

NO. 81750-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

RICARDO INIGUEZ,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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ARGUMENT

- (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.¹ 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 and when 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. The first factor also acts as a threshold requirement. Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); 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,

¹ This court has said it will not address whether there are any differences between the speedy trial provisions of the state and federal constitutions without argument from the affected defendant. State v. Fladebo, 113 Wn.2d 388, 394 n. 3, 779 P.2d 707 (1989). Iniguez makes no such argument and no analysis of the factors of State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

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).

Iniguez was arrested on May 25, 2005, and jury selection for his first trial commenced on February 8, 2006; thus, he was brought to trial 14 days after the eight-month anniversary of his arrest. (04/13/06 RP, 174-76; 02/08/06 RP). Doggett observed that courts “have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year.” Doggett, 505 U.S. at 652 n.1. 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, 233, 972 P.2d 515 (1999), which involved a delay of “over eleven months” (arguably a period approaching one year).² Nonetheless, the Court of Appeals in the instant case adopted a rule that an eight-month delay is presumptively prejudicial. 143 Wn. App. 859.

² The court in State v. Vicuna, 119 Wn. App. 26, 35-36, 79 P.3d 1 (2003), addressed all four Barker factors without noting the first factor was a threshold requirement.

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. It is stated in 5 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.

United States v. Titlbach, 339 F.3d 692 (8th Cir. 2003) is directly on point with the instant case. In Titlbach, the Eighth Circuit stated:

A delay approaching a year may meet the threshold for presumptively prejudicial delay requiring application of the Barker factors. . . . Titlbach suffered a delay of only eight months with regard to Count 1 – conspiracy to distribute methamphetamine. Given the complexity of the conspiracy and the length of the trial, Titlbach did not suffer presumptive prejudice related to Count 1. Where no presumptively prejudicial delay existed, we need not examine the remaining three factors under Barker.

Id. at 699 (citations omitted). Similarly, the time between the arrest of Iniguez and the start of his first trial was just over eight months. Since no presumptively prejudicial delay existed, the court need not examine the remaining three factors under Barker.³

One year is indeed the logical point to set the threshold for those extraordinary delays requiring judicial examination. For example, one year is the traditional division between misdemeanors and felonies. See State v. Bowen, 51 Wn. App. 42,

³ Other examples of the modern trend include State v. Moran, 711 N.W.2d 915, 920 (N.D. 2006); State v. Karlen, 589 N.W.2d 594, 599 (S.D. 1999); State v. Zmayefski, 836 A.2d 191, 194 (R.I. 2003); People v. Crane, 195 Ill.2d 42, 52-53, 743 N.E.2d 555, 562 (2001); State v. Goss, 245 Kan. 189, 193, 777 P.2d 781, 785 (1989); People v. Williams, 475 Mich. 245, 262, 716 N.W.2d 208, 218 (2006); United States v. Casas, 425 F.3d 23, 33 (1st Cir. 2005); United States v. Watford, 468 F.3d 891, 901 (6th Cir. 2006); United States v. Ingram, 446 F.3d 1332, 1336 (11th Cir. 2006) and United States v. Bergfeld, 280 F.3d 486, 488 (5th Cir. 2002).

47, 751 P.2d 1226 (1988). This is one of the reasons why equal protection rights are not violated by having indeterminate sentencing for misdemeanors and determinate sentencing for felonies. Id. It has been recognized in other contexts that greater discretion may be given to trial courts in imposing “short” sentences, defined as those less than one year. State v. Pascal, 108 Wn.2d 125, 142 n.3, 736 P.2d 1065 (1987) (Goodloe, J., concurring and dissenting). Similarly, trial courts may be entrusted with more flexibility in adjusting trial dates when cases are brought to trial within one year.

Another 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.E.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. Since these provisions provide adequate protection in the vast majority of cases, the more painstaking Barker analysis may be reserved for genuinely prolonged delays.

