

NO. 49730-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

LLEWELYNE V. HOLCOMB,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

After Llewelyn Holcomb was arrested and unable to post bail, he repeatedly told the court, prosecutor, and his attorney that he wanted to begin his trial as soon as possible. His attorney prepared quickly, and when new information arose from the prosecution, he assured the court he did not need any further delay. But the prosecutor and judge remained perpetually unavailable or unprepared. The court set long continuances due to other trials or its own recesses without seeking another judge to preside. The prosecutor bungled the availability of police witnesses and started other trials even when told Mr. Holcomb's would take precedence. The extensive and unnecessary delays due to the judge's unavailability and prosecutor's mismanagement require dismissal under CrR 8.3, CrR 3.3, and the constitutional right to a speedy trial.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously denied Mr. Holcomb's motion to dismiss due to governmental delay and mismanagement in violation of due process and the requirements of CrR 8.3.

2. The court impermissibly continued the trial due to court congestion or a judge's unavailability, over Mr. Holcomb's objection, contrary to CrR 3.3.

3. The prosecution failed to bring Mr. Holcomb to trial within the requirements of CrR 3.3 and the right to a speedy trial under the Sixth Amendment and article I, section 22.

4. The court misunderstood its discretion to impose a sentence below the standard range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution's mismanagement of a case requires dismissal when it substantially delays the trial beyond speedy trial time. Mr. Holcomb's case was delayed for almost one year due to the prosecution's failure to timely investigate and prepare its case, over his clear objection. Where Mr. Holcomb was repeatedly denied his right to a speedy trial due to governmental mismanagement, should the court have dismissed the case?

2. A judge may not continue a case based on judicial availability without making a clear record that no alternative judge is available and must reset the case in as short a time as possible. Here,

the judge repeatedly continued the case due to her own unavailability without meaningfully trying to locate another judge. Some delays were wholly unexplained and one delay lasted one month because the court set a “recess.” Does extensive delay for courtroom congestion that repeatedly occurred despite Mr. Holcomb’s objection violate CrR 3.3?

3. An accused person’s right to a speedy trial is protected by CrR 3.3 and the state and federal constitutions. The prosecution’s lack of preparation and mismanagement of this case and its case load generally caused extended delays despite Mr. Holcomb’s clear pronouncements that he wanted his trial to begin as soon as possible. Was Mr. Holcomb denied his right to a speedy trial?

4. A court’s statutory sentencing authority includes the power to impose a sentence below the standard range if a mitigating factor offers substantial and compelling reasons for a lower sentence. The court expressed a belief that the imposition of multiple deadly weapon enhancements led to a disproportionate sentence under the Sentencing Reform Act, but believed it lacked authority to decrease Mr. Holcomb’s sentence. Did the court misunderstand its authority to impose an exceptional sentence?

D. STATEMENT OF THE CASE.

On the night of October 6, 2015, Summerlove McClish drank “heavily” with her childhood friend Heidi Campbell, Heidi’s husband Phillip, and John McMains, a sometime boyfriend of Ms. McClish. 9/14RP 651-52, 678, 745; 9/15RP 834.<sup>1</sup> Ms. McClish woke up from sleeping in a living room chair and saw a person outside the home. 9/15RP 846-49. She initially thought this person might be Llewelyn Holcomb, her former boyfriend, but later testified he was not the person. 9RP 868-69. All other adults in the house were asleep, having passed out from alcohol consumption. 9/14RP 653-54, 707, 745; 9/15RP 842-43.

Ms. McClish heard what sounded like gunshots and called 911. 9/15RP 851-52. Police discovered multiple gunshots fired from outside the home into a side corner, near the bedroom where Mr. McMains remained fast asleep, unaware anything had occurred. 9/13RP 593-98.

Because Ms. McClish initially suspected Mr. Holcomb, two officers drove to his house. 9/13RP 424. They saw a car pull up and a person exit into the home. 9/13RP 441. They did not see the person’s

face or identify Mr. Holcomb. 9/13RP 442. When Mr. Holcomb later stepped outside the house with his dogs, the police arrested him. 9/13RP 444-45. He denied having been anywhere, and said his friend Steven had borrowed his car and dropped it off. 9/13RP 446-47.

Police searched his home for a gun and did not find one. 9/13RP 535, 542. They found some shell casings in a junk drawer in the kitchen. 9/13RP 537-38; Exs. 73, 74. This drawer also contained items belonging to Ms. McClish, who had lived in the home and owned guns. 6/28RP 216; 9/13RP 552. Later, a ballistics examiner claimed the casings had “a great deal of correspondence with” those found at the scene. 9/13RP 575.

Mr. Holcomb was charged with two counts of first degree assault. CP 43-44. The prosecution added one charge of tampering with a witness and three charges of violating a no-contact order based on recorded phone calls Mr. Holcomb had with Ms. McClish while Mr. Holcomb was in jail. CP 44-46.

Mr. Holcomb remained in jail, unable to post bail. He repeatedly insisted he wanted to have his trial as soon as possible. Beginning

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<sup>1</sup> The verbatim report of proceedings (RP) is referred to by the month

January 21, 2016, Mr. Holcomb objected to any trial continuances and maintained these objections each time the court announced a delay. 1/22RP 4-5; 2/26RP 4, 6; 3/10RP 4; 3/24RP 6; 4/28RP 5; 6/1RP 3; 6/2RP 5; 6/16RP 4-5; 6/21RP 3; 7/18/16RP 5; 9/7RP 4; 9/8RP 10.

