depends on the specific circumstances of each case. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 530-31). Because the inquiry is fact-specific, the U.S. Supreme Court expressly rejected the notion that the constitutional speedy trial right can be quantified into a specific time-period. *Barker*, 407 U.S. at 523; *Iniguez*, 167 Wn.2d at 283. Moreover, a showing of presumptive prejudice cannot, by itself, prove a speedy trial violation because more is required. *Iniguez*, 167 Wn.2d at 283 (citing *Doggett*, 505 U.S. at 655-56).

In *State v. Iniguez*, the Washington Supreme Court considered whether an eight-month delay between the defendant's arrest and first trial constituted a violation of his constitutional right.<sup>16</sup> 167 Wn.2d at 281. The Supreme Court recognized that intermediate appellate courts had found

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<sup>15</sup> The term "presumptively prejudicial" does not indicate a statistical probability of prejudice. It simply marks the point at which courts deem the delay unreasonable enough to trigger a *Barker* inquiry. *Iniguez*, 167 Wn.2d at 283 n. 3 (citing *Doggett*, 505 U.S. at 652 n. 1).

<sup>16</sup> In *Iniguez*, the first trial ended in a mistrial. A second trial began approximately 10 months after the defendant's arrest. *See* 167 Wn.2d at 279.

delays exceeding 11 months to be presumptively prejudicial. *Iniguez*, 167 Wn.2d at 291 (citing *State v. Corrado*, 94 Wn. App. 228, 231, 972 P.2d 515 (1999)). The *Iniguez* court rejected the defendant's argument that any delay exceeding six months was presumptively prejudicial. 167 Wn.2d at 281, 290-292.

The *Iniguez* court found an eight-month delay to be presumptively prejudicial when (1) the defendant was held in custody pending trial, (2) the defendant did not face complex charges (first degree robbery), and (3) the State's case rested in large part on eyewitness testimony from multiple people underscoring the importance of a prompt trial to avoid difficulty associated with fading memories. 167 Wn.2d at 292. However, the Supreme Court ultimately concluded the eight-month delay in *Iniguez* did not violate the defendant's constitutional right. 167 Wn.2d at 296.

Here, Laine's trial was only delayed six months and thirteen days. As such, this Court should hold the six-month delay is not presumptively prejudicial. *See Iniguez*, 167 Wn.2d at 293 (eight month pretrial delay was just beyond the bare minimum needed to be presumptively prejudicial and trigger the *Barker* inquiry).

While Laine remained in custody throughout the pendency of the proceedings and the charges against him were relatively uncomplicated, the defense required/agreed to multiple continuances. *See e.g.* CP 155-56,

179, 194, 197, 199-200, 202, 209-10; CP Supp. (Minutes 2/19/2010); CP Supp. (Minutes 3/22/2010); CP Supp. (Minutes 6/15/2010); RP (6/14/2010) at 3-4; RP (6/15/2010) at 2-6. Additionally, Laine requested/agreed to continuances even after he erroneously believed there was a speedy trial violation. *See e.g.* CP 194, 197, 199-200; CP Supp. (Minutes 6/15/2010); RP (6/14/2010) at 3-4; RP (6/15/2010) at 2-6.

Lain argues that a six month delay was “presumptively prejudicial” because (1) he spent the six months in custody, and (2) the case was not complicated. *See* Brief of Appellant at 10. However, he provides no authority to support his position that a six month pretrial incarceration, by itself, is presumptively prejudicial. He also fails to cite any authority that a trial court cannot continue an uncomplicated case based on good cause or defense requests. *See* Brief of Appellant at 10.

The length of the delay, by itself, does not support a speedy trial violation.

2. The several continuances were reasonable.

The second factor in the inquiry is the reason for the delay. Washington’s appellate courts look to each party’s level of responsibility for the delay and assigns different weights to the reasons for the delay. *Iniguez*, 167 Wn.2d at 284, 294 (citing *Doggett*, 505 U.S. at 657. If the

government deliberately delays a proceeding only to frustrate the defense, then such a delay is heavily weighed against the State. *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 531). If the State is merely negligent or the delay is due to an overcrowded court, the delay is weighed against the prosecution, however, to a lesser extent. *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 531). However, if the defendant asks for the delay, or agrees to the delay, then the defendant waives his speedy trial claim.<sup>17</sup> *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 529).

Here, the defense requested multiple continuances to prepare for trial. *See above*. The defense even moved to continue the trial date after Laine filed his two pro se motions to dismiss on “speedy trial” grounds. *See above*.

