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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

TOMMY ROSS,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

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

BRIEF OF RESPONDENT

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A. INTRODUCTION.

In 1978, the State filed a murder charge against Tommy Ross and said it would seek the death penalty. Six months later, the State relinquished jurisdiction, sending Mr. Ross to Canada where he faced a different murder charge. In Canada, Mr. Ross was convicted and sentenced to prison. Over the years, the State never filed an extradition request. It admitted it was not ready to prosecute Mr. Ross if he returned to Washington.

When Canada granted Mr. Ross parole in November 2016, the State insisted it would now pursue the 1978 charge. The trial court found the State was responsible for causing an extraordinary delay that prejudiced Mr. Ross. It ruled the State violated Mr. Ross' right to a speedy trial. This ruling should be affirmed on appeal.

B. ISSUES PRESENTED.

The state and federal constitutions guarantee an accused person the right to a speedy trial. The prosecution bears the burden of proving it has provided a speedy trial. Four factors frame the test for a speedy trial violation: the length of the delay, the reason for it, the defendant's role in seeking a speedy

trial, and prejudice caused by the delay. Although no factor is dispositive, the most significant factor is the reason for the delay.

Here, the court weighed each factor. It found the 38 years of delay between charging Mr. Ross and arraigning him was caused by the State's decision to send him to another country, the State failed to use available means to bring him back earlier, Mr. Ross was not responsible for the delay, and the loss of evidence prejudiced Mr. Ross' ability to mount a defense and receive a fair trial. Should this Court affirm the trial court's ruling that the State was responsible for causing an extraordinary, prejudicial delay that violated Mr. Ross' right to a speedy trial?

C. COUNTERSTATEMENT OF THE CASE.

The prosecution's Statement of the Case omits some critical facts that shape the speedy trial violation. These facts are set forth below and within the relevant argument sections.

In mid-1978, Tommy Ross was accused of two murders that happened three weeks apart, one in Victoria, B.C. and one

in Port Angeles. CP 25, 2455. Arrest warrants were issued by the respective courts. CP 25, 2456.

On December 22, 1978, Mr. Ross was arrested in Los Angeles on these two warrants as well as California charges. CP 25. California quickly notified Clallam County authorities that it would drop its charges so Mr. Ross could be promptly extradited to Washington. CP 383.

Mr. Ross was 19 years old when he was arrested. CP 214. He was unable to read or write. CP 26. He remains illiterate today. CP 81, 393.

A Clallam County police officer traveled to Los Angeles and spoke with Mr. Ross on January 10, 1979. CP 80. Mr. Ross denied involvement in the murder he was accused of committing. CP 82-84. The officer never asked Mr. Ross if he would voluntarily come to Washington and did not discuss extradition. CP 80.

The next day, a police officer from Victoria met with Mr. Ross. CP 387. According to the officer's detailed notes, at 12:20 p.m. on January 11, 1979, he began speaking to Mr. Ross about the incident and also explained the process of extradition. CP

388. Mr. Ross agreed to waive extradition and face the charges against him in Canada. *Id.* The conversation ended at 12:48 p.m. *Id.* At 3:05 p.m., Mr. Ross signed an extradition waiver form. *Id.* At 4 p.m., the Victoria police officer arranged for Mr. Ross to fly to Victoria the next day. *Id.*

At 5 p.m. on January 11, 1979, a Canadian prosecutor, Richard Anthony, called the newly elected Clallam County prosecutor, Grant Meiner. *Id.*; CP 201. Mr. Meiner had started his job as county prosecutor three days earlier. CP 484. Mr. Anthony said Mr. Ross agreed to waive extradition to Canada but the California authorities would not release him to Canada without Washington's permission. CP 208, 388. In response, Mr. Meiner agreed to withdraw his extradition warrant and send Mr. Ross to Canada. CP 388.

At 5:59 p.m., Mr. Meiner sent a telegram to Los Angeles authorities, officially removing the Washington extradition warrant so Mr. Ross could be taken to Canada. CP 389.

Later in 1979, Mr. Ross was convicted of murder in Victoria and sentenced to life in prison, with a 25-year minimum term before he would be parole eligible. CP 333. Mr. Meiner

claimed Mr. Anthony had assured him that Mr. Ross would return after his trial in Canada, regardless of the result. CP 202. As proof, Mr. Meiner offered a telegram dated January 12, 1979, from Mr. Anthony. CP 210. The telegram states Mr. Ross would return to the United States through deportation channels, but the telegram adds “should the charges fail.” CP 210; *see* CP 85.

Although the telegram specifies Mr. Ross would be deported if the charges failed, Mr. Meiner claimed Mr. Anthony said Mr. Ross would be returned even if convicted. CP 202.

Other Canadian prosecutors later told Mr. Meiner that under Canadian law, a person sentenced to prison must serve that sentence and be paroled before he will be deported. CP 219, 224-25. When Mr. Meiner pointed to extradition laws giving Canada discretion to release Mr. Ross earlier, a Canadian prosecutor said that in practice, the Canadian government would likely require Mr. Ross to serve his full sentence if he filed an extradition request. CP 238. No prosecutor filed an extradition request for Mr. Ross. CP 29.

As a black man in prison, Mr. Ross suffered from racist treatment by guards, resulting in a financial settlement from

the human rights commission. CP 1114. He was also stabbed in his eye and lost sight in it. CP 147, 151.

