

FILED
Court of Appeals
Division II
State of Washington
12/21/2018 4:57 PM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

TOMMY ROSS JR.,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 5063

BRIEF OF APPELLANT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR3

III. STATEMENT OF THE ISSUES.....5

IV. STATEMENT OF THE CASE.....6

V. ARGUMENT.....15

 A. A CAREFUL BALANCING OF THE BARKER FACTORS SHOWS THAT THE STATE DID NOT VIOLATE ROSS’S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL BECAUSE ROSS CONTRIBUTED SUBSTANTIALLY TO THE DELAY, ROSS NEVER ASSERTED HIS RIGHT TO A SPEEDY TRIAL, AND THE ABILITY TO MOUNT A DEFENSE WAS NOT PREJUDICED BY THE DELAY.....15

 1. *Reason for Delay* - The cause of approximately 40 year delay should not be weighed against the State because the delay was caused by the defendant’s actions leading to warrants in 3 jurisdictions, Canada’s post-conviction decision to hold Ross until his sentence was completed, and the defendant’s actions in filing multiple unsuccessful suppression motions and motions to dismiss, and the prosecuting attorney’s decision to allow Ross to be tried in Canada was for a legitimate governmental purpose.....16

 a. The defendant’s actions leading to warrants in 3 different jurisdictions are a cause of the delay.....17

b. Canada’s actions in renegeing on its agreement to return Ross to Clallam County until after he served his sentence was a cause of the delay and should not be weighed against the State.....19

c. Ross’s repeatedly retracted his consent to his return to the U.S. after his request for transfer was approved showing that he did not want to have a trial and Ross’s actions, when he was finally held in custody on the charge, in filing multiple unsuccessful motions to dismiss or suppress evidence caused an almost 2 years of additional delay20

d. The Prosecutor’s decision to defer to Canada’s murder charge first was for a legitimate governmental purposes and was not negligent.....22

e. The court erred in its finding of fact that the State never took any action to extradite Ross and erred in its legal conclusion that this resulted in a violation of Ross’s speedy trial because the State is not required to seek a course of action in futility and Ross acquiesced in the delay.....25

2. *Assertion of Right to a Speedy Trial* - The record conclusively demonstrates that Ross never asserted his right to a speedy trial and that he acquiesced in any delay and the trial court erred by failing to consider the wealth of case law which outlines that a defendant’s failure to assert the speedy trial right is a very significant factor and difficult to overcome in proving a speedy trial violation.....27

3. *Prejudice from delay* - There was minimal if any resulting prejudice from the delay, the defendant’s ability to mount a defense was not prejudiced by the delay, and the court’s legal conclusions finding prejudice are not supported by the findings of fact or the record and prejudice is therefore rebutted.....31

a.	The trial court’s conclusions finding prejudice to Ross’s defense are erroneous and are rebutted by substantial evidence in the record..	32
b.	Presumed prejudice to the ability to mount a defense is not enough where it is evident that the defendant acquiesced in the delay.....	42
4.	<i>The length of the delay</i> – The delay is less significant considering that it was attributable to Ross’s criminal acts in 3 different jurisdictions, Canada’s decision to keep Ross until his sentence was served, Ross’s failure to assert a speedy trial right, and Ross’s multiple motions to suppress or dismiss during the 2 years when finally held on the charge before claiming a violation.	44
B.	A CAREFUL BALANCING OF THE <i>BARKER</i> FACTORS SHOW THAT DEFENDANT NEVER SUFFERED FROM ANY OF THE EVILS WHICH THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WERE DESIGNED TO PROTECT AGAINST AND THERE WAS NO SPEEDY TRIAL VIOLATION.....	47
VI.	CONCLUSION.....	49
	CERTIFICATE OF DELIVERY	51

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. CONST. amend. VI.....	2
Washington Const. art. I, § 22	2

Washington Supreme Court Cases

<i>State v. Ollivier</i> , 178 Wn.2d 813, 312 P.3d 1 (2013).....	15, 16, 28, 31, 44, 46, 47
---	----------------------------

United States Supreme Court Cases

<i>Barker v. Wingo</i> , 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101 (1972)	15, 31, 44
<i>Beavers v. Haubert</i> , 198 U.S. 77, 86, 25 S.Ct. 573, 575, 49 L.Ed. 950 (1905)	18
<i>Divers v. Cain</i> , 698 F.3d 211, 219 (5th Cir. 2012)	31
<i>Doggett v. United States</i> , 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)	44, 45
<i>Loud Hawk</i> , 474 U.S. at 315	44
<i>U.S. v. Loud Hawk</i> , 474 U.S. 302, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986)	22, 32, 44

Federal Cases

<i>U.S. v. Corona-Verbera</i> , 509 F.3d 1105, 1116 (9th Cir. 2007)	45
<i>U.S. v. Bagga</i> , 782 F. 2d 1541 (11th Cir. 1987)	42, 43
<i>U.S. v. Corona-Verbera</i> , 509 F.3d 1105, 1114 (9th Cir. 2007)	25
<i>U.S. v. Erenas-Luna</i> , 560 F.3d 772, 777 (8th Cir. 8 2009).....	16, 32, 33
<i>U.S. v. Grimmond</i> , 137 F.3d 823, 828 (4th Cir.1998)	23, 24
<i>U.S. v. McConahy</i> , 505 F.2d 770, 773 (7th Cir. 1974)	17, 25
<i>U.S. v. Moreno</i> , 789 F.3d 72, 79 (2d Cir. 2015)	23
<i>U.S. v. Reumayr</i> , 530 F.Supp.2d 1200, 1206 (D.N.M., 2007)	20

U.S. v. Schreane, 331 F.3d 548, 555 (6th Cir. 2003)..... 24
U.S. v. Tchibassa, 452 F.3d 918 (D.C. Cir. 2006)..... 28, 42
U.S. v. Watford, 468 F.3d 891, 902 (6th Cir. 2006)..... 24, 26

Other State Cases

Hopper v. State, 495 S.W.3d 468, 478 (Tex.App.-Hous. 2016)..... 45

APPENDIX

In re Bramson, 107 F.3d 865 (1997).

I. INTRODUCTION

Tommy Ross was charged with Murder in 1978 in Port Angeles, Clallam County, Washington. Ross was also charged with Murder in Victoria, B.C., Canada, in 1978. Additionally, the Los Angeles Police Dept. had a warrant for Ross's arrest for charges of Attempted Rape and Burglary. Arrest warrants for all three jurisdictions were outstanding when Ross was arrested on Dec. 22, 1978.

In early 1979, Clallam County Prosecuting Attorney, Grant Meiner, authorized Ross's release from the Clallam County hold which allowed Ross to be extradited to Canada to be tried on the Murder charge in Victoria first. Prior to this decision, the Canadian Crown counsel had represented to Mr. Meiner that Canada would return Ross to the United States after his trial to face trial in Clallam County.

However, in 1979, after Ross was ultimately convicted of Murder in Victoria, B.C., a new Crown Counsel represented to Mr. Meiner, that the former Crown Counsel was incorrect. Although the current Extradition Treaty allowed for Ross's return to the U.S., new Crown Counsel informed Meiner that Canada would not allow Ross to go back to Canada until after he served his sentence for Murder, a minimum of 25 years. Thus, Ross did not have his first appearance on the Port Angeles Murder charge until 38 years later in 2016 just after being released on parole for the Canadian Murder

conviction.

Ross was never held in custody on the Port Angeles Murder charge either before or the Canadian Murder conviction or the following 38 years while serving his sentence in Canada. Furthermore, Ross never asserted his right to a speedy trial or even requested a trial during that time. In fact, Ross declined multiple opportunities to have his prison sentence transferred to the U.S. after being advised that if Ross returned to the U.S. he would be brought to Clallam County on the Murder charge in Port Angeles, Washington. Ross never complained of a speedy trial violation until Aug. 2018, after almost two years of litigation involving multiple failed motions to suppress evidence and motions to dismiss for governmental misconduct.

Ross never suffered any of the evils for which the right to a speedy trial under U.S. CONST. amend. VI and Washington Const. art. I, § 22 were designed to protect against. Nevertheless, Ross's case was dismissed for a constitutional speedy trial violation. The trial court dismissed the case primarily on the basis that the Clallam County Prosecuting Attorney's decision, in 1978, allowing Canada to bring Ross to trial on the Victoria, B.C. Murder charge first was the ultimate cause of the delay.

