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Division III  
State of Washington  
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NO. 37169-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE MICHAEL CURTISS,

Appellant.

---

BRIEF OF RESPONDENT

---

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises one assignment of error.

1. Whether the court violated Curtiss' right to a speedy trial by granting the State's request for a continuance.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Appellant's speedy trial rights were not violated.

II. STATEMENT OF THE CASE

The preliminary appearance form, dated June 10, 2109, notes that at the time of this appearance that Curtiss was under a secondary hold by the Department of Corrections. (DOC) if bail was posted on this charge this defendant could not have been released. CP 5

Curtiss's pretrial services report indicated that he had five (5) prior "FTA"s (failure to appear) in his history and that 2 or more of those FTA's were in the last two years. Because of the risk factors presented that report states "Release Not Recommended." CP 6

He was charged with three counts: Possession of Stolen Motor Vehicle, Possession of a Controlled Substance, Methamphetamine and, Second Degree Driving while License Suspended or Revoked. CP 7.

His trial counsel was appointed on June 19, 2019 CP 8 and Curtiss was arraigned and entered a plea of not guilty on June 24, 2019. CP 9,

10. On July 25 the Omnibus Order was entered, it was noted on the order that the State was “waiting for Crime Lab drug test” CP 11-12 One July 25, 2019 “Order Setting Case Schedule” was entered setting the date of the trial as 8/12/19. CP 13.

On August 9, August 16, September 27 and, October 21, 2019 the defendant raised the issue of speedy trial. RP 6-, 9-11, 14-15, 18-19, 29-34. On October 21, Curtiss’s counsel filed another written motion objecting to the trial date. CP 52-3

On August 9, 2019 the State requested a continuance indicating there were three bases for the request. RP 5-11 Although Curtiss has not supplied the record from an earlier hearing the State’s attorney indicates during the August 9, hearing that he had informed the court and Curtiss that the State would likely need a continuance:

MR. OAKLEY: Triage calendar, cause 19-1-10-26.  
I believe the State has a motion to continue.

MR. ELLIS: That’s correct, Your Honor. When we were here on July 25<sup>th</sup>, I think I made a record, basically, that this was a very likely thing that was gonna happen when we reached -- when we reached today’s date. RP 5.

The State supplied the following information to the court and Curtiss as the reasons for this request.

...So, Mr. Curtiss is obviously in custody being held on this matter. He was arraigned on June 24th, which means that we have speedy trial until roughly August 24th. So, for the next two weeks. Just -- there’s a

couple of reasons that the State's asking for the continuance. One is just my own unavailability to try this case. As I've mentioned before, I currently have two cases already on the trail with shorter speedy trial times. And so, those -- and then, basically, those need to go out next week or they'll need to be continued. And then, on the 19<sup>th</sup> and 20<sup>th</sup> I am scheduled to be doing pretrial on an aggravated homicide case. And then from the 21<sup>st</sup> through the 28<sup>th</sup>, I am out of -- well, the 22<sup>nd</sup> through the 28<sup>th</sup>, but I can't start trial on the 21<sup>st</sup>, I'm scheduled to be out of the country with a pre longstanding vacation plan. So, that covers basically the rest of Mr. Curtiss' current speedy trial window.

Also, as I mentioned last time, Count 2 here is possession of a controlled substance methamphetamine. This case arose on June 9<sup>th</sup> and so, it's just over two months old. I know that, cause I've spoken to YSO, evidence about this, the drugs, have been or the suspected controlled substances have been sent to the crime lab. And so, I will reach out to the crime lab to ask them to expedite the testing so we can get an answer on that. But they are not done as of today's date.

And so, those -- so it's basically, cause I'm asking for a continuance to give the crime lab more time to test the suspected controlled substances and then also, because of my own unavailability for the remaining two weeks of our speedy trial window.

The following colloquy amongst the parties and the court occurred:

THE COURT: All right. And is there any prejudice to your client in the presentation of his case by this continuance?

MR. OAKLEY: I don't think so, other than he would have to languish in custody if his request to be released on his own recognizance is denied.

THE COURT: Well, under our guidelines, this case should be resolved by January of this coming year with an arraignment in June. I am gonna find there's good cause for the continuance as requested and by this

you're also indicating you're ready to go to trial now, is that correct? RP 7

...

THE COURT: All right. Defense is ready. State needs a continuance. I find there's good cause for the continuance. There's no prejudice to Mr. Curtiss in the (RP 7)

presentation of his defense in that matter. That continuance will be granted. I think bail is appropriately set. I did note that there was a DOC hold. I don't know what the status of that is now.