In contrast, the State sought one continuance. CP 206; CP Supp. (State’s Response to Motion to Dismiss at 2). Because Trooper Tilton, a material witness, was unavailable due to a prearranged leave of absence, the trial court found good cause supported a trial continuance. CP 206; CP Supp. (State’s Response to Motion to Dismiss at 2); RP (5/7/2010) at 2-3. *See also Barker*, 407 U.S. at 531 (a missing witness is a valid reason that justifies an appropriate delay). Further, the State did not intend to frustrate

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<sup>17</sup> However, the waiver must be made knowingly and voluntarily. *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 529).

the defense with its continuance, CP 157, and the court reset the trial date within the previously ordered time for trial period. CP 205; RP 5/7/2010) at 3.

Finally, the court only continued the trial date due to congestion on two occasions. CP 156, 195, 201-03; CP Supp. (Minutes 3/22/2010); RP (6/14/2010) at 2-4. Clallam County is relatively small. It has only three superior court judges and three superior courts to address its demanding criminal calendars. RP (6/14/2010) at 2-3. A continuance based on “overcrowded courts should be weighted less heavily” against the State. *See Barker*, 407 U.S. at 531. If court congestion demands a trial be continued, the presiding judge should make a detailed record regarding the number of courts and the availability of other judges or pro-tempore judges. *See State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009). The first time the judge continued the trial dated due to court congestion, it failed to make the appropriate record. However, the defense, with Laine’s assent, waived his March 22 trial date. CP 156, 202, 204. The second time the court continued the trial date due to court congestion, it noted the absence of its superior court judges and that no pro tempore judges were available. RP (6/14/2010) at 2-4. The defense did not oppose the court’s need to reschedule the trial due to congestion. RP (6/14/2010) at 3-4.

The continuances were reasonable under the circumstances. Furthermore, the defense requested/agreed to the vast majority of continuances, even after the parties addressed Laine's pro se motions to dismiss the charges for perceived speedy trial violations. This Court should hold the second factor does not support a speedy trial violation.

3. The defendant's demand for a speedy trial does not support his argument on appeal.

The third factor is the extent to which the defendant asserts his speedy trial right. The *Barker* court recognized a defendant is more likely to complain the more serious the deprivation. 407 U.S. at 531. "Therefore, the defendant's assertion of his speedy trial right is entitled to 'strong evidentiary weight.'" *Iniguez*, 167 Wn.2d at 284 (quoting *Barker*, 407 U.S. at 531-32). However, the appellate court is required to examine objectively the defendant's demand in light of his other conduct. *Iniguez*, 167 Wn.2d at 284 (citing *United States v. Loud Hawk*, 474 U.S. 302, 314, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986)). If the defendant fails to assert his right to a speedy trial, it is much more difficult to prove any violation. *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 532).

In *Iniguez*, the Washington Supreme Court noted that the *Iniguez* defendant asserted his speedy trial right at every stage of the proceeding:

Iniguez asserted his right at every continuance request. He objected, requested reduced bail, moved for a severance twice, and moved for a dismissal at least four times. Iniguez consistently asserted his speedy trial rights, and thus, this factor weighs against the State.

167 Wn.2d at 295. Nonetheless, the Supreme Court held that the defendant's right to a speedy trial was not violated. 167 Wn.2d at 295-96.

In the present case, Laine failed to assert his speedy trial right with the same fervor as the defendant in *Iniguez*. Laine filed two pro se motions to dismiss the criminal case against him because he mistakenly believed his right to a speedy trial had been violated. CP 156, 162-74. However, the first demand occurred two days after he voluntarily signed the order continuing the trial date. CP 156, 167-68, 201-03, 207-09. Additionally, the defense failed to note the improperly served/filed pro se demands for a hearing until one month after Laine drafted his second motion. CP 156, 162-74. Finally, Laine never made a speedy trial demand after the May 21 hearing and he required/agreed to continuance after this date. *See e.g.* CP 194, 197, 199-200; RP (6/14/2010) at 3-4; RP (6/15/2010) at 2-6; CP Supp. (Minutes 6/15/2010). Like *Iniguez*, this Court should hold that Laine's demand for a speedy trial does not tip the balance toward a speedy trial violation.

4. The delay did not prejudice the defendant's right to a "fair trial."

The fourth factor is prejudice to the defendant as a result of the pre-trial delay. Prejudice generally involves: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. *Iniguez*, 167 Wn.2d at 284-85, 295 (citing *Doggett*, 505 U.S. at 654; *Barker*, 407 U.S. at 532). A lengthy pretrial incarceration disadvantages a defendant because it often means job loss and a disruption to his/her family life. *Iniguez*, 167 Wn.2d at 284-85 (citing *Barker*, 407 U.S. at 532). It also has the practical effect of hampering his/her preparation of a defense because he cannot gather evidence or contact witnesses. *Iniguez*, 167 Wn.2d at 284-85 (citing *Barker*, 407 U.S. at 533).