Mr. Ross was released on parole in November 2016 and deported. CP 449. Under the prosecutor's direction, he was brought to Clallam County, arraigned, and appointed counsel CP 2411-14. As Mr. Ross' lawyer gathered evidence to defend Mr. Ross, he found old newspaper articles explaining the reasons for the delay and filed a speedy trial objection. CP 443, 448-49. The trial court ruled Mr. Ross was denied his right to a speedy trial. CP 30-31.

D. ARGUMENT.

Mr. Ross was denied his right to a speedy trial by the nearly 40-year delay caused by the prosecution's negligent and purposeful efforts to postpone any trial.

- 1. The state and federal constitutions guarantee a speedy trial as a fundamental right of a person accused of a crime.*

An accused person's right to "a speedy trial" is guaranteed by the Sixth Amendment and article I, section 22 of the state constitution. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768

(2009).¹ Article I, section 10 further dictates that “[j]ustice in all cases shall be administered . . . without unnecessary delay.”

“The right to a speedy trial is ‘as fundamental as any of the rights secured by the Sixth Amendment.’” *Iniguez*, 167 Wn.2d at 290 (quoting *Barker v. Wingo*, 407 U.S. 514, 515 n.2, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). The “right has its roots at the very foundation of our English law heritage,” where, “the delay in trial, by itself, would be an improper denial of justice.” *Klopfer*, 386 U.S. at 223-24.

Washington has adopted the multi-factor test set forth in *Barker* to determine whether speedy trial rights have been violated. *Iniguez*, 167 Wn.2d at 290. Under the *Barker* inquiry, the court examines: (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.*

¹ The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” Article I, section 22 similarly provides, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.”

Here, the trial court ruled the State violated Mr. Ross' right to a speedy trial. The court issued its ruling after reviewing multiple lengthy written pleadings and holding oral argument. CP 24-25; *see* CP 70-492. The court was also familiar with details of the allegations after presiding over lengthy pre-trial proceedings. 10/2/18RP 10; CP 24-25; *see, e.g.*, CP 1157-65 (ER 404(b) ruling recounting details of charges); CP 1076-84 (CrR 3.5 ruling); CP 2462-65 (rulings on motion to dismiss for insufficient evidence and misconduct); 5/20/17RP 9-120 (hearing on allegation police lost or forged critical fingerprint evidence).

On appeal, the trial court's resolution of factual questions are reviewed for abuse of discretion. *State v Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010); *see Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed.3d 520 (1992) (appellate court gives "considerable deference" to trial court's determination of government's speedy trial diligence). This Court will defer to the trial court's factual determinations unless clearly erroneous. *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006). The legal question of whether delay

constitutes a violation of speedy trial is reviewed de novo.

Iniguez, 167 Wn.2d at 280-81.

The prosecution assigns error to only two of the court's written findings by number, FOF XX (finding of prejudice) and XXII (finding Mr. Meiner's relinquishment of jurisdiction was genesis for delay). AOB at 3-4; RAP 10.3(g). The vast majority of the court's findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997).

2. The length of the delay is extraordinary.

As the trial court correctly concluded, the length of delay is "extraordinary." CP 55.

The *Barker* inquiry requires a threshold showing that the delay is longer than ordinary to trigger a potential speedy trial violation. *Id.* at 283. In *Iniguez*, the court held that an eight month delay is "just beyond" the minimum threshold to trigger the *Barker* inquiry. *Id.* Delay is generally considered "presumptively prejudicial" as it extends beyond one year after charges are filed. *Doggett*, 505 U.S. at 652 n.1.

Here, 38 years passed between the filing of charges and Mr. Ross' arraignment, almost all of which he spent in jail. The

nearly four decades of delay certainly “crossed a line from ordinary to presumptively prejudicial.” *Iniguez*, 167 Wn.2d at 283; *see* 10/2/18RP 9 (defense counsel explained, “To my knowledge . . . no one person has ever had to wait 38 years to receive his day in court”).

The “presumption that pretrial delay has prejudiced the accused intensifies over time.” *Doggett*, 505 U.S. at 652. The extraordinarily long delay weighs against the State and Mr. Ross was denied his right to a speedy trial.

3. The prosecution caused the extraordinary delay and never took legal action to mitigate this delay during the 38 years that followed.

a. The reason for the delay is the most a critical factor in speedy trial analysis.

The trial court ruled the prosecution’s lack of diligence in prosecuting the case was the reason for the delay. CP 30.

The reason for the delay is considered the most significant of the *Barker* factors. “The flag all litigants seek to capture is the second factor [of the Barker analysis], the reason for the delay.” *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.

Ct. 648, 88 L. Ed. 2d 640 (1986). The burden is on the government to justify the delay. *Barker*, 407 U.S. at 531.

When assessing the cause of delay, courts may “assign different weights to the reasons for delay.” *Iniguez*, 167 Wn.2d at 294. If the delay occurs because the prosecution “intentionally held back in its prosecution” to hamper the defense, delay is heavily weighed against the State. *Doggett*, 505 U.S. at 656. Prosecutorial negligence also falls to the wrong side of the line and weighs against the State. *Id.* at 657. A prosecutor must be reasonably diligent in pursuing a prosecution. *Id.*

b. The “genesis” of the delay was the prosecution’s decision to send Mr. Ross to Canada.