...

MR. OAKLEY: Very well. I guess I will have to file my objection to the trial setting under Criminal Rule 3.3. It seems like Your Honor should probably hear that one. Would the Court like to have that noted up?

THE COURT: Well, whenever.

MR. OAKLEY: I –

THE COURT: Let me just look. You're the only one that does that and I'm glad to hear it, but I don't want to –

MR. OAKLEY: Other judges have taken the position that since Your Honor granted the continuance that Your Honor should -- the judge who grants the continuance should hear the objection. 3.3 (d). (RP 8)

THE COURT: Well, I -- I -- I'm glad to hear it anytime. I don't -- it's -- I think the way I'm reading it is that this is a continuance that's been requested. It's not -- the time for trial has not expired. I am simply continuing the time for trial.

MR. OAKLEY: As I'm understanding it, the trial will not occur before the expiration date of August 23rd, unless I missed something.

THE COURT: Yeah, but I've moved, there's been a motion to continue to extend that.

MR. OAKLEY: Mm-hmm (affirmative).

THE COURT: So, it's not -- the time for trial hasn't been violated, it's been continued. But, I'm glad --if you want to put it on next week, that's fine.

MR. OAKLEY: Next Friday?

THE COURT: That's fine. There's no argument on

it. You're just simply filing a notice and –

MR. OAKLEY: Well, the rule –

THE COURT: -- your objection.

MR. OAKLEY: -- also says it should be noted up for hearing at your earlies, I don't know, convenience or something to that –

THE COURT: Yeah, I don't think this -- I'll look at it again, but I don't think it applies to this, but I'm glad to hear it next Friday. (RP 9)

MR. OAKLEY: I don't -- I don't want to waive this issue.

THE COURT: No, no, no –

MR. OAKLEY: For my client.

THE COURT: Yep, that's fine.

...

MR. ELLIS: -- a lot more than I do and he said that their times for testing this suspected controlled substance are less than for others and so they should be able to get it done maybe within a month. And so, I was thinking of coming back in the middle of September for trial, if that works for the parties or the beginning of October.

THE COURT: Okay.

MR. OAKLEY: I would prefer to set it at the end of the month without waiving my objections because I don't want to have to come back and have you have another continuance. So, either first of October or end of September.

On this same date, August 9, 2019, the trial court entered on Order of Continuance – Contested. This order states “DPA unavailability; suspected controlled substance being tested at the Crime Lab.” This order reset the trial date to September 20, 2019. CP 14.

Counsel for Curtiss filed a written “Objection to Trial Setting” on August 16, 2109. In this motion Curtiss objects to the continuance to

September 30, 2019 and that the court must set trial on or before August 23, 2019 or dismiss the case. CP 15-20. In that memorandum Curtiss argues “The sole issue is whether routine and foreseeable congestion at the Laboratory is good cause to grant the plaintiff’s motion to continue beyond the time for trial.” CP 17

At this hearing Curtiss stated he had filed a written motion objecting to the court granting the State’s motion for a continuance. Counsel filed a written motion because he believed the rules called for that process. He addressed the continuance, “...[t]hat continuance was granted over the defense’s objection and I set this -- the Court set this matter on for hearing under my specific objection under Rule 3.3(d). I filed a motion in that respect...we object to that. We don’t believe that’s good cause for continuance and we ask for trial on or before August 23rd.” RP 14

The court stated:

THE COURT: And I’m not trying to hear each motion twice. I think the motion was properly heard, found good cause for the continuance before. I think filing this, you can file any written objection you want, but it isn’t a -- we’re not doing double motions -- having arguments twice on every hearing. I think the rule doesn’t apply to what we’ve done. That’s a different application. I think I’ll look at it again, but I looked at it last week or when we argued -- you argued it before. You can always file a written objection, I’m good with that, but we’re not gonna hear two bail motions for each motion. RP 15

On September 27, the State again moved for a continuance of one week. RP 18 A State's attorney asked for additional time so that the State's trial attorney would have time to prepare for his case after one of his other trials that he had prepared for pleaded out. RP 18 This reset, as noted by the trial court was "...just simply a reset within the thirty day buffer." RP 18. Curtiss again objected to this continuance. The court stated:

THE COURT: The Court will allow a one week reset to the 7th. I'm looking at his PSA scores out a five and a six. He's got substantial prior convictions and substantial failures to appear. Court will maintain the bail as it is. Court doesn't find any prejudice to the presentation of the defendant's case by setting this matter over one week. RP 19

On October 4<sup>th</sup> during discussion of this case the speedy trial issue was discussed again. The trial court inquired of Curtiss' counsel "...so, your position is that the time for trial is not subject to modification or continuance?" Counsel's response was "[o]h, I think it is subject to continuance. I just don't think that it was -- there was a good enough reason to continue it." RP 24-25.

