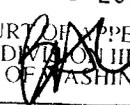


NO. 28462-0-III

FILED

MAR 03 2011

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DIVISION III  
STATE OF WASHINGTON  
BY 

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

JOSE G. CHAVEZ-ROMERO,

Petitioner.

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AMICUS BRIEF OF THE  
WASHINGTON DEFENDER ASSOCIATION

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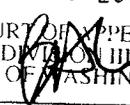
CINDY ARENDS  
ANN BENSON

Washington Defender Association  
110 Prefontaine Pl. S., Suite 610  
Seattle, WA 98104

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## TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....	1
ISSUES TO BE ADDRESSED BY AMICUS.....	1
STATEMENT OF THE CASE .....	2
ARGUMENT.....	3
I.    ICE Detainers: How they interact with the criminal courts.....	3
A.    What is an ICE Detainer. ....	3
B.    Legal Authority to Issue an ICE Detainer.....	4
C.    ICE Detainers Are A Reality For Virtually All Noncitizens Booked Into Jail .....	5
D.    ICE Detainers Are Not Reliable Indicators of a Person’s Immigration Status or Whether They Will Be Deported. ....	6
E.    Triggering the ICE Detainer and its Effects. ....	7
F.    Conditions at the Immigration Detention Center Impede a Defendant’s Access to Counsel and Right to a Fair Trial. ....	8
II.   The Court is Responsible for Ensuring Speedy Trial.....	9
A.    Release Decisions Must Factor in a Defendant’s Likelihood of Appearance and Stated Desire for a Speedy Trial.....	10
B.    The Court Has Authority to Continue a Case Rather than Release a Defendant. ....	11
C.    The Court Can Required the Prosecutor To Seek Federally Sanctioned Departure Control Order From ICE and Negotiate for the Defendant’s Release to the Community.....	14
D.    Governmental Mismanagement of a Case Resulting in Prejudice to a Defendant Warrants Dismissal under CrR 8.3(b).....	15
IV. CONCLUSION .....	18

TABLE of AUTHORITIES

WASHINGTON SUPREME COURT CASES

State v. Carson, 128 Wn.2d 805, 912 P.2d 1016 (1996) .....9  
State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005) .....13  
State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009).....9  
State v. Michieli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) .....17  
State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976).....10

WASHINGTON APPELLATE COURT CASES

Butler v. Kato, 137 Wn.App. 515, 521-522, 154 P.3d 159 (2007).....11  
State v. Carney, 129 Wn.App 742, 119 P.3d 922 (2005) .....9  
State v. Day, 51 Wn.App. 544, 754 P.2d 1021(1988) .....12  
State v. Kelly, 60 Wn.App. 921, 808 P.2d 1150 (1991).....11  
State v. Koerber, 85 Wn.App 1, 3, 931 P.2d 904 (1996).....13  
State v. Nguyen, 68 Wn.App. 906, 914, 847 P.2d 936 (1993) .....12

FEDERAL CASES

Matter of Sanchez, 20 I&N Dec. 223, 225 (BIA 1990).....4  
Matter of Urena, 25 I&N Dec. 140 (BIA 2009) .....15  
U.S. v. Garcia-Gallardo, 2009 WL 113412 at 2 & n.13 (D. Kan. 2009)...15

OTHER STATE CASES

People v. Jacinto, 49 Cal. 4<sup>th</sup> 263, 231 P.3d 341, 109 Cal.Rptr.3d 610  
(Cal., 2010) .....15  
State of Kansas v. Montes-Mata, 41 Kan.App.2d 1078, 208 P.3d 770  
(2009).....5  
State v. Sanchez, 110 Ohio St.3d 274, 853 N.E.2d 283 (2006).....5

FEDERAL STATUTES

8 C.F.R. 215.3 .....15  
8 C.F.R. 215.2 .....14  
8 C.F.R. 236 .....15  
8 C.F.R. 251.1 .....14  
8 C.F.R. 287.7 .....4, 7  
8 U.S.C. 1003 .....4  
8 U.S.C. 1155 .....7  
8 U.S.C. 1226 .....4, 8, 15  
8 U.S.C. 1229 .....6, 7  
8 U.S.C. 1255 .....7