As the court ruled, “Mr. Meiner’s relinquishment of jurisdiction over Mr. Ross was the genesis for the reason for the delay in this case.” CP 30 (FOF XXII). The Clallam County prosecuting attorney agreed to postpone any proceedings against Mr. Ross and send Mr. Ross to Canada to face a trial for murder. CP 26-27 (FOF X, XI, XII; XVI).

The State never asked Mr. Ross to waive extradition to Washington. 10/2/18RP 51-52. California made Mr. Ross directly

and immediately available to Washington. CP 383. California told Washington prosecutors that it would drop its charges against Mr. Ross in favor of his extradition to Washington. CP 387, 390.

Canada could not extradite Mr. Ross without Washington's permission. CP 27, 201. The State readily dropped its extradition warrant so that Mr. Ross would be immediately flown to Canada. The State decided to send Mr. Ross to Canada without any formal assurance he would return. CP 27, 389.

The State's decision to drop its extradition request and allow Canada to take custody happened quickly. On Thursday January 11, 1979, two Canadian detectives met with Mr. Ross. CP 388 (detective's notes). During a 28 minute interview, they questioned him about the charges and obtained his agreement to sign a waiver of extradition. *Id.* At 3:05 pm, Mr. Ross signed an extradition waiver form. *Id.* At 4 pm., the officer arranged to fly Mr. Ross to Canada the next day. *Id.* At 5 pm, the Canadian prosecutor "advised" the Clallam county prosecutor about Mr. Ross' waiver of extradition. *Id.* Mr. Meiner "agreed to cancel

extradition proceedings in the State of Washington in view of this waiver.” *Id.*

Within the hour, Mr. Meiner sent a telegram to Los Angeles authorities stating “You are authorized to release Tommy Ross Jr. on Clallam County, Wash. Superior Court Fugitive Warrant #5063 to Canadian Authorities.” CP 389.

As background, Mr. Meiner became Clallam County’s elected prosecutor on January 8, 1979. CP 25-26 (FOF VI). He defeated the prosecutor who filed the charges against Mr. Ross, Craig Ritchie. CP 484. Mr. Ritchie aggressively pursued extradition. CP 25 (FOF VI). Before leaving office, he expressly warned Mr. Meiner, “under no circumstances should he relinquish the County’s jurisdiction” over Mr. Ross and let him go to Canada first. CP 484-85 (Declaration of Ritchie); CP 26 (FOF VII). He told Mr. Meiner that Canada “would never return him.” CP 485.

The State insists Mr. Ross caused the delay by virtue of having multiple charges in different jurisdictions. AOB at 17-19. But successive prosecutions do not remove the State’s obligation to act with due diligence in reasonably pursuing its charges. *See*

People v. Stanitz, 857 N.E.2d 288, 293 (Ill. App. 2006) (agreeing with similar decisions from other states that “delay occasioned by the State’s own decision to surrender the defendant [to another jurisdiction] must be charged to the prosecution and not the defendant.”).

For example, the prosecution cites *United States v. McConahy*, 505 F.2d 770, 711 (7th Cir. 1974), where a defendant who had been released on bail fled to England. In England, he was convicted of a new crime and sentenced to prison. *Id.* at 772. While serving his sentence, he asked to return to the United States and the government made no effort to bring him back. *Id.* at 773. The government claimed England would not have released him under its extradition laws, so the defendant’s request was meaningless. *Id.*

The *McConahy* Court faulted the prosecution for never formally asking England to return the defendant. It ruled the government “had a constitutional duty to made a diligent, good-faith effort” to bring Mr. McConahy to the United States once they located him in another country. *Id.* at 773. Because it never meaningfully tried to bring the defendant back to the United

States, the court held that the defendant's right to a speedy trial was denied. *Id.*

McConahy reinforces the State's constitutional duty to take advantage of available means to bring a person to court, rather than simply wait for another prison sentence to end. In *McConahy*, the prosecution had not actually sent the defendant to another country, rather the defendant purposefully fled being sentenced in the United States. *Id.* at 771-72. But the prosecution still had the constitutional obligation to make a "diligent good-faith effort to bring him back." 505 F.2d at 773.

Here, the prosecution purposefully sent Mr. Ross to a foreign country to be prosecuted for a foreign crime. Before the prosecutor agreed to send Mr. Ross to Canada, the previously elected prosecutor warned him against taking this action due to the difficulty of ever getting him back. CP 484-85.

The prosecution's brief never addresses a strikingly similar case on which the trial court relied, *People v. Romeo*, 12 N.Y.3d 51, 904 N.E.2d 802 (NY 2009). CP 60-62. In *Romeo*, the defendant was charged with murders in both Canada and New York. *Id.* at 53. Based on some "encouraging" but not definitive

statements from a Canadian official, the prosecution agreed to postpone its case, and let Canada proceed first, mistakenly believing the defendant would return to New York after his Canadian trial. *Id.* at 54.

Mr. Romeo was convicted in Canada and sentenced to serve 25 years to life. *Id.* He eventually returned to New York after 19 years, based on an amendment to the extradition law letting New York “borrow” him from Canada. *Id.*

This delay denied Mr. Romeo his right to a speedy trial. *Id.* at 57-58. The court ruled that the prosecution “knew or should have known that there was no guarantee” the defendant would be brought back “in a timely manner,” even if a Canadian official had encouraged the prosecution to believe this was possible. *Id.* at 57. Anytime the defendant is incarcerated outside of the state, the prosecution must “make diligent, good faith efforts to secure his presence in the state for arraignment and trial.” *Id.*

Similarly to *Romeo*, the prosecution had the ability to arraign and try Mr. Ross in January 1979, but instead voluntarily sent him to Canada. Its agreement to transfer Mr.

