

NO. 28332-1

FILED

~~DEC 02~~ 2011

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

v.

DAVID P. WEBSTER,

Appellant.

RESPONDENT'S BRIEF

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Attorney General

Melanie Tratnik
Assistant Attorney General
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Seattle, WA 98104
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I. ISSUE PRESENTED

Did Defendant receive a constitutionally speedy trial when the State advised the court two months after arraignment that it was ready to proceed to trial, Defendant received numerous continuances over the State's objections, Defendant repeatedly delayed his trial by being combative with his attorneys and filing frivolous motions, and when he has shown no prejudice resulting from his self-created delays?

II. SUMMARY OF THE CASE

The state and federal constitutions guarantee a criminal defendant the right to a speedy trial. The right requires that defendants receive a trial within a reasonable period of time given the circumstances of their case.

The State charged Defendant with three counts of first degree rape for raping his cellmate at the Franklin County jail. The trial was continued numerous times. The trial court granted all but one of these continuances, a one week continuance request made by the State due to a scheduling conflict, at the request of the defense. Nearly all continuances were granted over the State's objection. A jury convicted Defendant of one count of second degree rape. He now seeks dismissal of his conviction, claiming he did not receive a speedy trial.

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III. STATEMENT OF THE CASE

On September 25, 2003, a jury convicted Defendant of assaulting M.B., and then soliciting an undercover police officer to kill her. CP 55, 1544. Defendant was acquitted of raping her. CP 54-55. Defendant was housed at the Franklin County jail as he awaited sentencing. CP 170. Between 10:00 p.m. on September 30, 2003 and 5:00 a.m. on October 1, 2003, Defendant raped his cell mate, R.K., three times, once by forcing him to perform oral sex on him and twice by anally raping him. CP 222-23, RP (4/8/09) 101-12. R.K. reported the rape when the guards opened the cell doors. CP 222-23; RP (4/8/09) 113-14. Medical personal examined R.K. and administered a rape kit. RP (4/9/09) 274. Subsequent analysis found that semen present in R.K.'s anus contained Defendant's DNA. CP 222-23, RP (4/13/09) 685-68.

R.K. sued Franklin County. After the civil suit settled, Franklin County referred the case to the Attorney General's Office to avoid any appearance of a conflict of interest. On August 30, 2005, Defendant was arraigned on three counts of rape in the first degree. CP 1563-67. Throughout this case, Defendant was serving a twenty-six year sentence at the Department of Corrections (DOC) for his second degree assault and solicitation to commit murder convictions. CP 71-82. He was transported

to Franklin County for the arraignment, and then transported back to the DOC in Walla Walla immediately afterwards. CP 1913-14.

Defendant appeared for arraignment with Robert Thompson, who was permitted to withdraw after he advised the court of a potential conflict. CP 1908. The court appointed Patrick McBurney to represent Defendant. CP 1563. Trial was set for November 16, 2005. CP 1908. Because of his limited experience with felony trials, McBurney asked the court to appoint co-counsel. CP 1832, 1842. On October 24, 2005, the court appointed James Egan as co-counsel. CP 1833.

Defense counsel moved to transfer Defendant to the Franklin County jail. CP 1901-04. The State objected, noting that Defendant was a behavioral problem and should not be housed at the scene of the alleged crime. CP 1561. The trial court ordered that Defendant be transferred to the Benton County jail. The court later rescinded the order when Benton County challenged it. CP 1892; RP (2/17/06) 277.

On November 1, 2005, Egan moved to continue the trial. RP (11/1/05) 5, 6, 12. Egan said he needed additional time to review discovery, investigate, interview witnesses, and to file suppression motions. RP 5-11. Egan stated he could not effectively represent Defendant without a continuance. RP 20. Defendant objected to the continuance and refused to waive his right to a speedy trial. RP 8, 12, 19.

The State declared it was ready for trial. RP 5, 13. Faced with a conflict between Defendant's speedy trial right and the right to the effective assistance of counsel, the trial court granted the continuance and set a new trial date of February 15, 2006. RP 13, 14, 18, 20.

On December 9, 2005, the court granted a defense request to continue the 3.5 hearing set for that day. RP (12/0/05) 7. Egan proceeded to argue motions to the court that had been written by Defendant, rather than by defense counsel. RP 80. Egan explained that while he understood his ethical obligation to zealously represent his client, he also felt it was inappropriate for him to file frivolous motions and that he had attempted to resolve this conflict by filing Defendant's motions under Defendant's name. RP 81. As this brief will demonstrate, Egan's statements foreshadowed events which led to multiple delays and the withdrawal of four attorneys due to conflicts caused by Defendant's unyielding demands that his counsel pursue frivolous motions.

On January 31, 2006, two weeks before trial, Egan moved to withdraw citing a complete breakdown in communication, "animosity" from the defendant, and a bar complaint made by Defendant. RP (1/31/06) 139-50. McBurney advised he could not effectively represent Defendant alone and asked to withdraw as well. Defendant wholeheartedly joined the motions, stressing he could not get a fair trial

unless his attorneys withdrew. He compared his situation to being represented by a snake and a scorpion. RP 142-43, 152. Defendant urged the court to dismiss both attorneys while simultaneously refusing to waive his speedy trial right. RP 179. The State objected to the withdrawal motions, calling them a delay tactic. RP 152, 154, 156, 181. The State further noted that Defendant was manipulating the situation to create a “Catch-22” by dismissing his attorneys shortly before trial and then laying the seeds for a speedy trial argument by refusing to waive that right. RP 165, 179. The court granted the motions to withdraw and ordered that new counsel be appointed by February 10, 2006. RP 193.

Christopher Swaby was appointed on February 10, 2007. RP (2/10/07) 207. On February 17, 2006, he appeared in court with Defendant. Defendant complained about his speedy trial right. RP (2/17/06) 226, 228, 246, 250, 270. However, he also demanded the effective assistance of counsel. RP 224, 228, 246, 250, 272. The trial court re-iterated that it had previously continued the matter in the interests of justice. RP 231-33. Defendant told the court he wanted to be housed in the Benton County jail instead of at DOC. RP 277-78. The trial court rejected this move based on Benton County’s resistance to housing him. RP 277-78. The court set a trial date of April 19, 2006.

On March 31, 2006, Swaby moved to continue trial from April to July, telling the court he needed more time to prepare. RP (3/31/06) 328-31. Defendant made conflicting statements regarding his desire for a speedy trial. At times he said he wanted a speedy trial. RP 293, 314, 330, 349, 351-54. But he also agreed to waive his right to a speedy trial date and continue the case to July. RP 328, 336, 349, 359. The State objected to the continuance. RP 354. The court granted the defense motion and continued the trial to July 26, 2006. RP 359. Swaby and Defendant addressed Defendant's housing. Defendant again insisted he wished to await trial in the Franklin County jail. RP 309. The State again objected. RP 310. The court granted Defendant's request. CP 1754.

On April 7, 2006, the previous trial continuance to July 26 was discussed. Defendant reaffirmed that he was agreeing to have his case continued to July 26, 2006. RP 10-11. The State renewed its objection to the continuance. RP (4/7/06) 16. The court reaffirmed it had continued the trial in order to ensure Defendant was adequately represented. RP 19. Captain Long of the Franklin County jail asked the court to return Defendant to DOC. Long said the jail had limited staffing capabilities and that Defendant presented serious security risks. Swaby said he wanted Defendant to remain at the jail. RP 25-27. The State again expressed

concern about Defendant being housed there. RP 28. The court declined to reverse its order. RP 41.

On June 20, 2006, Swaby moved to continue the trial to August in order to continue interviewing witnesses. CP 1747. The State did not object, and the court continued trial to August 30, 2006. CP 1747.