The court refused to reduce his bail as the trial delays mounted. 4/28RP 13, 15. Despite Mr. Holcomb's unwavering insistence that his trial begin as soon as possible, and his attorney's similarly voiced readiness to begin the trial, trial testimony did not start until September 13, 2016, over 11 months from Mr. Holcomb's arrest. 9/13RP 423.

Before trial testimony started, the court decided it would "bifurcate" the case, start some pretrial motions in late June 2016, then recess the case repeatedly due to its own scheduling needs involving other cases or vacations. 6/23RP 4. Mr. Holcomb objected to starting and stopping the trial proceedings. 6/2RP 5.

After the prosecutor asked to again delay the trial so he could attend an out-of-state conference in mid-September, Mr. Holcomb agreed to waive his right to a jury trial so the proceedings could begin. 9/12RP 290-91, 299-300. He also moved to dismiss the prosecution due

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and date of the hearing. All hearings occurred in 2016.

to the extensive, foreseeable, non-emergency delay. 9/12RP 306. The court denied the motion to dismiss. 9/12RP 311. After a bench trial, the court convicted Mr. Holcomb of one count of second degree assault and one count of first degree assault, both with firearm enhancements, one count of tampering with a witness, and three counts of violation of a no-contact order. CP 47-55.

The court imposed a standard range sentence of 216 months, which was the low end of the standard range, but said it was unable to impose a lower sentence due to the mandatory nature of firearm enhancements. CP 64; 12/1RP 13.

The procedural history is explained below.

E. ARGUMENT.

**1. The prosecution's excessive mismanagement of its case and the court's unjustified trial continuances for issues of court congestion deprived Mr. Holcomb of his right to a speedy trial and fair treatment.**

*a. Governmental mismanagement may deny an accused person the right to a speedy and fair trial.*

An accused person's right to a fair trial is protected by the guarantees of due process of law, effective assistance of counsel, and a speedy trial. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct.

2095, 95 L.Ed.2d 697 (1987); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 22. Article I, section 10 further dictates that “[j]ustice in all cases shall be administered . . . without unnecessary delay.”

Because an accused person has the constitutional rights to effective assistance of counsel and a speedy trial, the prosecution cannot force a person choose between these rights. *State v. Brooks*, 149 Wn.App. 373, 387, 203 P.3d 397 (2009).

Court rules enforce these constitutional rights. Simple mismanagement of cases by the prosecution requires dismissal of the charges if it causes actual prejudice to the defense, without any requirement that the prosecution acted with nefarious intent. CrR 8.3 (b).<sup>2</sup> “CrR 8.3 exists to see that one charged with crime is *fairly treated*.” *State v. Michielli*, 132 Wn.2d 229, 245-46, 937 P.2d 587 (1997) (emphasis in original, internal citation omitted).

Courts further protect the accused’s speedy trial rights by strictly enforcing CrR 3.3. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d

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<sup>2</sup> CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.

1024 (2009). “[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.” *Id.*, quoting *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976). “Failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice.” *State v. Raschka*, 124 Wn.App. 103, 112, 100 P.3d 339 (2004) (citing *State v. Adamski*, 111 Wn.2d 574, 582, 761 P.2d 621 (1988)).

In the case at bar, mismanagement by the prosecution and court deprived Mr. Holcomb of his right to a speedy and fair trial, despite Mr. Holcomb’s repeated insistence on proceeding to trial immediately from the start and his objections to unnecessary delays and piecemeal decision-making.

*b. The court improperly delayed the trial due to court congestion and the judge’s extended, non-emergency recesses.*

Court congestion does not justify a delay beyond the speedy trial period. *Kenyon*, 167 Wn.2d at 137. If congestion arises, the court must make concerted efforts to find another judge, including a pro tem judge,

and if none is found, it must definitively document its efforts on the record. *Id.*

The court must “record details of the congestion, such as how many courtrooms were actually in use” and “the availability of visiting judges” to hear criminal cases. *Id.* The court may allow a continuance for court congestion only when “it carefully makes a record of the unavailability of judges and courtrooms and of the availability of judges pro tempore.” *Id.*

*Kenyon* arose in Mason County, where only two judges sat in superior court. *Id.* at 134. The assigned judge continued the case because he was presiding over another trial and the county’s second judge was on vacation. *Id.* The Supreme Court ruled the court’s efforts were inadequate to justify delay under CrR 3.3. *Id.* at 137. The mere unavailability of one of the two judges did not suffice because the court must also make efforts to bring in a visiting or pro tem judge, and document those efforts on the record, before continuing the case due to judicial unavailability.

The Pierce County judge continued Mr. Holcomb’s trial several times because the judge herself was unavailable, without making and

documenting efforts to locate another available judge. *See, e.g.*, 3/24RP 6; 4/28RP 12; 6/23RP 4; 9/8RP 12; CP 34 (August 8, 2016 continuance for 30 days entered without hearing or explanation). On the few occasions the judge claimed to have inquired into other judges' availability, she did not explain who she contacted, when other judges might be free, or what number of courtrooms could be used. 3/24RP 6; 6/23RP 4. The judge never checked for a pro tem judge even though *Kenyon* explains the court system purposefully expanded pro tem judge's available so courts could meet their speedy trial obligations. 167 Wn.2d at 138-39.

