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SUPREME COURT OF THE STATE OF WASHINGTON NO. _____

COURT OF APPEALS - DIVISION III NO. 25218-3-III

FILED

MAY 07 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

vs.

RICARDO INIGUEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

PETITION FOR REVIEW

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STATE OF WASHINGTON
[Signature]

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUES PRESENTED FOR REVIEW.....1

 (1) WILL A DELAY OF LESS THAN ONE YEAR TRIGGER AN INQUIRY INTO WHETHER A DEFENDANT’S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED?... .1

 (2) WILL A DEFENDANT’S INVOCATION OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL ALWAYS TRUMP THE POLICY FAVORING JOINT TRIALS OF CODEFENDANTS?.....1

 (3) IS THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL VIOLATED WHERE THE DELAY RESULTS FROM THE NECESSITY TO TRY CODEFENDANTS TOGETHER, TRIAL COMMENCES WITHIN NINE MONTHS OF ARREST, AND THE DEFENDANT ADMITS THERE IS NO PREJUDICE TO HIS ABILITY TO PRESENT A DEFENSE?.....1

D. STATEMENT OF THE CASE.....2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....6

 (1) THE MODERN TREND REQUIRES A DELAY OF ONE YEAR BEFORE AN INQUIRY WILL BE TRIGGERED INTO WHETHER A VIOLATION OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS OCCURRED.....6

TABLE OF CONTENTS (Continued)

(2) THE COURT OF APPEALS DECISION CONFLICTS WITH WELL ESTABLISHED WASHINGTON LAW THAT A DEFENDANT'S RIGHT TO A SPEEDY TRIAL MUST SOMETIMES YIELD TO THE POLICY FAVORING JOINT TRIALS.....12

(3) THE CONSTITUTIONAL SPEEDY TRIAL RIGHT OF RICARDO INIGUEZ WAS NOT VIOLATED.....17

F. CONCLUSION.....19

TABLE OF AUTHORITIES

Cases

<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)	6, 7, 8, 19
<u>Doggett v. United States</u> , 505 U.S. 467, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).....	6, 7
<u>Graves v. United States</u> , 490 A.2d 1086, 1103 (D.C. App. 1984) .	18
<u>Hartridge v. United States</u> , 896 A.2d 198, 209 (D.C. App. 2006) ..	16
<u>People v. Crane</u> , 195 Ill.2d 42, 48, 743 N.W.2d 555, 560 (2001) ..	10
<u>People v. Williams</u> , 475 Mich. 245, 716 N.W.2d 208 (2006)	10
<u>State v. Corrado</u> , 94 Wn. App. 228, 133, 972 P.2d 515 (1999)	8
<u>State v. Dent</u> , 123 Wn.2d 467, 869 P.2d 392 (1994).....	13, 16
<u>State v. Eaves</u> , 39 Wn. App. 16, 19, 691 P.2d 245 (1984).....	13
<u>State v. Goss</u> , 245 Kan. 189, 777 P.2d 781 (1989).....	10
<u>State v. Greenwood</u> , 120 Wn.2d 585, 592, 845 P.2d 971 (1993) ..	12
<u>State v. Karlen</u> , 589 N.W.2d 594, 599 (S.D. 1999).....	9, 19
<u>State v. Melton</u> , 63 Wn. App. 63, 67, 817 P.2d 413 (1991)	13, 14
<u>State v. Moran</u> , 711 N.W.2d 915, 920 (N.D. 2006).....	9
<u>State v. Nguyen</u> , 131 Wn. App. 815, 129 P.3d 821 (2006)	14
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005)	13
<u>State v. Zmayefski</u> , 836 A.2d 191 (R.I. 2003).....	10

TABLE OF AUTHORITIES (Continued)

United States v. Annerino, 495 F.2d 1159, 1162-62
(7th Cir. 1974) 15

United States v. Brugman, 655 F.2d 540, 542 (4th Cir. 1981)..... 15

United States v. Casas, 425 F.3d 23, 36-37 (1st Cir. 2005)..... 16, 18

United States v. Grimmond, 137 F.3d 823, 827
(4th Cir.1998) 6, 7, 14, 15

United States v. Ingram, 446 F.3d 1332 (11th Cir. 2006)..... 10

United States v. Shuford, 454 F.2d 772, 775 (4th Cir. 1971)..... 15

United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003)..... 11

United States v. Watford, 468 F.3d 891 (6th Cir. 2006) 10

Other Authorities

2 WAYNE R. LA FAVE & JEROLD R. ISRAEL, CRIMINAL
PROCEDURE § 18.2 (1984) 9

4A WASHINGTON PRACTICE, RULES PRACTICE
(6th ed. supp. 2007) 11

WAYNE R. LA FAVE & JEROLD H. ISRAEL, ET. AL.,
CRIMINAL PROCEDURE § 18.2(b)
(New 3rd ed. current through 2007-2008) 8, 9

Rules

CrR 3.3..... 1, 5, 11, 12, 13

CrR 3.3(f)(1)..... 2

CrR 4.4(c)(2)(i) 12, 13

A. IDENTITY OF PETITIONER

State of Washington asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals issued an opinion on April 8, 2008, reversing the conviction of Ricardo Iniguez. The court found Iniguez received a timely trial in compliance with CrR 3.3, but that his constitutional right to a speedy trial was nonetheless violated. A copy of the opinion in the appendix at A-1 through A-15.

C. ISSUES PRESENTED FOR REVIEW

- (1) WILL A DELAY OF LESS THAN ONE YEAR TRIGGER AN INQUIRY INTO WHETHER A DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED?**
- (2) WILL A DEFENDANT'S INVOCATION OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL ALWAYS TRUMP THE POLICY FAVORING JOINT TRIALS OF CODEFENDANTS?**
- (3) IS THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL VIOLATED WHERE THE DELAY RESULTS FROM THE NECESSITY TO TRY CODEFENDANTS TOGETHER, TRIAL COMMENCES WITHIN NINE MONTHS OF ARREST, AND THE DEFENDANT ADMITS THERE IS NO PREJUDICE TO HIS ABILITY TO PRESENT A DEFENSE?**

D. STATEMENT OF THE CASE

On May 31, 2005, Ricardo Iniguez was charged by Information with Robbery in the First Degree While Armed with a Firearm. (Iniguez CP 222-24). Jimmy Henry McIntosh was charged with the same crime along with an additional count of Burglary in the First Degree. (McIntosh CP 144-45). Arraignment occurred on June 7, 2005, and trial was set for July 27, 2005. (RP 6/7/05).