On August 15, 2006, Swaby moved to continue the trial. RP (8/15/06) 2. He told the court that the defense had interviewed 31 witnesses, and that Defendant had provided him with names of people he wanted interviewed. RP 2, 4-5. Swaby said he would be ineffective without additional time to interview witnesses and investigate the DNA evidence against Defendant. RP 16. The State did not object to the continuance. RP 19. Defendant made conflicting statements regarding his speedy trial right; he initially advised his attorney he was willing to continue the trial, then demurred, then declared "I don't care if you continue [the trial] to the moon." In the end he agreed to continue the trial to February 14, 2007 and to waive his speedy trial. RP 19, 32, 36, 38. 41.

On January 9, 2007, Swaby moved to continue the trial saying he needed more time to interview witnesses, review discovery, and investigate the DNA evidence. RP (1/9/07) 366, 368-69, 389, 393, 403. Swaby acknowledged the State bore no responsibility for the delay, and explained the case was more complicated than expected. RP 365, 367-68,

394-95. Defendant agreed to continue the trial and to waive speedy trial. RP 377-78, 383, 410, 413, 425-26. Indeed, he said he would accept a “six year” continuance in order to adequately prepare for trial. RP 383. The State objected to the continuance and renewed its earlier calls to proceed to trial as soon as possible. RP 367, 380-85. The court granted the defense motion and continued the trial to April 18, 2007. RP 415.

On April 4, 2007, two weeks before trial, the court ruled on numerous pre-trial motions. RP (4/4/07) 42, 66, 76, 79-80, 90-91, 95-96, 106, 113, 114. Defendant interrupted the proceedings and insisted the court hold an evidentiary hearing regarding the “conspiracy” against him. RP 42-46. Defendant had made complaints to the Bar Association and the Judicial Conduct Commission, and asked the court to continue his trial while these bodies reconsidered their rejection of his complaints. RP 62. When the court refused, Defendant claimed Swaby had violated attorney-client privilege while advocating his position regarding his complaints to the Bar and the Judicial Conduct Commission. RP 123-25. Defendant tactically sought to place the court in an impossible position after he declared he wanted Swaby to continue as his attorney, but also refused to waive the “conflict” while simultaneously reserving the right to remove Swaby at a future time. RP 128-30. The court issued a written ruling on April 11, 2007, finding that Swaby did not violate the attorney-client

privilege and that Defendant forfeited the privilege by discussing the matters in open court and asking Swaby to advocate for him. CP 1245-50.

On April 18, 2007, the State and defense jointly agreed to a continuance in order to examine newly discovered evidence. RP (4/18/07) 430, 456, 458. Defendant told the court “[t]he State can take all the time” it wants in bringing him to trial. RP 437. The court continued the trial to June 20, 2007. RP 448. Defendant signed a speedy trial waiver. RP 457.

On June 5, 2007, the court granted the State’s request to continue the June 20th trial one week due to a scheduling conflict involving a Supreme Court argument. RP (6/5/07) 469. After the one week continuance was granted, Swaby told the court that “Mr. Webster would like – would object and suggest that he’s not ready for trial” because he wants the DNA evidence retested. RP 501. Swaby said he had told Defendant he intended to try and suppress the DNA and retesting it was unnecessary, but Defendant nonetheless adamantly demanded a continuance to accommodate retesting. RP 501-503, 508. The State objected to any further continuances, stating:

It’s very clear Mr. Webster does not want to go to trial. It’s been continued eight times. You can hear him over there talking to his attorney during these motions to try to get it continued [.] RP 508.

The defense did not deny the truth of the State's statements. RP 508-22. Defendant then explicitly repudiated any assertion of his speedy trial right, telling the court he did not want a speedy trial dismissal. RP 514-17. The court denied the continuance, leaving trial set for June 27, 2007. RP 520.

On June 19, 2007, Swaby asked for a continuance to further investigate R.K.. RP (6/19/07) 526. R.K. told the State he had incorrectly answered a question in his prior defense interview. The State immediately informed Swaby. RP 525-27. Defendant endorsed the continuance request, and trial was continued to October 24, 2007. RP 527, 537.

On September 12, 2007, Swaby appeared in court with his own attorney, Mr. Arnold, and moved to withdraw. RP (9/12/07) 554, 568. Arnold presented the court with exhibits showing Defendant had told jail staff that Swaby and his investigator were smuggling contraband to him by concealing it within legally privileged materials protected from search. RP 554-55, CP 974-83. Defendant first claimed he made the statements to trick the guards. RP 555. He later claimed he made the allegations under duress. RP 603. The court allowed Swaby to withdraw, citing concerns about attorney-client privilege, the confidence between counsel and Defendant, and Swaby's ability to zealously represent a defendant who was accusing him of criminal misconduct. RP 569-70.

On September 25, 2007, the State urged that Defendant be returned to DOC because he was threatening witnesses who worked in the jail. RP (9/25/07) 594-95. Defendant objected, claiming it was critical he stay in Franklin County to address his case and to remain near his family and fiancé. RP 601-02. The court denied the State's motion. RP 617. Defendant asked the court to "postpone this matter" while he awaited decisions on his petition for review and habeas corpus petition. RP 604. He told the court these decisions would "shed light on this case" and that "the void ruling of 2003 would be void." RP 604.

On October 9, 2007, the court held a hearing to potentially appoint Greg Scott. As the hearing began Defendant explicitly waived his right to object on speedy trial grounds, and then later attempted to reclaim the right. RP (10/9/07) 642, 665. Office of Public Defense (OPD) Director Raymond Gonzalez advised the court that Defendant's behavior was subverting his attempts to find counsel for him. RP 667. The court told Defendant his behavior was affecting the ability to retain counsel and getting the case to trial. RP 669. The court granted a recess so Scott could confer with Defendant. RP 671-73. Afterwards, Scott refused to take the case, explaining:

I have represented many clients in everything from aggravated homicide on down, federal as well as state. I can anticipate where this trial is going and what the

situation is. I'm going to decline the request to be appointed at this time. I anticipate that if I were to accept the appointment that it would end at a point later on that I would up withdrawing, I can see that. RP 675.

On October 22, 2007, the court attempted to hold a hearing a day early because the court had encountered a scheduling conflict for the October 23rd date. RP (10/22/07) 708. Defendant refused to waive notice of the hearing date so the court continued the matter to October 30, 2007. RP 708-09, 719-20. Defendant proceeded to cite case law, arguing that his due process rights were violated because Swaby was removed from the case without proper notice. RP 711. Defendant said the allegations he made against Swaby "may be true and may not be true, I'm not saying what is true or not true at this moment." RP 711. He then blamed Swaby's removal on Swaby and asked that he be criminally charged, and that he be permitted to testify against him. RP 715-16.

On October 30, 2007, Gonzalez told the court that William McCool had provisionally agreed to represent Defendant. RP (10/30/07) 725. The court continued the case to allow McCool to speak with Defendant. RP 764. McCool later refused the appointment. CP 1627. When housing was addressed, Defendant once again stressed he wished to remain in the Franklin County jail. RP (10/30/07) 747-48.

On November 13, 2007, the court ordered that Defendant undergo a mental evaluation to determine his ability to assist counsel. CP 961-65.

On December 27, 2007, Gonzalez told the court he had contacted three attorneys to represent Defendant “who have not turned us down cold.” RP (12/27/07) 784. Despite the trial court’s October 9th admonition to Defendant that his behavior was impeding Gonzales’ ability to find him new counsel, Gonzalez again advised the court that Defendant’s behavior was making it difficult to obtain counsel. RP 785. Defendant again repudiated his speedy trial right, explicitly telling the court he did not want a dismissal based on speedy trial grounds. RP 790.