The State appeals the order of dismissal on the basis that the extreme remedy of dismissing the case is not in accord with constitutional speedy trial rights jurisprudence and is inappropriate because Ross never suffered any of

the evils in which the right was designed to protect.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to carefully balance the four factors set forth in *Barker v. Wingo* and instead used primarily one factor as a talisman contrary to *Barker v. Wingo*.
2. The State assigns error to the trial court's conclusion that the State violated Ross's constitutional right to a speedy trial based upon the decision to allow Canada to try Ross on its Murder charge first.
3. The trial court erred failing to consider Ross's actions in declining multiple opportunities in to come back to the United States to face trial, by offering in 2003, to return to the United States if the State would not seek the death penalty, and by never asserting a right to a speedy trial or complaining of a violation until after almost two years of filing motions to suppress and dismiss the case.
4. The trial court erred in finding that Clallam County Prosecuting Attorney, Grant Meiner, was negligent in allowing Canada to try Ross for Murder first because Ross was an American and was already in the United States.
5. The trial court erred in finding that former Clallam County Prosecuting Attorney Craig Ritchie aggressively sought Ross's extradition before Mr. Meiner took over as the newly elected

Prosecuting Attorney.

6. The trial court erred in finding that no Clallam County prosecuting attorney ever took any action to have Ross extradited back to Clallam County to face trial.
7. The trial court erred in finding that there was no genuine issue of material fact.
8. The trial court erred in finding of fact XX, finding prejudice to Ross's ability to mount a defense based on speculative claims.
9. The trial court erred in its finding of fact XXII that Mr. Meiner's relinquishment of jurisdiction over Mr. Ross is the genesis of the reason for delay in this case.
10. The trial court erred in concluding that prejudice is assumed due to the length of the delay.
11. The trial court erred in its conclusion of law II that no blame can be placed on Mr. Ross for the delay.
12. The trial court erred in its conclusion of law III that all four Barker facts weigh heavily against the State.
13. The trial court erred in finding that Ross's constitutional right to a speedy trial was violated and the only remedy is dismissal with prejudice.
14. The trial court erred in ordering dismissal of the State's case.

III. STATEMENT OF THE ISSUES

1. Whether the cause of delay should be attributed solely to the State when Grant Meiner's decision to allow Ross to be extradited to face trial for Murder in Canada first was a permissible cause of delay and Ross's criminal acts in three jurisdictions leading to three outstanding warrants, Canada's failure to honor its agreement to return Ross to the U.S. after his trial, Ross's avoidance of returning to the U.S. when he could have done so voluntarily, and Ross's actions of filing multiple unsuccessful motions over almost two years before claiming a violation of his speedy trial right were also a cause of delay?
2. Whether the State failed to diligently prosecute the case when Meiner made efforts to have Canada honor its agreement to return Ross back to the U.S. after his trial in Victoria and further efforts would have been futile and possibly more harmful?
3. When considering whether there exists a violation of a constitutional right to speedy trial, Courts look to a defendant's actions which may delay a trial or in never complaining or asserting a right to a speedy trial. Here, did the State violate Ross's right to a speedy trial when Ross, serving a sentence for Murder in Canada, declined multiple opportunities to come back to the United States to stand trial, and

when Ross never complained of his right to a speedy trial until after almost two years of litigation including multiple motions to suppress evidence and dismiss the case?

4. Whether prejudice to Ross's ability to mount a defense was appropriately weighted against the State although prejudice is not rebutted by substantial evidence in the record?
5. Whether dismissal of the case is an appropriate remedy for a delayed trial when the defendant does not suffer any of the underlying evils which the constitutional right to speedy trial was designed to protect against?

IV. STATEMENT OF THE CASE

The Clallam County Prosecuting Attorney's Office charged Tommy Ross with Aggravated First Degree Murder on June 10, 1978 alleging that Ross murdered Janet Bowcutt on April 24, 1978. CP 117. That same day, the Clallam County Superior Court issued a warrant for Ross's arrest based on Prosecuting Attorney Craig Ritchie's Affidavit of probable cause. CP 118-19.

Ross was subsequently charged with the crime of Murder in Victoria, B.C., for murdering Janice Forbes three weeks later on May 14, 1978 in the same manner as the Bowcutt murder: by hog-tying his victim and leaving the victim to self-asphyxiate. CP 25, 118, 234, 150. A warrant for Ross was

issued for this crime as well. CP 25.

Additionally, a warrant for Ross's arrest was issued in Los Angeles for Attempted Rape and Burglary. CP 25. Ross was eventually arrested in California on Dec. 22, 1978 on all three warrants. CP 25.

Ross waived extradition to Canada on Jan. 11, 1979 to face the Canadian murder charge in Victoria, B.C. CP 200, 236. Ross was convicted by a jury for the Canadian murder charge in 1979. CP 150, 235.

Prior to Ross waiving extradition, newly-elected Clallam County Prosecutor, Grant Meiner and Canadian Crown Counsel in Victoria, Richard Anthony, agreed that Ross would be returned to the United States after his trial in Victoria, B.C., regardless of the outcome. CP 201-02, 217, 235. The 1971 extradition treaty between Canada and the United States allowed for extradition in such a situation at the discretion of the requested state, which was Canada. CP 221, 360. Meiner also received a telegram stating that if Ross was acquitted of the Murder charge in Canada, that Ross would be deported back to the U.S. as an undesirable alien. CP 202, 210, 217.

Prosecutor Meiner, after thorough review of both the Port Angeles and Victoria cases determined that the Victoria case was likely stronger as there was an eyewitness that placed Ross at the scene. CP 202. Meiner determined that the Port Angeles case would benefit by waiting until the conclusion of the Victoria trial because of the similarities between the cases,

Meiner would possibly be able to use the Victoria facts in his case-in-chief to help prove identity under ER 404(b). CP 202-03, 299.

Years later, on Sept. 13, 2017, the evidence of the Janice Forbes Victoria murder was ruled admissible at Ross's upcoming Port Angeles murder trial as similar facts evidence. CP 1157, 1166.

Meiner also consulted with a United States Attorney and determined that a delay to allow the Victoria case to proceed first would not affect Ross's speedy trial rights. CP 202.

However, nearly six months later Canadian authorities informed Prosecutor Meiner that Anthony was no longer employed as Crown Counsel and that it was the position of the Ministry of the Attorney-General, that Canada would not turn over Ross to the United States until he had served his sentence for the Victoria murder. CP 203, 219. Still, Prosecutor Meiner notified the new Victoria prosecutor that he would be moving forward with extradition proceedings. CP 204, 221. A member of the Canadian Department of Justice and the new Crown Counsel, R. D. Law, in Victoria both wrote to Meiner and reiterated that Ross would not be returning to the United States until he was done with his 25 year sentence if extradition proceedings were undertaken. CP 204, 224, 232, 238. Digby Keir from the Canadian Dept. of Justice informed that Ross could be returned without an order for extradition when and if released from parole. CP 225. Ross would

be first eligible for parole after serving 25 years. CP 238; State's Ex. F, at 30-31.

Meiner therefore determined that pursuing formal extradition proceedings to bring Ross back to Clallam County would be futile. CP 204. Furthermore, Prosecutor Meiner believed that formally applying for extradition could lengthen the time it would take to bring Ross to trial in Clallam County and that Ross could be returned quicker through deportation if granted parole which could occur in eight to ten years. CP 205-06. Meiner declared under penalty of perjury, that Mr. Ross never requested to be returned to Clallam County to face the murder charge either directly or indirectly through his appointed counsel Christopher Shea, appointed in 1979 to represent Ross, or his Canadian attorney, or anyone else on his behalf at any while Meiner was the Prosecuting attorney. CP 206

About eight years later, in 1987, while serving his sentence in Canada, Ross applied to be transferred to the United States and he was appointed counsel to represent him. CP 148-49, 160. The transfer was approved as of Dec. 10, 1987. CP 157, 159.

Thereafter, the State successfully moved to have the arrest warrant quashed. CP 247. The State provided several reasons at the time for the request, including that Ross was seeking to be transferred to the United States and may use the warrant's existence as pretext, Ross may use a transfer as a

means of escape, and that Ross's return "may force a premature decision regarding the prosecution." CP 247.

Regardless of the State's fears, Ross reconsidered his request to come back to the United States and decided to remain in Canada during a hearing with a U.S. magistrate on June 16, 1988. CP 163.

After consulting with his appointed attorney, Mr. Kirchheimer, Ross withdrew his request for a transfer during a hearing with a U.S. magistrate that holds transfer hearings. CP 166. The magistrate reviewed the issues and inquired whether Ross knew about his outstanding arrest warrant in Port Angeles, Washington, and Ross stated that he was aware of that warrant. CP 169. The magistrate informed Ross that if he would he would likely have to answer for the warrant if he was returned to the U.S. CP 170. The magistrate also informed Ross that if Ross was willing to consent to transfer to the U.S. that he would have to acknowledge in writing that he understood he would not be able appeal the Canadian sentence in any United States court. CP 170. It was pointed out during the hearing that Ross's appeals in Canada were already exhausted. CP 172.

