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NO. 81750-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RICARDO INIGUEZ,

Respondent.

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APPEAL FROM THE SUPERIOR COURT
FOR FRANKLIN COUNTY

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STANDARD OF REVIEW

The right to speedy trial is a fundamental constitutional guarantee under both the Sixth Amendment and Article I, sec. 22. To determine whether that right has been violated in a particular case, a court considers and “balances” the four factors set forth in Barker v. Wingo, 407 U.S. 514 (1972)(length of delay, reasons for delay, demand for speedy trial and prejudice). On appeal, the appellate court engages in *de novo* review of the constitutional question in light of the four factors upon the record. Barker v. Wingo; Doggett v. United States, 505 U.S. 647 (1992); State v. Brillon, 955 A.2d 1108 (Vt. Sup. Ct. 2008), *cert. granted*, 129 S.Ct. 30.

No one factor is dispositive for Sixth Amendment analysis. Barker 407 U.S. at 533 (“none of the four factors [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.”). Appellate balancing of the Barker factors should be rigorously objective. Hartridge v. United States, 896 A.2d 198, 224 (D.C.Ct.App. 2006)(dis. op. of Glickman, J.).

In this case, the Court of Appeals, Division 3, objectively weighed the Barker factors to determine that the speedy trial rights of Respondent Ricardo Iniguez under the Sixth Amendment were denied. State v. Iniguez, 143 Wn.App. 845, 180 P.3d 855, 861-63 (2008).

Mr. Iniguez asserts that Art. I, sec. 22 provides even greater speedy trial protection to a defendant than does the Sixth Amendment. The Washington Association of Criminal Defense Lawyers (WACDL) agrees.

Consistent with this position, a heightened Barker-type analysis is warranted so that, depending on the circumstances, a single factor may be dispositive. In a pre-Barker decision, this Court identified four factors under Article I, sec. 22 in the *disjunctive* and indicated that proof of any one factor could be sufficient to establish a violation of the speedy trial right. State v. Christensen, 75 Wn.2d 678, 686, 453 P.2d 644 (1969) (“(1) a delay of such length alone as to amount to a denial of the right to a speedy trial; (2) prejudice to the defense arising from the delay; (3) a purposeful delay designed by the state to oppress the defendant; *or* (4) long and undue imprisonment in jail awaiting trial.)”

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY WEIGHED THE BARKER FACTORS TO DETERMINE, BASED ON THE RECORD, THAT THE SIXTH AMENDMENT SPEEDY TRIAL RIGHTS OF MR. INIGUEZ WERE VIOLATED

It is axiomatic that the right to a speedy trial is a fundamental right of the accused under the Sixth Amendment. Barker v. Wingo, 407 U.S. at 515, 533; Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). The Sixth Amendment provides in relevant part:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]”

In Barker, the United States Supreme Court established four non-exclusive factors a court must consider in determining whether the Sixth Amendment right to a speedy trial has been protected: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and preju-

dice to the defendant.” 407 U.S. at 530. These factors are to be considered as a “balancing test” requiring a “sensitive balancing process.” 407 U.S. at 530, 533. “[T]his process must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.” *id.* The Supreme Court adjusted the speedy trial calculus in Doggett holding that actual prejudice is not necessarily required to prove a speedy trial violation where there is lengthy delay. United States v. Shell, 974 F.2d 1035, 1036 (9th Cir.1992)(“The Court modified the Barker v. Wingo four-part test, and held that no showing of prejudice is required when the delay is great and attributable to the government.”).

1. Length of Delay. The Court of Appeals determined that the record established a nearly nine-month delay from the arrest of Mr. Iniguez (5/25/05) to the initial trial start (2/8/06) 180 P.3d at 861, 859. In his supplemental Brief, Mr. Iniguez points out that the record also shows that the actual trial starting date was April 21, 2006, an eleven-month delay. Supp. Brf. of Iniguez at p. 1 and *see* 180 P.3d at 859. Mr. Iniguez explains that the record should reflect the reason the case did not go forward on the earlier date was the state’s and court’s failures to insure the presence of a necessary interpreter and this additional unnecessary delay should not be deducted from the computation of the overall delay.