Again, there was a lengthy discussion of this issue and the court yet again ruled against Curtiss:

MR. ELLIS: And I know we have different understandings of when speedy trial expires, but from, I think, my understanding and understanding the

Court's been (RP 23) working on, we have until the end of the month.

MR. OAKLEY: And it's -- well, our position that time for trial has already expired.

THE COURT: All right. And that -- and that is certainly something that the appellate court will be, I'm sure, please to deal with. So, we have through the end of roughly October 29, 30. And your argument, just so I'm clear, Mr. Oakley, is that -- that my decision of August 9<sup>th</sup> was in error?

MR. OAKLEY: Well yes, Your Honor. Also, we argued that, but the actual written motions I filed were seeking to protect my client's right to a speedy trial under Rule 3.3 objecting to the reset trial dates is beyond speedy -- the expiration of speedy trial.

MR. ELLIS: And I fully understand that and I think that's why Mr. Oakley's made that note on the trial status order to make it clear that he's not agreeing to speedy trial, but I've written there --

MR. OAKLEY: We don't agree.

MR. ELLIS: -- it's reserving everything on --

MR. OAKLEY: I don't want to -- there to be any hint that I've waived that issue.

THE COURT: So, is it -- well, I guess I -- so, your position is that the time for trial is not subject to modification or continuance? (RP 24)

MR. OAKLEY: Oh, I think it is subject to continuance. I just don't think that it was -- there was a good enough reason to continue it.

THE COURT: Okay. Now I --

MR. OAKLEY: And I filed a previous motion was objecting to the trial date that was set on September 30<sup>th</sup>. The motion I filed today with us objecting to a trial date of Monday, October 7<sup>th</sup>.

MR. ELLIS: Which was a move seven days into the thirty day buffer from the State's perspective.

MR. OAKLEY: I felt I needed to file yet another

THE COURT: All right.

MR. OAKLEY: -- objection to the trial date to preserve my client's rights.

THE COURT: All right. So, we'll -- I've got

the trial status order. You're going -- you are going on the trialing list. I think two -- two are going out next week and --

MR. ELLIS: And unfortunately, I think from Court Admins perspective it should -- should be either of the cases that I've handed up trial status orders on today.

THE COURT: Yeah.

MR. ELLIS: But I'll check in with Sandra.

MR. CURTISS: (indiscernible). (RP 25)

MR. OAKLEY: That is our trial status order which says that this is what we're gonna do for trial. This says that our objections to the trial date were denied.

The motion to dismiss based on this alleged violation of Curtiss' speedy trial was again denied by the trial court and an order entered on October 4, 2019. CP 50.

And finally on October 21, before the start of the CrR 3.6 motion the trial court granted the State's motion finding good cause the continuance request and denied Curtiss' motion to dismiss his case based on his allegation that the continuance violated CrR 3.3 RP 7, 33. Once again, the trial court made a lengthy ruling regarding Curtiss' speedy trial allegation:

THE COURT: All right. And -- and I did review the file. It looks like Mr. Curtiss was arraigned on 6/24. No trial date was set at that time. An omnibus hearing was set, but within the sixty days a trial date was set on 7/25 for 8/12 on that -- on the 7/25 date. The omnibus order in that said that good cause to exceed the 3.3 sixty day period essentially, and I'm paraphrasing, had been found at that point on the omnibus order. And then, on August 9th a new trial date was set and it was over the objection of Mr. Curtiss. That was a contested

continuance to 9/30 and I believe the basis, at that point, which was found as good (RP 31) cause by Judge Elofson was unavailability of the deputy prosecuting attorney as well as the necessity to, I guess, get results from the crime labs. So, and so, that was set. Then there was -- there is the thirty day buffer period, which this does fall within. I understand that -- that Mr. Oakley and Mr. Curtiss -- Mr. Oakley, on his behalf, is arguing that it should have been set within the initial sixty days. But good cause was found by both Judge Elofson, as well as myself over the objection of Mr. Curtiss and for those reasons, I'm gonna go ahead and - - and deny the objection to the trial setting and request for dismissal. And, the good cause, in my mind, is that Mr. Ellis, it's my understanding, was in another trial previously -- I believe even as recently as last week. Additionally, there was his unavailability earlier on which Judge Elofson found was good cause and would not prejudice the ability of Mr. Curtiss to present a defense. I understand he's been in custody and incarcerated since June and also the necessity of obtaining the evidence, despite the Wake matter which is 56 Wn.App.472 (RP 31-21)

...