In *Iniguez*, the Washington Supreme Court noted the defendant only “relie[d] on the presumption of prejudice and d[id] not try to show how the delay impaired his defense.” 167 Wn.2d at 295. Here, Laine also relies on the prejudice he believes follows a six month delay. He does not explain how his defense at trial was adversely impacted by the six-month delay. He conveniently overlooks the fact that (1) his attorney required numerous continuances to prepare his defense, and (2) the State failed to prove two of the three charges confronting him at trial. *See e.g.* CP 155-

56, 179, 194, 197, 199-200, 202, 209-10; RP (6/14/2010) at 3-4; RP (6/15/2010) at 2-6; CP Supp. (Minutes 2/19/2010); CP Supp. (Minutes 3/22/2010); CP Supp. (Minutes 6/15/2010).

There is nothing in the record to show oppressive pretrial incarceration. Here, Laine only spent six months in the custody of the Clallam County Jail. The U.S. Supreme Court did not consider a ten-month pretrial incarceration to be prejudicial, absent any actual impairment of the defense. *Barker*, 407 U.S. at 534.

There is nothing in the record to show the six-month delay caused Laine to become overly anxious or concerned. While he filed two pro se motions to dismiss for want of a speedy trial, he subsequently requested/agreed to additional continuances after filing these two demands. *See* CP 194, 197, 199-200; CP Supp. (Minutes 6/15/2010); RP (6/14/2010) at 3-4; RP (6/15/2010) at 2-6.

Finally there was little risk that the pre-trial delay impaired witnesses' memories. If there was any impairment, it was the State's case that was prejudiced because two of its witnesses struggled to reconcile their testimony with the statements they provided law enforcement following the incident. *See e.g.* RP (7/19/2010) at 65-70, 79-85; RP (7/20/2010) at 46-47, 53-54. The present six month delay does not support a speedy trial violation.

Because Laine cannot show any prejudice to his defense at trial, he relies entirely on the sentencing court's refusal to impose a prison DOSA based, in part, on the length of time he remained in custody prior to trial. *See* Brief of Appellant at 13-14. However, this argument fails.

Laine asked the superior court to continue the sentencing hearing. CP Supp. (Minutes 8/4/2010). Thus, he contributed to the delay that persisted after his guilty verdict.

The sentencing court refused to impose a prison DOSA because Laine was entitled to credit for the time served in the Clallam County Jail. Because Laine had already served 8 months, without the benefit of any treatment, the sentencing court believed he was a poor candidate for a DOSA (which required a 12.75 month period of confinement and treatment). However, this undesired result at sentencing had no impact on his ability to present a defense at trial. Laine has failed to cite any authority to support his argument that an adverse sentence constitutes the same prejudice that *Barker* and its progeny guards against.

On balance, the totality of the circumstances in the present case does not support a finding that a speedy trial violation occurred that would justify the extreme remedy of dismissal of the charges with prejudice. There was no speedy trial violation.

B. THE SUPERIOR COURT PROPERLY EXERCISED  
ITS DISCRETION WHEN IT DENIED THE  
DEFENDANT’S REQUEST FOR A DOSA.

Laine argues the sentencing court erred when it refused to impose a prison DOSA. *See* Brief of Appellant at 14-17. Laine apparently believes the court denied the DOSA because it believed he would only receive 3-4 months community supervision. *See* Brief of Appellant at 15-16. However, Laine mischaracterizes the record and fails to recognize the court refused to impose a DOSA because he was an inappropriate candidate for an alternative sentence. The argument fails.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, gives sentencing courts discretion to impose a DOSA sentence if the offender meets certain eligibility requirements and if the court determines that such a sentence is appropriate under the circumstances. RCW 9.94A.660(2); *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519, *review denied*, 136 Wn.2d 1044, 966 P.2d 901 (1998). A DOSA’s purpose is to provide drug offenders with “treatment-oriented sentences.” *Conners*, 90 Wn. App. at 53 (quoting Laws of 1995, ch. 108).

As a general rule, a sentencing judge’s decision whether to grant a DOSA is not reviewable on appeal. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); *Conners*, 90 Wn. App. at 53. However, this prohibition does

not bar a party from challenging legal errors or abuses of discretion such as a categorical refusal to consider whether a DOSA is appropriate. *Grayson*, Wn.2d at 338, 342. A sentencing court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Eligibility is only one step when the sentencing court exercises its discretion whether to grant a DOSA. *See Grayson*, 154 Wn.2d at 335. RCW 9.94A.660 provides that after a sentencing court finds the offender eligible, the court must still determine whether a DOSA is “appropriate”:

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section *and that the alternative sentence is appropriate*, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664.

RCW 9.94A.660 (emphasis added). Thus, the sentencing court was required to make a discretionary determination in light of Laine’s particular circumstances.