On January 15, 2008, Gonzales advised the court that Michael Lynch had agreed to represent Defendant but that Lynch had concerns about his behavior. RP (1/15/08) 50, 72. The court reiterated his intention to have Defendant evaluated for competency, explaining that his conflicting statements about prior counsel and his behavior towards counsel gave him concern about his ability to proceed to trial. RP 62-64. Defendant proceeded to argue about his prior convictions. RP 68-71. He was repeatedly told to properly address the court or risk being removed. RP 67, 82. Jail counsel asked that he be returned to DOC. RP 89. Defendant said he wanted to remain at the jail. RP (1/15/08) 81, 89. The

court appointed Lynch. RP 81, 100-01. The court deferred ruling on the housing issue. RP 90.

On April 18, 2008, Lynch moved to continue trial six months to review the large volume of discovery. RP 813, 817. Defendant refused to sign a speedy trial waiver, but agreed to the continuance. RP 816, 818, 820. The court granted the continuance. RP 825-26.

On April 30, 2008, the State asked that Defendant be returned to DOC because his threatening behavior was escalating. RP (4/30/08) 112. Jail reports documented Defendant's threats to cut a person's throat, cut a person's head off, blow up the jail, kill the prosecutor, an inmate, and several jail staff members, and to rape two female jail officers. RP 114, 122. Counsel for the jail reported two attempted assaults on staff. RP 125. Lynch told the court Defendant wished to remain at the jail. RP 121. When the court ordered that Defendant be returned to DOC, Defendant asked his attorney to withdraw. RP (4/30/08) 130-31. Lynch and Defendant explained that Lynch had been assisting Defendant with his federal lawsuit regarding his prior convictions, and that this would become more difficult if he was returned to DOC. RP 131. Defendant claimed the "federal rulings would have an impact on rulings in this court right here because the causes are both closely related." RP 134. The court ordered

that Defendant not be moved to DOC until after May 7, 2008, the next date the federal court was set to address his prior convictions. RP 134-35.

On September 5, 2008, Lynch asked for a six month continuance. RP (9/5/08) 3-4. Lynch said he and his investigator had talked to ten witnesses, and that he needed to interview more including DNA experts and potential defense witnesses. RP 3. Lynch said if Defendant wanted to go to trial as quickly as possible he'd ask to continue trial only thirty days and would then go to trial as best he could. RP 5. Defendant objected to any continuance. RP 20. The State objected to any continuance past the October 31, 2008 speedy trial expiration. RP 8. The court continued trial to October 22, 2008 to allow the defense more time to prepare. RP 21.

On October 1, 2008, Lynch renewed his request for the six month continuance that had been previously denied. RP (10/1/08) 78, CP 1610. He noted the 2400 pages of discovery, and said the prior investigator's information totaled 215 additional pages and an approximately equal number of attachments. CP 1609. He said he had interviewed ten of the forty-two witnesses on the State's witness list, and planned to interview seven more the coming week. CP 1609. He further advised he intended to obtain the victim's prior medical records, information on all his past incarcerations, contact all penal institutions he had been at, and interview his known associates to explore his reputation for truthfulness. RP 78-81.

Defendant agreed to continue the case, advising the court “I really don’t mind, because it’s very important to me.” RP 84-87. Defendant also said he wanted the trial continued because he had more motions to file, including ones “that would clear my earlier case.” RP 86. The State again objected to any delays. The State noted there had been ten prior continuances, nine of which were objected to by the State, and expressed concern about the impact the delays were having on the victim. RP 87-88. The court continued the trial to April 1, 2009. RP 104-05.

On December 15, 2008, Defendant asked the court to remove Lynch because they disagreed on trial strategy. RP (12/15/08) 4, 7, 9. Lynch confirmed he and Defendant were in conflict because Defendant wanted to re-litigate his prior convictions, and he had advised him that the trial court would not allow that. RP 29-30. Lynch added that Defendant’s insistence that prior convictions be challenged caused the Defendant’s conflicts with his prior attorneys as well. RP 29. Defendant demanded his right to represent himself. RP 18-19. Lynch noted that the Supreme Court had just ruled a pro se defendant must be competent to represent himself.¹ RP 18-19. The court set a hearing to determine Defendant’s competency to represent himself. RP 46-47. As court adjourned, Defendant called

¹ See *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008).

Judge Mitchell an “Uncle Tom” and made a thinly veiled threat on his life.² RP 70-72.

On December 29, 2008, as the court tried to address Defendant’s motion to represent himself, Defendant launched into arguments that his prior convictions were unconstitutional. RP (12/29/08) 830-33. Lynch asked to withdraw due to a “breakdown in communication.” RP 838. He said Defendant had threatened him, had refused to help him prepare a defense, and had filed a bar complaint against him.³ CP 634, RP (2/17/09) 29. When the court addressed defense counsel’s suggestion to have Defendant evaluated to determine if he was competent to represent himself, the State objected to this as yet another delay. RP 838-72. The court ordered an evaluation. RP 872.

The evaluation by Dr. Robert Halon concluded that Defendant was competent to represent himself. CP 635-44. The report addressed Defendant’s behavior in the courtroom at length, declaring it a calculated effort aimed at getting what he wanted.⁴

² Defendant stated: “[F]uck that judge. He’s an Uncle Tom. Your ass is going to be in the papers, too. That’s why judges get shot, man, because they’re stupid. Uncle Tom ass bitch.”

³ Defendant had also filed bar complaints against prior attorneys, Robert Thompson and James Egan, and the State’s attorney. RP (1/31/06) 139, RP (3/9/09) 99.

⁴ Prior mental health experts have also noted Defendant’s calculating manner; indeed he had bragged to previous examiners that he was a “master at manipulation.” CP 778.

“Everything Mr. Webster does appears to be done willfully and tactically. His entire ‘defense’, his rejection of his court-appointed attorney, his behavior when in the courtroom and whenever addressing his case, can all be accounted for by his well-described intentions and supporting rationale.” CP 637.

On February 17, 2009, the court heard Mr. Lynch’s motion to withdraw. The State objected to allowing Lynch to withdraw, explaining:

[I]t’s very clear that Mr. Webster can’t get along with anybody. ... And Mr. Webster’s stated objectives are not always accurate. He always says he wants to go to trial and yet here we are years later. I don’t believe he wants to go to trial at all. I believe he wants to continue to have these road trips to Franklin County and get all the attention and media coverage and that getting rid of attorney after attorney just makes this case get continued over and over again. RP (2/17/09) 30-31.

The court granted Lynch’s motion to withdraw. RP (2/17/09) 4-5, 28.

The court allowed Defendant to represent himself, and appointed standby counsel. CP 630-31.

Trial began on April 1, 2009. CP 403. The jury convicted Defendant of one count of second degree rape, and hung on the remaining two counts. CP 288, 290-93. Defendant now appeals.

IV. ARGUMENT

Article I, section 22 of the Washington State Constitution and the Sixth Amendment of the United States Constitution afford a criminal defendant the right to a speedy trial. *State v. Iniguez*, 167 Wn.2d 273,

281-82, 217 P.3d 768 (2009). The two rights are equivalent. *Id.* at 290. No bright-line rule exists for measuring whether a defendant received a speedy trial; instead “[t]he constitutional right to speedy trial is not violated at the expiration of a fixed time, but at the expiration of a *reasonable time.*” *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 186 (1997) (alteration in the original).

A speedy trial claim is reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d at 280. To evaluate whether a defendant received a trial within a reasonable time, a court must perform a two part test. *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), *Iniguez*, 167 Wn.2d at 290-96. Defendant must first show that trial was not provided within a reasonable period of time. *Doggett*, 505 U.S. at 651-52. Only if this threshold showing is met will the court evaluate the claim by balancing “the conduct of both the prosecution and the defendant” using several factors. *Vermont v. Brillion*, --- U.S. ---, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231 (2009) (quoting *Barker*, 407 U.S. at 530).