The magistrate informed Ross that if he decided to go back to the U.S. that a van was available that very day and Ross would be transported that very day. CP 175. Mr. Kirchheimer stated on the record that he had a very lengthy discussion about all the issues arising from a decision to transfer to

the U.S. and that Ross had as fair an understanding as anybody he's represented. CP 182. Ross indicated that he was satisfied that he did not want to go back to the U.S. CP 186.

Also in 1988, the State amended the information, changing Count I from Aggravated First Degree Murder to First Degree Murder. CP 249–53. Later that same year, this Court issued both a search warrant for Ross's hair and fingerprints and an arrest warrant at the State's request. CP 255–63, 265–69. The State cited to Ross's recent confession to Janet Bowcutt's murder and retraction of his request for transfer as reasons to reinstate the arrest warrant. CP 266–67.

Ross continued to dabble in the possibility of returning to the United States for the subsequent 28 years. He sent a letter dated March 7, 1994, to the Port Angeles Police Department asking about the status of the Clallam County case. CP 296.

In 2002 and 2003, an attorney out of Quebec, Sylvie Bordelais, operating on Ross's behalf inquired whether the State would agree to take the death penalty off the table if Ross agreed to return. CP 274, 276. Clallam County Prosecuting Attorney Deb Kelly expressed to Bordelais her uncertainty and the basis for uncertainty, as to whether the death penalty was viable or not. CP 274. Kelly informed Bordelais that she would not take the death penalty off the table if the death penalty was viable and also that she

would be forced to take the death penalty off if it was not viable. CP 274.

Ross even made another request for transfer to the United States in 2007, which was approved in 2008, only to withdraw the request again after corresponding with a U.S. Federal Public Defender, Thomas Hillier. CP 190–93, 195–967, 213, 284–86; State’s Ex. D at 8–11. Ross requested assistance of counsel before deciding to give his consent to a transfer. CP 194. Ross had expressed a desire to know what would happen regarding the outstanding charges in Port Angeles, WA, if he transferred to the U.S. CP 194.

The Canadian Parole Board released Ross on November 10, 2016. CP 288. Law enforcement arrested Ross at the border on November 15, 2016 and transported him to the Clallam County jail. CP 288–89. The Clallam County Prosecuting Attorney’s Office was ready to make sure that Ross was taken into custody immediately upon Ross’s arrival at the U.S. Border and brought to Clallam County to face trial. CP 288.

The following day, Nov. 16, 2016, Special Deputy Prosecutor Deborah Kelly filed a Motion for Determination of Probable Cause and attached a Certification for Probable Cause from Detective Arand to the Motion. CP 292–94. All of the evidence contained in Detective Arand’s Certification for Probable Cause connecting Ross to the murder of Janet Bowcutt was evidence obtained on or before 1988, including Ross’s 1988

confession to Ms. Bowcutt's murder. State's Ex. O at 4.

Ross had his preliminary appearance in Clallam County Superior Court on Nov. 16, 2016. On that date, based upon the State's Motion and the accompanying Certification, the trial court found probable cause for the filing of the information and for the continued cognizance of Ross. CP 303. The trial court entered conditions of release, including the imposition of \$1,500,000 bail. CP 305.

An original trial date of January 2017 was set but Ross waived his right to a speedy trial and the trial was reset for Aug. 28, 2017. CP 2361-62. Since then, both sides have requested continuances, including Ross at the most recent status hearing on August 14, 2018, in order to allow new counsel for Ross, Myles Johnson, to get up to speed on the case to assist defense counsel, Lane Wolfley. CP 493-96.

Motions filed by Ross during this period include the following:

- Motion in limine to exclude fingerprint evidence based upon police misconduct, perjury and forgery (Lively Motion); and Motion to Dismiss Information for lack of evidence and in furtherance of justice, filed May 10, 2017. CP 2163.
- Supplementary memorandum to motion in limine to exclude fingerprint evidence and motion to dismiss, filed May 12, 2017. CP 2158.
- Second supplementary memorandum to motion in limine to exclude fingerprint evidence and motion to dismiss, filed May 16, 2017. CP 2133. *See also*, Court's ruling on defendant's motions heard Tuesday May 30, 2017, denying the motion to exclude fingerprint evidence

and denying the motion to dismiss. CP 1319–1322.

- Motion for reconsideration of Order allowing admissibility of fingerprint evidence – best evidence rule, filed June 20, 2017. CP 1335. CP 1139. *See also*, Court’s ruling on reconsideration of defendant’s motions heard June 9, 2017, ruling that if the State provides a copy of the original negatives of the fingerprints then they will be appropriate duplicates of the original. CP 1325–26.
- Notice for Discretionary Review to Court of Appeals, filed June 30, 2017. CP 1318. *See also*, Ruling denying review in Court of Appeals, Div. 2, filed Oct. 16, 2017. CP 1139.
- Defendant’s second motion in limine to exclude unsupported inflammatory and racist commentary, filed Jan. 9, 2018. CP 1123.
- Motion for Order of Dismissal for Governmental Misconduct of Perjury, filed Jan. 9, 2018. CP 1048 .
- Objections to States’s notice of intent to use business records in accordance with RCW 10.96.030, and motion to quash for abuse of process, filed Jan. 24, 2018. CP 1031.
- Motion to suppress DNA testing results – false arrest, filed Feb. 6, 2018. CP 882. *See also* Court’s memorandum opinion on defendant Tommy Ross’s motion to suppress DNA testing results/false arrest, filed May 7, 2018, denying the motion to suppress. CP 659–64.
- Motion to refer defendant Tommy Ross to Western State for Competency Evaluation, filed Mar. 19, 2018. CP 760. *See also* State’s Memorandum in opposition to motion for competency evaluation, filed Mar. 26, 2018. CP 675. Defendant found competent on July 31, 2018. CP 498.

Finally, soon after Ross’s last continuance motion, Ross filed a motion to dismiss based on an alleged violation of his speedy trial rights on August 27, 2018. CP 433. After briefing and argument, the trial court filed its memorandum opinion and then set the matter over to allow the parties to

prepare findings of fact and conclusions of law. CP 49–65. The trial court entered its findings and conclusions of law on Oct. 23, 2018. CP 24–31. The State filed this appeal.

V. ARGUMENT

“We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.” *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101 (1972).

A. A CAREFUL BALANCING OF THE BARKER FACTORS SHOWS THAT THE STATE DID NOT VIOLATE ROSS’S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL BECAUSE ROSS CONTRIBUTED SUBSTANTIALLY TO THE DELAY, ROSS NEVER ASSERTED HIS RIGHT TO A SPEEDY TRIAL, AND THE ABILITY TO MOUNT A DEFENSE WAS NOT PREJUDICED BY THE DELAY.

The Court reviews the claim of a violation of a constitutional speedy trial right de novo. *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013) (citing *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009)).

Washington courts “use the balancing test set out in *Barker* to determine whether a constitutional violation has occurred.” *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013) (citing *State v. Iniguez*, 167 Wn.2d 273, 292, 217 P.3d 768 (2009); *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972)).

“The analysis is fact-specific and “necessarily dependent upon the

peculiar circumstances of the case.’” *Ollivier*, 178 Wn.2d at 827 (quoting *Iniguez*, 167 Wn.2d at 288 (quoting *Barker*, 407 U.S. at 530–31, 92 S.Ct. 2182)). “[T]he conduct of both the prosecution and the defendant are weighed.” *Ollivier*, 178 Wn.2d at 827 (quoting *Barker*, 407 U.S. at 529, 530, 92 S.Ct. 2182).

Among the nonexclusive factors to be considered are the “[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.” *Ollivier*, 178 Wn.2d 827 (quoting *Barker*, 407 U.S. at 530, 92 S.Ct. 2182). “None of these factors is sufficient or necessary to a violation.” *Ollivier*, 178 Wn.2d 827 (citing *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 533, 92 S.Ct. 2182)). “But they assist in determining whether a particular defendant has been denied the right to a speedy trial.” *Ollivier*, 178 Wn.2d 827

- 1. Reason for Delay - The cause of approximately 40 year delay should not be weighed against the State because the delay was caused by the defendant's actions leading to warrants in 3 jurisdictions, Canada's post-conviction decision to hold Ross until his sentence was completed, and the defendant's actions in filing multiple unsuccessful suppression motions and motions to dismiss, and the prosecuting attorney's decision to allow Ross to be tried in Canada was for a legitimate governmental purpose.**

“Under the second *Barker* factor, we consider the reasons for the delay and evaluate “whether the government or the criminal defendant is more to blame.” *U.S. v. Erenas-Luna*, 560 F.3d 772, 777 (8th Cir. 8 2009)

(quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)).

a. *The defendant's actions leading to warrants in 3 different jurisdictions are a cause of the delay.*

“We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside.” *U.S. v. McConahy*, 505 F.2d 770, 773 (7th Cir. 1974) (citing quoting *Barker*, 407 U.S. at 529, 92 S.Ct. at 2191).