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 Barker balancing test has never been applied to delays not approaching one year. The current version of CrR 3.3, adopted in 2003, “allow[s] a trial court more flexibility in avoiding the harsh remedy of dismissal with prejudice[.]” State v. Flinn, 154 Wn.2d 193, 199 n.1, 110 P.3d 748 (2005). Trial courts should be given the full benefit of this flexibility when it comes to relatively short time periods; a Barker analysis on appeal should only be employed for truly exceptional delays, i.e., those exceeding one year.

(2) The Court of Appeals decision conflicts with well established Washington law that severance of defendants is not mandatory even when one defendant’s speedy trial rights are at issue.

As pointed out in the State’s Petition for Review at 12-14, Washington appellate courts have consistently held that severance of defendants is not mandatory even when one defendant’s speedy trial rights are at issue. See, e.g., State v. Eaves, 39 Wn. App. 16,

19, 691 P.2d 245 (1984);⁴ State v. Melton, 63 Wn. App. 63, 67, 817 P.2d 413 (1991); State v. Dent, 123 Wn. 467, 484-85, 869 P.2d 392 (1994); State v. Nguyen, 131 Wn. App. 815, 820, 129 P.3d 821 (2006). The Court of Appeals did not address any of the foregoing Washington cases. Instead, at 143 Wn. App. 856 it quoted from Grimmond, 137 F.3d at 828, to the effect that a defendant's invocation of the right to a speedy trial "would trump" the policy of joining codefendants for trial. The quote from Grimmond must be read in its full context, including:

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 deserves some deference) . . .

⁴ Eaves notes that severance to protect speedy trial rights is discretionary under CrR 4.4(c)(2)(i). Since that rule uses the term "speedy trial", it refers to the constitutional right to a speedy trial rather than the CrR 3.3 "time for trial" rule. See State's Petition for Review, at 12-13.

Grimmond, 137 F.3d at 829 (footnotes omitted). The Grimmond court went on to analyze all four of the Barker factors in finding there was no speedy trial violation. See Grimmond, 137 F.3d at 830-31. Under Barker, a defendant's assertion of the right to a speedy trial is just one of the factors that go into the balance. See Barker, 407 U.S. at 530. When the Grimmond opinion is read in its entirety, it becomes apparent that the court simply misspoke and meant to say a defendant's speedy trial demand may trump the usual joinder policy when considered along with the other three Barker factors.

The Grimmond court's citation to United States v. Annerino, 495 F.2d 1159, 1162-63 (7th Cir 1974), is noteworthy. 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.

In Hartridge v. United States, 896 A.2d 198, 209 (D.C. App. 2006), cert. denied, 127 S. Ct. 1503, 167 L. Ed. 2d 242, 75 USLW 3473 (2007), the court explained:

Joinder of cases is favored, where appropriate, because it fosters efficient use of judicial and prosecutorial resources and decreases the burden on citizens who are called as witnesses. Where the government espouses a policy of trying defendants jointly, our cases assign some responsibility to the government for the delay in a defendant's trial, but in light of the policy considerations favoring joinder, the responsibility does not weigh heavily against the government.

Id. at 210 (citations and quotes omitted). The court went on to hold that the point was not reached where the policy of a joint trial should have yielded to Hartridge's constitutional right to a speedy trial, despite the fact Hartridge was incarcerated for two years, three months and nine days awaiting trial:

Mr. Hartridge was charged with committing a murder not by himself but with the aide of confederates, and in such circumstances, as this case aptly demonstrates, the difficulty a trial court has in attempting to schedule a reasonably timely date of trial when all of the multiple defense counsel are available can be severe. Nor is that difficulty met by easy recourse to severance of defendants, for that disregards society's important interest in having persons charged with jointly committing grave offenses tried together. . . . [W]hile we do not minimize the anxiety and disruption to his life that Mr. Hartridge endured while detained, Doggett nonetheless implies – consistent with Barker and our

own decisions – that absent either serious fault by the government in causing the lapse of time or specific prejudice to the preparation of the defense, the delay of twenty-eight months in bringing Mr. Hartridge to trial does not justify the severe remedy of dismissal.