Whether the delay is calculated at nine months or eleven months, in either event the delay is sufficient to establish a presumption of prejudice and to trigger the speedy trial inquiry.

While the United States Supreme Court has not yet established a threshold period of delay sufficient to trigger application of the four-part Barker test, the Court noted in a footnote in Doggett v. United States that “the lower courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year.” 505 U.S. at 652, n.1. Division 2 of the Court of Appeals expressly held a delay of eleven months to be “presumptively prejudicial” in State v. Corrado, 94 Wn.App. 228, 234, 972 P.2d 515 (1999). In the course of its opinion, Division 2 cited with approval caselaw which holds that the threshold of delay to establish presumptive prejudice is eight months.

“Other courts have noted that shorter delays are presumptively prejudicial. United States v. Beamon, 992 F.2d 1009, 1012-13 (9th Cir. 1993)(noting that the second circuit in United States v. Vassell, 970 F.2d 1162, 1164 (2d Cir.1992), found a general consensus that eight months delay is presumptively prejudicial).”

State v. Corrado, 94 Wn.App. at 233.

Accordingly, the Court of Appeals properly relied on this line of authority to conclude that the length of delay in this case was presumptively prejudicial and weighed heavily against the state in conjunction with the other Barker factors. State v. Iniguez, 180 P.3d at 862-63.

2. Reasons for Delay. The Court of Appeals properly recognized that the record shows that Mr. Iniguez “was not responsible for any of the delay.” 180 P.3d 861. The Court identified two primary causes for the inordinate delay both of which must be charged to the state. The first cause was the state’s insistence on jointly trying Mr. Iniguez and his co-

defendant despite the objections to delays caused by the co-defendant and repeated requests for severance to allow a timely trial for Mr. Iniguez. The second cause was the state's negligence in not keeping track of a key witness and allowing the departure out of the country of the witness to result in unnecessary delay.

A. THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO SPEEDY TRIAL TRUMPS THE NON-CONSTITUTIONAL POLICY OF JUDICIAL ECONOMY FAVORING JOINT TRIALS WHENEVER THE DEFENDANT DEMANDS SPEEDY TRIAL, REQUESTS SEVERANCE AND IS NOT RESPONSIBLE FOR DELAY

While Washington acknowledges a policy generally favoring joinder of trials for co-defendants as a matter of judicial economy, it also recognizes that such policy must yield to a defendant's right to speedy trial in certain circumstances. In the court rule context, CrR 4.4(c) provides that severance should be granted whenever "it is deemed necessary to protect a defendant's rights to a speedy trial" ¹ Division 1 of the Court of Appeals has explicitly recognized that "the trial court *should* sever to protect a defendant's right to a speedy trial." State v. Eaves, 39 Wn.App. 16, 19, 691 P.2d 245 (1984)(court's emphasis).

Of course, in the present context, the state's interest in judicial economy remains merely as a *non-constitutional* policy interest – there is no constitutional provision favoring joint trials. On the contrary, the only

¹ "The court, ... on application of the defendant ... should grant a severance of defendants whenever: (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial" CrR 4.4(c)(2).

constitutional provision at play is the protection of the accused's right to a speedy trial. In the constitutional context, the right to a speedy trial must necessarily trump a policy favoring joint trials at least where a defendant asserts his speedy trial right, moves to sever his trial from that of his co-defendant and is not responsible for the ensuing delay(s) of trial.

This is the critical point made by Judge Glickman in his dissenting opinion in Hartridge v. United States, 896 A.2d at 226:

“Simply put, the non-constitutional reasons of policy that favor joinder – efficient use of resources and decreasing the burden on witnesses – are not so compelling that they outweigh the ‘fundamental’ policy enshrined in the Constitution.”

The contrary position – that the non-constitutional policy favoring joint trials should trump a defendant's constitutional right to a speedy trial has been squarely rejected by the courts. In Townsend v. United States, 512 A.2d 994, 998 (D.C.CtApp.1986), the government attempted to justify the delay in bringing Townsend to trial on the basis that it needed additional time “so that all three defendants could be tried jointly.” The District of Columbia Court of Appeals rejected this argument as justification for delay of Townsend's trial:

“[W]e are of the view that the proffered reason does not excuse the delay or render it neutral.”