“In a sense the delay resulting from a defendant's imprisonment in another jurisdiction is attributable to him. The quoted sentence from *Barker* does not, however, apply to such a case unless either *the defendant fails to demand that an effort be made to have him returned for trial* or, after a demand has been made by him, the prosecuting authorities make a diligent, good faith effort to have him returned and are unsuccessful.” *McConahy*, 505 F.2d at 773 (emphasis added).

The dilemma of a defendant facing multiple charges in multiple jurisdictions and the problem that creates in respects to the right to a speedy trial is nothing new. However, in those situations, the speedy trial right does not result in a loss of the State's right to seek justice.

“The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It

does not preclude the rights of public justice.” *Wingo*, 407 U.S. at 522, 92 S.Ct. 2182 (quoting *Beavers v. Haubert*, 198 U.S. 77, 86, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950 (1905)).

“Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged, or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and, whatever be the demands of public justice, they must wait. We do not think the right is so unqualified and absolute.” *Haubert*, 198 U.S. at 86, 25 S.Ct. 573.

“[The right to a speedy trial] cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest,-means of bringing a defendant to trial.” *Id.* at 87.

Here, a neutral magistrate found probable cause that the defendant committed Murder in Clallam County and Attempted Rape and Burglary in Los Angeles and issued arrest warrants accordingly. Canada also had their

arrest warrant for a murder that occurred in Victoria, B.C., within weeks of the Clallam County murder. Ross was convicted after a jury trial in Victoria.

Therefore, it was Ross's actions in three different jurisdictions that was necessarily going to lead to a delay and should be weighed against Ross accordingly.

- b. Canada's actions in renegeing on its agreement to return Ross to Clallam County until after he served his sentence was a cause of the delay and should not be weighed against the State.***

Clallam County Prosecuting Attorney, Grant Meiner, was contacted by Canadian authorities in 1978 after Ross was arrested on his three warrants in Los Angeles. Meiner was informed that Ross would waive extradition to Canada but he would not be released to Canada unless Meiner agreed to release Ross from the Clallam County hold.

Before making his decision, Meiner spoke with Crown Counsel Richard Anthony from Victoria, B.C. and he was assured that Ross would be returned to the U.S. after his trial in Victoria, regardless of the outcome. CP 201-02, 235. The agreement was authorized by the 1971 Extradition Treaty which made it clear that a decision to defer extradition until after a sentence was served was discretionary. CP 221, 360.

However, in July 1979, Meiner was informed by new Crown Counsel that Ross would not be returned as agreed by the former Crown Counsel.

Crown Counsel was authorized to speak on behalf of Canada in these matters. Meiner was justified in relying upon a good faith agreement with Crown Counsel. This should not be weighed against the State.

The decision to require Ross to complete his 25 year minimum sentence before allowing extradition was unfortunate but should not be weighed against the State.

- c. ***Ross's repeatedly retracted his consent to his return to the U.S. after his request for transfer was approved showing that he did not want to have a trial and Ross's actions, when he was finally held in custody on the charge, in filing multiple unsuccessful motions to dismiss or suppress evidence caused an almost 2 years of additional delay***

“Courts have recognized that a defendant resisting extradition, or otherwise avoiding attempts to bring him to this country, is attempting to avoid going to trial at all in the United States. This is the opposite of insisting on a speedy trial. For that reason, absent unusual circumstances, courts have uniformly held the defendant, rather than the government, liable for delay caused by extradition proceedings or by other attempts to remain outside the United States.” *U.S. v. Reumayr*, 530 F.Supp.2d 1200, 1206 (D.N.M., 2007) (citing *United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir.1995) (defendant could not “avoid a speedy trial by forcing the government to run the gauntlet of obtaining formal extradition and then complain about the delay that he has caused by refusing to return voluntarily to the United

States"); *In re Bramson*, 1997 WL 65499 (4th Cir.1997)¹ (defendant being held in Liechtenstein for extradition proceedings could presumably return to the United States and stand trial of his own volition at any time; therefore, for speedy-trial purposes he is responsible for the delay)).

Here, Ross had clear opportunities in 1988 (CP 175) and 2008 (191–93) to return to the U.S. when his requests to have his prison transferred to the U.S. were approved. On both occasions, after consultation with counsel on the issue, Ross withdrew his consent to the transfer. CP 170, 186, 194, 284. Although, these incidents are not a resistance to government attempts to bring Ross back to Washington to resist trial, Ross's withdraw of his consent to the transfer to the U.S. after it was approved shows that Ross did not want to return to Washington State to be tried on the charge. Ross was aware of the likelihood of being taken to Washington to face the murder charge if he was transferred to the U.S. CP 169–70. Ross inquired about the case on two occasions asking the Port Angeles Police Dept. for information about the case in 1994 and then having attorney Sylvie Bordelais inquire about the case in

¹ *In re Bramson*, cited to in *Reumayr*, 530 F.Supp.2d at 1206 is an unpublished case. See GR 14.1(b): (b) Other Jurisdictions. A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." and FRAP 32.1(a): "(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007."

2003. CP 296, 274, 276. Clearly in 2007, Ross wanted to know what would happened regarding the outstanding charges if he was transferred to the U.S. CP 194.

Ross could have return and face trial voluntarily in 1988 and again in 2007 and on each occasion, Ross withdrew his request for transfer to the U.S. Therefore, Ross contributed to the delay. Additionally, when Ross was finally released on parole and taken into custody on the charges, Ross, rather demanding a trial, filed multiple motions to suppress evidence or dismiss the case and filed or agreed to multiple continuances which caused an additional delay of almost 2 years before he filed his motion to dismiss for a speedy trial violation in Aug. 2018. *See U.S. v. Loud Hawk*, 474 U.S. 302, 314–15, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986) (recognizing delay of six months caused by respondents' actions in filing repetitive and unsuccessful motions).

Therefore, the cause of delay should not be weighed against the State.

d. The Prosecutor's decision to defer to Canada's murder charge first was for a legitimate governmental purposes and was not negligent.

Prosecutor's decision to allow one jurisdiction to proceed to trial first is not negligence.

“The Sixth Amendment is rarely violated by delay attributable entirely to the defendant, *see Vermont v. Brillon*, 556 U.S. 81, 90, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009), or by delay that serves some legitimate government

purpose, *Doggett*, 505 U.S. at 656, 112 S.Ct. 2686 (“The government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down.”). *See also Barker*, 407 U.S. at 531, 92 S.Ct. 2182 (“[A] valid reason, such as a missing witness, should serve to justify appropriate delay.”).” *U.S. v. Moreno*, 789 F.3d 72, 79 (2d Cir. 2015).

“When a defendant violates the laws of several different sovereigns, as was the case here, at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for delay.” *U.S. v. Grimmond*, 137 F.3d 823, 828 (4th Cir.1998) (citing *United States v. LaBorde*, 496 F.2d 965, 968 (6th Cir.1974) (per curiam) (reversing the district court's dismissal of an indictment and holding that a twenty-one month delay did not violate a defendant's right to a speedy trial because in addition to the neutral reason of an overcrowded docket, the federal district court relinquished custody of the accused to another jurisdiction in order for the defendant to stand trial in that jurisdiction)).

“To so hold does not suggest ‘that a pending state prosecution in any sense tolls the running of the Sixth Amendment period of delay’; rather, it should be understood as ‘a factor in the government's favor, to be weighted in considering the length of the delay, the prejudice to the accused, and the

accused's assertion of right.” *U.S. v. Schreane*, 331 F.3d 548, 555 (6th Cir. 2003) (citing *United States v. Thomas*, 55 F.3d 144, 151 (4th Cir.), *cert. denied*, 516 U.S. 903, 116 S.Ct. 266, 133 L.Ed.2d 189 (1995)); *see also U.S. v. Watford*, 468 F.3d 891, 902–03 (6th Cir. 2006).

Here, the prosecutor had a duty to seek justice and to evaluate the evidence and strength of his case. Prosecutor Meiner determined that the Victoria case was likely stronger as there was an eyewitness involved unlike the Port Angeles case and, because of the similarities between the cases, Meiner would possibly be able to use the Victoria facts in his case-in-chief to help prove identity under ER 404(b). CP 202–03, 299. Meiner also consulted with a United States Attorney and determined that a delay to allow the Victoria case to proceed first would not affect Ross’s speedy trial rights. CP 202. Moreover, Meiner also had an agreement with Crown Counsel that Ross would be returned to face trial in Port Angeles after his trial in Victoria.