8 U.S.C. 1357 .....4

WASHINGTON RULES

CrR 3.2.....10, 11  
CrR 3.3.....passim  
CrR 8.3.....15, 16

OTHER DOCUMENTS

Civil Enforcement Priorities for the Apprehension, Detention and  
Removal of Aliens, Policy No. 10072.1, FEA 602-14, issued June 30,  
2010.....4  
Affidavit of Betsy Tao, February 28, 2011 .....7, 8  
I-247 Immigration Detainer.....3  
Memorandum of John Morton, Assistant Secretary, U.S. Immigration and  
Customs Enforcement, Civil Immigration Enforcement: Priorities for  
the Apprehension, Detention and Removal of Aliens, Policy No.  
10072.1, FEA 601-14, issued 6/30/10 .....5  
U.S. Immigration & Customs Enforcement Interim Policy Number  
10074.1: Detainers, issued 8/2/10 .....6  
Voices from Detention: A report on Human Rights Violations at the  
Northwest Detention Center in Tacoma, Washington, Seattle University  
School of Law International Human Rights Clinic in collaboration with  
OneAmerica, July 2008 .....8

REFERENCES TO THE RECORD

4/21/2009 RP 3-4.....3  
4/21/2009 RP 2 .....2

## INTEREST OF AMICUS CURIAE

The Washington Defender Association is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. WDA is a not-for-profit corporation with 501(c)(3) tax-exempt status. WDA represents 21 public defender agencies and has over 1000 members. WDA has received permission on many occasions to file amicus briefs with Washington and United States appellate courts. The WDA amicus committee has approved filing of this motion.

The association's objectives and purposes include the following:

A) To protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; B) To promote, assist, and encourage public defense systems to ensure that all accused persons receive effective assistance of counsel, and C) To improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

### ISSUES TO BE ADDRESSED BY AMICUS

I. Whether Immigration and Customs Enforcement (ICE) Detainers Impact a Defendant's Right to a Fair Trial and Access to Counsel.

II. Whether the Court errs when it releases an in-custody pre-trial defendant with an immigration detainer, over his objection, allowing the

State to circumvent speedy trial under CrR 3.3, knowing that the defendant will be detained and possibly deported by immigration officials.

#### STATEMENT OF THE CASE

This brief relies largely upon the petitioner's statement of the case, which appears to be supported by the record of the proceedings below.

The record indicates that the prosecutor sought a continuance of the pre-trial hearing on April 21, 2009 due to a missing witness. April 21, 2009  
RP 2.

No details were provided to the court regarding the identity of the witness, the reason for the non-appearance, any expected future availability, and whether the prosecutor had properly issued a subpoena for the witness. Id.

When the Court released Mr. Chavez-Romero, it was aware he would likely fail to appear:

THE COURT: I don't know what the immigration will do with him if we drop our hold.

MR. CORKRUM [prosecutor]: I don't know your Honor. That shouldn't be this court's concern. That's a federal matter.

THE COURT: I know. It isn't my concern, but you may lose your defendant.

MR. CORKRUM: That's his problem, your Honor. I'll ask for a warrant at that time.

THE COURT: All right. I am going to reset the trial date to May 13. What would be the appropriate pretrial?

MR. CORKRUM: If we could have that next week Tuesday April 28<sup>th</sup>.

THE COURT: OK

MR. CORKRUM: at 1:30.

THE COURT: Do you have a pretrial release order?

MR. CORKRUM: I'll prepare one for the Court, your Honor.

MS. KANE [Defense Attorney]: And, your Honor, just so the record's clear, my client is requesting at this time not to be PRed because he

does not want to be taken into immigration's custody until he has dealt with this case. He's trying to be responsible. He's trying to do what's right due to facing these charges. And I would just make a formal objection to the resetting of the trial date as beyond speedy trial.

THE COURT: Thank you, and your objection's noted I'll that that when it's ready.

MR. CORKRUM: Thank you, your Honor.

4/21/2009 RP 3-4.

## ARGUMENT

The trial court errs when it releases an in-custody pre-trial defendant who opposes release, when the defendant has notified the court and the prosecutor that an Immigration (ICE) detainer is in place which will be served upon his release, resulting in his removal to federal immigration custody, rendering him unable to appear for his trial.

This amicus brief asks the court to find that the court's actions interfere with a defendant's right to a speedy trial. Amicus asks that the court find that the actions of the prosecutor amount to governmental misconduct which results in prejudice to the defendant's right to a speedy trial, right to a fair trial, and impedes a defendant's right to counsel.

### I. ICE Detainers: How they interact with the criminal courts.

#### A. What is an ICE Detainer.

An immigration detainer is a written document<sup>1</sup> served on the jail by either Immigration and Customs Enforcement (ICE) (or Customs and Border Patrol (CBP)) agents.<sup>2</sup> The immigration detainer serves as a notification request to the correctional facility that ICE intends to take

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<sup>1</sup> See Attachment A for a sample I-247 Immigration Detainer.