Id. at 212 (emphasis original). By the same token, Iniguez was not charged with committing armed robbery by himself, but with the aide of his confederate Jimmy Henry McIntosh. The trial court faced severe difficulty in attempting to schedule a trial date when all defense counsel were prepared and available. Severance of defendants would not have provided an easy recourse, as that would have disregarded society's important interest in having persons charged with jointly committing grave offenses tried together. The delay resulting from the State's advocacy of a joint trial does not weigh heavily against the State. Both defendants admitted there was no prejudice to their ability to present a defense. (01/03/06 RP, 8:15-17, 8:18-20, 10:10-12). Thus, there was neither serious fault by the State in causing the lapse of time nor specific prejudice to the preparation of the defense. If the twenty-eight month delay in Hartridge did not justify the severe remedy of dismissal, neither does the delay of eight months plus 14 days in the instant case.

The court in United States v. Casas, 425 F.3d 23 (1st Cir. 2005) held a defendant was not denied his Sixth Amendment right to a speedy trial despite delays caused by joinder with two codefendants. Id. at 33-37. The court noted that the denial of a motion to sever is reviewed only for abuse of discretion. Id. at 34. None was found. “Because the general rule is that those indicted together are tried together to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources, severance is particularly difficult to obtain where, as here, multiple defendants share a single indictment.” Id. at 37.

In Washington, the standard of review for the denial of a severance motion is likewise abuse of discretion. Dent, 123 Wn.2d at 484. Severance here would have required two separate trials of a serious and complex case, burdening the court, jurors and witnesses. See id. These are tenable reasons for denying severance, and it certainly cannot be said that no reasonable judge would have made the same ruling.

In any event, it is simply not true that either the speedy trial right or the joinder policy must “trump” the other. “[P]retrial delay is often both inevitable and wholly justifiable”, and is not necessarily inconsistent with the right to a speedy trial. Doggett, 505 U.S. at

656. So long as delay attendant to joinder is reasonable, it does not result in a speedy trial violation at all. Such was the case here.

(3) A balancing of the four Barker factors shows the constitutional speedy trial right of Ricardo Iniguez was not violated.

Whether the delay was uncommonly long. Even if one accepts that an eight-month delay is presumptively prejudicial, that does not end the consideration of this factor. As stated by the United States Supreme Court in Doggett:

The first of these [Barker, factors, whether the delay was uncommonly long,] is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that interval between accusation and trial has crossed the threshold dividing ordinary from “presumptively prejudicial” delay . . . If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter enquiry is significant to the speedy trial analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time.

Doggett, 506 U.S. at 651-52 (emphasis added). Assuming the threshold is properly set at eight months, that point was not reached here until January 25, 2006 (the eight-month anniversary of Iniguez’s arrest on May 25, 2005). Trial commenced on February 8, 2006; thus, the delay stretched just 14 days beyond “the bare minimum needed to trigger judicial examination of the

claim". There was no time over which prejudice could have intensified.

Even if the delay here crossed the line to become presumptively prejudicial, it did so just barely. In light of the second part of the Doggett "double enquiry", this factor weighs against finding a constitutional speedy trial violation.

Reasons for the delay. Different weights are assigned to different reasons for delay. Barker, 407 U.S. at 531. Here, the reasons for the delay do not weigh heavily against the State.

The Court of Appeals erroneously states at 143 Wn. App. 850 that the continuance on September 27, 2005, resulted from the State's desire to interview defense 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 contact and interview two defense witnesses (09/27/05 RP, 3:1-2, 4:16-19), "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:

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). Thus, all of the continuances except the last one on January 3, 2006, were solely to allow McIntosh's attorney time to prepare and accommodate his trial schedule.⁵ 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 trial does not necessarily result in a constitutional speedy trial violation. Casas, 425 F.3d at 33-37. Where the prosecution espouses a policy of trying defendants jointly, some responsibility is assigned to the prosecution for the delay in a defendant's trial; but in light of the policy considerations favoring joinder, this responsibility does not weigh heavily against the prosecution. Hartridge, 896 A.2d at 210.