Therefore, the decision to release Ross to Canada was for a legitimate governmental purpose and thereafter, Meiner was “[s]imply waiting for another sovereign to finish prosecuting a defendant” and this was a valid reason for delay.” *Grimmond*, 137 F.3d at 828.

The delay that occurred after Ross’s Victoria trial was attributable to Canada and Ross himself, not Meiner’s decision to let Victoria prosecute Ross first.

e. The court erred in its finding of fact that the State never took any action to extradite Ross and erred in its legal conclusion that this resulted in a violation of Ross's speedy trial because the State is not required to seek a course of action in futility and Ross acquiesced in the delay.

The U.S. Court of Appeals, 9th and 2nd Circuits, held that "that where our government has a good faith belief supported by substantial evidence that seeking extradition from a foreign country would be futile, due diligence does not require our government to do so." *Corona-Verbera*, 509 F.3d at 1114 (citing *United States v. Blanco*, 861 F.2d 773, 778 (2d Cir.1988)); *see also McConahy*, 505 F.2d at 773 (holding that where a defendant makes a demand to be brought to trial, the government must exercise due diligence and make a good faith effort to return the defendant "[u]nless there is a showing that an effort to have the defendant returned to this country for trial would be futile."

In 1979, Clallam County Prosecuting Attorney Grant Meiner, made multiple requests with the Crown Counsel in Canada as to whether Canada would honor Crown Counsel Richard Anthony's agreement to return Ross back to Washington after Ross's trial in Victoria, B.C. It became increasingly clear through Meiner's communications with the new Crown Counsel that Canada would be exercising its right to defer extradition until after Ross served his sentence of 25 years.

Furthermore, the communications with Crown Counsel convinced

Meiner that formally applying for extradition could lengthen the time it would take to bring Ross to trial in Clallam County and that Ross could be returned quicker through deportation if granted parole which could occur in eight to ten years. CP 205-06. Unfortunately, Ross was not granted parole until 2016.

The record demonstrates that Meiner made continued efforts to hold Canadian authorities to its agreement to return Ross to the U.S. after his Victoria trial from July to November 2017. Those efforts became futile. Moreover, formal extradition proceedings would have the effect of lengthening the time it would take to return Ross to the U.S.

Therefore, the State was no longer required to seek extradition in order to demonstrate due diligence and the court erred in finding the State made no efforts to bring Ross back to face trial.²

CONCLUSION

“The purpose of this weighting scheme is to quantify ‘whether the government or the criminal defendant is more to blame for [the] delay.’” *U.S. v. Watford*, 468 F.3d 891, 902 (6th Cir. 2006) (quoting *Maples v. Stegall*, 427 F.3d 1020, 1026 (6th Cir. 2005)).

Ross’s criminal activity resulting in three warrants in three different

² The current prosecuting authority was ready to receive Ross after release on parole as soon as he arrived at the border and a trial was set accordingly. CP 288.

jurisdictions necessarily led to delay. Ross's acquiescence and retraction of his approved requests for a transfer also led to more delay from 1988 through 2007. This demonstrates Ross did not want a speedy trial and weighs against Ross. Ross's actions in filing motions to dismiss and to suppress evidence and his motions to continue the trial which led to almost two more years of delay demonstrate that Ross was not interested in having a trial. This also weighs against Ross. Meiner's measured decision to allow Canada to prosecute Ross first with an agreement for his prompt return after trial served a legitimate governmental purpose and therefore weighs in the State's favor.

The balance of these factors shows that Ross contributed more to the delay than the State.

2. *Assertion of Right to a Speedy Trial* - The record conclusively demonstrates that Ross never asserted his right to a speedy trial and that he acquiesced in any delay and the trial court erred by failing to consider the wealth of case law which outlines that a defendant's failure to assert the speedy trial right is a very significant factor and difficult to overcome in proving a speedy trial violation.

"The third Barker factor is "the defendant's assertion of or failure to assert his right to a speedy trial." *Ollivier*, 178 Wn.2d at 837 (citing *Barker*, 407 U.S. at 514). "The Court added in *Barker* that 'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" *Id.* at 837 (quoting *Barker*, at 532).

"Assertion of the speedy trial right is important in the balancing. The

Court explained:

[t]he more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Thus, assertion of the right is relevant to whether a violation has occurred and also helps to establish or reinforce the conclusion that the defendant has not waived the right.” *Ollivier*, 178 Wn.2d at 837–38.

Ross does not claim anywhere in the record or in his motion to dismiss that he asserted his speedy trial right. Ross’s actions demonstrate that he not only failed to assert his speedy trial right, but actively withdrew his consent to return to the U.S. after his application for transfer was approved. Ross preferred to not face trial in Clallam County. This factor weighs heavily against Ross.

U.S. v. Tchibassa, 452 F.3d 918 (D.C. Cir. 2006) demonstrates that, when a defendant is aware of the charges and decides to not exercise his speedy trial rights, he should not get to later assert them once he is returned to the United States in order to face prosecution. Tchibassa participated in the kidnapping for ransom of an American citizen in Angola and was indicted in federal court. *Tchibassa*, 452 F.3d at 921–22. However, Tchibassa remained a free man living in the Democratic Republic of the Congo (DROC) and only

became aware of the charges three years after the indictment. *Id.* at 922. Tchibassa decided to remain in the DROC until his arrest and extradition eight years later. *Id.* Tchibassa did not move to dismiss based on a speedy trial violation until nine months after his arrest. *Id.* at 926. In deciding the third *Barker* factor favored the government, the court held, “[I]f [Tchibassa] was aware that charges were pending against him... his failure to make any effort to secure a timely trial on them (and his apparent desire to avoid one) manifests a total disregard for his speedy trial right.” *Id.*

Here, Ross was clearly aware of the pending charge against him as he was arrested on the warrant in Los Angeles in 1978. Ross repeatedly made mere overtures to gather information or to see what would happen if he transferred his prison to the U.S. in 1988, 1994, 2003, and 2007. He then consistently decided that he would be better off if he remained in Canada. Ross checked in with the Port Angeles Police Department in 1994 to see if he was still charged with murder. A Canadian attorney on Ross’s behalf made another inquiry in 2002 and 2003, when she talked to Prosecutor Kelly. The Department of Justice wrote an email in 2008 stating Ross was wondering what would happen with the Clallam County case if he decided to return to the United States. That same year, Ross consulted another attorney, Thomas Hillier, and followed Mr. Hillier’s advice to not seek a transfer to the United States even though the Clallam County matter was still pending.

Simply put, Ross was content to stay in Canada while the murder charge was pending in Clallam County. For example, also in 1988, Ross was represented by counsel and appeared before a United States Magistrate. The Magistrate told Ross that he could be in a van headed to the United States that day if he agreed to extradition. The Magistrate informed Ross at the hearing that there was an outstanding warrant in Port Angeles and Ross replied that he already knew about it. The Magistrate also informed him that he “might have to answer for” the Port Angeles case if he returned to the United States and Ross stated that he understood.

The Magistrate then assured Ross that he would be happy to revisit a request for Ross to return to the United States and Ross should not feel that he decision to remain in Canada would foreclose future opportunities to return to the United States. CP 184, 186.

Ross’s decision to remain in Canada shows that he acquiesced in the delay. Therefore, Ross was not asserting his speedy trial right because he did not want to come back to Clallam County.

Ross should not receive the benefit of asserting his speedy trial right now because, for almost 38 years, he did not demand a prosecution in Clallam County. Instead, he has waited to claim a speedy trial violation only after nearly two years have passed following his return to Clallam County and this Court’s granting of several continuances, the most recent one at Ross’s

request. This lack of desire to face the judicial music should be fatal to his claim that his speedy trial rights were violated. As the Court held in *Barker*, “[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates... that the defendant did not want a speedy trial.” *Barker*, 407 U.S. at 536; *see also Divers v. Cain*, 698 F.3d 211, 219 (5th Cir. 2012) (waiting 17 months to objection on speedy trial grounds significantly impaired the claim).

The record in this case demonstrates Ross did not want a speedy trial.

Therefore, this factor weighs heavily against Ross.

3. *Prejudice from delay* - There was minimal if any resulting prejudice from the delay, the defendant’s ability to mount a defense was not prejudiced by the delay, and the court’s legal conclusions finding prejudice are not supported by the findings of fact or the record and prejudice is therefore rebutted.

“Under the fourth factor, prejudice to the defendant as a result of delay may consist of (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.” *Ollivier*, 178 Wn.2d at 840 (quoting *Doggett*, 505 U.S. at 654).