<sup>2</sup> ICE and CBP are both agencies within the federal Department of Homeland Security.

some action on the individual upon their release from criminal custody. In the vast majority of cases, this action is that ICE will assume custody of the individual and initiate removal proceedings.

B. Legal Authority to Issue an ICE Detainer.

Express statutory authority for issuance of immigration detainers is contained in the immigration statute at 8 U.S.C. 1357 (d) and governed by federal regulations at 8 C.F.R. 287.7.<sup>3</sup> By filing a detainer, ICE is requesting that the jail notify them of an individual's release from criminal custody so that ICE can make a determination about whether to assume custody of the individual. *Id.* The Board of Immigration Appeals has characterized a detainer as "an administrative mechanism to assure that a person subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act." Matter of Sanchez, 20 I&N Dec. 223, 225 (BIA 1990).

While this legal framework purports to provide some guidance on the issuance of detainers, the practice of how ICE lodges them is confusing and inconsistent with ICE's stated enforcement priorities.<sup>4</sup> Depending upon the particular agent and location, immigration detainers are issued against noncitizens regardless of their immigration status, whether they have been charged or convicted of offenses that trigger

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<sup>3</sup> In addition to 8 U.S.C. 1357 (d), ICE asserts authority to issue detainers also pursuant to its general authority to detain pursuant to 8 U.S.C. 1226 as well as its general authority to administer and enforce immigration laws under 8 U.S.C. 1003.

<sup>4</sup> See Civil Enforcement Priorities for the Apprehension, Detention and Removal of Aliens, Policy No. 10072.1, FEA 602-14, issued June 30, 2010 and available at: [http://www.ice.gov/doclib/detention-reform/pdf/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf).

deportation and often in disregard of the impact on pending criminal proceedings, such as the ability to obtain release if the hold had not been lodged.

Criminal courts have held that the lodging of an immigration detainer is an “expression of ICE’s intention to seek future custody” and that immigration detainers are not equivalent to traditional criminal “detainers” or “holds” since they provide no concurrent criminal basis for continued custody, such as the existence of pending criminal charges in another jurisdiction. State of Kansas v. Montes-Mata, 41 Kan.App.2d 1078, 208 P.3d 770 (Kan. App. 2009) (holding presence of ICE detainer did not toll defendant’s speedy trial clock.); State v. Sanchez, 110 Ohio St.3d 274, 853 N.E.2d 283 (2006).

C. ICE Detainers Are A Reality For Virtually All Noncitizens Booked Into Jail

Virtually all noncitizens arrested and booked into jail throughout Washington will have an immigration detainer placed on them. ICE has identified removal of aliens with criminal convictions as a priority.<sup>5</sup> As a result, ICE agents have a regular presence in almost all jails throughout the state. Increased collaboration between ICE and local jails has meant that the jails routinely provide ICE agents with booking information indicating a person’s alienage (usually place of birth), which is all that is needed to lodge an immigration detainer with the local jail.

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<sup>5</sup> See Memorandum of John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement, Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens, Policy No. 10072.1, FEA 601-14, issued 6/30/10 and available at [http://www.ice.gov/doclib/detention-reform/pdf/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf).

The immigration detainer has become the primary tool that ensures that noncitizens will be funneled directly from the criminal justice system into the deportation and detention system.<sup>6</sup> Jailed noncitizens in Washington can expect an immigration detainer to be lodged against them soon after their booking into jail. Once their criminal hold has ended, the immigration detainer is likely to mean transfer to ICE custody and detention at the Northwest Detention Center in Tacoma during the pendency of removal proceedings.

D. ICE Detainers Are Not Reliable Indicators of a Person's Immigration Status or Whether They Will Be Deported.

As the immigration detainer form indicates, the presence of an ICE detainer means that ICE believes that the person is a noncitizen. The detainer makes no mention of the person's specific immigration status. While ICE places detainers against persons whom it believes are present in the U.S. without authorization, it also routinely places holds on those lawfully present, including U.S. citizens, lawful permanent residents (a.k.a. green card holders), and refugees. The presence of an ICE detainer is not determinative of a person's immigration status just as the presence of a detainer is not determinative of whether a person will be deported.