Pierce County has 22 judicial departments for elected judges, as well as eight full-time superior court commissioners, an established visiting judge program, and pro tem judges.<sup>3</sup> RCW 2.08.150 (explaining authority of visiting judge); RCW 2.08.180 (permitting pro tem judges as any member of the bar upon agreement).<sup>4</sup> RCW 2.08.061 allots Pierce County 24 judges for superior court, indicating the county has two vacancies.

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<sup>3</sup> *See* Pierce County Official Website, Judicial Officers, available at: <https://www.co.pierce.wa.us/1060/Judicial-Officers>

The court's minimal cursory claims that it checked for other judges does not constitute the careful review dictated by *Kenyon* and defies logic as given the likelihood a qualified judicial officer could be found during the many times the preassigned judge was unavailable.

*i. March 24, 2016 delay for court to take another trial.*

On March 24, 2016, the court announced it was “starting the Warren case,” and noted it would be “taking another trial instead of this one.” 3/24RP 3.<sup>5</sup> The court said, “I did make an inquiry to see if we could send the case to another courtroom. None were available to take the case. They all are also in trial.” 3/24RP 6. The court did not indicate who it contacted, the length of other judges’ unavailability, the numbers of courtrooms, or the possibility of a visiting or pro tem judge. *Id.*

The court intended to continue Mr. Holcomb’s case from March to June because it had other cases and obligations, explaining, “Green starts on the 25<sup>th</sup>” of April, then an older murder case “starts on May

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<sup>4</sup> See Washington Courts, Elected Judges Pro Tempore, available at: [https://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.protem&yr=16](https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.protem&yr=16). (listing elected judges available as pro tem judges in 2016)

5<sup>th</sup>, and then I have a conference . . . for two days. Then there's a holiday, a recess, and then I come back June 1<sup>st</sup>." 3/24RP 6-7.

Mr. Holcomb objected to a delay of over two months. 3/24RP 3, 7. The court said its "first available date" was April 21<sup>st</sup>, but counsel was away that one day at a conference, so the court set the trial for April 28, 2017. *Id.* at 7-8.

The bulk of this delay was based on court congestion, not the requests of the prosecutor or defense. Although the prosecutor also asked for "a brief continuance" to respond to a CrR 3.6 motion, the prosecutor only said she was not ready "today." 3/24RP 3. The prosecutor asked for the time allocated by court rule; presumably referring to CR 6(d)'s rule that a motion should be filed five days before a hearing and opposing affidavits no later than one day prior. CR (6)(d); CrR 8.1 (making CR 6 applicable to criminal cases). The prosecutor sought only a brief continuance, not the 34-day delay the

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<sup>5</sup> The prosecutor also asked for "a brief continuance" to respond to the CrR 3.6 motion and the detective "isn't available today." 3/24RP 3. The written order extending the trial indicates time was needed for forensic testing and because the detective was not available next week, but the defense did not ask for any continuance for testing and the detective was only unavailable "today." CP 28; 3/24RP 3.

court ordered to suit its own schedule, constituting an unjustified delay. *Kenyon*, 167 Wn.2d at 137.

*ii. April 28, 2016 delay extended for court unavailability.*

This continuance was nominally at the prosecutor's request due to unavailable witnesses, but the length of the continuance rested on the judge's availability. The prosecution sought a continuance until Officer Nettleton returned from vacation on May 17, 2016, but the court set the trial date as June 1, 2016. 4/28RP 11.

Mr. Holcomb clearly stated his objection on the record and asked the judge to make any continuance "as short as possible." 4/28RP 5-7. He further noted that continuing the case to July, when another officer would return from leave, would likely trigger more delay because the court's department "is on recess" during the first two weeks of July. 4/28RP 7.

The court selected June 1 solely because it had another prescheduled case and "I anticipate being free to take Holcomb on the 1<sup>st</sup>." 4/28RP 12. The court called it "the first date that appears to be open at this juncture," on the court's calendar. *Id.* The court did not

check the availability of other judges before June 1<sup>st</sup>, as it is required to do. *See Kenyon*, 167 Wn.2d at 137.

The officer's May vacation would not have required postponing the trial if the court had simply continued the case for the brief continuance the prosecution requested in late March, rather than one month based on the court's own scheduling needs. At the least, two weeks of delay were caused by court congestion alone.

*iii. June 2016 delay due to court congestion.*

On June 2, 2016, over Mr. Holcomb's objection, the court directed the prosecutor to begin a different trial in its courtroom rather than starting Mr. Holcomb's case. 6/2/RP 6-7. The court set Mr. Holcomb's case for June 16<sup>th</sup>, to see if the other trial was finished. 6/2RP 7. The other trial was not completed until June 22, 2016.

On June 21, 2016, Mr. Holcomb again objected to delays. 6/21RP 3. The court continued the trial until June 23, 2016, because the trial currently under way would be completed by then. *Id.* Acknowledging that further continuances to Mr. Holcomb's case would be unacceptable, the court *sua sponte* stated, "I intend to start Holcomb and then recess Holcomb. It's going to have to work with my

schedule.” 6/21RP 3-4. “It will be done in parts until it gets done.”

6/21RP 4.

On June 23, 2016, the court announced this “will be a bifurcated trial” and could be interrupted by another trial in an older case that had not yet started. 6/23RP 4. The court also said,

For the record, we’ve made numerous attempts to reassign this case to CDPJ. I am available today. We will start the case. We can recess it to accommodate various schedules as we move on.

6/23RP 4.