The State moved to consolidate the trials of McIntosh and Iniguez. (Iniguez CP 201-03, McIntosh CP 193-95). On July 26, 2005, Iniguez and McIntosh were joined for trial with all parties in agreement. (7/26/05 RP, 6:2-7; 8/9/05 RP, 13:19; 8/30/05 RP, 26:12). Counsel for Iniguez requested and was granted a two-week continuance of the trial to accommodate his previously scheduled vacation. (7/26/05 RP, 5:15-24, 7:17-18). McIntosh executed a stipulated continuance pursuant to CrR 3.3(f)(1) setting his trial date to October 5, 2005. (McIntosh CP 143). On August 9, 2005, Iniguez's trial date was moved to October 5, 2005, to be consistent with that of McIntosh. (8/9/05 RP, 16:6-15). While Iniguez made a pro se objection on speedy trial grounds, his

attorney agreed with the State's position that the joinder order justified continuing the trial date of Iniguez to coincide with that of McIntosh. (8/9/05 RP, 14:16-20).

On September 27, 2005, McIntosh executed another stipulated continuance resetting his next trial date for November 16, 2005. (McIntosh CP 142). Iniguez's trial date was continued to the same date as the result of the consolidation. (9/27/05 RP, 4:20).

Counsel for McIntosh advised the court on November 8, 2005, that due to his schedule of other major criminal trials, he would not be available to try the case until the early part of January, 2006. (11/08/05 RP, 13: 23-25, 14: 1-6) Counsel for McIntosh further stated:

The entire time this has been pending, we have been trying to prepare for trial. To this point, we still have witnesses we have not secured to come in, but we know they are there. We have all sorts of problems with the preparation of the case as well, so I just need to put that on the record.

(11/08/05 RP, 14: 17-22). The trial court expressed a tentative inclination to continue the trial to January 4, 2006, and formally did so the following week. (11/8/05 RP, 16: 15-17, 21-22; 11/15/08 RP; 11/22/08 RP, 12:9).

It subsequently came to the State's attention that Gilberto Bahena, a victim and material witness, was unavailable for trial on January 4, 2006, because he had left to visit his family and children in Mexico over the holidays without notifying the prosecutor's office. (12/30/05 RP, 5:17-20; 01/3/06 RP, 4:24). Bahena's absence was only discovered when the State attempted to serve him with a subpoena listing the new trial date. Id. He had twice before been personally served with subpoenas. (Iniguez CP, 258, 278). He had been extremely cooperative, including coming in to be interviewed at the request of defense counsel, and had apparently just misunderstood his continuing obligations under the subpoenas. (12/30/05 RP, 13:16-21). He advised a detective by telephone from Mexico that he would be returning to Pasco, Washington, on February 1 or 2, 2006. (1/03/06 RP, 6:1-2). The first available trial setting after the witness's return was February 8, 2006. (1/03/06 RP, 6:2-3). The trial court expressly asked counsel for McIntosh and Iniguez, "Other than the stay in jail, how would your defendant be prejudiced by a delay from today's date until February 8th?" (01/03/06 RP, 8:15-17). Counsel for McIntosh replied, "Your Honor, the only prejudice I can fathom at this point is that he has been in custody for an extended period of time." (1/03/06 RP, 8:18-

20). Counsel for Iniguez stated, "He's been in jail since the latter part of May. Other than that, we cannot demonstrate any prejudice." (01/03/06 RP, 10:10-12). The court continued the trial to February 8, 2006. (01/03/06 RP, 10:24).

The charges against both defendants were amended to four counts of first degree robbery while armed with a firearm. (Iniguez CP 165-67, McIntosh CP 100-02). Trial commenced as scheduled with jury selection on February 8, 2006. (02/08/06 RP). A mistrial was declared on February 16, 2006 after the court determined that the certified interpreter had not been performing adequately. (02/16/06, 105-09). A new trial date was set for April 12, 2006. (02/21/06 RP, 35:7). Jury trial proceeded as scheduled on April 12-17, 2006, resulting in guilty verdicts against both defendants. (04/12/06 through 04/17/06 RP). This appeal followed.

The Court of Appeals issued its opinion on April 8, 2008. While finding Iniguez received a timely trial in compliance with CrR 3.3, it nonetheless reversed his conviction on grounds that he his constitutional right to speedy trial had been violated. A copy of the opinion is in the appendix at A-1 through A-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- (1) THE MODERN TREND REQUIRES A DELAY OF ONE YEAR BEFORE AN INQUIRY WILL BE TRIGGERED INTO WHETHER A VIOLATION OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS OCCURRED.

The United States Supreme Court has identified four factors that should be balanced in determining whether a defendant has been denied his right to a speedy trial. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); United States v. Grimmond, 137 F.3d 823, 827 (4th Cir.1998). These factors are (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant. Barker, 407 U.S. at 530; Grimmond, 137 F.3d at 827. See also Doggett v. United States, 505 U.S. 467, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (applying the four-factor test announced in Barker). The first factor also acts as a threshold requirement. Doggett, 505 U.S. at 651-52; Grimmond, 137 F.3d at 827. If the delay is not uncommonly long, the inquiry ends there. See Doggett, 505 U.S. at 652 (stating that "by definition, [a defendant] cannot complain that the government has denied him a 'speedy' trial if it has, in fact,

prosecuted his case with reasonable promptness”); Barker, 407 U.S. at 530 (noting that “[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance”); Grimmond, 137 F.3d at 827 (same).