Here, Defendant fails to make the threshold showing that his trial was unduly delayed. Even if the court reaches the merits of his claim, the balancing test laid out by the Supreme Court shows he received a trial within a reasonable amount of time.

A. Defendant received a speedy trial because trial was held within a reasonable period of time given the circumstances of this case.

The Court should reject Defendant's speedy trial claim because he fails to make the threshold showing that the time between accusation and trial exceeded reasonable limits. To successfully press a speedy trial claim, Defendant must first show such unreasonable delay that this delay became "presumptively prejudicial." *Doggett*, 505 U.S. at 651-52. The Supreme Court has emphasized the contextual nature of the right to a speedy trial, stating that "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950 (1905)). Relevant factors to the threshold inquiry include the length of delay, whether the charges were complex, and whether the case relied on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292. The circumstances of Defendant's case show he was prosecuted with due promptness.

Delay only becomes presumptively prejudicial when the State inexcusably delays trial given the facts of the case. For example, in *Iniguez*, a defendant was charged with four counts of first degree robbery. *Iniguez*, 167 Wn.2d at 292. The trial court granted several continuances over *Iniguez's* objections. One continuance was granted to allow

Iniguez's attorney to take a vacation. Another allowed the State to interview defense witnesses, something it had failed to do in a timely manner. Another continuance resulted from a scheduling conflict with the attorney of Iniguez's co-defendant, and the final one resulted from the State inexplicably allowing a critical witness to leave the country just before trial was supposed to start. *Id.* The Washington Supreme Court held that the eight months delay was presumptively prejudicial. *Id.* at 292. It based its holding on several grounds. Firstly, it determined that eight months was a substantial length of time, and noted that Iniguez spent the entire period in jail. *Id.*, at 292. Secondly, the Court noted that Iniguez did not face "complex charges." *Id.* Finally, the court noted that the case rested largely on eyewitness testimony, risking prejudice should any of the witnesses forget events or become unavailable. *Iniguez*, 167 Wn.2d at 292. All factors considered, the court held the delay was presumptively prejudicial.

In contrast, the circumstances of Defendant's case show he was tried within a reasonable amount of time. Four factors readily distinguish this case from Iniguez's: (1) the State did not cause trial delays, (2) Defendant did not await trial in jail because of these charges, (3) the defense repeatedly acknowledged the case was complex, and (4) the case

did not rely on eyewitness memories. This Court should therefore hold that the trial delay in this case is not presumptively prejudicial.

1. Given the circumstances, Defendant's trial was not unreasonably delayed.

The essence of a speedy trial claim is unreasonable delay under the "specific circumstances" of a case. *Iniguez*, 167 Wn.2d at 283. Defendant's case is readily distinguishable from a case like *Iniguez* where the court found presumptive prejudicial delay. *Iniguez* had "clean hands" with regard to the delays in his trial. Two of the continuances resulted from the State's negligence: one because it had failed to interview the defense's witness in a timely manner and another because it allowed one of its critical witnesses to leave the country as the trial was about to start. A third continuance resulted from a scheduling conflict with one of *Iniguez's* co-defendant's attorneys. Despite this, the State refused to sever the trials to allow *Iniguez* to receive a speedy trial. *Id.* at 294. Thus, in *Iniguez's* trial, the State bore substantial responsibility for the delays.

In contrast, the State here declared it was ready to proceed to trial two months after arraignment. RP (11/1/05) 5, 13. The State requested only one continuance, a mere one week delay to accommodate a Supreme Court argument. RP (6/5/07) 469. The State joined a defense requested two month delay to test newly discovered evidence. RP (4/18/07) 430,

456, 458. Defendant not only agreed to the State's one week continuance request, but asked that it be continued longer. RP (6/5/07) 501, 503, 508. On the joint request, Defendant signed a speedy trial waiver and told the court the State could take "all the time" it wanted in bringing him to trial. RP (4/18/07) 437, 457.

Even if the Court were to attribute both of the aforementioned delays to the State, only two and a quarter months of "delay" can be attributed to the State. This is less than ninety days for a Defendant charged with three class A felonies, and for whom no bail was set at arraignment because he was serving a twenty-six year sentence for prior convictions. RP (11/1/05) 14, CP 1908, CP 71-86.⁵ In contrast, Defendant or his counsel constantly sought to delay the trial. His attorneys sought numerous continuances in order to mount an effective defense. Many continuances resulted from Defendant's quarrels with his attorneys, which led to no less than four of them withdrawing. Trial was repeatedly delayed as each successive attorney needed time to prepare anew for trial. Additionally, Defendant himself asked for delays, and also deliberately created situations with necessitated delays. The State had no control over these delays, and objected to almost every one.

⁵ Defendant's twenty-six year sentence was imposed on December 4, 2003. He remained in custody on that sentence throughout these proceedings. CP 71-86.

Further, in considering whether the time passage was reasonable the *Iniguez* court seemed to factor in that Iniguez's was in custody due to his pending charges. Here, Defendant was not confined because of his pending charges but rather because of his prior convictions. Therefore, the Court should not consider Defendant's custodial status when determining whether the pre-trial delay was presumptively prejudicial.

Defendant declares the delay here was presumptively prejudicial because a "considerable" period of time elapsed. However, the Washington Supreme Court has rejected the notion that the passage of a certain amount of time creates the presumption of prejudice. *Iniguez*, 167 Wn.2d at 292. Given that the defense sought every continuance except for a single one week continuance sought by the State, this court should hold that Defendant received a trial within a reasonable period of time and reject his claim under this threshold prong of the speedy trial analysis.

2. The trial court properly allowed the defense adequate time to prepare a case which involved complex issues and voluminous discovery.

Unlike Iniguez's trial, Defendant's trial involved complex issues. While Defendant now claims his trial involved simple issues, every defense attorney at the trial court level said the issues were complex. *See, e.g.*, RP (1/9/07) 368, 370, 394-96, RP (10/1/08) 78-84, 96. For instance, Lynch advised the court that investigations conducted by prior attorneys

had swelled discovery to over 2400 pages. CP 1609-10. The case had racial overtones because the Caucasian victim alleged the African American defendant had raped him because of his white supremacist tattoos. CP 171. The case received intense media attention. CP 1490-1494; RP (10/1/08) 83-84. The case involved DNA evidence, and numerous questions about a victim with an extensive criminal history who had filed a civil suit against the county. RP (10/1/08) 78-84. Further, Defendant constantly alleged that a wide-ranging conspiracy victimized him, and repeatedly insisted that his counsel explore these issues. *See, e.g.*, RP (2/17/06) 252-63. Because of such issues, it took five days to pick a jury. CP 403-47. Because each defense attorney told the court it needed time to investigate the many complexities of this case, this Court should find Defendant received a speedy trial consistent with the need to allow the defense to thoroughly prepare.

3. Eyewitness testimony played a minor role in Defendant's conviction.

Unlike in *Iniguez*, Defendant's case did not rely on eyewitness testimony. On the contrary, there were no eyewitnesses because the only people present during the rape were the victim and the defendant who were locked in a cell. DNA analysis proved Defendant had anal sex with R.K. RP (4/9/09) 274, RP (4/13/09) 685-88. Defendant claimed he and

R.K. had agreed to have consensual reciprocal sex. But he also admitted the encounter ended with forced sex beyond what the parties had agreed to. Defendant said after anally penetrating R.K., he “screwed him hard intentionally” a second time because he “didn’t want him to like it.” He testified he did this so R.K. would no longer want to engage in sexual activity with him.⁶ RP (4/20/09) 1622-44.