The Court of Appeals correctly adopted this principle relying on United States v. Grimmond, 137 F.3d 823, 828 (4th Cir.1998), *see* State v. Iniguez, 180 P.3d at 861. The court in Grimmond acknowledged the policy of judicial economy promoted by joint trials (“barring special

circumstances, individuals indicted together should be tried together”) but also recognized the critical importance in the context of a particular case of a defendant’s demand that his constitutional right to a speedy trial be honored.

“Of course, a defendant’s invocation of his Sixth Amendment right to a speedy trial would be just the type of ‘special circumstance’ that would *trump* the general rule.” (emph. ad.)

The Court of Appeals quite properly concluded in light of Mr. Iniguez’ timely and repeated demands for speedy trial and for severance, “That is the case here.” 180 P.3d at 861. Because it is undisputed that the delay was caused at the state’s behest because of its insistence on joint trial in the face of Mr. Iniguez’ expressed desire for speedy trial, this factor, in conjunction with the others, must count heavily against the state.²

B. THE STATE’S INABILITY TO TIMELY PROCEED TO TRIAL BECAUSE OF ITS NEGLIGENT FAILURE TO MAINTAIN CONTACT WITH A KEY WITNESS IS NOT A VALID REASON TO DELAY THE TRIAL OF AN INCARCERATED DEFENDANT WHO ASKS FOR SPEEDY TRIAL AND FOR SEVERANCE

A second cause of delay was the departure out of the country of a state’s witness. The state “failed to inform the witness of the new trial date until less than one week before trial,” 180 P.3d at 861, and then made no arrangements to have the witness arrive back in the country in time for trial. Instead, the state used its own negligence to justify yet another delay of trial. 180 P.3d at 858-59.

²

It would be “ironic” indeed if “excessive delay should be deemed acceptable in the interests of efficiency.” Hartridge v. United States, 896 A.2d at 225, n.3 (Glickman, J.).

Where delay results from the combination of the state's insistence on joint trial over objection and its ineptitude in timely preparing for trial, the correct weighing of the "reason for delay" factor is described by Judge Glickman as follows:

"A proper balancing must be 'sensitive' to the high value we place on the right to a speedy trial. A defendant's right to a speedy trial therefore must not be held hostage to co-defendants' prolonged inability to proceed with trial, *just as it must not be held hostage to the prosecution's inability to do so.*"

Hartridge v. United States, 896 A.2d at 226 (dis. op., emph. ad.).

The Court of Appeals conclusion, therefore, that the delay resulting from the state's negligence in assuring the presence at trial of its witnesses "was not reasonable" is correct.³ 180 P.2d at 861. Accordingly, this invalid reason for further trial delay counts heavily against the state along with the other invalid reason as aptly determined by the Court of Appeals.

3. Demand for Speedy Trial. In identifying a defendant's objection to trial delay and assertion of the right to speedy trial as one of the Barker factors, the Supreme Court noted that this factor would "allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection." 407 U.S. at 529. The Barker Court highlighted the great weight that should be accorded to this factor where the demand for speedy trial is vigorous and consistent. "The defendant's assertion of his speedy trial right, then, is entitled to

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Negligence "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." Doggett, 505 U.S. at 657.

strong evidentiary weight in determining whether the defendant is being deprived of the right.” Barker v. Wingo, 407 U.S. at 531-32.

The record shows, according to the Court of Appeals:

“Here, Mr. Iniguez – through counsel and pro se – objected to delaying the trial, asserted his right to a speedy trial and/or demanded severance on each occasion he was before the court, even if delay was not the topic before the court.”

180 P.3d at 861-62.

Consequently, the Court of Appeals faithfully and objectively followed the Supreme Court’s directive in Barker to give “strong evidentiary weight” to this factor. The frequent and forceful objections to delay and assertions of his right to speedy trial, in conjunction with the other Barker factors, heavily weigh against the state and in favor of the Court of Appeals’ conclusion that the right was denied.