No legal determination of the individual's deportability is made at the time that the detainer is issued. Removal (a.k.a. deportation) proceedings generally involve four steps: (1) Issuance of a charging

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<sup>6</sup> See U.S. Immigration & Customs Enforcement Interim Policy Number 10074.1: Detainers, issued 8/2/10. A copy of the memorandum is available at <http://centerforinvestigativereporting.org/files/ICEdetainerpolicy.PDF>.

document (usually a Notice to Appear pursuant to 8 U.S.C. 1229 (a)); (2) A removal hearing before an immigration judge (or designated ICE official); (3) Consideration of any applications for relief from removal/deportation; (4) Appeal of the immigration judge or ICE official's decision to the Board of Immigration Appeals or the federal district or circuit courts.

Unless a person has a prior order of deportation, the ICE detainer is issued before any of these steps in the removal process. It is important to note that many undocumented noncitizens have avenues to obtain lawful immigration status and avoid deportation which they can and do pursue once in removal proceedings.<sup>7</sup>

E. Triggering the ICE Detainer and its Effects.

The immigration detainer is triggered when the jail's lawful authority to detain the individual expires. 8 C.F.R. 287.7. Thus, an immigration detainer is triggered if (assuming no other criminal detainers): (1) the case is pending and the court orders release or, if bail imposed, defendant posts bail; or, (2) the case is dismissed; or (3) a conviction is entered and the defendant completes his or her sentence.

Once a detainer is triggered the jail will notify ICE of the defendant's impending release. Under regulation, the jail is required to continue detention of the individual for a period not to exceed 48 hours in

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<sup>7</sup> See, for example, 8 U.S.C. 1229 (a) "Cancellation of Removal", 8 U.S.C. 1155, "Asylum" and 8 U.S.C. 1255 "Adjustment of Status To Lawful Permanent Residence". See also, Affidavit of Betsy Tao at Attachment B.

order for ICE to make a decision about whether to assume custody.<sup>8</sup> Noncitizens transferred into ICE custody from jail are detained at the Northwest Detention Center (NWDC) in Tacoma during the pendency of their removal proceedings.<sup>9</sup> Noncitizens not subject to mandatory detention for criminal convictions<sup>10</sup> are entitled to be granted a bond and released during removal proceedings. However, bonds must be paid in cash and amounts are often prohibitively high. Consequently, the majority of noncitizens facing removal are detained at Northwest Detention Center in Tacoma.<sup>11</sup>

F. Conditions at the Immigration Detention Center Impede a Defendant's Access to Counsel and Right to a Fair Trial.

In 2007-2008, conditions at the NWDC in Tacoma were studied in by the International Human Rights Clinic at Seattle University School of Law and OneAmerica (formerly Hate Free Zone), a Seattle-based immigrant, human and civil rights organization. Among the many deplorable conditions they discovered, there were significant barriers to access to counsel unveiled in the study. The full report<sup>12</sup> details the treatment of those attorneys who travel to the NWDC to meet with clients.

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<sup>8</sup> 8 C.F.R. 287.7 (d). State and local law enforcement officers have no independent authority to detain an alleged noncitizen beyond the 48 hour period after release. Once the 48 hour period has lapsed, the jail is required to release the individual if ICE has not taken the individual into custody.

<sup>9</sup> Affidavit of Betsy Tao.

<sup>10</sup> See 8 U.S.C. 1226 (c).

<sup>11</sup> Affidavit of Betsy Tao.

<sup>12</sup> Voices from Detention: A report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington, Seattle University School of Law International Human Rights Clinic in collaboration with OneAmerica, July 2008; available online at: <http://www.detentionwatchnetwork.org/nwdcreport>. The information begins at page 35.

Obstacles to providing counsel to those in detention were identified to include (1) insufficient interview rooms for the population – noting 4 rooms for a population of approximately 1000 detainees; (2) lengthy wait times to see clients of up to 1-2 hours to see a detainee-longer if the attorney arrived during head count (3) inconsistent treatment of attorneys by staff working the front desk and monitoring the interview rooms, resulting in attorneys receiving expedited entry only intermittently at the center; (4) inadequate confidentiality for the attorney and client as officers would stare through the window into the interview room, inappropriately knock on windows of interview rooms, and/or enter during an interview to gauge how long the interview would take; (5) detainees reported problems in sending legal mail – it was either opened or not sent; (6) detainees were not able to readily make confidential calls to attorneys.

Given the reported conditions at the NWDC, a criminal defendant who gets funneled into immigration detention during the pre-trial stage would have a very difficult time maintaining contact with his attorney at a critical stage of his case.