The defense never expressed any concern over witness issues. On the contrary, the defense informed the court on at least two occasions that it was having no problems with witness recollections. RP (1/9/07) 367, RP (6/5/07) 519-20. Because Defendant’s conviction did not rely on eye witness testimony, and because Defendant does not demonstrate that his case suffered due to any memory loss, the court should hold that the time passage in Defendant’s trial was not presumptively prejudicial.

B. Defendant received a constitutionally speedy trial based on the balancing test set out by the Supreme Court.

If the Court reaches the merits of Defendant’s claim it must weigh several factors regarding the conduct of the State and Defendant. *Doggett*, 505 U.S. at 651. These factors include the length of the delay, the reasons for the delay, Defendant’s assertion of his speedy trial right, and resulting

⁶ Defendant was charged with oral rape in count I, and anal rape in counts II and III with the third count occurring sequentially later. CP 325. The jury convicted Defendant of count III, the count which matches up with Defendant’s description of forceful sex beyond what was allegedly agreed to. CP 288.

prejudice. *Brillion*, 129 S. Ct. at 1290. Each of the factors shows Defendant received a trial consistent with his right to a speedy trial.

Notably, this court must resolve Defendant's claim by evaluating only events that occurred between charges being filed and the start of trial. Defendant's brief frequently references time periods before charges were filed on August 15, 2005. *See, e.g.*, App's Brief at 19, 21. But the "clock" for a speedy trial claim does not start until the State files an information; prior delay is "wholly irrelevant" to a speedy trial claim. *United States v. Lovasco*, 431 U.S. 783, 788-89, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

1. The "length of delay" factor weighs against Defendant because the State was ready for trial in two months.

The court's inquiry into the length of the delay "focuses on the extent to which the delay stretches past the bare minimum needed to trigger the *Barker* analysis," i.e., judicial examination of the claim. *Iniguez*, 167 Wn.2d at 283-84. Not all delay supports a speedy trial claim. As our state Supreme Court has noted, "some pretrial delay is often 'inevitable and wholly justifiable.'" *Id.* at 282 (quoting *Doggett*, 505 U.S. at 656.) Although the length of delay and the reasons for delay are separate factors the court should consider them together in this case to avoid creating incentives for defendants to delay trial. As noted by the Supreme Court, "defendants may have incentives to employ delay as a

‘defense tactic’.” *Brillion*, 129 S. Ct. at 1290. Also, because the State bears the burden of proof the “passage of time may make it difficult or impossible for the Government to carry this burden.” *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986). The State pointed out, and Defendant did not deny, that he was using delay as a tactic. RP (6/5/07) 508. Allowing Defendant to claim the entire period of delay would allow him and future defendants to capitalize on obstructionist behavior by adding multiple periods of delay wholly beyond the control of the State.

The only delays even remotely attributable to the State are the State’s one week continuance request made on June 5, 2007, and the joint two month continuance request made on April 18, 2007. RP (6/5/07) 469; RP (4/18/07) 430, 456, 458. Not only did Defendant not object to the State’s one week request, he asked that it be longer. RP (6/5/07) 501-03. On the joint request, Defendant signed a speedy trial waiver and told the court “the State can take all the time” it wanted to bring him to trial. RP (4/18/07) 437, 457. Even if the court were to attribute the joint continuance to the State, the State only “caused” nine weeks of delay and these delays were clearly granted for good cause. Such a short period of time does not exceed the minimum necessary to “trigger judicial examination of the claim.” *Doggett*, 505 U.S. at 652.

Almost all the delays resulted from defense requests to further investigate and prepare the case, a process that had to start anew with each new defense attorney. The Court should consider such delays as “inevitable and wholly justifiable” as they were necessitated by the trial court’s duty to ensure Defendant’s constitutional right to the effective assistance of counsel. Viewed in context, Defendant did not experience undue delay, and the Court should reject his speedy trial claim.

2. The “reason for the delay” factor weighs heavily against Defendant because of his repeated requests for delays and constant quarrels with his attorneys.

When evaluating a speedy trial claim, the Court must ask “whether the government or the criminal defendant is more to blame for the delay.” *Doggett*, 505 U.S. at 651. Where the defense intentionally causes the delay, the Court must weigh this against the defendant. *Brillion*, 129 S. Ct. at 1290. This factor weighs overwhelmingly against Defendant as he bears the blame for almost all the delays, either because he caused the delays himself or because his attorneys sought continuances.

a. Defendant and his counsel constantly delayed the trial with continuance requests.

The defense continually sought and often received continuances:

- November 1, 2005: The State announced it was ready for trial. Continuance granted to ensure effective assistance of counsel. RP (11/1/05) 5, 13-14.

- March 31, 2006: Continuance granted to allow defense counsel time to prepare for trial. RP (3/31/06) 328-31.
- August 15, 2006: Continuance granted to allow defense counsel time to prepare for trial. RP (8/15/06) 2
- January 9, 2007: Continuance granted to allow defense counsel time to prepare for trial. RP (1/9/07) 366.
- April 4, 2007: Defendant requests continuance for State Bar and Judicial Conduct Commission to reconsider his complaints. RP (4/4/07) 62.
- April 18, 2007: Joint request for continuance granted to allow testing of newly discovered evidence; Defendant agreed to continuance and signed a speedy trial waiver. RP (4/18/07) 430, 456, 458.
- June 5, 2007: After State afforded one week continuance due to Supreme Court argument scheduling conflict Defendant declares he is not ready for trial and moves for additional continuance to retest the DNA. RP (6/5/07) 469, 501-08.
- June 19, 2007: Continuance granted to allow defense to investigate victim. RP (6/22/07) 526.
- September 25, 2007: Defendant asks court to postpone his case while he awaits decisions regarding his petitions for review on his prior convictions. RP (9/25/07) 604.
- April 18, 2008: Continuance granted to allow defense counsel time to prepare for trial. RP (4/18/08) 813.
- September 5, 2008: Continuance granted to allow defense counsel time to prepare for trial. RP (9/5/08) 21.
- October 1, 2008: Continuance granted to allow defense counsel time to prepare for trial. RP (10/1/08) 78.

The court granted nearly all of these continuances, often over the State's objection. RP (10/1/08) 88. Defendant concedes that "[t]he State did not cause these delays," and admitted that "[t]he majority of the delays were, however, caused by Mr. Webster's various lawyers[.]" App's Brief at 24. Delays caused by defense counsel's request for continuances, either to prepare for trial or due to scheduling conflicts, weigh against the defendant when evaluating speedy trial claims. *Brillion*, 129 S. Ct. at 1292. For example, in *Brillion*, several defense attorneys sought continuances. *Id.* at 1291-92. The Supreme Court held that "[b]ecause 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant." *Id.* at 1290-91 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). The Court stressed that "an assigned counsel's failure to 'move the case forward' does not warrant attribution to the State," explaining that a contrary rule could create incentives for the defense to delay a case at trial and then claim a speedy trial violation on appeal. *Id.* at 1291.

Under the rule established in *Brillion*, delays requested by defense counsel must be attributed to Defendant. Therefore, Defendant bore the responsibility for all delays caused by Egan, McBurney, Swaby, and Lynch, as each acted as his agent. Furthermore, Defendant often

sanctioned their requests by agreeing to the continuances or by his persistent demands for the effective assistance of counsel. The State sought a single one week continuance, while the defense sought the remaining ones. Thus, the Court should weigh the “reason for the delay” prong against him, and reject his speedy trial claim.