The court did not inquire into another judge’s availability by the process *Kenyon* requires. 167 Wn.2d at 137. It did not carefully review and explain the availability of other judges who could conduct the trial promptly as opposed to a piecemeal fashion over many months, even though defense counsel objected to this bifurcation and opposed the long delay that would likely ensue. 6/2RP 5. Even if one of the other 21 judges were not available that day, another elected or pro tem judge would have been far available sooner and could handle the trial without significant interruptions, unlike the assigned judge.

The court started the suppression hearing on June 23, and held several days of pre-trial proceedings on June 27, 28, and 29, 2016. But

in late June, the court simply recessed the case until July 18<sup>th</sup>, without ruling on the motions to suppress or explaining the necessity for this further delay. 6/29RP 273, 275.

The court may have been waiting for the prosecution to call its final witness for the CrR 3.6 hearing, Officer Thompson, who had been present at the time of Mr. Holcomb's arrest and was on a military leave of absence that was expected to end by July 1<sup>st</sup>. The prosecution had previously promised Mr. Thompson would be available on June 27, then said he could come on July 1, but Mr. Thompson never appeared in court. 9/12RP 318-19.

*iv. Delay in July, August, and September for unexplained court recesses.*

Scheduled, non-emergency and foreseeable court recesses gave the prosecution ten more weeks of pretrial delay, from June 29 to September 7, 2017, without needing to demonstrate good cause to further continue the trial.

The court had a scheduled "recess" during the first two weeks of July. 4/28RP 7. And while another one-week recess was planned in early August, a different judge informed the parties on August 8th that the court's "recess" was extended until September 7, 2016, without any

on-the-record proceeding or finding of good cause. CP 34, 101. The judge admitted her courtroom was “in recess for the entire month of August.” 9/8RP 12.

On July 18, 2016, the prosecutor told the court that he was about to start another case that was older than Mr. Holcomb’s. 7/18RP 3-4. This other trial was “set to start,” but had not begun. *Id.* at 4. Even though the court had previously set Mr. Holcomb’s trial to resume on July 18<sup>th</sup>, the court permitted the prosecutor to start this older case. 6/29RP 273, 275; 7/18RP 7. The court ruled it would let the prosecutor’s other case “take precedence” even though Mr. Holcomb’s case was technically in “recess mode” awaiting the conclusion of pretrial motions with jury selection expected to begin. 6/29RP 273; 7/18RP 7. Rescheduling a case “for court congestion and unavailability of the government . . . does not qualify as an excluded period under CrR 3.3(e).” *State v. Lackey*, 153 Wn. App. 791, 799, 223 P.3d 1215 (2009).

On July 22, 2016, the prosecutor asked the court to authorize a deposition of Deputy Oetting, because this deputy had a planned vacation for the month of August that the prosecutor just learned about.

7/22RP 278-79. The court refused, finding the prosecutor had not met the requirements of ER 804, but the court's extended "recess" gave the prosecution even more delay than it sought. *Id.* at 284.

In August, the court was "in recess" for the entire month and had no on-the-record hearings. CP 34; 9/8RP 12.

On September 7 and 8, 2016, the prosecutor was sick and did not appear in court. 9/7RP 3; 9/8RP 8. On September 8, 2016, the court expressed "frustration" with "the way this case had been handled by the State." 9/8RP 12. On September 12, the court heard argument on the motions to suppress and trial started the following day.

Mr. Holcomb's speedy trial rights were violated by these extensive delays over Mr. Holcomb's repeated objection. The delay predicated on court congestion violates speedy trial. *Kenyon*, 167 Wn.2d at 137. The court did not adequately ensure no other judge was available. *Id.* It did not seek a pro tem judge or detail the obligations of other judges, despite knowing of its own limited availability due to scheduled holidays and of Mr. Holcomb's plainly stated desire to begin trial as soon as possible. The court violated the plain dictates of *Kenyon*

by failing to meaningfully engage in efforts to locate an available judge over the course of many months.

*c. The court's lengthy recesses subverted the time for trial rules.*

CrR 3.3 contains no provisions for a court to simply hold a pretrial hearing and then postpone the case for weeks or months free from the constraints of CrR 3.3 and without justifying the delay under CrR 3.3's strict rules. *State v. Andrews*, 66 Wn. App. 804, 810, 832 P.2d 1373 (1992).

Generally, a trial begins for purposes of the CrR 3.3 (c)(1) calculation when the case is called for trial and the court "hears and disposes of preliminary motions." *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996). In *Carson*, the trial commenced for speedy trial purposes when the court called the case for trial, denied a defense motion to continue, and set the case over for the next day when trial actually began in earnest. *Id.* at 810, 820.

In *Andrews*, the trial commenced under CrR 3.3 when the court ruled on an initial motion to exclude witnesses, even though the court had to recess for a few days due to an unexpected dental emergency. 66 Wn. App. at 812-13.

Although *Andrews* permitted a brief recess after hearing preliminary motions under CrR 3.3, it noted,

Had the State taken advantage of the rule to justify an undue delay of the remainder of the trial, a different case might be presented.

*Id.* at 811. *Andrews* also found it important that in that case “it [was not] the design of the State that resulted in the trial not proceeding immediately after the first preliminary motion.” *Id.* Here, however, extended delay was precisely the aim of the prosecution and court. Due to the judge’s vacations, one witness’s military leave who the prosecution later insisted it did not need for the suppression hearing, and other trials the prosecution choose to start during Mr. Holcomb’s trial proceedings, the court continued the case for an extended time without legitimate justification.