## II. The Court is Responsible for Ensuring Speedy Trial.

It is ultimately the responsibility of the trial court to ensure compliance with CrR 3.3. CrR 3.3 (a) (1), State v. Carson, 128 Wn.2d 805, 912 P.2d 1016 (1996), State v. Carney, 129 Wn.App 742, 119 P.3d 922 (2005). The purpose underlying CrR 3.3 is to protect a defendant's constitutional speedy trial right. State v. Kenyon, 167 Wn.2d 130, 216

P.3d 1024 (2009) (citations omitted). “[P]ast experience has shown that unless a strict rule is applied the right to speedy trial as well as the integrity of the judicial process cannot be effectively preserved.” *Id.* (citing State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)).

A. Release Decisions Must Factor in a Defendant’s Likelihood of Appearance and Stated Desire for a Speedy Trial.

CrR 3.3 contemplates that some defendants will be detained and then released prior to the expiration of the time for trial. CrR 3.3 (b) (3). When a defendant is initially detained, then released prior to the expiration of the 60 day time for trial, the time limit is extended to 90 days. *Id.* Most often, this rule applies when a defendant, after initially being detained, posts bail while his case is procedurally still in the pre-trial stage. This rule also applies where the court releases an individual, such as Mr. Chavez-Romero, on personal recognizance at a pre-trial hearing when the State has problems with a witness.

CrR 3.2 governs release of a defendant prior to trial. Except in capital cases, release is presumed. CrR 3.2(a). When the court determines that release will not “reasonably assure the accused’s appearance, when required” then the presumption of release is overcome. The court is then required to impose the *least restrictive* condition or conditions that will “reasonable assure that the accused will be present for later hearings.” CrR 3.2(b) (emphasis added).

Those conditions include placing the accused in the custody of a designated person or organization agreeing to supervise the accused, restrictions on travel or association,

requiring a bond, requiring the accused to return to custody during specified hours, or electronic monitoring. The rule also authorizes the court to impose any condition other than detention deemed reasonably necessary to assure appearance as required.

Butler v. Kato, 137 Wn.App. 515, 521-522, 154 P.3d 159 (2007) (citing CrR 3.2(b)).

The court can also amend or revoke the release order:

The court ordering the release of the accused on any condition specified in this rule may at any time on change of circumstances, new information, or showing of good cause amend its order to impose additional or different conditions for release.

CrR 3.2 (k).

Trial courts generally have discretion when deciding on pretrial release of a defendant in a criminal case. State v. Kelly, 60 Wn.App. 921, 808 P.2d 1150 (1991). Because the Court has an obligation to safeguard speedy trial, the Court's decision must also factor in the defendant's immigration hold and a stated desire to not be released from custody.

Where the Court releases an individual *knowing that they will likely fail to appear*, as was the case here, the court fails in its duty under CrR 3.2 to ensure the presence of the accused at trial, as well as its duty under CrR 3.3 to ensure a speedy trial.

B. The Court Has Authority to Continue a Case Rather than Release a Defendant.

When the prosecutor is missing a witness and moves for release of an in-custody defendant in order to get more time, the Court has

alternatives available that both protect an individual's speedy trial right and afford the prosecutor an opportunity to present its witness.

The court can continue a pre-trial hearing date leaving the trial date intact if enough time is left within speedy trial. It can do this without releasing the defendant or extending time for trial. So, as here when a witness is missing, the court could briefly continue the pre-trial, allow the prosecutor time to locate and present his witness. This would ensure that the trial would still occur within the 60 day time for trial.<sup>13</sup>

If the prosecution is missing a witness and the time for trial is expiring, the court can continue a trial date "in the administration of justice" beyond the expiration of the time for trial, pursuant to CrR 3.3(f). When the court grants a continuance under CrR 3.3(f), that time is excluded from the computation of speedy trial. CrR 3.3(e)(3). Whenever the court applies an excluded period, speedy trial extends to at least "30 days after the end of the excluded period." CrR 3.3(b)(5).