4. Prejudice. The Court of Appeals determined that Mr. Iniguez had not demonstrated particularized prejudice to his trial defense but did establish that he was presumptively prejudiced by delay and also prejudiced by oppressive pretrial incarceration and anxiety and concern entailed by delay (“Mr. Iniguez has a valid claim of prejudice on the first two interests ...). 180 P.3d at 862.

Presumptive Prejudice. While the Supreme Court stated in Doggett that “presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria,” the Court also said and held that “affirmative proof of particularized prejudice is not

essential to every speedy trial claim.” Doggett, 505 U.S. at 655-56. *See also*, United States v. Shell, 974 F.2d at 1036.

While the presumptive prejudice in this case is at the low end of the scale, it is balanced by the actual prejudice experienced by Mr. Iniguez in being incarcerated during the entire period from arrest to eventual trial. The Supreme Court in Barker v. Wingo itself recognized that a comparable period of pretrial incarceration (10 months) constituted very real prejudice. Barker, 407 U.S. at 534. The Supreme Court discussed the nature of the prejudice in the following terms, 407 U.S. at 527, 532-33:

“[A] defendant confined to jail prior to trial is obviously disadvantaged by delay ... obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing these consequences on anyone who has not yet been convicted is serious.”

Balancing Process. The Court of Appeals carefully and objectively considered and balanced the four Barker factors found in the record. The Court determined that all four factors weighed against the state and in support of the conclusion that Mr. Iniguez was denied his right to a speedy trial. The length of delay was sufficiently long to establish presumptive prejudice. The reasons given by the state for delay were unreasonable and weighted heavily against the state. The unequivocal and consistent demand for speedy trial also weighted heavily against the state.

While no specific prejudice to trial rights was produced, other indicia of prejudice, including incarceration, were present and combined with the presumption of prejudice weighted against the state. In sum, an objective balancing was conducted by the Court of Appeals and its conclusion should be affirmed.

II. UNDER AN INDEPENDENT INTERPRETATION OF THE RIGHT TO SPEEDY TRIAL IN ART. I, SEC. 22 A DELAY OF EIGHT MONTHS CONCLUSIVELY ESTABLISHES A VIOLATION WHERE DEFENDANT DEMANDS SPEEDY TRIAL AND IS NOT RESPONSIBLE FOR DELAY

Two decades ago, this Court noted that prior to Barker v. Wingo it had announced “a somewhat similar test for deprivations of the right [to speedy trial] under Const. art 1, sec. 22 (amend. 10).” See State v. Fladebo, 113 Wn.2d 388, 393, 779 P.2d 707 (1989), citing State v. Christensen, 75 Wn.2d 678, 686, 453 P.2d 644 (1969). The Court in Christensen expressly held that a single factor under the state test, such as delay alone, could be sufficient to establish a violation of Art. I, sec. 22. In Fladebo, this Court neither reconciled the two tests nor indicated whether the Court would continue to apply its independent test under the state constitution. The Court did, however, explicitly recognize that it was an open question whether there are “any possible differences between the state and federal constitutional protections.” Fladebo, 113 Wn.2d at 394, n.3.

The present appeal presents the question reserved in Fladebo. Mr. Iniguez has presented a Gunwall analysis to urge the Court to hold that Article I, sec. 22 does in fact provide greater protection of the right to a

speedy trial than does the Sixth Amendment. Supp. Brf. at pp. 5-7. The Supreme Court in Barker specifically acknowledged that a state “is free to prescribe a reasonable period consistent with [federal] constitutional standards.” 407 U.S. at 523. Mr. Iniguez submits that under Art. I, sec. 22 the maximum time allowable should be not more than six (6) months from arrest whenever the defendant has made a demand for speedy trial and is not responsible for any delay. Under a Gunwall analysis, there is certainly support for such an interpretation of Art. I, sec. 22. Cf. Barker, 407 U.S. at 528 (“if the first demand is made three months after arrest in a jurisdiction which prescribes a six-month rule, the prosecution will have a total of nine months – *which may be wholly unreasonable under the circumstances.*”)(emph. ad.).