Here, the defense requested a prison based DOSA to address his drug addiction. RP (8/26/2010) at 16-19. Laine's standard range sentence was 22-29 months. RP (8/26/2010) at 14-15. Thus, pursuant to the statute, he was required to spend 12.75 months in confinement during which time he would receive treatment. RCW 9.94A.662(1)(a), .662(2). The sentencing court gave the following explanation when he denied the requested DOSA:

[Laine has] been in custody already 8 months. The most I could give him is 12 months under the prison based DOSA and then he's only on supervision for another 3 or 4 months according to that scheme because you take half the standard range, you split it. So it's really not going to accomplish -- you know, if we were early in the process here, you know, that might be a consideration. But it's not going to work here. So it's really not in my -- well, I guess it's in my ability to do but I don't think it's the proper thing to do here.

RP (8/26/2010) at 21. While the sentencing court stated Laine would only be on "supervision for another 3 or 4 months," the State submits that the judge was referencing the remaining period of confinement (and not accounting for earned early release). The sentencing correctly recognized Laine would not receive the full panoply of treatment required under RCW 9.94A.662(2).

Additionally, the sentencing court clearly believed Laine was not an appropriate candidate for a DOSA sentence. The sentencing court

recognized, and the defense affirmed, that Laine had failed in all his previous drug treatment efforts. RP (7/30/2010) at 3; RP (8/26/2010) at 22. Without a full 12.75 months in custody with the benefit of treatment, followed by 12.75 months of community supervision with continued treatment obligations, the sentencing court's concerns were supported by the record.

The record does not reflect a misapplication of the law or an error in discretion when considering Laine's DOSA request. The sentencing court did not abuse its discretion.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Laine argues he received ineffective assistance of counsel when his attorney failed to argue that the defendant would be under community supervision for more than 12 months after his release from confinement. *See* Brief of Appellant at 18-19. This argument fails.

To prevail on a claim of ineffective assistance of counsel, Laine must overcome the presumption of effective representation and demonstrate that (1) his lawyer's performance in failing to remind the sentencing court that the defendant would still serve 12.75 months on community custody was so deficient that he was deprived "counsel" for Sixth Amendment purposes, and (2) there is a reasonable probability that

the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thiefaul*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

Here, Laine cannot satisfy either prong of his ineffective assistance claim. He mistakenly assumes the sentencing court believed there would only be a 3-4 months of community custody. *See* Brief of Appellant at 16, 18-19. However, the defense understood that the sentencing court opposed the DOSA because (1) Laine would not receive treatment in a state correctional facility for a full 12.75 months, and (2) Laine was not an appropriate candidate for a DOSA because his track record demonstrated an inability to comply with treatment demands. Because defense counsel understood the court had not misapplied the statute, but only objected to Laine's release from confinement within 3-4 months without first having received treatment, she did not provide ineffective assistance when she failed to remind the court her client would also serve 12.75 months on community custody.<sup>18</sup>

Even if counsel should have reminded the sentencing court that the DOSA statute required 12.75 months of community custody, the court would have imposed the same sentence. The sentencing court believed

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<sup>18</sup> It's important to note that without first receiving treatment while in custody, Laine would quickly be subject to the same pressures in the community that caused him to fail in his previous attempts at treatment.

Laine was not an appropriate candidate for a DOSA. *See above*. Laine repeatedly failed to comply with previous treatment requirements when he was permitted to reside in the community. *See above*. The sentencing court may have imposed a DOSA if Laine could have served a full 12.75 months in custody while receiving treatment. However, this was not possible because he served 8 months in a county jail (without treatment) prior to his sentence. Counsel's failure to remind the court of the 12.75 months of community supervision did not prejudice the defense.

Laine relies on *State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002), to support his argument that he received ineffective assistance of counsel. However, *McGill* is easily distinguished.

In *State v. McGill*, remand was appropriate because the sentencing court erroneously believed it did not have the authority to depart from the standard range, and the court's comments indicated that it might do so if it knew it had such authority. 112 Wn. App. at 100.

Here, the sentencing court recognized it had the authority to impose a DOSA. RP (8/26/2010) at 21. However, it refused under the facts of the case and its knowledge of the defendant's track record. RP (7/30/2010) at 3; RP (8/26/2010) at 21-22. The sentencing court made a deliberate decision based upon the facts it confronted and the law it was asked to apply. Because the counsel effectively represented Laine at

sentencing, and the court would impose the same discretionary sentence upon remand, reversal is inappropriate. *See McGill*, 112 Wn. App. at 100.

**IV. CONCLUSION:**

For the reasons argued above, the State respectfully requests that this Court affirm Laine's conviction and sentence.

DATED this 26<sup>th</sup> day of JULY, 2011.

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