The court can continue a case "in the administration of justice" when a prosecution witness is unavailable, if the witness will become available within a reasonable period of time and there is no substantial prejudice to defendant. The prosecution must show due diligence in efforts to obtain a witness's testimony. State v. Nguyen, 68 Wn.App. 906, 914, 847 P.2d 936 (1993) (continuance sought of 50 days when a police

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<sup>13</sup> In Mr. Chavez-Romero's case the pre-trial hearing was held on April 21, 2009 and continued to April 28, 2009. The court did not need to release the defendant and extend the time for trial. Arraignment occurred March 3, 2009, so the time for trial did not expire until May 2, 2009.

officer, a National Guard, was called up to active duty and would be out of the country), State v. Day, 51 Wn.App. 544, 754 P.2d 1021(1988) (trial continued three weeks for the defendant's wife, a material witness, to become available when divorce final). Courts have recognized that a continuance of the trial date is possible when the prosecution has a witness who is ill on the day of trial. State v. Koerber, 85 Wn.App 1, 3, 931 P.2d 904 (1996). The Court has also recognized that a continuance of a trial date beyond speedy trial expiration is permissible when the State needs time to prepare for the defendant's diminished capacity defense. State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005) (continuance of 5 weeks to allow prosecutors time to interview the defense expert and to retain their own expert to evaluate the defendant.)

In cases like the present case, the court should require more of the prosecutor than a simple motion for release, including probing the prosecutor for detailed information about a missing witness. Depending upon the explanation provided, the court can find that the circumstances justify a continuance and the court may reschedule the pre-trial date and/or the trial date if needed rather than release a defendant over his objection. This alternative safeguards the right to speedy trial as well as accommodates the prosecutor's need for more time to present its witness, assuming the prosecutor has been diligent and responsible.

When trial courts grant the prosecution's request for release of a defendant on personal recognizance, where both the court and the

prosecutor know that the defendant's release will mean triggering the immigration detainer and transference to ICE custody, risking the defendant's deportation prior to the completion of the criminal proceedings, it demonstrates a failure of the court in its duty to safeguard defendant's speedy trial rights.

C. The Court Can Required the Prosecutor To Seek Federally Sanctioned Departure Control Order From ICE and Negotiate for the Defendant's Release to the Community.

Federal regulations provide a specific mechanism whereby ICE officials can issue a "departure-control" order to prevent the deportation of any noncitizen defendant or witness whose presence is essential to the criminal proceedings. 8 C.F.R. 215.2.

Under 8 C.F.R. 215.2(a), a non-citizen is not permitted to "depart" the United States when doing so would be "prejudicial to the interests of the United States..." A federal departure-control agent must issue an order preventing any individual's departure if it would result in prejudice to the United States.<sup>14</sup> The term "departure" includes departing "from one geographical part of the United States for a separate geographical part of the United States." 8 C.F.R. 251.1(h)

These regulations specifically identify departures of criminal defendants as prejudicial to the interests of the United States and provide for the issuance of a departure-control order to prevent the departure of

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<sup>14</sup> *Id.* ("Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 215.3 *shall* temporarily prevent the departure of such alien...") (emphasis added). The temporary departure prohibition becomes final 15 days later. 8 C.F.R. 215.2(b).

“any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court of the United States...” 8 C.F.R. 215.3(g).<sup>15</sup>

Both state and federal courts have recognized the availability of departure-control orders as a means of suspending deportation process for a defendant or witness during the pendency of criminal proceedings. *See, e.g., U.S. v. Garcia-Gallardo*, 2009 WL 113412 at 2 & n.13 (D. Kan. 2009); *People v. Jacinto*, 49 Cal. 4<sup>th</sup> 263, 231 P.3d 341, 109 Cal.Rptr.3d 610 (Cal., 2010).

While regulations provide for a mechanism for ICE to prevent a defendant’s deportation during criminal proceedings, they do not specifically address immigration custody. ICE has options that allow for alternatives to detention for some non-citizens facing removal proceedings.<sup>16</sup> The criminal prosecutor could communicate with ICE to both facilitate or negotiate the detainee’s release and seek a departure control order.

**D. Governmental Mismanagement of a Case Resulting in Prejudice to a Defendant Warrants Dismissal under CrR 8.3(b).**

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<sup>15</sup> 8 C.F.R. § 215.3(g). An even-broader provision is found at 8 C.F.R. 215.3(h), which prohibits a non-citizen’s departure if he is “needed in connection with any investigation or proceedings being, or soon to be, conducted by any official executive, legislative or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state or local.”

<sup>16</sup> Immigration detention during removal proceedings is mandatory only for certain classes of noncitizens with prior criminal convictions or who are suspected of involvement in terrorist activity. 8 U.S.C. 1226(c). ICE officials have discretion to release all other noncitizens. 8 U.S.C. 1226(a). These release determinations are governed by the same basic considerations that control criminal release, dangerousness and flight risk. *See, Matter of Urena*, 25 I&N Dec. 140 (BIA 2009) and 8 C.F.R. 236(c)(8).