The court subverted CrR 3.3’s time for trial rules by recessing from June until September, implicitly treating the case as if trial had started, and thereby creating an open-ended continuance, contrary to CrR 3.3(e) and (f)’s strict rules limiting the court’s authority to grant continuances and requiring constant reassessment of the necessity or prejudice involved in a continuance. Having decided to simply start a

few days of pretrial proceedings and then recess the case for several months, despite Mr. Holcomb's in-custody status and his plainly voiced desire for a speedy trial, the court exceeded its authority by recessing the case outside of the confines of CrR 3.3. The court took advantage of the few days of pretrial hearings to obviate the court congestion issue that would have otherwise required dismissal under CrR 3.3(h).

CrR 3.3 makes the court ultimately responsible for ensuring a defendant receives a timely trial under CrR 3.3. *Kenyon*, 167 Wn.2d at 136; CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."). There is no incentive to comply with the provisions of CrR 3.3 if an indefinite recess is available to avoid the rule altogether. The procedure employed in this case not only eliminates the protections of CrR 3.3, it undermines the integrity of the process and requires reversal. *See Kenyon*, 167 Wn.2d at 136.

*d. The prosecution's excessive delay violated speedy trial and constituted substantial mismanagement.*

*i. The prosecution mismanaged its police witnesses and lacked valid reasons to substantially delay the trial.*

The prosecution is required to exercise due diligence at the outset of its case, under CrR 3.3, CrR 8.3, and the constitutional rights to a fair, speedy trial on which these court rules are based.

This diligence includes ascertaining witnesses' availability. *See State v. Wake*, 56 Wn.App. 472, 475-76, 783 P.3d 1131 (1989). If a material witness will be unavailable, the prosecution may try to accelerate the trial date or make other accommodations, but it cannot indefinitely extend a case due to some witness scheduling issues. *Id.* at 475-76 & n.3.

Under CrR 3.3(f)(2), a court may grant a continuance where a material witness is unavailable if (1) there is a valid reason for the unavailability, (2) the witness will be available within a reasonable time frame, and (3) the defendant incurs no substantial prejudice from the continuance. *State v. Nguyen*, 68 Wn.App. 906, 914, 847 P.2d 936 (1993). The prosecution must act with due diligence in securing the witness's presence. *Id.* at 915-16.

Issuing a subpoena to a witness “is a critical factor in granting a continuance.” *Wake*, 56 Wn. App. at 476. When the prosecution does not issue a subpoena, it does not establish that the witness could have been available if the State supplied sufficient notice. *Id.* at 475-76. With a subpoena, alternative arrangements could be made or ruled out as impossible. *Id.* But without a subpoena, the prosecution has not established the witness’s unavailability.

The bulk of the prosecution’s delay centered on Officer Thompson, yet he was never subpoenaed as a witness.<sup>6</sup> The prosecutor did not believe Officer Thompson was a necessary witness until shortly before pre-trial hearings started, when he stated the officer was important to the case; but he later equivocated on the need for this witness; and finally he insisted he was completely confident he did not need Officer Thompson. 4/28RP 4 (Thompson on military leave until July 1, but “I could make the case work” without him); 6/2RP 3 (“just learned . . . last Friday” Thompson was necessary); 6/16RP 4 (“I don’t believe Aaron Thompson would be necessary for the 3.6, and so I don’t

think he would, really, be a basis for a continuance”); 9/12RP 293-94 (Thompson unavailable but “I’m confident I can make my argument without him”).

At best, Officer Thompson was a minimally relevant witness. Officers Thompson and Oetting drove to Mr. Holcomb’s home after the allegation he fired shots at another person’s home. 6/23RP 17. They saw a car park, the driver exit in the dark, and watched the house to see if anything else happened. 6/23RP 23, 31-32. The information the prosecutor learned “last Friday” was that Deputy Oetting had momentarily stopped watching Mr. Holcomb’s house to get rifles from his car. 6/2RP 3-4. The prosecutor wanted to call Officer Thompson for the suppression hearing because he had presumably watched Mr. Holcomb’s home without interruption. 6/2RP 2-3. It does not appear that prosecutor had interviewed Officer Thompson when determining his importance to the case.

Officer Thompson ultimately never testified and the prosecutor said he did not need him. 9/12RP 294. The prosecutor never explained

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<sup>6</sup> The court’s docket contains many returns on subpoenas, but none are addressed to Officer Thompson. Should the court or opposing counsel request further information, counsel will designate the subpoenas contained in the court

what the officer's military leave entailed, including whether the officer remained in the state, when the prosecution received notice of the leave, or if the officer could attend a court proceeding at some point during the leave. The prosecutor did not try to arrange a deposition for Officer Thompson, unlike his efforts for Deputy Oetting when he announced a vacation in August. 7/22RP 279. Despite being on military leave, Officer Thompson got married in September and was away on a honeymoon on the September 12, 2016 court date, demonstrating he was not in a remote location or totally inaccessible. 9/12RP 291.

The ambiguous, extended leave of an officer who was of dubious importance to the case without evidence that the prosecution formally advised the officer of the necessity of his testimony in writing, by subpoena, does not justify months of continuances for his testimony. By June 16, 2016, the prosecutor no longer thought this officer's testimony was needed for the pre-trial suppression motion, yet the court continued the case until September, seemingly due to his absence. 6/16RP 4; 9/12RP 294.