⁵ McIntosh's attorney was finally able to locate and speak with his key witnesses, Lanaea Mercado and Henrietta McIntosh, immediately before the start of testimony in the first trial. (02/14/06 RP, 9-10). He decided not to call Ms. McIntosh due to her health. (02/14/06 RP 9: 14-18). Ms. Mercado was excluded from the first trial due to late disclosure (02/14/06 RP, 14: 4-14) but testified at the second trial (04/17/06 RP, 293-306).

The trial was continued a final time from January 4, 2006, to February 8, 2006, to accommodate the absence of the State's key witness. (01/03/06 RP, 11:16-25, 12:1-5). Gilberto Bahena 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; 01/03/06 RP, 4:24). The State's subpoena of Bahena for the January 4, 2006 trial date was issued in a timely manner on December 6, 2005. (State's Supplemental CP). The sheriff timely attempted service on December 18, 2005, but was advised the witness was in Mexico. Id. The witness had twice before been personally served with subpoenas. (Iniguez CP, 258, 278). A subpoena imposes a continuing obligation to appear and a new subpoena is not required for each resetting of the trial date. State v. Tatum, 74 Wn. App. 81, 85-86, 871 P.2d 1123 (1994). Thus, the witness remained under subpoena.

While no one would condone a subpoenaed witness leaving the United States on vacation without prior approval, there were substantial mitigating circumstances here. He had been extremely cooperative, including coming in to be interviewed at the request of defense counsel. (12/30/05 RP, 13:16-21). It is obvious that he simply misunderstood his continuing obligations under the

subpoenas. The fact that he is not proficient in the English language and required the services of an interpreter while testifying helps explain his confusion. (04/13/06 RP, 68:6-10). When contacted by telephone in Mexico, he did not say that he would not cooperate; rather, he said he planned to return on February 1 or 2, 2006, and asked if the trial could be moved until after his return. (Iniguez CP 174).

As with the initial decision to grant a continuance, the length of the continuance is a matter that falls within the trial court's discretion. Flinn, 154 Wn.2d at 201. The trial court balanced the inconvenience of the witness with the inconvenience of the defendants. (01/03/06 RP, 12:19-20). It recognized it was not reasonable to require the victim to make a special return trip all the way from Mexico. (01/03/06 RP, 12:19-20). The conflict with the victim's vacation was only created by the previous delays requested by one of the defendants; certainly the trial would have never been set on January 4, 2006 in the first place had the court known of the victim's vacation plans. The trial was continued to February 8, 2006, the first available trial setting after the victim's return. (01/03/06 RP, 6:2-3). The trial court clearly acted within its discretion.

The Court of Appeals states at 143 Wn. App. 856 that “[a] defendant’s speedy trial rights do not depend on how convenient the trial date is to potential witnesses,” quoting Cain v. Smith, 686 F.2d 374, 382 (6th Cir. 1982) which cited Strunk v. United States, 412 U.S. 434, 439 n.2, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973). The full context of the quoted sentence from Cain is as follows:

The unavailability of a material witness will justify a reasonable delay. However, the prosecution’s efforts to ensure the attendance of the witness, particularly where witnesses have been absent on a previous occasion, should also be considered. A defendant’s speedy trial rights do not depend on how convenient the trial date is to potential witnesses. Moreover, an absent witness whose testimony is merely cumulative or of slight importance cannot justify a delay in the trial.

Cain, 686 F.2d at 382 (citations omitted; emphasis added). The Cain court justified the emphasized sentence only by a citation to footnote 2 in Strunk. However, the note in Strunk merely states:

It can also be said that an accused released pending trial often has little or no interest in being tried quickly; but this, standing alone, does not alter the prosecutor’s obligation to see to it that the case is brought on for trial. The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges.