Ross to another country for prosecution makes the State's responsible for the extraordinary delay that followed.

c. The prosecution did not obtain any actual agreement for Mr. Ross's timely return to the United States.

Throughout its brief, the prosecution claims there was an "agreement" to return Mr. Ross to Washington. But no agreement existed. The prosecution asked the trial court to find there was at least a "verbal agreement" between a Canadian prosecutor and Clallam County prosecutor Meiner, but the court refused. 10/23/18RP 76. The judge said, "I can't make that finding" because there was no evidence of such an agreement. *Id.*

The prosecution's brief makes no mention of the court's refusal to find any agreement existed involving Mr. Ross' return to Washington following the Canadian trial.

The prosecution not only misleadingly claims there was an agreement with the "Crown Counsel" and Mr. Meiner, it also asserts that Crown Counsel "was authorized to speak on behalf of Canada in these matters." AOB at 20. The State cites nothing in the record to support its claim that the Canadian prosecutor

was “authorized” to make an agreement that bound the government of Canada. *Id.* Crown Counsel is simply the title given to a prosecutor and does not denote any official governmental authority over matters of extradition.

According to a memorandum Mr. Meiner wrote later, the Canadian prosecutor told Mr. Meiner that once the Victoria trial was concluded, Mr. Ross would be ejected from Canada as a “persona non grata.” CP 208. A telegram confirms that the Canadian prosecutor said Mr. Ross would be “deportable on your warrant” but also said this applied “if charges in Victoria fail.” CP 210. Neither the telegram nor Mr. Meiner’s memorandum reflected any discussion of what would happen if Mr. Ross was convicted and sentenced to prison.

The prosecutor, Richard Anthony, who purportedly encouraged Mr. Meiner to believe Mr. Ross would be quickly returned to Washington, was only briefly part of the prosecution team. CP 219. Mr. Anthony was no longer working for the prosecution by the time of trial and sentencing in Victoria.

Mr. Meiner’s memo also claims Crown Counsel Anthony said he would get Mr. Ross to sign a statement agreeing to

extradition to Washington, but no statement was ever obtained or otherwise mentioned again. CP 208; *see* CP 27 (FOF XI). Mr. Meiner's claim that the Canadian prosecutor promised to ask Mr. Ross to waive extradition is not supported by any evidence other than Mr. Meiner's assertion in his memo. CP 208.

As the court properly found, there is no evidence the State entered into an agreement for Canada to return Mr. Ross if convicted. CP 26-27. Even the trial prosecutor conceded that any agreement lacked any degree of formality. 10/23/18RP 76. The prosecution's brief vastly overstates evidence of an illusory or fictitious agreement involving Mr. Ross' removal to Washington.

d. The prosecution never requested a waiver of extradition before Mr. Ross went to Canada.

The State did not ask Mr. Ross to come to Washington before his extradition to Canada. CP 26 (FOF VIII). The court faulted the State for failing to make this simple inquiry. It found inexplicable the State's decision not to obtain an actual written extradition waiver prior to agreeing to transfer Mr. Ross to another country. 10/23/18RP 87-88.

e. Once in Canada, the prosecution never requested extradition even when the extradition laws changed and made transfer readily available.

At no point in time did the prosecution seek Mr. Ross's extradition. CP 29 (FOF XIX). Over time, the extradition laws changed so inmates would be temporarily transferred between Canada and the United States. Even after this change to the law, the prosecution made no effort to bring Mr. Ross to Washington.

As the court described in *Romeo*, extradition laws between Canada and the United States changed to permit "the 'borrowing' of the defendant from Canada." 12 N.Y.3d at 54-55. This change in the law allowed New York to bring Mr. Romeo to that state for prosecution even while he was serving a Canadian sentence of 25 years to life. *Id.* Mr. Ross was similarly serving a sentence of 25 years to life in Canada, but unlike New York, the prosecution did not borrow Mr. Ross to proceed with its prosecution.

When the prosecution initially agreed to send Mr. Ross to Canada in 1979, the extradition law gave Canadian officials discretion to permit an inmate's surrender to the United States.

CP 352; *United States v. Pomeroy*, 822 F.2d 718, 721-22 (8th Cir. 1987). The 1971 Treaty on Extradition between the United States and Canada, Article 7, 27 UST 983, provided that when receiving an extradition request for a person serving a sentence, the person's surrender "may be deferred" until "the full execution of any punishment" imposed. CP 352 (text of treaty attached to pleading).

The Canadian government "may" have denied the State's request if it was made, but no formal effort ever occurred. CP 29.

The extradition treaty was amended in 1991. CP 365, 367 (citing Protocol Amending the Treaty of Extradition (enacted 1991)). Article V of the new Treaty Protocol replaced Article 7, providing that when a country seeks extradition of a person serving a sentence in another country, the country holding the person may either surrender the person immediately or "postpone" surrender until the person has served "the whole or any part of the sentence imposed." CP 353 (quoting 1991 Protocol, Article V). This 1991 modification increases a country's ability to agree to extradition when the person has served part

of the sentence and removes the requirement that the full sentence be served. CP 367.