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docket to show they were not addressed to Officer Thompson.

This mismanagement of a police witness delayed Mr. Holcomb's trial far beyond the speedy trial time, demonstrating prejudicial mismanagement. *See Brooks*, 149 Wn. App. at 391 (delayed discovery preventing counsel from proceeding to trial within original speedy trial time constitutes prejudicial mismanagement under CrR 8.3).

*ii. The prosecution's mismanagement of its witnesses and case load violated CrR 8.3 and CrR 3.3.*

A continuance is manifestly unreasonable if the prosecution's lack of preparation stems from mismanagement and lack of diligent preparation. *State v. Saunders*, 153 Wn. App. 209, 220-21, 220 P.3d 1238 (2009).

Despite being on the verge of starting trial in March and April, the prosecution did not interview its witnesses and understand which officers were necessary. It learned of police officers' unavailability only when it was too late to change plans or make alternative arrangements. The charges themselves rested largely on the testimony of the people present during the incident, and these eyewitnesses remained available – it was police officers who had scheduling issues but they were peripheral witnesses supplying background information.

Some delays arose because the prosecutor was in trial in other matters. The unavailability of counsel may constitute unforeseen or unavoidable circumstances, warranting an extension under CrR 3.3(e)(8).

But this excuse does not apply when the other trials were foreseeable and avoidable. *Id.* In June and July, the prosecutor chose to start two other trials rather than Mr. Holcomb's trial.

In June, Mr. Holcomb was ready and available. Without explanation, the court directed the prosecutor to try a different case. This was not an unavoidable circumstance. The prosecutor had previously said he would seek a replacement prosecutor for this case but did not do so. 4/28RP 12. The assigned prosecutor had just started this case, replacing the original prosecutor in April, showing the particular prosecutor had no longstanding personal knowledge that rendered him more qualified than another prosecutor. 4/28RP 8.

The prosecutor was also involved in another trial in July. When the prosecutor mentioned this other case in June, the court said Mr. Holcomb's case "will take precedence." 6/23RP 3-4. But on July 18<sup>th</sup>, the court issued the opposite ruling, declaring this other trial would

“take precedence” over Mr. Holcomb’s because it was older, even though the other trial had not started. 7/18RP 7.

As time wore on, the court grew impatient with the prosecution’s mismanagement. In September, it expressed “frustration” with the prosecution, stating it had “numerous concerns” about the prosecution’s handling of Mr. Holcomb’s case. 9/8RP 12. It criticized the prosecution for claiming to be ready but then several times arriving in court with another case to try first. *Id.*

*e. The substantial delay requires dismissal.*

The excessive and unjustified delay in Mr. Holcomb’s case was a product of both governmental and court mismanagement, prejudicing Mr. Holcomb and violating his rights under CrR 3.3 and CrR 8.3.

The remedy for violating CrR 3.3 is dismissal, without requiring the accused show prejudice. The court and prosecution violated Mr. Holcomb’s right to a speedy trial within the 60 days allotted for a person held in jail pending trial.

Court congestion does not satisfy CrR 3.3 unless the court makes and carefully documents the efforts to obtain a replacement. Here, the preassigned judge did not make these efforts, continuing the

case in March, April, May, and June due to its own unavailability, and in July, August, and early September due to its own vacation. A few phone calls on a few isolated occasions asking about the availability of another elected judge does not satisfy the court's obligation, particularly given the excessive delay that resulted and in light of Mr. Holcomb's clearly expressed desire to begin his trial as soon as possible.

Witness unavailability also does not satisfy delaying the trial under CrR 3.3 when the witness is not material, has not been formally subpoenaed, and the prosecution has not made timely, diligent efforts to secure his presence.

Finally, the prosecutor's other trials do not justify CrR 3.3 delay when the prosecutor was equally available but simply opted to try other cases, even when in the middle of litigating Mr. Holcomb's pretrial motions.

Because the prosecution also mismanaged the case, CrR 8.3 separately mandates dismissal. The court denied Mr. Holcomb's motion to dismiss due to governmental mismanagement and excessive delay, explaining that the prosecution had not acted in bad faith. 9/12RP 311-

12. But “simple mismanagement is sufficient” under CrR 8.3, the prosecution’s purpose need not be evil or dishonest. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

Mr. Holcomb was prejudiced under CrR 8.3 because his trial was unjustifiably delayed far beyond speedy trial. The delays caused him to forgo his right to a jury trial simply to avoid further postponement. Dismissal is appropriate based on the prejudice to Mr. Holcomb’s loss of his right to a speedy trial, over his repeated objections. *Brooks*, 149 Wn. App. at 387; *Michielli*, 132 Wn.2d at 245-46.

*f. Dismissal is also required because the delay violates the constitutional right to a speedy trial.*

The right to “a speedy trial,” guaranteed by the Sixth Amendment and article I, section 22, is “as fundamental as any of the rights secured by the Sixth Amendment.” *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009), quoting *Barker v. Wingo*, 407 U.S. 514, 515 n.2, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). While the constitutional and court rule guarantees of speedy trial are related, the constitutional right is “both narrower and broader than the corresponding” right by court rule. *United States v. Gearhart*, 576 F.3d 459, 462-63 (7<sup>th</sup> Cir.

2009). Thus, “a violation of one [right] may be found without a violation of the other.” *United States v. White*, 443 F.3d 582, 588 (7th Cir.2006).