In the instant case, Iniguez readily acknowledged the statement in Doggett that “the lower courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year.” Brief of Iniguez, at 9-10 (quoting Doggett, 505 U.S. at 652 n.1). Iniguez did not argue for a different rule than the one suggested by the United States Supreme Court in Doggett. Instead, he focused on his second trial which began nearly 11 months after his arrest (a period he apparently considered to be “approaching” one year). Brief of Iniguez, at 14. However, the Court of Appeals correctly recognized that in determining whether Iniguez received a speedy trial, the operative date was that when his first trial commenced (February 8, 2006, which was eight months plus 18 days after his arrest on May 25, 2005). Slip opinion, at 9. That would have concluded the matter, except that the Court of Appeals proceeded, *sua sponte* and without briefing or argument, to adopt a rule that an eight-month delay is

presumptively prejudicial. Slip opinion, at 13-14. The Court of Appeals adopted this rule despite recognizing the shortest period ever before found to justify even a speedy trial inquiry in a Washington case was that in State v. Corrado, 94 Wn. App. 228, 133, 972 P.2d 515 (1999), which involved a delay of “over eleven months” (arguably a period approaching one year). Id. Certainly a constitutional rule of this importance should not be engrafted into the law of the State of Washington without briefing and argument. That alone is sufficient reason for the Supreme Court to grant review.

A leading treatise on criminal procedure has identified a modern trend to require a delay of one year before initiating a constitutional speedy trial inquiry. The following is stated in WAYNE R. LA FAVE & JEROLD H. ISRAEL, ET. AL., CRIMINAL PROCEDURE § 18.2(b) (New 3rd ed. current through 2007-2008):

The lower courts have been inclined to apply the first Barker factor [the threshold requirement for a delay of presumptively prejudicial length] without any extensive assessment of the unique facts of the particular case. Rather, the courts have usually tried to settle upon some time period after which, as a general matter, it makes sense to inquire further into why the defendant has not been tried more promptly. Though there are some cases that do not fit the mold, it was said some years back that

any delay of eight months or longer is “presumptively prejudicial.” . . . Furthermore, there is apparent consensus that delay of less than five months is . . . insufficiently “prejudicial” to trigger further constitutional inquiry. . . . There is judicial disagreement as to the six to seven month range, the majority holding a delay of this length “presumptively prejudicial.”

While some courts still follow the eight-month mark or even something shorter, most have settled on a somewhat longer period, such as nine months or, more commonly, a time “approaching,” at, or slightly (or even more than slightly) beyond one year.

(emphasis added; footnotes omitted). In the instant case, the Court of Appeals relied on the rule from “some years back” without noticing the modern trend identified by LA FAVE & ISRAEL. Notably, in footnote 2 on page 13 of the slip opinion, the Court of Appeals cited a quote from 2 WAYNE R. LA FAVE & JEROLD R. ISRAEL, CRIMINAL PROCEDURE § 18.2 (1984) to the effect that “it may generally be said that any delay of eight months or longer should be considered presumptively prejudicial.” Unfortunately, the 1984 edition of LA FAVE & ISRAEL is not the current one.

Examples of the modern trend from other states include State v. Moran, 711 N.W.2d 915, 920 (N.D. 2006) (“a delay of one year or more is considered presumptively prejudicial, triggering the analysis”); State v. Karlen, 589 N.W.2d 594, 599 (S.D. 1999) (“This

Court has found delays of more than one year to be presumptively prejudicial”); State v. Zmayefski, 836 A.2d 191 (R.I. 2003) (“A delay longer than one year is ‘presumptively prejudicial’”); State v. Goss, 245 Kan. 189, 777 P.2d 781 (1989) (delay “a little over a year . . . is not clearly presumptively prejudicial . . . and hence there is no necessity for inquiry into the other factors”); and People v. Williams, 475 Mich. 245, 716 N.W.2d 208 (2006) (“Following a delay of eighteen months or more, prejudice is presumed”). Federal cases to the same effect include United States v. Watford, 468 F.3d 891 (6th Cir. 2006) (“a delay is presumptively prejudicial when it exceeds one year”) and United States v. Ingram, 446 F.3d 1332 (11th Cir. 2006) (same).

One factor supporting the modern trend is the advent of time-for-trial provisions in statutes and court rules. Such provisions are enacted “[b]ecause of the imprecise nature of the constitutional guarantee to a speedy trial.” People v. Crane, 195 Ill.2d 42, 48, 743 N.W.2d 555, 560 (2001). While these provisions are not coextensive with the constitutional right, they implement the right by specifying certain periods within which a defendant must be brought to trial. Id. The Supreme Court of Illinois has held that when a defendant receives a timely trial in compliance with that

state's statutory provision, a violation of the constitutional right will not be found except in "cases involving prolonged delay or novel issues." Id. Moreover, federal courts have noted that "[i]t would be unusual to find the Sixth Amendment has been violated when the [federal] Speedy Trial Act has not." United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003).

The instant case appears to present the only Washington published opinion where a court has ever found a defendant received a timely trial in compliance with CrR 3.3, but that the constitutional right to a speedy trial was nonetheless violated. One reason may be that until now the constitutional right has never been applied to delays not approaching one year. CrR 3.3 was completely re-written in 2003 pursuant to the recommendations of an 18-member Time-for-Trial Task Force appointed by the Washington Supreme Court. Author's Comment to CrR 3.3, 4A WASHINGTON PRACTICE, RULES PRACTICE (6th ed. supp. 2007). Objectives of the Task Force included to "[s]implify and clarify the complicated provisions" related to time-for-trial. Id. Applying constitutional speedy trial analysis to periods less than one year would reintroduce the very complexity and uncertainty that the Task Force sought to eliminate. CrR 3.3 provides adequate

protection of defendants' rights when it comes to relatively short time periods; constitutional analysis should be reserved for truly exceptional delays, i.e., those exceeding one year.

**(2) THE COURT OF APPEALS DECISION
CONFLICTS WITH WELL ESTABLISHED
WASHINGTON LAW THAT A DEFENDANT'S
RIGHT TO A SPEEDY TRIAL MUST
SOMETIMES YIELD TO THE POLICY
FAVORING JOINT TRIALS.**

The Court of Appeals held that a defendant's invocation of the right to a speedy trial will always trump the policy of joining for trial defendants who are charged together. Slip opinion, at 10. In so holding, it overlooked clearly settled Washington law to the contrary expressed in decisions of the Supreme Court and the Court of Appeals.

CrR 4.4(c)(2)(i) provides that a trial court "should grant a severance of defendants whenever . . . it is deemed necessary to protect a defendant's right to a speedy trial[.]" (Emphasis added). "When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature." State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). The Legislature is deemed to intend different meanings when it uses different terms in different statutes. State v. Roggenkamp, 153

Wn.2d 614, 625-26, 106 P.3d 196 (2005). CrR 3.3 employs the term “time for trial”; the words “speedy trial” do not appear anywhere in that rule. In contrast, CrR 4.4(c)(2)(i) uses the term “speedy trial”. Accordingly, CrR 4.4(c)(2)(i) refers only to the constitutional right to a speedy trial and not to CrR 3.3.