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A criminal defendant held in custody must be brought to trial within 60 days of the commencement date and a defendant not held in custody must be brought to trial within 90 days of the commencement date. CrR 3.3(b)(1), (b)(2). The initial commencement date is the date of arraignment. CrR 3.3 (c)(1). The commencement date can be reset following a waiver by the defendant, a failure to appear, or any one of the other five reasons listed in CrR 3.3(c)(2).

In cases where it is readily apparent that the prosecution's request to release a defendant is a sham or a ruse, intended to extend the time available to bring a defendant to trial and circumventing the rule, the court should not grant the request. A court should assess the sincerity of the request, taking into account the charge, the prosecution's original request for bail (in particular high bail requests), the context of the motion for release of the individual, and whether any misuse, abuse or mismanagement has occurred by the prosecutor.

The court can also be held responsible for mismanagement of a case. When courts release in-custody defendants with immigration detainers, over their objection and without first considering alternatives to release, the courts permit prosecutors to circumvent speedy trial requirements. When the court grants the prosecution's request, as it did here, the court is also complicit in the prosecution's efforts to circumvent speedy trial requirements. These actions by the trial court and the prosecution amount to governmental mismanagement that impedes a

defendant's fair trial, warranting dismissal of the criminal charge under CrR 8.3(b).

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First a defendant must show arbitrary action or governmental misconduct. Governmental misconduct, however, "need not be of an evil or dishonest nature; *simple mismanagement is sufficient*.... The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. Such prejudice includes the right to a speedy trial and the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense."

State v. Michieli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (citations omitted).

The potential for violation of the right to a fair trial goes beyond speedy trial violations. Trial courts must be aware that an in-custody defendant released with an immigration hold could experience a short or lengthy detention by ICE in the immigration center, and could potentially face deportation. The potential prejudice for a defendant in that position could include denial of access to counsel while detained, denial of the effective assistance of counsel who should be consulting with the defendant as he investigates and prepares the case for trial, denial of a speedy trial, or denial of a trial all together if the individual is deported. In Mr. Chavez-Romero's case, the detention was fairly short, but even a short detention can result in a violation of the right to a speedy trial.

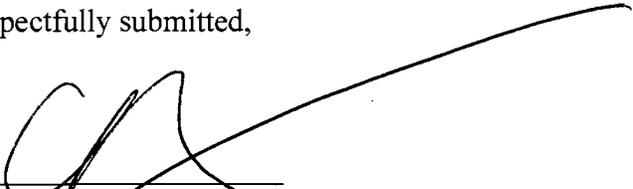
#### IV. CONCLUSION

Trial courts must take into consideration the presence of an immigration detainer and any objection of the defendant when considering release of a pre-trial defendant at the request of the prosecutor. The court is responsible for ensuring that a defendant's speedy trial right is honored and protected, and allowing the use of an ICE detainer and subsequent funneling of criminal defendants into the immigration courts puts defendants at risk of losing their right to trial, right to counsel, right to effective assistance of counsel, and right to speedy trial.

In the case of Mr. Chavez-Romero, the case should be dismissed for a violation of speedy trial and for governmental mismanagement.

Dated this 1<sup>st</sup> day of March, 2011.

Respectfully submitted,



\_\_\_\_\_  
Cindy Arends, WSBA#23127  
Washington Defender Association  
110 Prefontaine Pl. S. #610  
Seattle, WA 98104

Ann Benson, Alaska Bar # 9206013  
Washington Defender Association  
110 Prefontaine Pl. S. #610  
Seattle, WA 98104

# Attachment A

US. Department of Justice

Immigration and Naturalization Service

### Immigration Detainer - Notice of Action

File No.
Date:

To: (Name and title of institution)	From: (INS office address)
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Name of alien: \_\_\_\_\_

Date of birth: \_\_\_\_\_ Nationality: \_\_\_\_\_ Sex: \_\_\_\_\_

**You are advised that the action noted below has been taken by the Immigration and Naturalization Service concerning the above-named inmate of your institution:**

- Investigation has been initiated to determine whether this person is subject to removal from the United States.
- A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on

\_\_\_\_\_  
(Date)

- A warrant of arrest in removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)

- Deportation or removal from the United States has been ordered.

**It is requested that you:**

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments, or other treatment which he or she would otherwise receive.

- Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien. You may notify INS by calling \_\_\_\_\_ during business hours or \_\_\_\_\_ after hours in an emergency.