Here, there was no oppressive pre-trial incarceration. The nearly two year pre-trial delay prior to dismissal on speedy trial grounds was attributable to Ross and his numerous unsuccessful motions to dismiss or suppress evidence. *See Barker*, 407 U.S. at 535 (Court finding that record showed

defendant delaying trial to gain advantage); *see also U.S. v. Loud Hawk*, 474 U.S. 302, 314–15, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986) (assertion of a speedy trial right must be viewed in light of the defendant’s conduct and referring to fact defendant “filled the District Court’s docket with repetitive and unsuccessful motions.”). Certainly, there was no oppressive pre-trial incarceration.

Anxiety or concern of the accused appeared to be minimal as evidenced by a failure to ever complain of his right to a speedy trial or to assert it while serving his prison sentence in Canada. Besides, he was already serving a life prison sentence for his Murder conviction.

Moreover, prejudice to the ability to mount a defense may be affirmatively rebutted by the record.

a. The trial court’s conclusions finding prejudice to Ross’s defense are erroneous and are rebutted by substantial evidence in the record.

“The extent to which a defendant must demonstrate prejudice under this factor depends on the particular circumstances. A showing of actual prejudice is required if the government exercised reasonable diligence in pursuing the defendant.” *U.S. v. Erenas-Luna*, 560 F.3d 772, 778–79 (8th Cir. 2009) (citing *Doggett*, 505 U.S. at 656; *United States v. Brown*, 325 F.3d 1032, 1035 (8th Cir.2003)). “Where the government has been negligent, however, prejudice can be presumed if there has been an excessive delay.”

Erenas-Luna, 560 F.3d at 778–79 (citing *Doggett*, 505 U.S. at 656–58).

Here, prosecutor Meiner was not negligent as he had a legitimate purpose in allowing the Canada trial to go first and only after having assurance of Ross's return from Crown Counsel. Even after Canada reneged on the agreement, Meiner kept pushing the Canadian authorities to honor the agreement and did not stop until he realized that formal extradition proceedings could actually lengthen the delay. The State exercised its due diligence in trying to bring Ross back and more effort would have been futile and possibly disastrous. Therefore, Ross must show actual prejudice and has failed to do so. Moreover, prejudice is rebutted by substantial evidence in the record.

Trial court found without factual support that missing witnesses, evidence, or memories of eye witnesses have either faded or are compromised without any evidence that any of the alleged missing evidence was exculpatory. Rather, the trial court simply adopted word for word, the defenses' proposed findings of prejudice 1–8. Compare CP 29 (trial court's finding of fact XX and CP 41–42 (defense proposed conclusion of law). Each of these conclusions that are not supported by evidence from the record.

1. The fingerprint card B6 was lost or destroyed

The fingerprint card B6, which contained a lift from the interior doorknob in the Bowcutt apartment was held as evidence in the Victoria trial

as part of the 'Similar facts' of the Port Angeles case. It was released to Victoria PD Sgt. Braiden in April 1982 at the conclusion of the appeal in the Victoria case. It cannot now be found. CP 1145–1146 (Ruling Denying Review); CP 1406. However, the original negatives exist and new photographs were produced which may be examined by an expert.

At the close of the May 30th hearing on fingerprints, the court directed Special Prosecutor Deb Kelly to request prints from the original negatives from the FBI; and she did so the next day. On Monday June 5, two identical sets of photos arrived. Each set has 22 photos; both have photos of the front and back of B6. Two photos document the same lift. State's Supp. CP Index #124, filed 6/7/2017 (Supp Declaration of Deb Kelly filed June 7 2017).

The court denied Ross's motion to exclude the fingerprints based on claims of police misconduct, perjury or forgery. State's Supp. CP Index #125, filed 6/9/2017. Additionally, the trial court found after Ross's final motion to reconsider, assuming what has been presented to the Court as evidence, "the original negative and photo of the fingerprint card," the Court may find at trial that the original card B6 was sent to the FBI on May 5, 1978 and photographed when reviewed for analysis. CP 1325–1326 (Court's Ruling on Reconsideration of Defendant's Motions Heard June 9, 2017 and filed June 27, 2017).

A duplicate has been produced from the original negatives and there is no showing that they are not of decent enough quality to be examined anew and therefore they have not been ruled inadmissible as the State may still authenticate the photos at trial and their reliability may be contested at trial. *See* CP1151 (Ruling Denying Review); CP 1325–1326.

2. Every Piece of Evidence in the Victoria trial was lost or destroyed.

This is a purely conclusory statement in the Defense Motion to Dismiss without any reference to any exhibit or Declaration except for the missing fingerprint card B-6 as discussed above. CP 434, 467. The State's Memorandum in Support of Admission of Similar Facts Evidence filed May 23, 2017 includes State's Ex F, which includes 17 pages of photographs of the Victoria murder scene and victim. CP 2127 (Face page for Exh E, F, and G , says "Photos supplied directly to Court Administrator"). The crucial item of Victoria evidence was the teapot handle, on which Ross fingerprint was found. CP 1143. There is no showing that it disappeared after trial due to bad faith. *Furthermore, it was missing since the trial and not due to a 38 year delay.*

The transcripts of the Victoria trial testimony can be admitted or read to the jury without violating the Confrontation clause, Memorandum in Support of Motion in Limine /Admissibility of Prior Testimony filed 06/06/2018. CP 503, 525–543. The Defendant did not object to the admission

of the transcribed testimony of several of the witnesses at the Canadian trial (CP 501 –502) and a Minute Order was entered accordingly. CP 500. Finally, the court ruled that the evidence of the Victoria murder would be admissible at trial. CP 1157, 1159, 1166.

3. Tommy Ross was never given Legal Counsel on the Clallam County case through his incarceration in Canada.

Ross was provided counsel on a number of occasions during his incarceration in Canada:

a. On May 3, 1978, before the Victoria trial commenced, Chris Shea of the Clallam-Jefferson Public Defender requested the Court to appoint the public defender on an interim basis, State's Response to Defendant's Motion to Dismiss. CP 119–120.

b. Ross made an affidavit declaring Indigency and requesting the Clallam-Jefferson Public Defender be appointed, dated June 7, 1979. CP 121.

c. The public defender representing Ross filed a Motion for discovery which was opposed by the State, and argued on June 15, 1979. CP 123–134. Shea told the Court that the Public Defender had been in contact with Ross' Canadian attorney, and Ross said, “yes indeed I want an attorney.” CP 124. The Public Defender moved for discovery, citing a need to start working on the case in conjunction with Ross' Canadian attorney (CP 126) noting that a Canadian conviction could be used over here to show

aggravated circumstances enhance the death penalty. CP 125. *The Court noted that the delay in being tried in this country is not due to any fault of the prosecuting attorney in Clallam County.* (CP 127). The Court affirmed that the PD was appointed: "You asked to be appointed and I've appointed you." CP 131–32.

d. The public defender filed a Notice for Discretionary Review to the Court of Appeals, Div II on June 21, 1979 to review the Clallam County Superior Court's denial of the motion for discovery which noted the Defendant was represented by the Clallam Jefferson Public Defender. CP 137–38.

e. An Order of Indigency appointing the public defender on appeal was entered June 21, 1979. CP 122.

f. There followed further correspondence from the Clallam-Jefferson Public Defender to the Commissioner of the Court of Appeals on August 2, 1979 (CP 138-139); A further Order Denying discovery noting Ross was represented by Christopher Shea on September 7, 1979 (CP 140) and finally an Order Denying Review stating that Ross had moved for discretionary review of the Clallam County Superior Court refusal to compel the State to allow discovery, filed October 19, 1979. CP 141–143.

g. IN support of Defendant Tommy Ross's Motion to Dismiss for Violation of Defendant's Sixth Amendment Right of a Speedy trial filed

August 27, 2018, (CP 433), Ross filed a Declaration of Chris Shea: appendix F, . . . (CP 424-425) acknowledging that he 'likely sought appointment to try to get discovery . . . we were denied discovery by the trial court and the Court of Appeals as shown by the Court file. CP 125.

h. Ross was appointed Rowan P. Kirchheimer, Public Defender for the Legal Aid Society, Federal Defender Services United States for the Eastern District of New York, by US Magistrate Edmund Maxwell to advise and represent Ross in the matter of his consent to transfer to a prison in the United States, on June 20, 1988. CP 157. At a court hearing before Magistrate Maxwell, on June 16, 1988 (CP 158) with his attorney present (CP 160) Ross acknowledged that he was aware of the warrant outstanding from Washington State, Port Angeles. CP 166. Ross understood that if he transferred back to the United States, he would have to answer for the Washington State warrant. (CP 167). Ross discussed the transfer with Mr. Kirchheimer for several hours (CP 162) and made a good faith decision to withdraw his transfer request, based on his best interest. CP 179. Magistrate Maxwell verified that Ross had full opportunity to discuss the transfer with his assigned counsel. CP 185.