There is no “fixed point” in time at which a speedy trial violation occurs in every case. “A defendant has no duty to bring himself to trial; the State has that duty.” *Barker*, 407 U.S. at 527. But, some cases require more time to prepare with reasonable diligence. *Doggett v. United States*, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

The delay of almost one year to begin trial while Mr. Holcomb waited in jail is presumptively prejudicial. *Iniguez*, 167 Wn.2d at 283 (delay of eight months crosses threshold from ordinary to presumptively prejudicial). The prejudice is further established by examining the four *Barker* factors, (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his speedy trial right; and (4) the prejudice caused the accused by waiting for trial for a long time. *Id.*

The length of delay was over 11 months, as the trial began on September 13, 2016. While CrR 3.3 may be satisfied when the court

calls the case to trial and hears pretrial motions, the trial starts for Sixth Amendment purposes with the start of trial itself, not preliminary motions. *United States v. Young*, 657 F.3d 408, 416 (6<sup>th</sup> Cir. 2011).

Mr. Holcomb's attorney insisted that he was ready to begin trial by March 10<sup>th</sup>, and consistently pressed for the earliest possible date.

The trial court agreed the case was "not one of the more complex" type of cases. 9/12RP 311 Even though the charges were serious, the issues were simply about what eyewitnesses saw or heard connecting Mr. Holcomb to the gun shots visible on the outside of the house. Defense counsel's readiness to proceed further indicates the case did not require any preparation time beyond the first few months of time after charging. *See* 3/10RP 4, 6; 4/28RP (despite new discovery, defense ready and "not asking for a continuance").

The reason for the delay was the prosecution's mismanagement of witnesses and the court's other trials scheduled, without pursuing alternatives such as other judges who could hear the case. This delay was not due to the defense.

Mr. Holcomb plainly satisfied his obligation to assert his rights. He only agreed to the first continuance in November 2015 and objected

to every other one. CP 7, 8, 9, 28, 2931, 32, 33, 34, 36, 88. His attorney asked for one “brief” continuance on February 26, and did not object to the prosecution’s request on January 22, noting a few outstanding interviews, but by March 3, 2016, he assured the court that discovery was essentially complete and the defense did not wish further delay.

The final *Barker* factor is the prejudice caused by waiting for trial. Prejudice includes pretrial incarceration.

The primary driving force of the accused person’s right to a speedy trial is the oppressive nature of pretrial incarceration. *Doggett*, 505 U.S. at 659 (Thomas, J., dissenting). The jailed defendant cannot gather evidence or witnesses to aid in his defense. *Barker*, 407 U.S. at 533. He suffers prejudice from the anxiety of unresolved charges, job loss, and deprivation of a person’s private life. *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971) (criminal charges “may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”).

The delay also impaired Mr. Holcomb’s defense. Prejudice occurs when the defendant has a lessened ability to probe the details of

the witnesses' recollection. *Graham*, 128 F.3d at 376. Loss of memory" is hard to prove, "because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532.

He had to forgo the opportunity to question Officer Thompson before the court decided his motions to suppress, even though this officer was the only officer in a position to verify Mr. Holcomb's statement that another person drove his car on the night of the shooting. He waived his right to trial by jury after experiencing the long and unnecessary pretrial delay. 9/12RP 304-06. Giving up his bedrock right to trial by jury left him trying to convince the judge to disbelieve the prosecution's witnesses, which would have had better odds of prevailing if the prosecution had to prove the credibility of its witnesses to 12 unanimous jurors. Given the extreme drunkenness of all adult witnesses, the prosecution would have had a far harder time persuading 12 jurors beyond a reasonable doubt of Mr. Holcomb's involvement and intent. Mr. Holcomb only decided to waive his right to a jury trial after experiencing this extensive delay and when confronted by a prosecutor's request for further delay so he could attend a conference, thus it directly impacted his decision to waive his right to a jury trial,

his ability to contest the search of his home, and his ability to demonstrate that another person drove his car on the night of the incident. 9/12RP 290-95, 299.

Balancing these factors shows that Mr. Holcomb was denied his right to a speedy trial, requiring dismissal.

**2. Alternatively the court misunderstood its sentencing discretion to craft an exceptional term below the standard range.**

*a. The court abuses its discretion when it misunderstands its sentencing authority.*

The Sentencing Reform Act “seeks to ensure” the punishment is “proportionate to the seriousness of the offense and the offender’s criminal history.” *State v. McFarland*, \_ Wn.2d \_, \_ P. 3d \_, 2017 WL 3381983, \*2 (2017) (quoting RCW 9.94A.010(1)). While the SRA provides structures the presumptive sentence for a court to impose, it “does not eliminate discretionary decisions” by sentencing courts. *Id.*, citing RCW 9.94A.010.

Under the SRA, a court may impose a lesser sentence when the court identifies substantial and compelling reasons for doing so under the statutory scheme. *Id.*; RCW 9.94A.535; *see also In re Mulholland*, 161 Wn.2d 322, 329–30, 166 P.3d 677 (2007). “While no defendant is

entitled to an exceptional sentence . . . , every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111P.3d 1183 (2005) (quoted in *Mulholland*, 161 Wn.2d at 34).

In *Mulholland*, the court held that the SRA gives the trial court discretion to impose a mitigated sentence of concurrent terms for serious violent offenses, even though RCW 9.94A.589(1)(b) states that sentences for these offenses must be consecutive. 161 Wn.2d at 329-31. The court further held that the trial court’s erroneous belief it lacked discretion to impose concurrent sentences constituted a fundamental defect justifying collateral relief in that case. *Id.* at 332-33.