Strunk, 412 U.S. at 439 n.2. Thus, the note in Strunk is not referring to witnesses at all, but rather to defendants who are released pending trial and do not want a quick trial. As far as Cain is concerned, the only reference to a witness is that one of the continuances “was granted because a witness failed to appear . . . (but) the record neither identifies the absent witness nor indicates his relative importance to the case.” Cain, 686 F.2d at 376. The court merely noted the prosecution’s efforts to secure the attendance of a witness should be considered, “particularly where witnesses have been absent on a previous occasion[.]” Id. at 382. The further observation about speedy trial rights not depending on the convenience of witnesses is dicta, and moreover assumes a nonexistent conflict; a reasonable delay to accommodate a witness is completely consistent with the constitutional right to a speedy trial. See Barker, 407 U.S. at 531.

In any event, Cain is not on point with the instant case for two reasons. First, while the witness in Cain simply failed to appear without explanation, in our case the trial court granted a continuance prior to the trial date because the victim was gone on vacation. “[T]he situation in which the prosecution’s chief witness was on vacation [is distinguishable from] that in which the chief

witness for the prosecution had simply failed to appear.” State v. Grilley, 67 Wn. App. 795, 799, 840 P.2d 903 (1992). In exercising its discretion to grant a continuance, a trial court is not precluded from considering the vacation of a prosecution witness. Id.; see also State v. Vicuna, 119 Wn. App. 26, 30, 35, 79 P.3d 1 (2003) (noting that delay caused in part by State witness’s 24-day vacation was “valid” under Barker test). Second, the witness in the instant case was never absent on any prior occasion. (Iniguez CP 173-76).

Not only is the absence of a material witness a valid reason for a continuance, a delay for such reason is not weighted heavily against the prosecution. Barker, 407 U.S. at 531. See also 21A Am.Jur.2d Criminal Law § 961 (2008) (“delays caused by the unavailability of an essential prosecution witness, are justifiable and excusable delays, or should at least weigh less heavily against the prosecution than a purposeful delay”) (citing *inter alia* Hart v. State, 818 S.W.2d 430, 437 (Tx. App. 1991) (continuance to later date “because the necessary witness would then be back in town and available to testify” was valid reason for delay under Barker test)).

The Court of Appeals found the trial court did not abuse its discretion in granting any of the continuances. 143 Wn. App. 852-

55. The reasons for the delay were proper and do not weigh heavily against the State.

Whether and when the defendant asserted his right to a speedy trial. Iniguez's attorney agreed to joinder with McIntosh. (07/26/05 RP, 6:2-7; 7:17-18).⁶ He agreed that the joinder order justified continuing Iniguez's trial date to October 5, 2005, to coincide with that of McIntosh. (08/09/05 RP, 13:3-24; 14:16-18). While he objected to the later continuance to November 16, 2005 on "speedy trial" grounds, he made no motion to sever at that point; it was impossible for the trial to go forward without being severed. (09/27/05 RP, 4:4-19). Not until November 8, 2005 did he move to sever (when counsel for McIntosh said he would not be able to try the case until the early part of January, 2006). (11/08/05 RP, 3:16-25; 4:1-22). By that time, the case had been pending for over five months; trial began exactly three months later. Thus, only three months of the delay occurred after the motion to sever. At most, it can be said this factor does not weigh heavily in favor of finding a speedy trial violation. See Grimmond, 137 F.3d at 829 (speedy trial

⁶ Since Iniguez was represented by competent counsel, the trial court was entitled to disregard his pro se remarks. See State v. Bergstrom, 162 Wn.2d 87, 95-97, 169 P.3d 816 (2007).

demand made four months before start of trial did not weigh heavily against prosecution).

Whether the defendant was prejudiced by the delay. “The fourth factor, prejudice, is often the most important.” State v. Newcomer, 48 Wn. App. 83, 90, 737 P.2d 1285 (1987). While “oppressive” pretrial incarceration and “anxiety and concern” of the defendant are also considered, the most serious form of prejudice is that which impairs the defense at trial. Id.

The attorneys for both McIntosh and Iniguez readily acknowledged there was no prejudice to their ability to present a defense. (01/03/06 RP, 8:15-17, 8:18-20, 10:10-12). The absence of this most serious form of prejudice weighs heavily against finding a speedy trial violation. Graves v. United States, 490 A.2d 1086, 1103 (D.C. App. 1984).