In State v. Eaves, 39 Wn. App. 16, 19, 691 P.2d 245 (1984), the Court of Appeals noted that CrR 4.4(c)(2)(i) uses the directory term “should”; thus, severance to protect a defendant’s speedy trial rights is not mandatory. The Court of Appeals plainly stated in a later case: “Severance is not mandatory even when a defendant’s speedy trial rights are at issue.” State v. Melton, 63 Wn. App. 63, 67, 817 P.2d 413 (1991). In Melton, no abuse of discretion was found where the trial court relied on “the State’s policy favoring joint trials” and where no prejudice in presenting a defense is alleged. Id. at 66-67. The Supreme Court weighed in on the subject in State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994), where a trial was continued over two months to allow a co-defendant’s new counsel to prepare for trial after the original counsel was allowed to withdraw due to conflict of interest. The Supreme Court stated:

Although the delay of slightly over 2 months here was longer than the delay in Melton, Belcinde has not alleged that the delay caused him any

prejudice in presenting his defense. In addition, interests of judicial efficiency underlying the policy favoring joint trials supported the trial court's denial of severance. A separate trial would have burdened the court, jurors, and witnesses. As in Melton, the trial court properly exercised its discretion in weighing these factors and denying severance.

Id. at 484-85. In State v. Nguyen, 131 Wn. App. 815, 129 P.3d 821 (2006), the court reiterated: "When defendants are jointly charged, severance to protect the speedy trial right of one of the defendants is not mandatory." Id. at 820. The court further stated: "It is true that the right to a speedy trial must sometimes yield to considerations of judicial economy." Id.

The Court of Appeals did not address any of the foregoing Washington cases. Instead, at page 10 of the slip opinion it quoted from Grimmond, 137 F.3d at 828 to the effect that "a defendant's invocation of his Sixth Amendment right to speedy trial . . . would trump" the policy of joining the trials of defendants who are indicted together. First, the statement is dicta as the Grimmond court found the defendant had not made a timely invocation of his right to a speedy trial. Id. at 829. Second, the Grimmond dicta must be read in its full context, which is as follows:

It is well established that "[b]arring special circumstances, individuals indicted together should be tried together." United States v. Brugman, 655 F.2d

540, 542 (4th Cir. 1981); see also United States v. Shuford, 454 F.2d 772, 775 (4th Cir. 1971) (same). 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. Absent such a request, or some other "special circumstance," e.g., evidence that joinder was improper, waiting for another sovereign to finish prosecuting a codefendant is a valid reason for delay. Cf. United States v. Annerino, 495 F.2d 1159, 1162-62 (7th Cir. 1974) (holding that a delay caused by the Government's desire for a single trial is entitled to some deference) . . .

Id. at 829 (footnotes omitted). When the Grimmond dicta is read in context of the court's citation to United States v. Annerino, 495 F.2d 1159, 1162-63 (7th Cir 1974), it is clear the Grimmond court is not suggesting anything different than the Washington law: While a defendant's invocation of the right to a speedy trial is a factor to be considered, it will not invariably trump the policy favoring joint trials; the prosecution's desire for a single trial is also entitled to some deference. In Annerino, the attorney for a codefendant suffered a heart attack in the spring of the year and would not be recuperated until the following fall. Despite the speedy trial objections of the other defendant, the trial court left the cases joined for trial. The Seventh Circuit affirmed, finding the prosecution's desire for a single trial was entitled to deference despite its impact on the speedy trial rights of one defendant. Annerino, 495 F.2d at 1162-

63. See also Hartridge v. United States, 896 A.2d 198, 209 (D.C. App. 2006) (rejecting defendant's claim that invocation of constitutional right to speedy trial will always trump interests in judicial efficiency occasioned by joint trial); United States v. Casas, 425 F.3d 23, 36-37 (1st Cir. 2005) (no abuse of discretion in denying motion to sever, despite defendant's assertion of Sixth Amendment right to speedy trial and fact trial would have been speedier had it been severed from that of multiple codefendants, where the delay did not cause significant prejudice nor result in denial of fair trial).

In Washington, the standard of review for the denial of a severance motion is likewise abuse of discretion. Dent, 123 Wn.2d at 484. An abuse of discretion occurs when the trial court relies on untenable grounds or reasons. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). Severance here would have required two separate trial of a serious and complex case, burdening the court, jurors, and witnesses. See Dent, 123 Wn.2d at 484-85. The trial court's reasons for denying severance were not untenable. There is no showing of abuse of discretion.

**(3) THE CONSTITUTIONAL SPEEDY TRIAL
RIGHT OF RICARDO INIGUEZ WAS NOT
VIOLATED.**

When the forgoing standards are applied to the instant case, it is clear that Iniguez was not denied his constitutional right to a speedy trial. Apart from Iniguez's invocation of that right, none of the other relevant factors support the conclusion of the Court of Appeals.

The Court of Appeals erroneously states at page 2 of the slip opinion that the continuance on September 27, 2005, resulted from the State's desire to interview witnesses. The trial court did not make (and was not asked to make) any finding of fact on that question and the record does not support the Court of Appeals' conclusion. The continuance was actually based on a stipulation signed by both McIntosh and his attorney. (McIntosh CP 142). While a deputy prosecutor mentioned in passing that "we" had been unable to interview certain witnesses (09/27/05 RP, 3:2), "we" could refer to all counsel rather than just the prosecutors. Any ambiguity was eliminated by the acknowledgement of counsel for McIntosh on November 8, 2005, that he was then still attempting to locate witnesses and prepare for trial. (11/08/05 RP, 14: 17-22). Thus, all of the continuances except the last one on January 3, 2006, were to allow defense counsel time to prepare and accommodate

defense counsel's trial schedule. Any defendant's motion resulting in excludable time tolls the time-for-trial clock for his or her codefendants. Casas, 425 F.3d at 31. Leaving such defendants joined for does not necessarily result in a constitutional speedy trial violation. Casas, 425 F.3d at 33-37. While the Court of Appeals noted a defendant's speedy trial rights "do not depend on how convenient the trial date is to potential witnesses" (slip opinion, at 10), the fact remains that the delays requested by defense counsel created the conflict with the victim's vacation (thereby necessitating the final continuance). The Court of Appeals found the trial court did not abuse its discretion in granting any of the continuances. Slip opinion, at 4-8. The reasons for the delay were proper.