For the reasons set forth in the additional Gunwall analysis, *infra*, Amicus WACDL urges the Court to give an independent reading to the speedy trial provision of Art I, sec. 22 and to hold that a delay of eight (8) months establishes a conclusive presumption of prejudice and denial of speedy trial so long as the defendant has demanded speedy trial and is not culpable for the delay.

GUNWALL INTRODUCTION. For more than a century, Washington has established a sixty day time limit,⁴ then by

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R.C.W. 10.46.010 (Laws of 1909, ch. 249 sec. 60, based on Code of 1881 sec. 772) superseded by CrR 3.3, *see State v. Striker*, 87 Wn.2d 870, 875, 557 P.2d 847 (1976), repealed by Laws of 1984, ch. 76, sec. 29.

court rule⁵, in which to bring a defendant to trial consistent with the constitutional speedy trial guarantees. For more than three decades, pursuant to CrR 3.3 (i) and now CrR 3.3 (h), the remedy for failure to comply with the 60/90 day rule is dismissal without any requirement that a defendant show prejudice⁶.

It is well-settled that the speedy trial rules established by the Washington Supreme Court emanate from state and federal speedy trial guarantees. State v. Striker, 87 Wn.2d 870, 875, 557 P.2d 847 (1976); State v. Adamski, 111 Wn.2d 574, 582, 761 P.2d 621 (1988); State v. Nelson, 47 Wn.App. 579, 583, 736 P.2d 686 (1987); State v. Phillips, 66 Wn.App. 679, 689, 833 P.2d 411 (1992); State v. Hackett, 64 Wn.App. 205, 209, 822 P.2d 323 (1992).

Because the Washington court rule scheme for enforcement of speedy trial is constitutionally based, the relatively short periods for bringing accuseds to trial established in the rules give strong indication of the independent importance which must be accorded the speedy trial guarantee under Art. I, sec. 22 of the Washington Constitution which provides:

“In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury”

⁵ CrR 3.3, adopted April 18, 1973 providing generally for trial within sixty days for persons in custody and ninety days for persons out of custody (this is colloquially called the “60/90 day rule”).

⁶ “The rule applies even though the delay may have been inadvertent and resulted in no prejudice to the defense.” State v. Hackett, 64 Wn.App. 205, 209, 822 P.2d 323 (1992) citing Striker, 87 Wn.2d at 877.

Since even under the Sixth Amendment, a delay between the filing of a charge and trial is presumptively prejudicial after eight months, this should be considered the maximum time under Art. I, sec. 22 for bringing an available accused to trial. This is especially appropriate in light of the ninety day rule established by the Washington Supreme Court for persons out of custody and sixty days for juveniles and for persons in custody. Even a period of eight months is four times the presumptive length of time permitted under the court rules and former statute. See CrR 3.3; CrRLJ 3.3; JuCR 7.8(b); R.C.W. 10.46.010.

The long-time presumption in the speedy trial rules that a trial delay exceeding sixty days (or ninety days for those out of custody) violates the right to speedy trial, and the prior Washington case law strictly construing the speedy trial rules and dismissing prosecutions in various contexts for violation of the rules without a showing of prejudice should be considered by the Court in determining the limits of Art. I, sec. 22. Under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), prior state law including case law, statutes and court rules, must be considered in determining whether Art. I, sec. 22 affords greater protection than the Sixth Amendment.

1. The Textual Language of the State Constitution

The speedy trial provision of Art. I, sec. 22 is essentially identical to the Sixth Amendment.

2. Significant Differences in the Texts

Although the federal and state speedy trial provisions are essentially the same, Art. I, sec. 22 is supplemented, unlike the federal constitution, by Art. I, sec. 29 which provides in relevant part:

“The provisions of this constitution are mandatory... .”

Washington Constitution, Art. I, sec. 29.