Defendant claims some continuances occurred over his objections. The Court should treat this claim with skepticism as his “objections” were often cagy and strategic. For instance, even when he said he wanted a speedy trial, he simultaneously demanded the effective assistance of counsel. *See, e.g.*, RP (9/5/08) 20. The Washington State Supreme Court has held that since the need for the effective assistance of counsel generally outweighs the right to a speedy trial judges have the discretion to grant a defense attorney’s request for a continuance to prepare for trial over a defendant’s objection. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). Given the volume of discovery, the complex and wide-ranging issues, the difficulty of working with this defendant, his insistence that his attorneys pursue frivolous motions, and the need for each new attorney to investigate and prepare the case, the trial court did not abuse its discretion in granting continuances to ensure that Defendant’s right to the effective assistance of counsel was protected.

Further, Defendant could be heard discussing with his counsel how to get continuances even as he supposedly objected. RP (6/5/07) 508. Furthermore, all four mental health examinations noted Defendant's manipulative nature, and that everything he does in court is done for tactical reasons. CP 635-50; CP 670-76; CP 677-84; CP 774-83. The court should view Defendant's "objections" for what they are; just another tactic intended to allow for this very appeal, even as he sought the benefits of delaying his trial. This court should attribute all defense continuance requests to the Defendant and weigh the "reason for the delay" factor against him.

b. Defendant constantly delayed the trial by conflicts he created with his attorneys.

Delays caused by a defendant's quarrels with his attorneys weigh "heavily" against a speedy trial claim. *Brillion*, 129 S. Ct. 1292. For example, in *Brillion*, the court allowed Defendant's first attorney to withdraw due to "irreconcilable differences" over trial strategy after Defendant tried to "fire" him. *Id.* at 1288 and n.3. His third attorney withdrew after *Brillion* made threats against him. *Id.* at 1288. The Court rejected *Brillion*'s speedy trial claim because he bore responsibility for the delays. Speaking to *Brillion*'s attempts to "fire" his first attorney, and the threats against the third, the court held that "a defendant's deliberate

attempt to disrupt proceedings” should be “weighted heavily against the defendant.” *Id.* at 1292.

Here, McBurney and Egan asked to withdraw due to Defendant’s “animosity” towards them and the resulting communication breakdown. RP (1/31/06) 149-50. The trial court was forced to allow them to withdraw because it found the communication breakdown precluded the effective assistance of counsel. RP (2/17/06) 231.

Swaby was appointed next. Whenever trial approached, Defendant created conflict with him as well. On January 1, 2007, the court said no more continuances would be granted. RP (1/9/07) 415. On April 4, 2007, after pretrial motions concluded and trial appeared imminent, Defendant asked for a continuance to await decisions from the State Bar and Judicial Conduct Commission regarding complaints he had filed. RP (4/4/07) 62. When the court denied the request, he attempted to derail the trial by pressing a meritless claim that Swaby had violated attorney-client privilege. RP (4/4/07) 123-25. The record demonstrates, and the court’s written decision found, that Defendant purposely manufactured this “conflict” in a transparent attempt to further his own goals. RP (4/4/07) 144, CP 1245.

Swaby was eventually forced to withdraw because Defendant accused him of delivering contraband to him. RP (9/12/07) 554, CP 974-

83. Swaby took the allegations so seriously that he immediately retained his own counsel and moved to withdraw. *See* RP (9/12/07) 554. In his motion, Swaby declared that these accusations had created a complete breakdown of the attorney-client relationship. CP 968. The court was forced to allow Swaby to withdraw due to concerns about his ability to provide effective assistance of counsel. CP 967.

Defendant concedes that two possible replacement attorneys, Scott and McCool, refused to represent him after interacting with him. App's Brief at 23.; *See also*, RP (10/9/07) 674-75; RP (10/30/07) 725, 764; RP (12/27/07) 784. OPD Director Gonzales told the court on two occasions that Defendant was interfering with his ability to obtain counsel for him. RP (10/9/07) 667, RP (12/27/07) 785. Defendant continued to impede OPD's attempts to procure counsel for him even after the trial court warned him that his behavior could delay his trial. RP (10/9/07) 668-69. Defendant admitted he was interfering with the process, telling Gonzalez in open court "I like frustrating you." RP (1/15/08) 82.

Due to Defendant's disruptive behavior, it took OPD four months to secure new counsel.⁷ In *Brillion*, the Court held that delays caused by a trial court's failure to promptly appoint replacement counsel or by an institutional breakdown in the public defender system could count against

⁷ Swaby was permitted to withdraw on September 12, 2007. Lynch was appointed on January 15, 2008.

the State for speedy trial purposes. *Brillion*, 129 S. Ct. at 1287. However, the Court did not proceed to analyze these criteria because the State conceded that the time period during which Brillion was unrepresented should count against the state. *Id.* at 1292. Even with this concession, the Court held that “[i]n light of his own role in the initial periods of delay, however, this six-month period, even if attributed to the State, does not establish a speedy trial violation.” *Id.* at 1292, n 9.

Here, the delay in securing new counsel was not the result of any dilatory conduct by the trial court or an institutional breakdown at OPD, but rather by Defendant’s interference with OPD’s efforts to secure him new counsel. The court set periodic reviews to track OPD’s effort. Gonzales diligently updated the court on his efforts, including advising the court that Defendant’s behavior was impeding his efforts. Despite warnings by the court to cease such behavior Defendant continued to act out to such a degree that two attorneys who considered representing him declined to do so after interacting with him. This court should categorize Defendant’s behavior as the kind of “deliberate attempts to disrupt proceedings” condemned by the Supreme Court in *Brillion* and attribute the four month delay to him. *Id.* at 1292.

Further, Defendant’s actions were so extreme the court felt compelled to order a competency evaluation. If the trial court has “reason

to doubt” the defendant's competency to stand trial, the court must order an expert evaluation of the defendant's mental condition. RCW 10.77.060(1)(a); *State v. Harris*, 122 Wn. App. 498, 505, 94 P.3d 379 (2004); *See also, City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985) (explaining that the “reason to doubt” language “vests a large measure of discretion in the trial judge”). In determining whether a defendant is competent to stand trial, the court must consider (1) whether the accused is capable of properly understanding the nature of the proceedings against him and (2) whether he is capable of rationally assisting his legal counsel in the defense of his cause. RCW 10.77.010(15); *State v. Hicks*, 41 Wn. App. 303, 306, 704 P.2d 1206 (1985). Here, the court had a duty to order an evaluation because defendant's disruptive and seemingly irrational behavior gave the court substantial reason to doubt his ability to assist counsel.

The ordering of a competency evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial. *See* CrR 3.3(e)(1) and former CrR 3.3(g)(1). Thus, the period of delay from when the court ordered the evaluation on November 13, 2007 to when the court signed the order of competency on April 18, 2008 is not attributable

to any party for purposes of a speedy trial analysis.⁸ CP 1627-28; RP (4/18/08) 812. As such, when the stayed period triggered by the competency evaluation order is factored in, Defendant was without counsel from September 12, 2007 to November 13, 2007, a period of two months. Even if this delay were attributed to the State, as it was in *Brillion*, this delay is inconsequential in light of Defendant's overwhelming role in causing the remaining delays.

Defendant refused to cooperate with Lynch as well. In April 2008, Lynch told court that "Mr. Webster has his own ideas, his own opinions that have to be expressed, and that takes a lot of attorney time, much more than in the average case." RP (4/30/08) 121. Lynch took steps to assist Defendant with his attempts to overturn his prior convictions, telling the court "it's helpful to him and I think to my relationship with Mr. Webster." RP (4/30/08) 132. But as with all prior counsel, Defendant ultimately refused to maintain a working relationship with Lynch.