The attorneys for both McIntosh and Iniguez readily acknowledged there was no prejudice to their ability to present a defense. (01/03/06 RP, 8:18-20, 10:10-12). In Graves v. United States, 490 A.2d 1086, 1103 (D.C. App. 1984), the court stated:

In this case, appellant Graves concedes that his defense was not hampered by the delay. The absence of this most serious form of prejudice weighs heavily in our determination of whether appellant was deprived of his right [to a speedy trial].

The same factor should weigh heavily in the determination here.

Finally, the length of the delay is not extraordinary. In Karlen, 589 N.W.2d at 599, the Supreme Court of South Dakota stated:

In this case, Karlen claims the length of the delay is nine months. He concedes this delay may seem insignificant "in light of delays seen in other cases where a speedy trial issue has been raised." We agree with this concession.

The same rationale applies here. When the four Barker factors are balanced, it clear the Iniguez's constitutional right to a speedy trail was not violated.

F. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Washington Supreme Court grant review of the decision of the Court of Appeals which reversed the conviction of Ricardo Iniguez.

Dated this 7th day of May, 2008.

Respectfully submitted,

STEVE M. LOWE
Prosecuting Attorney

By: 
Frank W. Jenny
WSBA #11591
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

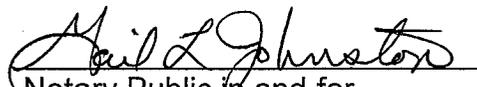
STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Deborah L. Ford, being first duly sworn on oath, deposes and says: That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 7th day of May, 2008, a copy of the foregoing was delivered to Ricardo Iniguez, Appellant, #895746, P. O. Box 881000, Steilacoom WA 98388 by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to opposing counsel, and to James Egan, opposing counsel, 315 West Kennewick Avenue, Kennewick, Washington 99336 by depositing it into Inter-City Legal Processing and Messenger Service.



Signed and sworn to before me this 7th day of May, 2008.



Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2010

df

APPENDIX

FILED

APR 08 2008

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 RICARDO INIGUEZ,)
)
 Appellant.)
)
 _____)
 STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JIMMY HENRY McINTOSH,)
)
 Appellant.)

No. 25218-3-III
(consolidated with
No. 25223-0-III)

ON 6-25-08 the
Court of Appeals
severed the
consolidation.

Division Three

PUBLISHED OPINION

SCHULTHEIS, J. — Richardo Iniguez and Jimmy McIntosh were both convicted of four counts of armed robbery (with firearms findings) after a joint trial. They each claim violations of their right to a speedy trial. We conclude that although the trial court complied with the speedy trial rights afforded the defendants under court rule, Mr. Iniguez's constitutional right to a speedy trial was violated. We therefore reverse Mr.

Iniguez's conviction. We affirm Mr. McIntosh's conviction, but remand for correction of a scrivener's error in his judgment and sentence.

FACTS

On May 31, 2005, Mr. McIntosh and Mr. Iniguez were each charged with first degree robbery with a special firearm allegation. Mr. McIntosh was also charged with first degree burglary. Both men were arraigned on June 7. Trial was set for July 27. Both men remained in custody pending trial.

The matters were joined for trial on July 26. Mr. Iniguez's attorney requested a trial continuance to accommodate counsel's planned vacation. Mr. Iniguez refused to consent to an extension of his time for trial. The court granted a good cause continuance of his trial date to October 5. Mr. McIntosh stipulated to the continuance and signed a speedy trial waiver.

On September 27, trial was re-set at the State's request to allow time to interview defense witnesses.¹ Mr. McIntosh agreed to the continuance and waived his right to speedy trial up to November 16. The continuance was granted over Mr. Iniguez's objection.

¹ The State asserts that the continuance was at Mr. McIntosh's request. But the only reason noted in the record for the continuance involved the State's need to interview witnesses.

Mr. McIntosh's counsel later requested a postponement of the November 16 trial date due to his trial schedule. Over Mr. McIntosh's objection, the trial was continued to January 4, 2006. Mr. Iniguez objected to continuing the trial date and moved for severance. The court denied the motion for severance and set a joint trial for January 4, 2006.

On December 30, 2005, the prosecutor informed the court that one of the victim witnesses who had been subpoenaed for an earlier trial date had left the country to visit family in Mexico without informing the State of his travel plans. The witness was scheduled to return on February 1, 2006. The prosecutor suggested a trial date of February 8, the first available trial date after the witness's return. The prosecutor asked for a good cause continuance. The trial court reserved ruling on the motion until Mr. Iniguez's counsel could contact his client.

At the next hearing on January 3, 2006, the trial court held that the State had taken reasonable steps to notify the subpoenaed witness, and the fact that the witness was out of the country for the holidays was a reasonable basis to reschedule the trial. The court determined that granting the continuance would not prejudice the defendants. The court also commented that if the witness had never been subpoenaed, the result would probably be different. The court balanced the inconvenience of the witness with the inconvenience of the defendants, and deemed it reasonable to continue the trial to February 8.

On February 8, trial commenced with jury selection on an amended information. Mr. McIntosh and Mr. Iniguez were each charged with four counts of first degree robbery during which each of them or an accomplice was armed with a firearm. The evidentiary portion of the trial began on February 15, which ended in a mistrial on February 16 when it was determined that the Spanish-speaking trial interpreter performed inadequately.

The case was retried on April 12, 2006. The jury found both defendants guilty of four counts of armed robbery in the first degree and found by special verdict that the men or accomplices were armed with a firearm.

DISCUSSION

1. SPEEDY TRIAL

A. Speedy Trial Rule

Mr. McIntosh and Mr. Iniguez both contend that their charges should have been dismissed under CrR 3.3(h) because their speedy trial rights were violated by a four-week delay requested by the State when it learned that a subpoenaed witness had left the country for the holidays without checking in to find out the new trial date.