- Please complete and sign the bottom block of the duplicate of this form and return it to this office.  A self-addressed stamped envelope is enclosed for your convenience.  Please return a signed copy via facsimile to \_\_\_\_\_  
(Area code and facsimile number)

Return fax to the attention of \_\_\_\_\_, at \_\_\_\_\_  
(Name of INS officer handling case) (Area code and phone number)

- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death or transfer to another institution.
- Please cancel the detainer previously placed by this Service on \_\_\_\_\_

\_\_\_\_\_  
(Signature of INS official)

\_\_\_\_\_  
(Title of INS official)

**Receipt acknowledged:**

Date of latest conviction: \_\_\_\_\_ Latest conviction charge: \_\_\_\_\_

Estimated release date: \_\_\_\_\_

Signature and title of official: \_\_\_\_\_

# Attachment B



5. In addition to not being able to be released on bond, the main issue detainees face is the barrier to accessing services, such as community support resources, and legal counsel. Most detainees are indigent and, since legal counsel is not appointed in removal proceedings, they lack the legal representation to adequately defend themselves in removal proceedings. Between 84 to 90% of detainees are forced to proceed before the immigration court pro se.
6. Many detainees end up in ICE detention while they still have pending criminal charges. This places an even greater burden on them, as well as their already over-worked public defenders, to defend against their criminal charges given the conditions at the NWDC.
7. Attorneys can visit the detainees daily from six a.m. to six p.m. However, the NWDC, outside Tacoma, is a long distance from where many detainees' criminal proceedings are being held. I rarely see criminal defenders visit their client's in ICE detention. Guards are regularly posted outside attorney meeting rooms and the confidentiality of the meetings is often questionable, given that it is possible to hear people talking when standing just outside the room.
8. Family and friends are permitted to visit during restricted visitation hours. Contact visits with family are rarely allowed, and all family visits, even with spouses, must happen through glass partitions while talking on a phone device. Many detainees' families include people who are undocumented who are too afraid of apprehension by ICE themselves to visit. Consequently, many detainees have no contact with anyone other than other detainees.
9. Detainees' ability to effectively communicate with anyone outside the NWDC is very limited. First, they must pay for all calls except for a short list of free legal services agencies, such as NWIRP, and consulates. If detainees want to call friends, family, their public defenders, criminal courts, or witnesses for their criminal cases, they must pay for those calls or the receiver must be willing to accept a collect call. When a call is made from the detention center, an automated warning plays first, which results in many people simply hanging up, making it very difficult for detainees to even make contact with someone who is not anticipating their call. It is incredibly difficult to get phone messages to detainees, even for attorneys.
10. I am not aware of any established procedure whereby ICE or NWDC staff transport detainees to hearings on pending criminal charges. That sort of transportation most likely only happens if ICE is working directly with a prosecutor. Frequently, detainees have criminal court dates while in detention, and if the prosecutor does not contact ICE, the individual misses his or her hearing. As a result, the person ends up with an active warrant once he or she leaves the detention center. Since detainees often miss court-imposed requirements of their probation, such as domestic violence treatment classes, this also seems to result in outstanding warrants.
11. Life is very difficult for most detainees at NWDC. Beyond basic health care, there are no services available to them while in NWDC. Many detainees become depressed and have, or acquire, other mental health issues. Detainees can get a job for a dollar a day, but do so mostly to combat boredom. Many give up and ask to be deported even if they have a legal basis to ask the immigration judge to stay or legal grounds to fight their deportation, because

they cannot endure the difficulties of life at NWDC, particularly when they are separated from families. There are clients who are literally sobbing every time we visit.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signed this 28<sup>th</sup> day of February, 2011, at Tacoma, Washington.

  
\_\_\_\_\_  
Betsy Tao  
WSBA No. 33348

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 28462-0-III
	)	
Jose G. Chavez-Romero	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, ALCIA DELMORE, STATE THAT ON THE 1<sup>st</sup> Day OF March, 2011, I CAUSED THE ORIGINAL AMICUS BRIEF OF THE WASHINGTON DEFENDER ASSOCIATION TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DPA: DAVID CORKRUM FRANKLIN COUNTY PROSECUTING ATTORNEY 1016 N. 4 <sup>TH</sup> AVENUE PASCO WA 99301	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] APPELLANT'S ATTORNEY: KRISTINA M. NICHOLS PO BOX 19203 SPOKANE, WA 99219	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 1 DAY OF MARCH, 2011.

x   
ALYCIA DELMORE