i. Ross was assisted by Professor Michael Jackson, Q.C., at least by 1996, when Ross instructed Jackson to file an application under Canadian Criminal Code sec. 745.6, in the nature of an application to have his parole

eligibility reviewed by a jury. CP 314–345. The application was explained by Prof. Jackson, in Declaration of Professor Michael Jackson In Response to State's Motion to Compel Discovery of Habeas Corpus/Parole Applications, filed Sept 18, 2018. CP 333.

j. In 2002, the Port Angeles Police were contacted by Ms. Sylvie Bordelais, Esq., a Canadian lawyer representing Mr. Ross, inquiring as to whether 'there is a procedure to have him brought back to the United States to face the charges', (CP 276), or transfer to a mental institution in the U.S. CP 277.

k. Thomas Hiller, a Washington State attorney and Federal Public Defender for the Western District of Washington 1982– 2014, was asked in early 2008 to help Ross with a possible transfer to a U.S. prison. CP 392. The request came from the Defender Services Division of the United States Courts. CP 392. Mr. Hillier traveled to the Drumheller, Alberta, institution and met with Mr. Ross. CP 393. They had a "long and thorough discussion of his situation. Hillier also requested and reviewed reports and information related to charges outstanding in Clallam County. CP 393. Hiller learned that Mr. Ross' interest in a treaty transfer was motivated by his desire to be close to his mother in California and to attend to the prosecution, if any, in Clallam County. Ultimately, Hiller advised against requesting a transfer for stated reasons related to U.S. Parole issues. CP 393.

4. The memories of eye witnesses are either faded or are compromised.

The trial court did not indicate which witnesses or how the defense is prejudiced. Special Prosecutor Deborah Kelly made a Motion in Limine filed June 6 2018 Re: Admissibility of Former Testimony; (CP 503) (another 100+ page monster) laying out the theory that because Ross was present in Court in Victoria and had the opportunity to cross examine witnesses, their former testimony can be presented against him if the witnesses are now unavailable. The trial court granted by Minute Order on State's Motion In Limine Re: Admissibility of Prior Testimony entered June 26, 2018 (CP 500) the admission of several of the Victoria witnesses who are dead or missing, and reserved as to others.

Ross argues in his proposed findings of fact no. 8 (CP 450) that Lee Mezaros' wife identified a different black man in a photo lineup; while this discredits Vail, it doesn't show that Ross was prejudiced in his defense and Mezaros himself placed the defendant in Port Angeles shortly before the Victorian murder. CP 127.

Defense counsel Wolfley claimed that Dominowski's husband identified a different black man. (CP 450) But this is completely unsupported by any declaration or other evidence.

5. The fingerprint examiners are either dead or unavailable to testify.

Fingerprint examiners may re-examine the original negatives. Ross

does not cite to any record to rebut this proposition. Fingerprint expert JT Mikita has dementia. He was asked by CBC TV to reexamine the Victoria teapot fingerprint photos (not the print itself because it was lost/destroyed in 1982) see above.

There is no reason why the analysis could not be duplicated with the same photos Mikita viewed. Also, two other fingerprint experts looked at the same photos and concluded the print was legitimate. CP 1143, 1147–48.

6. Investigating officers have died on both sides of the border.

Det. Vail and Turton are available to testify, as is Doug Richardson from the VPD; Officers who testified in Victoria and are now deceased may have their exam and cross exam read to the jury (see above). The trial court does not state how Ross was prejudiced.

7. A fingerprint examiner whose opinion was that a single fingerprint found was a forgery is unable to testify.

Fingerprint expert JT Mikita has dementia. He was asked by CBC TV to reexamine the Victoria teapot fingerprint photos (not the print itself because it was lost/destroyed in 1982). CP 1143.

There is no reason why the analysis could not be duplicated with the same photos Mikita viewed. Also, two other fingerprint experts looked at the same photos and concluded the print was legitimate. CP 1143, 1147–48.

8. The doorknob where the Defendant's fingerprint is said to have been found was never secured.

The doorknob was never secured therefore any prejudice was not a result from delay.

The court's findings and conclusions regarding prejudice are not supported by the record. There has been no finding that exculpatory evidence has been lost. Therefore, this factor should not be weighed against the State.

b. Presumed prejudice to the ability to mount a defense is not enough where it is evident that the defendant acquiesced in the delay.

If this Court determines that Ross has been presumptively prejudiced by the delay, the fourth factor should not outweigh Ross's actions that resulted in the delay and his complete failure to assert his speedy trial right. *See U.S. v. Tchibassa*, 452 F.3d 918, 926–27 (D.C. Cir. 2006) (finding no speedy trial violation where the cause of delay and failure to timely assert a speedy trial right weighed against the defendant despite the general claim of presumptive prejudice to the ability to mount a defense).

Even where actual prejudice may exist, dismissal is not appropriate where a defendant is not interested in a trial and never asserted his right to a speedy trial.

In *U.S. v. Bagga*, 782 F. 2d 1541 (11th Cir. 1987), Bagga testified under oath in a federal trial and was charged with false swearing based on

that testimony. *Bagga*, 782 F.2d at 1541-42. After his testimony and before he was indicted, Bagga went to India. *Id.* at 1542. Bagga found out about the indictment three years later, but took an additional three years to return to the United States and another four months to turn himself in. *Id.* Prior to Bagga finding out about the indictment, though, the trial court that took Bagga's testimony destroyed a tape that Bagga claimed had significant evidentiary value. *Id.* Bagga moved to dismiss, contending that the destruction of the tape caused a violation of his speedy trial right that could not be repaired. *Id.* at 1545.

In upholding the trial court's denial of Bagga's motion to dismiss, the court analyzed all four *Barker* factors, including whether the government was the cause of the delay and the prejudice to Bagga. *Id.* at 1542-45. However, the court concluded its opinion by focusing on Bagga's failure to assert his speedy trial right despite the tape having been destroyed. *Id.* at 1545. The court held that Bagga was a "reluctant defendant who was not concerned with a speedy trial." "We emphasize," the court stated, "that failure to assert the [speedy trial] right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* (citing *Barker*, 407 U.S. at 531, 532).

Likewise, even if this Court determines Ross has suffered actual, as opposed to speculative, prejudice from the passage of time, his failure to assert his speedy trial demonstrates that he, too, was a "reluctant defendant"

who was not interested in having a speedy trial.

Therefore, this factor does not favor Ross to any significant degree that it would outweigh the other *Barker* factors. *See Loud Hawk*, 474 U.S. at 315 (giving little weight to the prejudice factor where there was a possibility of absence or loss of memory of witnesses where respondent's conduct was not consistent with asserting the right to a speedy trial, and recognizing delay is a two edged sword which may affect the State's ability to meet carry its burden of proof).

4. ***The length of the delay* – The delay is less significant considering that it was attributable to Ross's criminal acts in 3 different jurisdictions, Canada's decision to keep Ross until his sentence was served, Ross's failure to assert a speedy trial right, and Ross's multiple motions to suppress or dismiss during the 2 years when finally held on the charge before claiming a violation.**

“Analysis of the length of delay entails a double inquiry.” *Ollivier*, 178 Wn.2d at 827 (citing *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)).

As a threshold to the *Barker* inquiry, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial. *Doggett*, 505 U.S. at 651–52 (citing *Barker*, 407 U.S. at 530). This inquiry is necessarily dependent on the specific circumstances of each case. *Barker*, 407 U.S. at 530–31. For example, the Court noted that a tolerable delay for trial on “an ordinary street crime is considerably less than for a serious, complex

conspiracy charge.” *Id.* at 531. Because drawing the line is a fact-specific inquiry, the Court expressly rejected the notion that the constitutional speedy trial right can be quantified into a specific time period. *Id.* at 523. Moreover, a showing of presumptive prejudice cannot, by itself, prove a speedy trial violation—more is required. *Doggett*, 505 U.S. at 655–56 (citing *United States v. Loud Hawk*, 474 U.S. at 315).

“A presumption of prejudice that arises from extended delay does not end the prejudice enquiry. Even with a presumption, the State may still prevail if the presumption of prejudice is “extenuated, as by the defendant’s acquiescence” or “persuasively rebutted.” *Hopper v. State*, 495 S.W.3d 468, 478 (Tex.App.-Hous. 2016) (quoting *Doggett v. U.S.*, 505 U.S. at 658) (finding no speedy right violation despite 18 ½ year delay where defendant acquiesced to the delay).