CrR 3.3(b) requires that a defendant in custody be brought to trial within 60 days of the commencement date of the action. The commencement date is the date of arraignment, which in this case was June 7, 2005. Certain periods are excluded from the computation of the speedy trial deadline, including continuances granted by the court pursuant to CrR 3.3(f) and CrR 3.3(e)(3). CrR 3.3(f) permits the court to grant

continuances (1) upon written agreement of the parties or (2) when a delay is required in the administration of justice and the defendant will not be prejudiced, so long as the parties agree in writing or on motion from a party or the court. When a period of time is excluded under CrR 3.3(e), the allowable time for trial “shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5).

According to Mr. McIntosh’s calculations, the time for speedy trial under the rule expired on January 15, 2006. He claims and the court improperly continued the trial past that date. The appellate court will not disturb the trial court’s ruling on a motion for continuance absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984) (citing *State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970)).

When Mr. McIntosh waived speedy trial upon the July 26, 2005 continuance, 48 days of his speedy trial time had expired. The time in which Mr. McIntosh waived speedy trial—through November 16, 2005—was properly excluded. CrR 3.3(f)(1). The court then granted a continuance on November 15 at Mr. McIntosh’s counsel’s request to accommodate his trial schedule, despite his client’s objection. That Mr. McIntosh objected to his counsel’s request is not controlling under the speedy trial rule when the continuance is required in the administration of justice and the defendant’s presentation of his case is not prejudiced. *Campbell*, 103 Wn.2d at 14-15.

Nos. 25218-3-III; 25223-0-III
State v. Iniguez and McIntosh

The continuances ordered over the defendants' objections (up to the last one involving the absence of the State's witness) constitute appropriate excludable delay where, as here, neither defendant shows prejudice to the presentation of his case. *State v. Cannon*, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (continuance properly based on prosecutor's trial schedule); *State v. Selam*, 97 Wn. App. 140, 142-43, 982 P.2d 679 (1999) (excludable delay for defense counsel's vacation); *State v. Flinn*, 154 Wn.2d 193, 201, 110 P.3d 748 (2005) (granting a trial continuance to allow the State additional time for trial preparation occasioned by newly received discovery is not an abuse of discretion); *State v. Eaves*, 39 Wn. App. 16, 20-21, 691 P.2d 245 (1984) (defense counsel's participation in another trial constituted good cause for a continuance).

The continuance ordered on January 3, 2006, which was within the previous excludable period, was caused by the witness's departure from the country without informing the prosecutor. The unavailability of a material State witness may provide a valid basis for a continuance. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). The trial court does not abuse its discretion in granting a continuance when there is a valid reason for the witness's unavailability, the witness will become available within a reasonable time, and the continuance will not substantially prejudice the defendant. *Id.*

These requirements are not satisfied, however, unless the party whose witness is absent proves it acted with due diligence in seeking to secure that witness's presence at trial. *State v. Nguyen*, 68 Wn. App. 906, 915-16, 847 P.2d 936 (1993). "[A] party's

failure to make 'timely use of the legal mechanisms available to compel the witness' presence in court' preclude[s] granting a continuance for the purpose of securing the witness' presence at a subsequent date." *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988) (quoting *State v. Toliver*, 6 Wn. App. 531, 533, 494 P.2d 514 (1972)). Thus, "the issuance of a subpoena is a critical factor in granting a continuance." *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989).

Mr. McIntosh and Mr. Iniguez argue that because the State did not serve a separate subpoena to the witness for the January 4 trial date, the State cannot show due diligence. But the witness here was served for the previous trial date. Division One of this court has held that "a subpoena ordinarily imposes upon the summoned party a continuing obligation to appear until discharged by the court or the summoning party." *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

In *State v. Alford*, the defendant argued that the State did not act diligently to secure the attendance of a subpoenaed witness who was out of state at the time of trial. *State v. Alford*, 25 Wn. App. 661, 665, 611 P.2d 1268 (1980), *aff'd sub nom. State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981). The court held that by showing the witness was under subpoena and unavailable for trial, the State complied with the basic requirements of due diligence. The court did not abuse its discretion in granting a trial continuance. According to the rule in *Tatum*, the same would be true here.

The trial court here noted that although the witness did not have a date certain for his appearance, he was under subpoena; he had simply failed to report before leaving. The court found that the State had taken reasonable steps to notify the witness of the new trial date, but the fact that he had left the country for the holidays was a reasonable basis to reschedule the trial. The witness had been cooperative; he had attended all previous meeting requests and complied with all defense discovery requests. The court then continued the trial to February 8. Guided by *Tatum* and *Alford*, we find no error under the speedy trial rules.

B. Constitutional Speedy Trial

Mr. Iniguez argues that his constitutional right to a speedy trial was violated. A criminal defendant's right to a speedy trial is guaranteed by both our federal and state constitutions. U.S. CONST. amend. VI; CONST. art. I, § 22. "[T]he constitutional right to speedy trial is not violated at the expiration of a fixed time, but at the expiration of a reasonable time." *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997) (citing *State v. Higley*, 78 Wn. App. 172, 184-85, 902 P.2d 659 (1995)).

The right to speedy trial afforded by the Sixth Amendment attaches when a charge is filed or an arrest made that holds one to answer a criminal charge, whichever occurs first. *State v. Corrado*, 94 Wn. App. 228, 232, 972 P.2d 515 (1999) (citing *Higley*, 78 Wn. App. at 184 (citing *United States v. Loud Hawk*, 474 U.S. 302, 310-11, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986))); *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct.

Nos. 25218-3-III; 25223-0-III
State v. Iniguez and McIntosh

455, 30 L. Ed. 2d 468 (1971); *Dillingham v. United States*, 423 U.S. 64, 65, 96 S. Ct. 303, 46 L. Ed. 2d 205 (1975). Thus, even when no formal charge is pending, the restraint of an arrest triggers Sixth Amendment speedy trial protections. *Corrado*, 94 Wn. App. at 232 (citing *Loud Hawk*, 474 U.S. at 310 (citing *Marion*, 404 U.S. at 320)).

When determining whether delay is unconstitutional, the court considers the length of the delay, the reason for the delay, whether the defendant asserted the right, the prejudice to the defendant, and such other circumstances as may be relevant. *State v. Whelchel*, 97 Wn. App. 813, 823-24, 988 P.2d 20 (1999) (quoting *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972))). Notably, the presumption that delay has prejudiced the defendant “intensifies over time.” *Corrado*, 94 Wn. App. at 233 (quoting *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)).