In 2003, a more streamlined extradition process was enacted in the Second Protocol Amending the Extradition Treaty with Canada. CP 353. The 2003 changes enable “sequential trials of individuals who have committed extraditable offenses in both countries at a time when witnesses and evidence to both crimes are more readily available.” CP 353, quoting Second Protocol. This treaty provides that once a person is “convicted and sentenced,” the country may “temporarily surrender the person to the requesting State for prosecution.” CP 354.

These extradition laws demonstrate that it was never futile for the prosecution to seek extradition. Had the prosecution requested extradition after 1991, the law favorably encouraged extradition and expressly permitted borrowing a defendant by 2003. But the prosecution never made a request.

In *Pomeroy*, 822 F.2d at 721-22, the court ruled that even if Canadian officials had discretion to deny the defendant’s surrender under the 1971 treaty, it would not presume that an attempt at extradition would have been futile. The government

still has a constitutional duty to make a diligent, good-faith effort to bring the accused before the court. *Id.* at 722.

Here, no prosecutor ever sought Mr. Ross's extradition, despite the increasingly favorable nature of the laws permitting transfer among people who are serving sentences in a Canada and also face prosecution in the United States. CP 29 (FOF XIX). The prosecution did not diligently pursue its case as it is constitutionally required to do based on its obligation to provide a speedy trial.

f. The prosecution asked the court to withdraw arrest warrants because it was not ready to prosecute Mr. Ross and for 30 years it never had an effective warrant in place for Mr. Ross.

In 1987, the prosecution asked the court to withdraw the arrest warrant for Mr. Ross because it was not prepared to try Mr. Ross if he came to the United States. CP 2452-53. The prosecutor said he learned Mr. Ross wanted to return to the United States on the warrant. CP 2453. He feared that Mr. Ross' appearance in Washington would "force a premature decision regarding the prosecution." *Id.* Some "material witnesses are not available" and the primary investigator is no longer with the

police department. *Id.* The court removed the outstanding warrant because the prosecution admitted it was not ready or able to try the case. CP 2454.

Although the warrant was reinstated in 1988, the prosecution later conceded this warrant was never registered with law enforcement databases. CP 672. In 2014, the prosecution asked the court to quash the warrant and never reinstated it. CP 28. In its 2014 motion to dismiss the warrant, the prosecution admitted the warrant does not appear in the law enforcement databases that track warrants. CP 672. It also conceded, “this case is 36 years old and witnesses and physical evidence may be difficult to pull together for trial.” *Id.* The court granted the motion revoking the warrant. CP 2412.

No active warrant existed at the time of Mr. Ross’ release. CP 28 (FOF XVI).

The prosecution did not diligently pursue its case after Mr. Ross was sentenced in Canada. Not only did the State fail to seek extradition, its fear that Mr. Ross might return prompted it to admit it was not ready to prosecute him. It did not register its arrest warrant, signaling its inattention to the case. These

actions show the State's disinclination to press its charges or provide Mr. Ross a speedy trial. *See Doggett*, 505 U.S. at 652 (when investigators "made no serious effort" to look for defendant, its "lethargy" shows prosecutorial negligence in causing speedy trial delay).

g. The prosecution opposed Mr. Ross' release on parole in Canada, even though parole was the only way to bring him to Washington without extradition.

At Mr. Ross's 2016 parole hearing, the prosecution told the parole board *not* to release Mr. Ross from his Canadian sentence and urged Canada to keep him in prison longer. CP 427-28. It sent a letter to the Parole Board "strongly recommending against his release on parole and encouraging Mr. Ross' further confinement in Canada." CP 428. In 1995, the Port Angeles police commander sent a letter to a Canadian immigration official, copying the Clallam County prosecutor, which stated that Mr. Ross' release from prison in Canada would be an "unfortunate event." CP 385.

Under the prosecution's theory on appeal, the State was required to wait for Mr. Ross' parole from Canada in order to pursue its case. But not only is that reading of extradition laws

inaccurate, the State also opposed Mr. Ross' release on parole. By encouraging Canada to keep Mr. Ross in a Canadian prison rather than release him so he could be brought to Washington sooner, the prosecution did not diligently seek to prosecute him. *See Doggett*, 505 U.S. at 652.

h. Mr. Ross did not the cause of the 38-year delay by deciding not to transfer to a federal prison anywhere in the United States.

The prosecution shifts the blame to Mr. Ross for failing to transfer to a federal United States prison to serve his Canadian sentence and posits this makes him the cause of the delay. AOB at 20.

Twice, Mr. Ross considered a *prison* transfer because he wanted to be closer to his family. On both occasions, there was no active warrant for his arrest in Washington (the prosecution lifted the warrant in 1987 and when it re-instated the warrant it never entered it validly). When withdrawing the warrant in 1987, the prosecution conceded was not prepared to pursue a trial if Mr. Ross transferred. CP 2453-54.

Mr. Ross ultimately withdrew his request to transfer to a federal prison facility in the United States for reasons unrelated

to this case. He wanted to return to the United States to be closer to his mother in California. CP 176, 393. Transfer would not end his Canadian sentence; instead, the United States Bureau of Prisons would control his sentence and his placement. CP 393.

Experienced federal defenders advised Mr. Ross it was unlikely he would be in a prison near California. CP 176, 393. They also said he would likely serve a longer sentence in federal prison than if he remained in Canada. CP 182, 393. The federal prison authorities in the United States would treat his sentence as a life term, and while he could be considered for parole after serving 30 years, parole could be hard to achieve. CP 393-94. The federal defenders advised him that “he would fare better seeking parole from Canada.” CP 394; *see* CP 182.