In October 2008, Lynch asked for a six month continuance, noting that "the defendant herein poses exceptional challenges in attorney-client

⁸ Lynch attended Defendant's competency evaluation February 6, 2008. On February 14, 2008, Eastern State Hospital experts issued their report opining Defendant was competent to stand trial and assist counsel. CP 774-83. The court gave Lynch time to explore having an independent evaluation done. On April 14, 2008, Lynch advised he had investigated that option and had decided against it. The court then signed the order of competency. RP (4/18/08) 811-12.

communications that require an enormous amount of time and effort and often impede an orderly approach to pre-trial preparation.” CP 1610.

On December 15, 2008, Lynch told the court that he, like prior attorneys, was clashing with Defendant because of his persistent demands that he challenge his prior conviction. RP (12/15/08) 29-30.

On December 29, 2008, Lynch asked for a competency evaluation, advising the court “I have found it impossible to communicate with Mr. Webster in a way that would allow for preparation of an effective defense.” CP 662.

On January 29, 2009, Lynch felt compelled to withdraw due to Defendant’s threats, a complete breakdown in communication, and yet another bar complaint. CP 634. Lynch’s motion to withdraw included reference to a January 15, 2009 trip to DOC which was cancelled because Defendant would not come out of his cell to meet with him. CP 634. On February 17, 2009, the court was left with no choice but to grant Lynch’s motion to withdraw. CP 630.

Defendant’s communication breakdowns with his attorneys were so extreme the court ordered him to undergo a competency evaluation. The trial court saw this as perhaps the only way to discover how to provide Defendant with counsel with whom he could co-exist. Given the court’s duty to ensure Defendants are competent and able to assist counsel,

and the evaluator's opinion that Defendant's actions were deliberate and tactical, Defendant's claim that the competency evaluation improperly impacted his speedy trial right is without merit.

Defendant claims the trial court denied his right to a speedy trial by allowing his attorneys to withdraw. This court should reject this claim for two reasons. First, the trial court had no choice but to allow his attorneys to withdraw due to the insurmountable problems he deliberately created. A complete breakdown of communication or an attorney-client conflict severe enough to prevent the presentation of an adequate defense requires the court to allow counsel to withdraw. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Secondly, Defendant's contentions are irrelevant because the court must adjudicate his speedy trial claim by weighing his conduct against that of the State. When done, the "reason for the delay" prong weighs heavily against him because his constant strife with his attorneys was the primary factor which delayed his trial.

Just as the *Brillion* court did, this court should hold that Defendant's constant quarrels with counsel, and the ensuing delay, weigh heavily against his speedy trial claim. The *Brillion* Court's summary of that case applies perfectly to Defendant's case: absent his behavior there would have been no speedy trial claim. *Brillion*, 129 S. Ct. at 1292.

c. Defendant's decision to proceed pro se is irrelevant to his speedy trial claim.

Defendant makes several claims regarding his decision to represent himself. First, he claims his frustration with trial delays caused him to represent himself. Second, he claims that once he was self-represented he proceeded to trial without delay, and claims this proves he bore no responsibility for the delays. Both claims lack merit.

The record does not support his claim that trial delays caused him to choose self-representation. As Dr. Halon explained, Defendant's desire to represent himself did not stem from frustration over trial delays, but rather from his lawyers' refusal to present his meritless defense.

[Defendant] is firmly committed to the idea that his best interests are in designing a defense that not only results in dismissing the charges against him in the case-at-issue but will also result in a reversal of the legal decision made in the case for which he is currently serving a 26 year state prison sentence. ... Since he has been repeatedly informed by counsel, and the court rulings that his approach does not have merit, he is determined to represent himself in pursuit of that defense[.] CP 637.

There can be no question Defendant believed his ability to overturn his prior convictions was inextricably linked to keeping the rape charges alive, as he repeatedly told the court that "the causes are both closely related." RP (4/30/08) 134. Delaying the rape trial and forcing attorneys to withdraw when they refused to pursue his strategy served two purposes:

1) it provided him with a forum in which to challenge his prior convictions, and 2) it provided a stream of attorneys who were at least temporarily willing to assist him in this endeavor as they tried earnestly to maintain a working relationship with him. Once an attorney was no longer willing to pursue his meritless legal strategy, he sought to have them removed or used other delay tactics.

For instance, on April 4, 2007, two weeks before trial, Defendant asked the court to continue his trial until such time as the Bar Association and the Judicial Conduct Commission reconsidered his complaints. RP (4/4/07) 62. When that tactic failed, Defendant claimed his attorney had violated attorney-client privilege and argued this created a conflict which could warrant his removal from the case. RP 128-29, 136. On another occasion, again after a defense continuance request was denied, Defendant claimed Swaby was bringing him contraband.

On June 5, 2007, two weeks before another trial date, Defendant told the court he was not ready for trial because he wanted the DNA retested, something his attorney told him was not necessary. RP (6/5/07) 501. Counsel for the State told the court she could overhear Defendant talking to his attorney about trying to get the trial continued, and the defense did not deny this. RP 508-22.

On September 5, 2008, Lynch told Defendant if he wanted to go to trial he would prepare as best he could and try the case as soon as possible. RP 5. Defendant initially refused, but shortly thereafter agreed to continue the case six months, telling the court “I really don’t mind, because it’s very important to me.” RP (9/5/08) 20, RP (10/1/08) 84. Defendant also said he wanted the trial continued because he had more motions to file, including motions “that would clear my earlier case.” RP 86. On September 27, 2007 Defendant again asked the court to “postpone this matter,” this time because he was awaiting a decision on his habeas corpus petition. RP (9/27/07) 604. Defendant’s refusal to take Lynch up on his offer to proceed to trial as soon as possible and his agreement to continue trial six months so he could “clear my earlier case,” belies his claim that he wanted to try his rape case as quickly as possible.

The record establishes that Defendant did not want to proceed swiftly to trial, frequently asked to delay the trial, and when that failed created situations whereby the court was forced to delay the trial. Delays caused by quarrels with counsel, irreconcilable differences over trial strategy, attorney withdrawals, and other “deliberate attempts to disrupt proceedings” are weighed heavily against a defendant. *Brillion*, 129 S.Ct. at 1288-1992. This court should therefore reject Defendant’s claim that he

was somehow “forced” to represent himself, and that going to trial pro se somehow erased his long history of deliberately delaying trial.

3. The “assertion of the right to a speedy trial” factor weighs against Defendant because he nullified his demands for a speedy trial with his other conduct and inconsistent statements.

A defendant’s demand for a speedy trial is “entitled to strong evidentiary weight” in evaluating whether a speedy trial violation occurred. *Barker*, 407 U.S. at 531-32. However, such demands do not alone establish that a defendant has “appropriately asserted [his or her] rights.” Instead, the courts must evaluate such demands in light of a defendant’s “other conduct.” *Loud Hawk*, 474 U.S. at 302, 314 (quoting *Barker*, 407 U.S. at 531-32). Here, Defendant constantly undermined the assertion of his speedy trial right with his contemporaneous statements, and with frivolous motions which wasted attorney and judicial time and resources that could have been used to move the case forward.

a. Defendant nullified the assertion of his speedy trial rights by constantly qualifying or withdrawing his demand and strategically forcing the court to make “no win” decisions so he could claim his rights were violated.

Even when Defendant asserted his speedy trial right, he often undermined his assertions with other contemporaneous statements, agreeing not to object to a continuance or waiving his speedy trial.

See, e.g., RP (9/5/08) 20 (Defendant objected to the continuance, demanded more time for Lynch to prepare, then accepted a continuance, all in a single sentence). On one occasion, Defendant told the court it could continue his trial for “six years.” RP (1/9/07) 383. On another, he said the state could “take all the time” it wanted to bring him trial. RP (4/18/07) 437. Defendant explicitly repudiated the assertion of his speedy trial right at least four times, telling the court that he did not want a dismissal on speedy trial grounds. RP (4/7/06) 17, RP (4/18/07) 437, RP (6/5/07) 514-17, RP (12/27/07) 790. Further, Defendant constantly demanded the effective assistance of counsel while at the same time refusing to allow his attorneys time to prepare. *See, e.g.*, RP (11/1/05) 8. Given that Defendant made confusing and antithetical statements about his claimed desire for a speedy trial, the Court should hold that he did not assert his right.

b. Defendant nullified his demands for a speedy trial by repeatedly delaying the proceedings by filing and arguing frivolous motions.