Here, Mr. Iniguez was arrested on May 25, 2005. He was brought to trial on his 260th day of incarceration—almost 9 months after his arrest. He was in custody pending trial, he persistently demanded a speedy trial or severance, and he was not responsible for any of the delay.

When examining the reasons for delay, the court must keep in mind that “different weights should be assigned to different reasons.” *Barker*, 407 U.S. at 531. Even if the reason for delay is neutral, rather than improper, “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Id.*

As stated, Mr. Iniguez had no hand in the delay. The delay was caused by requests of his codefendant or codefendant's counsel—unavailability because of vacation and trial schedule—and the State's requests for additional time to interview Mr. McIntosh's defense witnesses and to allow a witness to return from vacation.

When delay is caused by a codefendant joined by the government, a delay is generally acceptable except when the accused demands a speedy trial. *United States v. Grimmond*, 137 F.3d 823, 828-29 (4th Cir. 1998). In that case, “a defendant's invocation of his Sixth Amendment right to a speedy trial . . . would trump” the policy of joining the trials of defendants who are indicted together. *Id.* at 828. That is the case here.

The unavailability of a key witness is a valid reason for delaying a trial. *Barker*, 407 U.S. at 531. But for this reason to serve as a valid justification for delay, the government must not be responsible for the witness's unavailability, and it must diligently attempt to locate the witness or otherwise make him available to testify. *Cain v. Smith*, 686 F.2d 374, 382 (6th Cir. 1982). “A defendant's speedy trial rights do not depend on how convenient the trial date is to potential witnesses.” *Id.* (citing *Strunk v. United States*, 412 U.S. 434, 439 n.2, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973)).

Here, the State failed to inform the witness of the new trial date until less than one week before trial. When the trial court learned of the delay and the reason, the court did not order the witness to return earlier than planned. Instead, the court set the trial date for the earliest date after the witness's return—more than one month later. Because Mr.

Iniguez requested severance and demanded his right to a speedy trial and that this was the final (and under *Doggett*, the most intensive) delay—this delay was not reasonable.

“The defendant’s assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” *Barker*, 407 U.S. at 531-32. “The timeliness, vigor, and frequency with which the right to a speedy trial is asserted are probative indicators of whether a defendant was denied needed access to a speedy trial over his objection.” *Cain*, 686 F.2d at 384 (citing *Barker*, 407 U.S. at 528-29; *United States v. Avalos*, 541 F.2d 1100, 1115 (5th Cir. 1976); *United States v. Netterville*, 553 F.2d 903, 914 (5th Cir. 1977)).

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 then before the court. “Delay which occurs after a speedy trial is demanded should be scrutinized with particular care.” *Cain*, 686 F.2d at 382 (citing *United States v. Carini*, 562 F.2d 144 (2d Cir. 1977); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377-78 (2d Cir. 1979)).

“Although not essential to finding a violation of speedy trial rights, prejudice is a major consideration.” *Corrado*, 94 Wn. App. at 233 (citing *Higley*, 78 Wn. App. at 185 (citing *Moore v. Arizona*, 414 U.S. 25, 26, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973))).

Prejudice “should be assessed in the light of the interests . . . the speedy trial right was designed to protect.” *Barker*, 407 U.S. at 532. These interests include: (1) preventing

oppressive pretrial incarceration, (2) minimizing the anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Id.* Of these interests, “the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.*; *see also Doggett*, 505 U.S. at 654 (stating the same). Mr. Iniguez has a valid claim of prejudice on the first two interests, but he lacks evidence of the last.

Still, “consideration of prejudice is not limited to the specifically demonstrable” and “affirmative proof of particularized prejudice is not essential to every speedy trial claim.” *Doggett*, 505 U.S. at 655. The Supreme Court in *Doggett* reasoned that “impairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown.’” *Id.* (quoting *Barker*, 407 U.S. at 532). Generally, “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” *Id.* “While such presumptive prejudice cannot alone carry a [speedy trial] claim without regard to the other *Barker* criteria,” “it is part of the mix of relevant facts,” and “its importance increases with the length of delay.” *Id.* at 655-56.

Depending on the nature of the charges, most courts have generally found that a delay is presumptively prejudicial if it approaches one year. *Id.* at 652 n.1. Many courts have held that an eight-month delay is presumptively prejudicial. *E.g.*, *United States v.*

Beamon,² 992 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 a delay of eight months is presumptively prejudicial). Division Two of this court found that a delay of 11 months was presumptively prejudicial. *Corrado*, 94 Wn. App. at 233-34. We agree with these courts and hold that an eight-month delay is presumptively

² *Accord United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) (eight-month delay presumptively prejudicial on drug charges); *State v. Johnson*, 119 Idaho 56, 803 P.2d 557, 560 (Ct. App. 1990) (approximately eight-month delay on forgery claim); *State v. Olmsted*, 1998 MT 301, 292 Mont. 66, 968 P.2d 1154, 1162 (256-day delay for burglary and drug possession), *overruled in part by State v. Ariegwa*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815; *Jones v. State*, 944 S.W.2d 50, 53 (Tex. Crim. App. 1997) (eight and one-half month delay on delivery of cocaine charge). *See also United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1127 (7th Cir. 1984) (holding that a delay of eight months is enough to provoke a speedy trial inquiry); *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989) (“While there are some exceptions to the rule, ‘it may generally be said that any delay of eight months or longer is presumptively prejudicial.’”) (internal quotation marks omitted) (quoting 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 18.2 (1984)); *State v. Dixon*, 969 S.W.2d 252, 256 (Mo. Ct. App. 1998) (“[A] delay of eight months or longer should be considered presumptively prejudicial.”); *City of Billings v. Bruce*, 1998 MT 186, 290 Mont. 148, 965 P.2d 866, 877 (establishing 200 days as length of delay necessary to trigger further analysis), *overruled in part by Ariegwa*, 2007 MT 204; *Pierce v. State*, 921 S.W.2d 291, 294 (Tex. Crim. App. 1996) (“Most delays of eight months or longer are considered presumptively unreasonable and prejudicial.”). *But see United States v. Lugo*, 170 F.3d 996, 1002 (10th Cir. 1999) (holding no presumptive prejudice for approximately seven-month delay on charges of possession of cocaine with intent to distribute and re-entry of deported alien); *United States v. Derosé*, 74 F.3d 1177, 1185 (11th Cir. 1996) (rejecting presumptive prejudice claim on eight-month delay for charges of possession of marijuana with intent to distribute); *United States v. Delario*, 912 F.2d 766, 769 (5th Cir. 1990) (finding no presumptive prejudice for eight and one-half month delay on drug charges); *State v. Utley*, 956 S.W.2d 489, 491 (Tenn. 1997) (eight-month delay; armed robbery); *Tobias v. State*, 884 S.W.2d 571, 586 (Tex. Crim. App. 1994) (approximately nine-month delay; coercion of public servant).