THE COURT: All right. So, the record has been made on that. Your motion has been denied, to dismiss, based on the 3.3 violation and also I believe Mr. Oakley was raising constitutional issues as well. I would note that the arraignment was, again, June 24<sup>th</sup> of this year. So, okay. RP 33

Curtiss had at the time of his sentencing an offender score of 9 for the Possession of a Stolen Motor Vehicle base on five (5) prior felony convictions. CP 122-23

Curtiss moved to suppress the drugs that were seized from the stolen vehicle. CP 35-39. This motion was denied.

### III. ARGUMENT.

#### 1. **RESPONSE TO ISSUE ONE – SPEEDY TRIAL CrR 3.3.**

This is a very fact specific issue. When this court looks at the facts in the record it is clear that the trial court's basis for granting the continuances in this case was well within its discretion.

There can be no doubt that the standards set forth in Barker v. Wingo, 407 U.S. 514, 522, 533, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) and the cases that followed apply to this case. In Wingo the court stated that States can prescribe reasonable periods for commencement of trials consistent with constitutional standards. Wingo involved a delay which was "well over five years.", Doggett v. United States, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) Some pretrial delay is often "inevitable and wholly justifiable,"; State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009) Our state constitution "requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights."

This court uses the *Barker* test to determine whether the trial court violated the defendant's constitutional rights, but to trigger the *Barker* analysis, the Curtiss must first demonstrate that the "interval between accusation and trial has crossed the threshold dividing ordinary 'presumptively prejudicial' delay." Doggett, 505 U.S. at 651-52).

*See State v. Hatt*, 11 Wn.App. 2d 113, 150, 452 P.3d 577 (2019)

"Continuances appropriately granted by the court are excluded from the calculation of time to trial and extend the allowable trial date to 30 days after the end of the excluded period." (citing CrR 3.3(b)(5), (e)(3), (f)), *review denied*, 195 Wn.2d 1011 (2020).

When this court reviews the actions of the trial court it will find that the continuance was based on several valid reasons and the trial court did not abuse its discretion in granting these relatively short continuances. Curtiss' ground for relief fails.

*State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (Wash. 2014)

"The application of the speedy trial rule to a specific set of facts is a question of law reviewed de novo. *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). This court interprets court rules the same way it interprets statutes, using the tools of statutory construction. See *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007) (" [T]his court gives effect to the plain language of a court rule, as discerned by reading the rule in its entirety and harmonizing all of its provisions." )."

*State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009)

indicates that criminal charge not brought to trial within the time limits of CrR 3.3 must be dismissed with prejudice.

And as is the case here CrR 3.3(b)-(c) provides that a defendant, such as Curtiss, who is detained in jail, must be brought to trial within 60 days of arraignment. This rule protects the defendant's constitutional right to a speedy trial and prevents undue and oppressive incarceration before trial. State v. Kingen, 39 Wn.App. 124, 127, 692 P.2d 215 (1984).

However, this constitutional right to a speedy trial does not mandate a trial within 60 days. State v. Torres, 111 Wn.App. 323, 330, 44 P.3d 903 (2002).

In this State there are certain periods of time which are excluded from the computation of time, including continuances granted by the trial court. CrR 3.3(e). CrR 3.3(f)(2) states:

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance.

The trial court may and in this case did, grant the State's motion for a continuance when " required in the administration of justice" as long as the continuance granted by the court does not substantially prejudice the defendant in his defense. State v. Saunders, 153 Wn.App. 209, 217, 220 P.3d 1238 (2009) (quoting CrR 3.3(f)(2)). The decision to grant a

continuance under CrR 3.3 rests in the sound discretion of the trial court and will not be disturbed unless the trial court grants the continuance for untenable reasons. State v. Ollivier, 178 Wn.2d 813, 822-23, 312 P.3d 1 (2013).

Here the trial court stated on the record, on numerous occasions and by two separate jurists, that there was good cause for the continuance based on (1) the unavailability of the assigned prosecutor due to other trials, (2) the deputy prosecutor had a previously scheduled trip and, (3) the unavailability of the State's crime lab witness/ the controlled substance had not yet been tested.