Moreover, the speedy trial provision of section 22 should be considered in *pari materia* with the jury trial provision of section 21. Both sections expressly relate to trial by jury. Art. I, sec. 21 has long been held to require independent consideration and greater protection than the comparable Sixth Amendment. Under the latter, the United States Supreme Court has consistently held that six months potential punishment is the cut off for the constitutional right to jury trial. Any crime with punishment that does not exceed six months does not require a jury trial. Duncan v. Louisiana, 391 U.S. 145 (1968); Baldwin v. New York, 399 U.S. 66 (1970); Blanton v. North Las Vegas, 489 U.S. 538 (1989). But in 1982, this Court gave a much different reading to the right to jury trial in Art. I, sec. 21 and held that provision guarantees the right to jury trial *regardless* of potential punishment and rejected the more limited construction of the Sixth Amendment. City of Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982). *See also*, State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276, 1282 (2008); State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

It is noteworthy that the jury trial right in section 21, like the jury and speedy trial rights of section 22, contains no explicit time constraints

(number of months needed to trigger jury trial right; number of months needed to trigger speedy trial right) and both require judicial construction.

In the context of the right to counsel, a companion provision in Art. I, sec. 22 and essentially the same as its counterpart in the Sixth Amendment, this Court emphatically held three decades ago that the right was so important it deserved independent consideration and greater protection than the United States Supreme Court was prepared to give. State v. Fitzsimmons, 93 Wn.2d 436, 610 P.2d 893 (1980), *vacated and remanded*, Washington v. Fitzsimmons, 449 U.S. 977 (1980), *reaffirmed*, State v. Fitzsimmons, 94 Wn.2d 858, 620 P.2d 999 (1980).

3. State Constitutional and Common Law History

Although the United States Supreme Court has rejected under the Sixth Amendment a “fixed-time period because it goes further than the constitution requires,” (Barker, 407 U.S. at 529) the Washington Supreme Court has not rejected a fixed-time period under Art. I, sec. 22. To the contrary, the Washington Supreme Court has recognized that “a delay of such length alone [may be such] as to amount to a denial of the right to a speedy trial.” State v. Christensen, 75 Wn. 2d 678, 686 (emph. ad.).⁷

In State v. Ellis, 76 Wn.App. 391, 884 P.2d 1360 (1994), applying Art. I, sec. 22 to find a right to speedy sentencing, subsumed under the

⁷ In Christensen, a pre-Barker v Wingo case considering Art. I, sec. 22, the Washington Supreme Court declared its factors analysis in the disjunctive: “(1) a delay of such length alone as to amount to a denial of the right to a speedy trial; (2) prejudice to the defense arising from the delay; (3) a purposeful delay designed by the state to oppress the defendant; or (4) long and undue imprisonment in jail awaiting trial.” Christensen, at 686 (emph. ad.).

right to speedy trial, the Court of Appeals, Division 3, held that a lengthy delay alone justified dismissal. The Court applied a presumption of prejudice to a twenty-three month delay and found that “the State failed to rebut the presumption.” Ellis, 76 Wn.App. at 395. Thus, on length of delay alone, the Court of Appeals dismissed under Art. I, sec. 22.

Throughout Washington’s history, sixty days has been the benchmark for the time period in which a charged defendant must be brought to trial. Relying on Art. I, sec. 22 as well as the Sixth Amendment, the Court of Appeals in State v. Corrado, held that a delay becomes “presumptively prejudicial” not more than eleven months after the speedy trial period attaches and noted with approval the general consensus in the federal courts that “eight months delay is presumptively prejudicial.” Corrado, 94 Wn.App. at 233.

As noted, eight months is 4 times the historical sixty day time period in Washington. Given Washington’s century old history of a sixty day time period and in view of Washington’s elimination of a requirement that a defendant show prejudice in order to obtain dismissal since 1973, it is appropriate that Art. I, sec. 22 bar any trials more than eight months beyond the charging date.

4. Pre-Existing State Law

In 1909 the Washington Legislature enacted R.C.W. 10.46.010 which explicitly required that a charged defendant be “brought to trial

within sixty days.” This statute, in turn, was based on the Code of 1881 adopted before statehood. The statute read, in its entirety:

“If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown.”