prejudicial and we conclude that Mr. Iniguez was denied his constitutional right to a speedy trial. We therefore need not address his other contentions.

2. AMBIGUOUS JUDGMENT AND SENTENCE

Mr. McIntosh contends that the total amount of confinement set forth in his judgment and sentence is ambiguous because it could be read to impose a sentence of 390 months for each count of robbery, instead of the correct and intended amount of 210 months per count. The State responds that any ambiguity is clarified by the court's oral ruling. We agree.

"A sentence must be 'definite and certain.'" *State v. Jones*, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (quoting *Grant v. Smith*, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). In its oral ruling, the sentencing court imposed a midrange sentence of 150 months for each count of first degree robbery. It then added a 60-month firearm enhancement to each count. The court correctly ordered the underlying sentences to run concurrently and the enhancements to run consecutively. This amounted to a total confinement of 390 months. However, in paragraph 4.5 of the judgment and sentence, the court ordered 390 months' confinement for each robbery count, failing to record this amount in the section provided for months of "total confinement." Clerk's Papers (Cause No. 25223-0-III) at 24. Instead, paragraph 4.5(a) should have indicated 210 months' confinement per count with a total confinement of 390 months (150 plus 240).

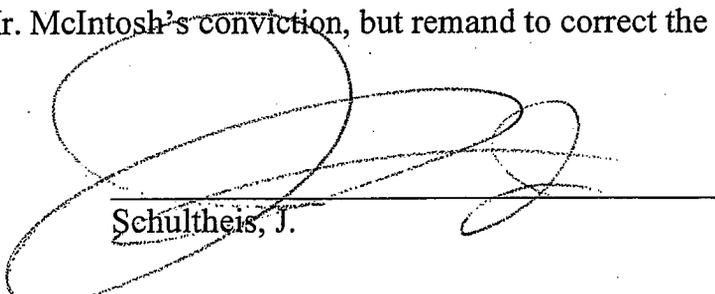
Any ambiguity in this paragraph, however, is clarified by the court's oral ruling, where it instructed counsel to "just put 390 months on each count and I understand that 60 months on each count is consecutive with each other and consecutive with the 150 for a total of 390 months on each count one through four." Report of Proceedings (May 16, 2006) (Cause No. 25223-0-III) at 9. In view of the record, Mr. McIntosh's sentence is not ambiguous, but remand is appropriate to correct paragraph 4.5 of the judgment and sentence form to reflect the correct and intended sentence of 210 months per count and total confinement of 390 months.

3. STATEMENT OF ADDITIONAL GROUNDS

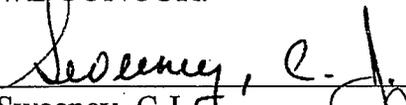
Finally, we have reviewed Mr. McIntosh's statement of additional grounds for review, and conclude that it raises no meritorious issues.

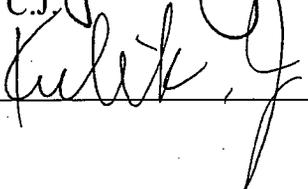
CONCLUSION

Because Mr. Iniguez's constitutional right to speedy trial was denied, his conviction is reversed. We affirm Mr. McIntosh's conviction, but remand to correct the judgment and sentence.


Schultheis, J.

WE CONCUR:


Sweeney, C.J.


Kulik, J.

FILED

JUL -3 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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No. 25218-3-III
(consolidated with
No. 25223-0-III)

**ORDER GRANTING MOTION
FOR RECONSIDERATION
AND AMENDING OPINION**

THE COURT has considered appellant Ricardo Iniguez's motion to release defendant from custody as a motion for reconsideration of our April 8, 2008 opinion.

IT IS ORDERED, the motion for reconsideration is granted and the opinion shall be amended as follows:

Nos. 25218-3-III; 25223-0-III
State v. Iniguez and McIntosh

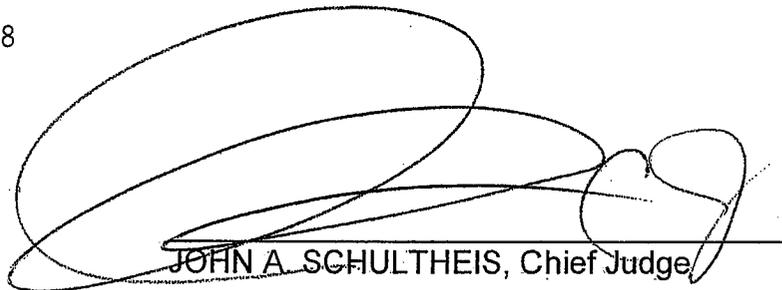
The sentence on the 25th line of page 1 and the first line of page 2 that reads—
“We therefore reverse Mr. Iniguez’s conviction”— shall be amended to read—“We
therefore reverse and dismiss with prejudice Mr. Iniguez’s conviction.”

The sentence on the 7th and 8th lines of page 5 that reads—“He claims and the
court improperly continued the trial past that date”—shall be amended to read—“He
claims the court improperly continued the trial past that date.”

The sentence on the 13th and 14th lines of page 15 that reads—“Because Mr.
Iniguez’s constitutional right to speedy trial was denied, his conviction is reversed”—
shall be amended to read—“Because Mr. Iniguez’s constitutional right to speedy trial
was denied, his conviction is reversed and dismissed with prejudice.”

DATED: July 3, 2008

FOR THE COURT:



JOHN A. SCHULTHEIS, Chief Judge