In *Loud Hawk*, the court noted that although the defendants repeatedly asserted their speedy trial rights they also filed numerous “frivolous” petitions for review “repetitive and unsuccessful motions.” *Id.* at 314-15. Viewing Defendants’ assertions of their speedy trial rights

in this context, the Court found they essentially did not assert their speedy trial rights. *Id.* at 314.

Here too, Defendant wasted inordinate amounts of court and attorney time pushing frivolous, repetitive and unsuccessful motions. Despite being repeatedly told that his motions lacked merit, he filed innumerable, opaque motions, requiring counsel and the court to expend resources reading, attempting to comprehend, and ruling on these motions. *See, e.g.*, CP 28-52, 93-113, 169, 202-04, 207-16, 276-84, 298-311, 397-402, 559-63, 584-608, 808-856, 933-41, 954-60, 1386, 1388, 1402-04. These motions frequently involved topics the trial court had previously ruled on, including numerous attempts to re-open his prior conviction. *See, e.g.*, RP (1/9/07) 373-76; RP (4/4/07) 42-46; RP (6/5/07) 470-500; RP (10/1/08) 86; RP (12/27/08) 793-96; RP (12/29/08) 830-34, 860-61, 876-84; RP (2/17/09) 21-24; 41, RP (3/9/09) 22.

For example, on January 15, 2008 the judge told Defendant he had reviewed all the cases he had provided in his verbal and written motions, and denied his motions to dismiss his prior convictions. This led to a lengthy exchange between Defendant and the judge in which Defendant tried to present the judge with additional cases which “you probably overlooked.” RP (1/15/08) 92-100. Defendant then proceeded to present

the court with more cases, this time to argue he should be able to select his own attorney at public expense. RP (1/15/08) 100-08.

Defendant repeatedly interrupted the court to press his own agenda. For example, on November 19, 2008 the court was to hear numerous motions in limine which had been briefed by the attorneys. Court was in session from 9:00 a.m. until 3:45 p.m., at which time court was prematurely adjourned because Defendant's constant outbursts made it impossible to continue. Because of Defendant's disruptions the Court ruled on only one motion filed by the attorneys during the nearly seven hours court was in session. CP 784-85.

Just as the Court did in *Loud Hawk*, this Court should hold that Defendant's constant filing of "frivolous, repetitive and unsuccessful" motions nullified any assertions of his speedy trial right.

4. The "prejudice to the defense" prong weighs against Defendant because the delay did not affect his defense.

The right to a speedy trial only protects against oppressive pre-trial incarceration, anxiety and concern due to accusation, and impairment to the defense due to the loss of memory or exculpatory evidence. *Doggett*, 505 U.S. at 654. The courts have issued conflicting opinions as to the requirement that a defendant show actual prejudice in order for the court to weigh this factor in a defendant's favor. *Compare Doggett*, 505 U.S. at

655 (no need to identify or prove prejudice) *with Reed v. Farley*, 512 U.S. 339, 353, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994) (prejudice “required” to establish a speedy trial violation), *Loud Hawk*, 474 U.S. at 315 (the “possibility of prejudice” insufficient to support a claim of speedy trial violation) *and Iniguez*, 167 Wn.2d at 295 (presumption of prejudice weakened by the failure of Defendant to articulate a manner in which delay prejudiced him). Regardless, because Defendant does not show any prejudice this court should affirm his conviction.

a. Defendant did not suffer “oppressive pre-trial incarceration” due to the charges against him.

Defendant did not suffer oppressive pre-trial incarceration because he was incarcerated due to prior convictions, not because of the rape charges. Incarceration on other grounds does not cause prejudice to a defendant’s speedy trial interests. *State v. Lackey*, 153 Wn. App. 791, 801-02, 223 P.3d 1215 (2009). Defendant concedes he would have been incarcerated regardless of the rape charges, but claims he was prejudiced because he partially awaited trial in the county jail instead of at DOC.⁹ He

⁹ Furthermore, Defendant experienced a restrictive environment due to his behavior, not his place of incarceration. He was placed in isolation at the Franklin County jail due to his innumerable threats to assault, rape, or murder corrections officers. CP 1645 (summary of threats) 989-94, 1001-05, 1012-40, 1052, 1061-79. He experienced similar conditions in prison where he was housed in the Intensive Management Unit because of his behavior. CP 188 (discussing what the IMU is and why Defendant was housed there), 1346-47. Defendant also admitted he had served prison sentences in Arkansas in isolation due to behavioral problems. CP 673.

claims he was only housed at the jail for the convenience of his attorneys. The record completely refutes his claim.

Defendant wholeheartedly joined in his counsels' motions to move to the jail. RP (2/17/06) 277-78, RP (3/31/06) 309. Thereafter, he strenuously resisted all attempts to return him to DOC. RP (9/25/07) 597, 602; RP (10/9/07) 700-03; RP (10/30/07) 747-48. Under the invited error doctrine, "the choices a party makes at trial may impact their ability to seek relief from an alleged error." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error." *Momah*, 167 Wn.2d at 153. Defendant affirmatively caused the court to house him at the jail. Thus, this court should not allow him to now claim he suffered injury from the very situation he created.

b. Defendant suffered no prejudice to his defense due to pretrial delay.

Defendant identifies no prejudice and none occurred. Our State Supreme Court noted in *Iniguez* that it would presume some prejudice to the defense that intensified over time. *Iniguez*, 167 Wn.2d at 295. Defendant relies upon this presumption for his claim. App's Brief at 26. But the *Iniguez* court also held that failing to demonstrate prejudice weakened a speedy trial claim. *Id.* at 295. As this Court noted in a post-

Iniguez decision, “without showing that the delay either improved the State’s case or damaged [the defendant’s] case, the prejudice prong of the balancing test weighs against” the defendant. *Lackey*, 153 Wn. App. at 802. Defendant does not identify any exculpatory evidence lost, witnesses that lacked memory, or anything which negatively impacted his defense. Thus, this Court should weigh the “prejudice to the defense” factor against him, and reject his speedy trial claim.

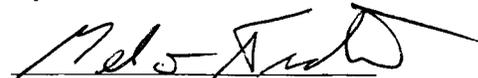
V. CONCLUSION

Courts evaluate a defendant’s speedy trial claim by balancing the defendant’s conduct against that of the government. For the aforementioned reasons, the court should hold Defendant received a constitutionally speedy trial and reject his challenge.

RESPECTFULLY SUBMITTED this 29th day of November, 2011.

ROBERT M. MCKENNA
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By:


Melanie Tratnik, WSBA #25576
Assistant Attorney General

NO. 28332-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

FILED

DEC 02 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID P. WEBSTER,

Appellant.

DECLARATION OF
SERVICE

ALLISON M. CLEVELAND declares as follows:

On Wednesday, November 30, 2011, I deposited into the United States Mail, first-class postage prepaid and addressed as follows:

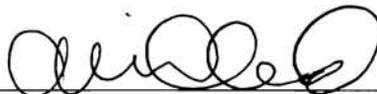
JANET GEMBERLING
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SPOKANE, WA 99209-9166

Copies of the following documents:

- 1) RESPONDENT'S BRIEF
- 2) DECLARATION OF SERVICE

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

RESPECTFULLY SUBMITTED this 30th day of November, 2011.


ALLISON M. CLEVELAND