Mr. Ross’ decision not to transfer to a United States prison does not make him responsible for the 38 years of delay.

The State cites cases involving a defendant who “purposefully absented himself from the proceedings,” and was affirmatively “resisting extradition.” AOB at 20-21. It concedes Mr. Ross was not actually resisting the government’s attempts

to bring him to Washington. *Id.* Mr. Ross engaged in no “affirmative resistance” to the government’s efforts to prosecute him. *United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995).

The prosecution contends Mr. Ross’ decision not to transfer to a U.S. prison indicates he did not “want” to be tried in Washington. AOB at 21. This assertion is not supported by the record and is contrary to the court’s findings. The record shows Mr. Ross’s decision on prison transfer related to the possibility of parole release or at least being held in a prison in California.

Even if Mr. Ross had transferred to a federal prison, there is no evidence the prosecution would have promptly brought him to Clallam County for prosecution. On the contrary, when confronted with Mr. Ross’ possible transfer to a United States prison, the prosecution admitted it was not ready to proceed, did not know if it could locate necessary witnesses, and wanted to delay even the possibility of trial. CP 2453-54.

i. The prosecution used the delay to hamper the defense.

After agreeing to send Mr. Ross to Canada in 1979, the prosecution opposed efforts made on behalf of Mr. Ross to prepare a defense. Then Clallam County public defender Christopher Shea was concerned that Mr. Ross would be at a significant disadvantage if the defense did not begin investigating the case while he was in Canada. Mr. Shea sought an “interim” appointment to obtain discovery while Mr. Ross was being prosecuted in Canada. CP 120.

Mr. Meiner adamantly refused to give any discovery to the public defender’s office. CP 128. The court rejected Mr. Shea’s request for “premature” discovery. CP 129, 137.

Mr. Meiner later assured the Canadian prosecutor that he would “continue to resist discovery sought by the Defendant’s attorney here, at your request” during Mr. Ross’ Canadian appeal. CP 221. At the same time, Mr. Meiner pressed the Canadian prosecutor to send him copies of the trial transcripts, so he could prepare for the trial while Mr. Ross’ future attorneys could not. *Id.* The State’s efforts obstructed any ability Mr. Ross might have had to prepare to defend himself close in time to the

incident. Its opposition to providing any discovery to the defense even while it worked in cooperation with the Canadian prosecutors showed it hoped to use this delay to its own advantage, and the disadvantage of the defense.

j. The prosecution sent Mr. Ross to Canada even though Canada was unlikely to return a person who faced the death penalty.

The State's opening brief asserts that sending Mr. Ross to Canada was for the legitimate strategic benefit of gaining ER 404(b) evidence it would use at trial against Mr. Ross. AOB at 24. It admits that its case was weaker than the Canadian case and hoped to boost its chances by using the Canadian conviction against Mr. Ross. *Id.* The mere existence of a strategic reason for delaying a case does not supercede the speedy trial consequences of this decision, especially in light of the foreseeable difficulty in obtaining Mr. Ross' presence afterward.

The State's charges against Mr. Ross included its intent to seek the death penalty. CP 2455. Canada did not condone the death penalty and would be reluctant to extradite a person who faced the death penalty on return. CP 297, 384; *see Com. v. Judge*, 916 A.2d 511, 513 (Pa. 2007) ("Canada refused to

extradite Appellant to Pennsylvania, pursuant to the extradition treaty between the United States and Canada, which provides that Canada will not extradite any person to face a sentence of death in the United States.” (citing 1971 Treaty on Extradition U.S.-Can., 27 U.S.T. 983).

The police told a local newspaper that the reason Mr. Ross was not extradited following his Canadian conviction was that a treaty “forbids extradition of a prisoner if he could be convicted of a capital crime.” CP 391. After the death penalty was invalidated in 1981, the police expected Mr. Ross would return. *Id.*; CP 297. But Mr. Meiner told the police he was “not presently inclined to begin the extradition process,” regardless of potential extradition issues involving the death penalty. CP 300.

As the original prosecutor Craig Ritchie warned Mr. Meiner, it would be impossible to obtain Mr. Ross’s presence in Washington if he went to Canada first. CP 484-85 (Declaration of Ritchie). The death penalty charge Mr. Ross faced made extradition from Canada particularly unlikely. None of the letters the prosecution exchanged with Canadian officials regarding the possibility of Canada sending Mr. Ross to

Washington for prosecution made any mention of the State's intent to pursue the death penalty. CP 217-43.

Any strategic benefit the State may have sought from using Mr. Ross' Canadian conviction against him in its Washington prosecution does not justify years of foreseeable delay this choice caused, particularly when the potential death penalty sentence Mr. Ross faced made it more unlikely Canada would readily return Mr. Ross to be prosecuted in Washington.

k. The prosecution triggered the lengthy delay and never mitigated it over the many years Mr. Ross was held in a foreign country.

An intentional delay by the government is weighed "heavily" against it. *Barker*, 560 F.3d at 531. A court's finding of negligence by the prosecution is accorded special deference on appeal. *Doggett*, 505 U.S. at 652.

Through various deliberate and negligent acts, the State bears responsibility for the untenable delay. The prosecution was never diligent in its pursuit of a speedy trial. The court correctly ruled that the prosecution caused the delay and this determination is a decisive factor in the speedy trial analysis. *Loud Hawk*, 474 U.S. at 315.