In 1949, the Washington Supreme Court considered this statute and held:

“Upon a showing of a failure of the state to bring the accused to trial within sixty days after the filing of the information, it is the duty of the court to order the action dismissed, unless good cause to the contrary is shown.”

State Ex Rel James v. Superior Court, 32 Wn.2d 451, 455, 202 P.2d 250 (1949).

Implicitly, because of the “good cause” provision, a defendant was required to show prejudice. However, by its adoption of CrR 3.3 in 1973, the Washington Supreme Court eliminated any requirement of “good cause” to dismiss for violation of speedy trial rights or any requirement that a defendant show actual prejudice. Prejudice was presumed by the delay alone, as a matter of law, either sixty or ninety days depending on the circumstances. Former CrR 3.3 (i) (“A criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice.”). See, e.g., State v. Nelson, 47 Wn.App. 579, 736 P.2d 686 (1987) (dismissal for 6-month delay between filing of information and arraignment); State v. Hackett, 64 Wn.App. 205, 822 P.2d 323 (1992) (dismissal for 7-month delay from first appearance); State v. McIntyre, 92

Wn.2d 620, 600 P.2d 1009 (1979) (dismissal where trial date set 6 days past expiration of speedy trial rule); State v. Wirth, 39 Wn.App. 550, 694 P.2d 1113 (1985) (dismissal for 26-month delay between filing of information and arraignment); CrR3.3(h) (“A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.”).

5. Differences in Structure between the Federal and State Constitutions

This factor supports independent interpretation of Art. I, sec. 22 because as stated in Gunwall:

“...The explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them.”

106 Wn.2d at 62.

6. Matters of Particular State Interest or Local Concern

The United States Supreme Court has explicitly acknowledged that “the states, of course, are free to prescribe a reasonable period consistent with [federal] constitutional standards.” Barker, supra, at 523. And, as noted, Washington has had its own speedy trial requirement since before statehood. Code of 1881, sec. 772.

Under the foregoing Gunwall analysis, Art. I, sec. 22 should be construed to require that a charged defendant be brought to trial no later than eight months after the charging date. An eight month delay, while presumptively prejudicial under the Sixth Amendment should be held to be conclusively prejudicial under Art. I, sec. 22. This is consistent with

constitutionally derived CrR 3.3 generally, and particularly CrR 3.3(i) and (h), as well as case law under CrR 3.3 and State v. Christensen. “The result of such a ruling would have the virtue of clarifying when the right is infringed and simplifying courts’ application of it.” Barker, at 523.

CONCLUSION. The Court of Appeals correctly evaluated the four Barker factors and appropriately concluded that the clear weight of the factors in the record, objectively considered, compelled the conclusion that Mr. Iniguez’ right to speedy trial under the Sixth Amendment was denied. The Court correctly imposed the required remedy of dismissal. Barker v. Wingo, 407 U.S. at 522. The Court of Appeals should be **AFFIRMED**.

In addition, the unexcused delay of more than eight months while Mr. Iniguez was incarcerated also denied his right to speedy trial under the state constitution. Article I, sec. 22 should be construed to compel the state to bring a defendant to trial no later than eight months after arrest or charge and where, as here, the defendant consistently demands speedy trial and is not responsible for the delay, eight months delay conclusively establishes a violation of Art. I, sec. 22.

DATED THIS 11th DAY OF MARCH, 2009.


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Attorney for Amicus WACDL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RICARDO INIGUEZ,

Respondent.

No. 81750-2

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

ss.

COUNTY OF SNOHOMISH)

The undersigned states that on the 11th day of March, 2009 he deposited in the mails of the United States of America two properly stamped envelopes directed to: Steven M. Lowe, Franklin County Prosecutor and Frank W. Jenny, Deputy, 1016 North Fourth Avenue, Pasco, Washington 99201 and James Egan, 315 West Kennewick Avenue, Kennewick, Washington 99336 containing copies of the Motion to File Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers (WACDL) and Amicus Curiae Brief of WACDL.

I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct.

DATED THIS 11th day of March, 2009 at Lynnwood, Washington.


DEREK T. CONOM WSBA#36781