Furthermore, the court held that the length of delay is not presumptively prejudicial when the government acted diligently to bring him to trial; the defendant must instead demonstrate specific prejudice. *U.S. v Corona-Verbera*, 509 F.3d 1105, 1116 (9th Cir. 2007) (citing *Doggett v. United States*, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); *U.S. v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995)).

Finally, “in numerous cases courts have not regarded delay as exceptionally long where the delay was as long as or longer than here,

particularly when the delay was attributable to the defense.” *Ollivier*, 178 Wn.2d at 28–29 (citing *United States v. Lane*, 561 F.2d 1075 (2d Cir.1977) (58 months, much attributable to repeated requests by the defense for continuances); *Gattis v. Snyder*, 278 F.3d 222 (3d Cir.2002) (28–month delay, all of which was attributable to the defendant); *United States v. Hills*, 618 F.3d 619, 630–31 (7th Cir.2010) (two-year delay, most of which was attributable to the defense); *United States v. Porchay*, 651 F.3d 930, 940 (8th Cir.2011) (assuming 39–month delay was presumptively prejudicial, no Sixth Amendment violation; “much of the delay ... was attributable to [defendant's] own actions” where “[s]he filed well over fifty documents during the nearly three years she was under indictment, including motions which required responses and hearings, notices of interlocutory appeal, and written motions for continuance”); *United States v. King*, 483 F.3d 969 (9th Cir.2007) (21–month delay did not violate the Sixth Amendment where defense obtained numerous continuances, case was complex, and defendant obtained new counsel halfway through proceedings); *United States v. Larson*, 627 F.3d 1198, 1209–10 (10th Cir.2010) (31–month delay did not violate Sixth Amendment in case that was not unduly complicated; second factor weighed heavily against the defendant where every continuance was attributable to the defendant)).

Here, the initial delay from Meiner’s decision to allow Victoria to

take Ross to trial first was for a legitimate purpose as manifested by the admission of the evidence from the Victoria trial for trial in the current case. The delay after the Victoria trial until Ross was granted parole in 2016 was due to Canada's renegeing of its agreement to send Ross back to Canada due to its analysis of Canada's Extradition Act, Parole Act, and *Regina v. Campbell*, after the fact that an agreement had been made. CP 206, 224.

Furthermore, Ross's acquiesced to the delay as shown by his stated desire to not return to the U.S. when he could have done so voluntarily to face trial in Port Angeles. The remaining two year delay after Ross was brought to Clallam County to face trial was not the fault of the State which diligently sought to bring Ross to trial.

Therefore, under these circumstances, and due to Ross's acquiescence, the delay was not exceptionally long and should not be weighed against the State. *See Ollivier*, 178 Wn.2d at 828-29.

B. A CAREFUL BALANCING OF THE *BARKER* FACTORS SHOW THAT DEFENDANT NEVER SUFFERED FROM ANY OF THE EVILS WHICH THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WERE DESIGNED TO PROTECT AGAINST AND THERE WAS NO SPEEDY TRIAL VIOLATION.

The discussion above reveals that government negligence, presumed prejudice which is un rebutted, and an assertion of the right to a speedy trial results in a constitutional violation of the right to a speedy trial.

No governmental negligence in causing delay, failure assert the speedy trial right, but some prejudice to the ability to mount a defense does not result in a violation

When the cause of the delay is neutral and there is no prejudice and no assertion of the right, there will be no violation.

Finally, where the cause of the delay is attributable to the defendant, there is outright avoidance of trial and no assertion of the right to a speedy trial, and there is no resulting prejudice, there is no violation.

Here, Ross was a cause of the delay by his multiple criminal acts in multiple jurisdictions. The State agreement with the Canadian Crown Counsel to allow Ross to be tried in Victoria first was a legitimate purpose and weighs in favor of the State. Ross's continued acquiescence to delay until his parole, when he was free to voluntarily be transferred back to the U.S. was further cause of delay and constitutes failure to assert his right to a speedy trial. When Ross was finally brought to Clallam County on the charge, he still failed to assert his right or complain of delay. Instead, Ross filed numerous motions to suppress evidence or dismiss the case for governmental misconduct and also filed motions to continue the trial. Ross never asserted his right to a speedy trial and he was not interested in going to trial

Ross was not prejudiced by delay. Ross was never held in custody on the current charge until he was paroled and deported back to the U.S. in 2016.

Therefore, Ross did not suffer oppressive pre-trial incarceration. Ross also did not suffer from anxiety and concern as evidenced by his actions in withdrawing his approved transfers to the U.S. knowing he would face trial. Ross was not interested in a speedy trial.

The State has shown that the delay has caused very little if any prejudice to Ross's ability to mount a defense as he may still have an expert evaluate the fingerprints and contest them at trial. Although the doorknob was never collected, its loss is not attributable to the delay. The loss of the fingerprint card occurred in 1982 and is not attributable to the State.

Considering all the circumstances above, the length of delay is not exceptionally long in the context of a speedy trial analysis.

Therefore, Ross was a cause of the delay, Ross failed to assert his rights, Ross was not prejudiced, and there was no violation of Ross's constitutional right to a speedy trial.

VI. CONCLUSION

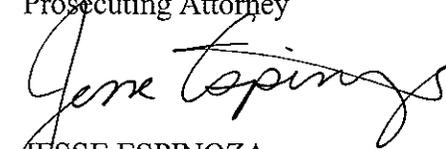
For the foregoing reasons, the Court should find that the State did not violate Ross's constitutional right to a speedy trial should reverse the trial court's order dismissing the case.

Respectfully submitted this 21st day of December, 2018.

Respectfully submitted,

MARK B. NICHOLS

Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Jesse Espinoza", written in a cursive style.

JESSE ESPINOZA

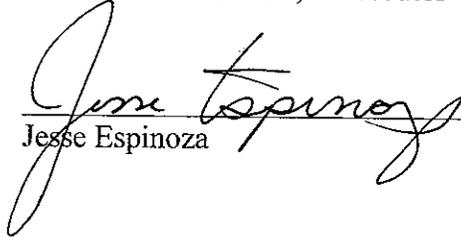
WSBA No. 40240

Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Nancy Collins on December 21, 2018.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

107 F.3d 865

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.

In re: Martin BRAMSON, Petitioner.

No. 96-622.

Submitted Dec. 26, 1996.

Decided Feb. 18, 1997.

Attorneys and Law Firms

Martin Bramson, Petitioner Pro Se.

Before WILKINS, WILLIAMS, and MICHAEL, Circuit Judges.

Opinion

PER CURIAM:

*1 Martin Bramson petitions this court for a Writ of Mandamus directing the district court to dismiss a pending federal indictment against him, or appoint counsel to advance his previously denied motion to dismiss the indictment. A party seeking mandamus relief must show that he has no other means of relief and that his right to the relief he seeks is "clear and indisputable." *In re Beard*, 811 F.2d 818, 826 (4th Cir.1987). We first note that, as a fugitive from justice who is not in the

custody of any official of this country, but is currently incarcerated in a Liechtenstein prison, it is not "clear and indisputable" that Bramson has the right to even request relief in this court. See *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

In any event, however, we reject the underlying basis for Bramson's request for mandamus relief—that his right to a speedy trial has been violated. The delay in bringing Bramson to trial is clearly primarily attributable to his own decision to flee this country over four years ago after he was indicted on a variety of federal charges. See *United States v. Mitchell*, 957 F.2d 465, 469 (7th Cir.1992). He admits that he is not being held in Liechtenstein for any violation of the laws of that principality, but rather pursuant to that country's extradition treaty with the United States for violations of this country's laws. He therefore can presumably return to this country and stand trial of his own volition at any time. Because Bramson is responsible for the delay of his trial, his Constitutional right to a speedy trial has not been violated. Moreover, delays attributable to the unavailability of a defendant are excluded from consideration under the Federal Speedy Trial Act of 1974. See 18 U.S.C.A. § 3161(h)(3)(A) (1994). Bramson therefore cannot establish any violation of that Act.

Accordingly, the petition for a Writ of Mandamus is denied.

PETITION DENIED

All Citations

107 F.3d 865 (Table), 1997 WL 65499

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

Appendix

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

December 21, 2018 - 4:57 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52570-4
Appellate Court Case Title: State of Washington, Appellant v. Tommy Ross, Respondent
Superior Court Case Number: -1- 5063-

The following documents have been uploaded:

- 525704_Briefs_20181221165632D2579189_9790.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Ross - 52570-4-II - Opening Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- johnsosp@gmail.com
- mdevlin@co.clallam.wa.us
- nancy@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Jesse Espinoza - Email: jespinoza@co.clallam.wa.us
Address:
223 E 4TH ST STE 11
PORT ANGELES, WA, 98362-3000
Phone: 360-417-2301

Note: The Filing Id is 20181221165632D2579189