4. *The defendant is not blamed for the delay when he had no opportunity to assert his right to a speedy trial.*

A defendant is never required to bring himself to trial.

Barker, 407 U.S. at 527. The prosecution bears the burden of proving a speedy trial waiver was “knowingly and voluntarily made.” *Id.* at 529. It is “impermissible” to presume waiver “from a silent record.” CP 58, quoting *Barker*, 407 U.S. at 516.

Applying *Barker*, the trial court found no evidence Mr. Ross intentionally relinquished his right to a speedy trial. *Id.*

Barker expressly rejected a rule that would require a defendant’s demand for a speedy trial to trigger the right to a speedy trial. 407 U.S. at 524-28 (“We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.”). It emphasized that the “primary burden” to “assure that cases are brought to trial” rests on the courts and prosecutors, not the defendant. *Id.* at 529.

The prosecution construes *Barker* to say that a defendant’s failure to specifically and repeatedly assert his right to a speedy trial during the period of delay shows he has waived it. AOB at 27-28. However, when the *Barker* Court indicated a

defendant generally has an obligation to object, it made this remark in the context of a case where the defendant had numerous opportunities to attend court proceedings while represented by counsel.

In *Barker*, the defendant was present in court, with counsel, when the government sought repeated continuances. 407 U.S. at 516-17, 520, 534. Unlike *Barker*, Mr. Ross never appeared in state court until late 2016, 38 years after his arrest in California. He was illiterate and held in a foreign prison. CP 383. The State never offered him the chance to come to Washington at the outset. CP 26. While in prison, he had “his eye gouged out” by an inmate, partially blinding him. CP 147, 151. He never had an attorney who was representing him, monitoring the prosecution’s case, and able to voice objections to delay during this time period as occurred in *Barker*.

The prosecution’s efforts to blame Mr. Ross rest on its repeatedly misleading assertions that he had an attorney appointed to represent him. *See, e.g.*, AOB at 36-38. In 1979, the local public defender asked to be temporarily appointed even without jurisdiction over Mr. Ross because “early representation

is critical to this defense” CP 487; *see* CP 125-16. Public defender Shea argued critical forensic evidence would disappear and the defense would be at a great disadvantage if no one could begin investigating the charges until he was brought from Canada. *Id.* The prosecution opposed the appointment of counsel and refused to provide any discovery. CP 129, 133.

But the court denied Mr. Shea’s request that he be permitted to obtain discovery and aid Mr. Ross. CP 491-92. The trial court, and a Court of Appeals commissioner after a motion for discretionary review, ruled this request was premature and the court lacked jurisdiction over the case. CP 129, 144-45. One reason the court gave for denying Mr. Shea’s discovery request was that Mr. Ross had never met Mr. Shea or agreed Mr. Shea could represent him. CP 129.

In 2002 and 2003, an attorney from Quebec contacted the police and prosecution to learn whether they could negotiate removing the death penalty and arrange for Mr. Ross to return to Washington. CP 272, 276, 280-81. The State refused the attorney’s request. Then-prosecutor Deb Kelley told Sylvie Bordelais that the State would not negotiate over the death

penalty. CP 274. Ms. Kelley was unaware that years earlier, a different prosecutor had amended the information and removed the notice of intent to seek death penalty, because the Supreme Court had invalidated the death penalty in *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). CP 2447-48. Ms. Kelley's misinformed opposition to a resolution demonstrates the State's inattention to the case against Mr. Ross and its disinclination to actually pursue charges against him.

The other occasion Mr. Ross had "counsel" was in relation to his requests to transfer to a federal prison in the United States. The federal courts appointed two different federal public defenders to solely advise Mr. Ross on a prison transfer at discrete points in time. CP 165, 392. The attorneys' roles were limited to providing advice on the transfer and parole issues he faced. However, Mr. Hillier later confirmed for Mr. Ross that Clallam County had withdrawn its arrest warrant. CP 400.

Mr. Ross never had an attorney who was actually appointed to represent him on this case until late 2016, when he finally came to Clallam County. CP 2414. His newly appointed lawyer had no familiarity with the case and extensively

researched the last 38 years of proceedings to determine the State's role in the delay. *See* CP 91 n.1 (attorney notes lack of discovery regarding issues related to reasons for delay and who bore responsibility); CP 496 (defense request for continuance due to extraordinary volume of materials to review). The only evidence he could locate about why the State delayed prosecuting Mr. Ross was from reading old newspaper articles. CP 449.

Mr. Ross was never given a meaningful opportunity to assert his right to a speedy trial until he came to Clallam County and his attorney investigated the reasons for the delay. The State has not proven Mr. Ross intentionally waived his right to a speedy trial, as it must do. *Barker*, 407 U.S. at 527, 529. The court's finding that Mr. Ross is not responsible for the delay is soundly supported by the record.

5. *The close to 40 years that have passed prejudice Mr. Ross's ability to defend himself and receive a fair trial.*

"Excessive delay presumptively compromises the reliability of a trial," even when no party can prove or identify the exact prejudicial effect. *Doggett*, 505 U.S. at 654, *quoting*

Barker, 407 U.S. at 532. *Barker* identified three types of prejudice stemming from speedy trial delay: “oppressive pretrial incarceration,” the “anxiety and concern of the accused,” and the “possibility that the accused’s defense will be impaired by dimming memories and loss of exculpatory evidence.” *Id.*

The “most serious” of these forms of prejudice is possible harm to the defense, “because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.*

The prejudice inquiry does not require the accused person prove the delay impaired the ability to raise specific defenses or produce specific evidence. *Doggett*, 505 U.S. at 655. Instead, the prosecution must “affirmatively” prove that the delay left the defendant’s “ability to defend himself unimpaired.” *Doggett*, 505 U.S. at 658 n.4.