While prejudice resulting from “anxiety and concern” to the defendant is not brushed aside lightly, “considerable anxiety normally attends the initiation and pendency of criminal charges; hence only undue pressures are considered.” Casas, 425 F.3d at 35 (quoting United States v. Henson, 945 F.2d 430, 438 (1st Cir. 1991)). A defendant “must show that ‘the alleged anxiety and concern had a specific impact on [his] health or personal or

business affairs.” Hartridge, 896 A.2d at 211 (quoting Hammond v. United States, 880 A.2d 1066, 1087 (D.C. 2005)). Iniguez makes no attempt to allege any particularized harm.

Lengthy detention is not necessarily “[]sufficient to establish a constitutional level of prejudice.” United States v. Santiago-Becerril, 13 F.3d 11, 23 (1st Cir. 1997) (finding fifteen months’ pretrial detention insufficient to establish prejudice); see also Barker, 407 U.S. at 533-34 (finding that “prejudice was minimal” despite “extraordinary” five-year delay because defendant was only held in pretrial detention for ten months). In Casas, while the court expressed great concern that the defendants were detained for forty-one months awaiting trial, it found that “other counterbalancing factors outweigh the deficiency and prevent constitutional error.” The court stated *inter alia*, “Appellants have not alleged that the conditions of their confinement were unduly oppressive, and the time served was credited against the sentences they received upon conviction.” Casas, 425 F.3d at 34. In the instant case, Iniguez was held for just over eight months prior to the start of his first trial. He has not alleged that the conditions of his confinement were unduly oppressive and the time served was credited against his

sentence upon conviction. RCW 9.94A.505(6). He has failed to establish a constitutional level of prejudice.

At 143 Wn. App. 858, the Court of Appeals relies heavily on Doggett for the proposition that “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” However, as explained by the Hartridge court, Doggett was:

a case in which egregious persistence [by the government] in failing to prosecute the defendant led to a delay of nearly 8 ½ years between his indictment and trial – a delay six times as long as that generally sufficient to trigger judicial review of a speedy trial claim. Key to the court’s analysis in Doggett was the government’s inexcusable oversights in attempting to track down and arrest the accused, for as the Court pointed out, “if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail . . . as a matter of course no matter how great the delay, so long as Doggett could not show specific prejudice to his defense.”

Hartridge, 896 A.2d at 212 (emphasis original by the Hartridge court; citations and quotes omitted). A defendant’s duty to show actual prejudice is relaxed under Doggett only when all three of the other Barker factors are found to weigh heavily against the prosecution. United States v. Ingram, 446 F.3d 1332, 1336 (11th Cir. 2006). In the instant case, Iniguez was arrested immediately

after the crime, he was brought to trial within nine months of his arrest, the minimal delay in his trial was for legitimate reasons, and he admitted there was no prejudice to his ability to present a defense. Unlike the situation in Doggett, here there is no reason to infer the possible existence of unprovable or unidentifiable prejudice. Under Doggett, Iniguez's speedy trial claim fails as a matter of course.

Balancing of the factors. Finally, even if one or more of the continuances was improper, that does not necessarily equate to a constitutional speedy trial violation. Rather, the determination must be made based on a balancing of the factors. Corrado, 94 Wn. App. at 325; Vicuna, 119 Wn. App. at 35-36. In Vicuna, the court found one of the delays (resulting from allowing the withdrawal of defense counsel) was not justified. Nonetheless, after balancing the factors it concluded there was no speedy trial violation. Id.

In the instant case, the length of the delay was not excessive. The reasons for the delay were the necessity to try codefendants together, and in one instance the absence of a State witness; none of the reasons weigh heavily against the State. Iniguez did not assert his speedy trial right in any meaningful way until the case had been pending for over five months, which was

just three months before the start of the first trial. Iniguez has not demonstrated prejudice of any kind. Even if some of the delays were unnecessary or avoidable, a balancing of the factors shows there was no violation of the constitutional right to a speedy trial.

Dated this 1st day of December, 2008.

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