In *McFarland*, the court similarly held that despite statutory language indicating firearms offenses shall be punished consecutively, the court retains discretion to depart from the standard range. 2017 WL 3381983, \* 2. The court emphasized that no statute “preclude[s] exceptional sentences downward” for firearm-related offenses. *Id.* at \*3. Thus, the court held that if the court believes the presumptive sentence is “clearly excessive,” it “has discretion to impose an

exceptional, mitigated sentence by imposing concurrent firearm-related sentences.” *Id.* at \*4.

At Mr. Holcomb’s sentencing, the judge imposed the low end of the standard range on all counts. 12/2RP 17. The judge noted that the standard range for first degree assault was quite high, and Mr. Holcomb was a not a “bad individual” meriting harsh punishment, but rather a person who exercised “bad judgment” during an incident. 12/2RP 16.

The court said, “I can’t even do anything about” the deadly weapon enhancements, which add 96 months to the underlying low end sentence of 120 months. 1/1RP 17. Because the judge believed she lacked authority to impose a concurrent or lesser sentence for the firearm enhancement attached to the second degree assault for Ms. McClish, it imposed two consecutive firearm enhancements. *Id.*

*b. The court’s authority to impose an exceptional sentence extends to firearm enhancements.*

As *Mulholland* noted, the exceptional sentence statute, RCW 9.94A.535 governs the imposition of exceptional sentences. It does not categorically prohibit any type of offense or sentence from eligibility for a reduced term.

RCW 9.94A.535 provides that exceptional sentences may be imposed even when the standard range appears to mandate consecutive terms. At issue in *Mulholland* was RCW 9.94A.589(1)(b), which states that a person convicted of serious violent offenses arising from separate and distinct criminal conduct “shall” receive consecutive sentences. But the *Mulholland* Court held that this language does not render inapplicable the exceptional sentence provisions of RCW 9.94A.535. 161 Wn.2d at 329-31.

Likewise, in *McFarland* the court emphasized that despite statutory language indicating firearm-related offenses shall be sentenced consecutively, the exceptional sentence provisions are not voided for such offenses. 2017 WL 3381983 at \*3.

A statute provides that firearm enhancements “shall” be imposed consecutively. RCW 9.94A.533. This statute explains that the standard range sentence for firearm enhancements requires consecutive terms, notwithstanding other sentencing provisions, which is a deviation from the typical presumption of concurrent sentences that applies under the standard range. *State v. Brown*, 139 Wn.2d 20, 27-28, 983 P.2d 608 (1999).

In *Brown*, the court held that the statute adding deadly weapon enhancements bars an exceptional sentence below the standard range for that enhancement. *Id.* But as Justice Madsen explained in *State v. Houston-Sconiers*, 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, J., concurring), *Brown* misconstrued the controlling statutory language. The statutory scheme does not prohibit a court from imposing an exceptional sentence that includes a firearm or deadly weapon enhancement. Indeed, it may amount to cruel and unusual punishment to misinterpret the statutory scheme in this fashion. *Id.* at 36-37. *Brown*'s misinterpretation of the statutory scheme is both incorrect and harmful because it requires courts to impose sentences far longer than a court believes the SRA otherwise mandates. *Id.* at 39-40.

Neither RCW 9.94A.533 nor RCW 9.94A.535 prohibit the imposition of an exceptional mitigated sentence for firearm enhancements. RCW 9.94A.533 does not mention exceptional sentences and does not preclude their potential availability. And RCW 9.94A.535 states that the multiple offense policy applies when it elevates a sentence in a manner that exceeds punishment, or when other case-specific mitigating circumstances arise.

While the presumptive standard range for firearm enhancements provides for consecutive terms under RCW 9.94A.533, courts are not precluded from considering the applicability of a reduced term under the strictures of the exceptional sentence statute.

Here, the court lamented its inability to “do anything” about the mandatory 96-months of additional punishment for the deadly weapon enhancements. 12/2RP 17. It imposed the lowest possible standard range sentence and indicated this consecutive term seemed appeared unduly disproportionate to Mr. Holcomb’s actions and history. It did not believe it had discretion to impose a concurrent sentence for the firearm enhancement even if substantial and compelling reasons favored it. *Id.* The court’s failure to understand its sentencing authority when imposing an exceptional sentence requires a new sentencing hearing.

*c. The remedy is a new sentencing hearing.*

When a sentencing court might have imposed an exceptional sentence if “it had known an exceptional sentence was an option,” remand is proper. *Mulholland*, 161 Wn.2d at 334; *see McFarland*, 2017 WL 3381983 at \*4. Here, the court made clear its desire to impose less

than the consecutive enhancements it believed it was required to impose. 12/1RP 17. Because it misunderstood its authority to craft an appropriate term, a new sentencing hearing should be ordered.

*McFarland*, 2017 WL 3381983 at \*5.

F. CONCLUSION.

Mr. Holcomb's convictions should be reversed and dismissed due to mismanagement and delay, under CrR 3.3, 8.3, and the constitutional right to a speedy trial. Alternatively, a new sentencing hearing should be ordered.

DATED this 22nd day of August 2017.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 49730-1-II
	)	
LLEWELLYNE HOLCOMB,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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# WASHINGTON APPELLATE PROJECT

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