Here, the prosecution insists there is enough evidence for it to go forward with its case. AOB at 40-42. But to rebut the presumptive prejudice stemming from 38 years of delay, the State must affirmatively prove Mr. Ross’s ability to defend himself is “unimpaired.” *Doggett*, 505 U.S. at 658 n.4. The

“possibility” that Mr. Ross’s defense “will be impaired” constitutes prejudice in the speedy trial context when there is extraordinary delay. *Id.* The State’s ability to muster evidence against Mr. Ross has little bearing on the prejudicial effect of delay his right to present a defense.

The trial court ruled the delay prejudiced Mr. Ross’ ability to mount a defense and listed some of the prejudicial circumstances in its findings. CP 29 (FOF XX). The trial court was familiar with the potential trial evidence. It had presided over pretrial litigation involving the admissibility of evidence from Canada, lost fingerprint evidence, and allegations of misconduct or perjury involving potential evidence. *See, e.g.*, CP 1157-65 (ER 404(b) ruling, recounting details of charges); CP 1076-84 (CrR 3.5 ruling); CP 2462-65 (rulings on motion to dismiss for insufficient evidence and misconduct). The trial court’s familiarity with the case demonstrates it is in best position to measure prejudicial effect of the delay on the available trial evidence. *State v. Hawkins*, 181 Wn.2d 170, 180, 332 P.3d 408 (2014).

The prosecution disputes these findings on appeal, claiming these missing pieces of evidence are may be replicated by using photographs or the faded memories can be replaced by 1979 transcripts. But the court's assessment of the delay's prejudicial ramifications merits deference on appeal. *See Hawkins*, 181 Wn.2d at 180.

Mr. Ross did not concoct claims of prejudice simply to manufacture a speedy trial argument. He filed motions to dismiss the case under CrR 8.3 and due process based on lost and missing evidence. *See* CP 1048, 1964, 2133. He presented an investigator's report detailing difficulties in contacting witnesses. CP 404-06. The prosecution supplied its own list of unavailable witnesses due to the passage of time. CP 641.

Extraordinary delay is deemed presumptively prejudicial because the passage of time alone means that memories will fade, potential witnesses will be unavailable, and new witnesses will be hard to locate decades after the incident. It also recognizes neither party may be able to prove or even identify the effect of excessive delay on the reliability of trial. *Doggett*, 505 U.S. at 655. The court's finding that lost or faded memoires

of eye witnesses, unavailable fingerprint examiners, deceased law enforcement officers, and destroyed evidence prejudice Mr. Ross' ability to defend himself is supported by the record. CP 29.

Beyond the individual pieces of missing or lost evidence, there are other reasons to doubt Mr. Ross' ability to receive a fair trial. The State intends to rely on evidence from the Canadian prosecution, but the Canadian Parole Board examined this evidence and voiced "serious concerns" about the fairness of that trial. It "agrees" with Mr. Ross' complaints about "the integrity of the police investigation" in that case. CP 1114.

The State will also have to contend with evidence of racism marring the integrity of its own prosecution. The detective's notes from an interview with Mr. Ross include a cartoonish drawing with exaggerated black facial features. Answer to Mt. to Modify, App. D. In 2017, the prosecutor accused Mr. Ross of "hating white women," to which Mr. Ross objected as an unfounded and inflammatory allegation of racism. CP 1123; 5/30/17RP 108. The Canadian Parole Board closely reviewed Mr. Ross' file and concluded "there is reliable

and persuasive information that you have been subjected to racism before and during your sentence.” CP 1114.

The intervening years after the prosecution opted to send Mr. Ross to Canada have been far from easy for Mr. Ross, who is now 60 years old. The nearly four decades of delay is not only presumptively prejudicial, it is actually prejudicial to Mr. Ross. The lost and missing evidence compromise the reliability of a trial. The record amply supports the court’s finding that this extraordinary delay prejudiced Mr. Ross and deprived him of his right to a speedy trial.

6. The remedy for a violation of the right to a speedy trial is dismissal.

If a person’s constitutional right to a speedy trial is violated, “the remedy is dismissal of the charges with prejudice.” *Iniguez*, 167 Wn.2d at 282; *Barker*, 407 U.S. at 522.

Mr. Ross was denied his right to a speedy trial by the extraordinary and prejudicial delay caused by the State’s actions and inactions. All four *Barker* factors weigh strongly against the State. The remedy is to dismiss the 1978 charges against Mr. Ross.

E. CONCLUSION.

Mr. Ross has been denied his constitutional right to a speedy trial. This Court should affirm the court's ruling that the State's violation of Mr. Ross' right to a speedy trial requires dismissal of the case against him.

DATED this 22nd day of January 2019.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Nancy P. Collins". The signature is fluid and cursive, with the first name "Nancy" and last name "Collins" clearly distinguishable.

NANCY P. COLLINS (28806)
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Attorneys for Respondent

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
v.)	NO. 52570-4-II
)	
TOMMY ROSS,)	
)	
Respondent.)	

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