Scheduling conflicts such as a preplanned vacation and the unavailability of witnesses are valid grounds to continue a trial pursuant to CrR 3.3(f)(2). State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005):

Common law has clarified that "[i]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors." State v. Heredia-Juarez, 119 Wn.App. 150, 155, 79 P.3d 987 (2003). Allowing counsel time to prepare for trial is a valid basis for continuance. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Williams, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). Scheduling conflicts may be considered in granting continuances. *See Heredia-Juarez*, 119 Wn.App. at 153-55, 79 P.3d 987 (valid continuance granted to accommodate prosecutor's reasonably scheduled vacation). "[O]nce a valid continuance is granted, ... the wise discretion of the trial court may be used in exceptional circumstances to set cases

beyond the 60-day limit of CrR 3.3." State v. Perez,  
16 Wn.App. 154, 156, 553 P.2d 1107 (1976).

As important, Curtiss did not articulate any prejudice resulting from the continuance and in fact told the court that there was no prejudice to his case other than he would continue to “languish” in jail.

THE COURT: All right. And is there any prejudice to your client in the presentation of his case by this continuance?

MR. OAKLEY: I don't think so, other than he would have to languish in custody if his request to be released on his own recognizance is denied. RP 7

Flinn, 154 Wn.2d at 199 “[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). "We will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).”

1) Length and reason for the delay. This case went to trial 119 days after the defendant was arraigned and 70 days after the original trial date. Our State Supreme Court has rejected "a formulaic presumption of prejudice upon the passing of a certain period of time" in favor of a fact-specific analysis of the length of delay, complexity of the charges, and

reliance on eyewitness testimony. Iniguez, 167 Wn.2d at 292, 217 P.3d 768.

State v. Monson, 84 Wn. App. 703, 929 P.2d 1186 (1997), review denied at 133 Wn.2d 1015 (1997). "...prejudice is not an essential factor in determining whether the constitutional right to a speedy trial has been violated. Moore v. Arizona, 414 U.S. 25, 26, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973); Higley, 78 Wn. App. at 185. Under the facts of this case, the delay in bringing Mr. Monson before the court was reasonable and no violation of his constitutional speedy trial rights.

This Court addressed delay in State v. Burton, 269 P.3d 337, 165 Wn.App. 866 (Div. 3 2012) stating:

Lovasco recognized that any demonstration of actual prejudice arising from delay in criminal proceedings makes a due process claim concrete and ripe for adjudication, but does not make the claim automatically valid. The due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. 431 U.S. at 789-90, 97 S.Ct. 2044.

Doggett stated "by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness." Doggett at 2690-1

The State acted with due diligence throughout the period of time that Appellant was in custody. This was not some attempt to keep Curtiss

in jail while the case progressed in an attempt to exact the State's pound of flesh, Curtiss' criminal history dictates that conviction for (as he was) the most basic charge here, Second Degree Driving While License Suspended would result in his incarceration for up to one year, far longer than he was in custody for a the time of his trial. And as was the case here he was convicted of the Possession of a Stolen Motor Vehicle which resulted, due to his 9 point score, in a sentence that 50 months. CP 122-24.

The court in State v. Rafay, 168 Wn.App. 734, 771-2, 285 P.3d 83 (2012) addressed the "prejudice factor" as follows:

In assessing the prejudice factor, a court looks to the effect of the delay on the interests protected by the right to a speedy trial, including preventing harsh pretrial incarceration, minimizing a defendant's anxiety and worry, and limiting impairment to the defense. Because of the difficulty of proof, a defendant need not show actual impairment to establish a speedy trial violation, and a court will presume that such prejudice "intensifies over time." Nonetheless, there will be a "stronger case" for a speedy trial violation if the defendant shows such prejudice.

Here, the defendants rely solely on the presumption of prejudice and do not allege that the delay impaired their defense. A claim of presumptive prejudice alone, without regard to the other Barker criteria, is insufficient to establish a Sixth Amendment violation.

Although the length of the delay in this case was significant, a consideration of all of the factors in this case shows no constitutional speedy trial violation. (Footnotes omitted.)

IV. CONCLUSION

The actions of the trial court should be upheld, and this appeal should be dismissed.

Respectfully submitted this 21st day of August 2020,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on August 21, 2020 the parties, I  
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 21<sup>th</sup> day of August, 2020 at Spokane, Washington;

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**YAKIMA COUNTY PROSECUTORS OFFICE**

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Motion 1 - Extend Time to File  
*The Original File Name was Curtiss 371697 Ext Date of filing.pdf*

**A copy of the uploaded files will be sent to:**

- admin@ewalaw.com
- jill@ewalaw.com
- joseph.brusic@co.yakima.wa.us

**Comments:**

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Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us  
Address:  
PO BOX 4846  
SPOKANE, WA, 99220-0846  
Phone: 509-426-0235

**Note: The Filing Id is 20200821153927D3672896**