

NO. 84573-5

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, Jr.,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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MARK K. ROE  
Prosecuting Attorney

SETH A. FINE  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. IDENTITY OF RESPONDENT**

The State of Washington, respondent, asks that review be denied. If review is granted, the respondent asks the court to review the issues specified in part II.

## **II. ISSUES RAISED BY RESPONDENT**

(1) To establish a due process violation on the basis of pre-charging delay, the defendant must show that the delay resulted in actual prejudice. Can this burden be satisfied that speculation that a State's witness might have given testimony that would have provided some additional support for a defense theory?

(2) Is a due process violation established by negligent pre-charging delay?

## **III. STATEMENT OF THE CASE**

### **A. THE CRIME.**

In May, 2000, 8-year-old A.R. spent a week at the home of the defendant (petitioner), David Oppelt, Jr. 6/10 RP 89-90. According to her testimony, she awoke one morning to discover that the defendant was taking off her shorts and underwear. He started rubbing her private area. She pretended to be asleep. The defendant stopped when Bonnie Bortles, a friend of A.R.'s mother, came into the room. 6/10 RP 92-96.

Later the same day, A.R. went to sleep on the couch. When she awoke, she found that the defendant had unbuttoned her clothes and pulled them down. Again, he started rubbing her vaginal area. 6/10 RP 100-01. After she returned home, A.R. revealed the abuse to her grandmother, Bertha Olson. 6/10 RP 104; 6/10 RP 51-52. Ms. Olson reported this to A.R.'s mother, who called police. 6//10 RP 57.

A.R.'s testimony was corroborated by Ms. Bortles. She testified that on May 14, 2001, she went to the defendant's house to pick up some papers. The door was answered by A.R.'s 4-year-old brother. Ms. Bortles went upstairs and found the defendant in bed with A.R. He was lying on his back with his hands outside of the blanket. A.R. had the blanket over her head. She didn't respond to anything that went on. 6/11 RP 111-17.

The defendant testified that he had never touched A.R. improperly. On the occasion described by Ms. Bortles, he wasn't aware that A.R. was in bed with him. 6/12 RP 60-62.

## **B. PROCEDURE.**

Everett police concluded their investigation in August, 2001. The detective's report said that it would be sent to the Prosecutor for review. The Snohomish County prosecutor, however, has no

record of having received that report. On June 4, 2007, the prosecutor learned about the case from a CPS worker. On November 26, an information was filed charging the defendant with one count of first degree child molestation. 1 CP 187. (This was later amended to add a second count. 1 CP 183).

The defense filed a motion to dismiss because of pre-charging delay. The court heard the matter on competing declarations from opposing counsel. 1 CP 136-52. No witnesses testified at the pre-trial hearing. The court found that there had been a negligent delay in filing charges. 1 CP 93, finding no. 18. It concluded that this resulted in prejudice due to a loss of memory on the part of Ms. Olson. 1 CP 94, conclusion no. 1. Apply a balancing test, the court concluded that the prejudice was insufficient to prevent the defendant from receiving a fair trial. 1 CP 95, conclusions no. 6-7.

Trial was held before a different judge. During trial, defense counsel sought to renew the motion for dismissal. The trial judge was unsure whether the matter should be heard by him or by the judge who had heard the pre-trial motion. He asked the parties to contact the other judge and determine whether she had retained jurisdiction. If she had not, he would hear the motion. Defense

counsel agreed with this "logistical plan." 6/12 RP 6-7. Counsel did not, however, raise the issue again.

The jury found the defendant guilty of one count of first degree child molestation. 1 CP 65-66. The Court of Appeals affirmed the conviction. It agreed with the trial court that the defendant was prejudiced by the delay, but the prejudice did not affect his right to a fair trial. Slip op. at 12.<sup>1</sup>

### **C. FACTS SURROUNDING FINDING OF PREJUDICE.**

In finding that the pre-charging delay resulted in prejudice to the defendant, the trial court relied primarily on one ground: Ms. Olson's alleged lack of memory concerning what ointment she applied to A.R. CP 94, conclusion no. 1. The Court of Appeals upheld the finding of prejudice solely on this ground. Slip op. at 8-9. Consequently, the facts surrounding this incident must be set out in detail.

When A.R. disclosed the abuse, she said that her privates hurt. Consequently, Ms. Olson put some lotion on A.R.'s vaginal area or had A.R. do so. 6/10 RP 104-05; 6/11 RP 51. The next

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<sup>1</sup> The Court of Appeals also struck some community custody conditions that the trial court had imposed. Slip op. at 13-15. The State is not challenging this portion of the decision.

day, A.R. was examined by a forensic nurse. She observed that A.R.'s labia majora were red and swollen. 6/10 RP 51.

A pediatric nurse practitioner testified that this irritation could be caused by many things. It could be caused by sexual abuse or by bubble baths, improper wiping, or use of a lotion. 6/11 RP 165-67. This kind of irritation "comes up quite a bit" in children of A.R.'s age. 6/11 RP 179.

Ms. Olson testified that the lotion she used was Vagisil. She would not use a perfumed lotion on a child's genitalia. 6/11 RP 54. This was partially corroborated by A.R., who testified that the lotion was "like vitamin, vitamin something, like." 6/10 RP 105. According to the forensic nurse, a perfumed cream could cause the irritation but Vagisil would not. 6/10 RP 63.

There was conflicting evidence concerning the accuracy of Ms. Olson's recollection. Ms. Olson's statement to police did not say what the lotion was. 1 CP 136-37, 150; Child hearsay ex. 3. Prior to trial, Ms. Olson was interviewed by a defense investigator. This was almost seven years after the event, and Ms. Olson had not been given an opportunity to review her statement. 1 CP 148. Ms. Olson told the investigator that "she doesn't remember anything about the lotion that was applied to A.R.'s genitals." 1 CP

140. There is no evidence that she ever identified the lotion as anything other than Vagisil.

#### IV. ARGUMENT

##### A. REASONS FOR DENYING REVIEW OF PETITIONER'S ISSUES.

###### 1. **Since It Is Doubtful Whether The Defendant Showed Actual Prejudice Resulting From Delay, This Case Does Not Provide A Proper Forum For The Court To Clarify The Effect Of A Finding Of Prejudice.**

The Court of Appeals concluded that Ms. Olson's lack of memory concerning the lotion established prejudice. The Court then balanced this prejudice against the reasons for the delay. Slip op. at 10-11. In applying this balancing, Division One followed the reasoning of its prior decision in State v. Schifferl, 51 Wn. App. 268, 753 P.2d 549 (1988).

The defendant points to contrary language in the Division Two decision in State v. Frazier, 82 Wn. App. 576, 818 P.2d 964 (1996). Frazier says that "balancing the State's interest against the prejudice to the accused is undertaken only when a justification is presented." Id. at 589. Notwithstanding this statement, Frazier proceeded to carry out the balancing that it said was unnecessary. Id. at 592-93.

Based on Frazier, the defendant appears to claim that *any* unjustified delay combined with *any* prejudice mandates automatic dismissal. Such a rule would make it easier to dismiss for *pre*-charging delay than for *post*-charging delay. In determining whether a post-charging delay violated the right to a speedy trial, the court considers four factors. The reasons for the delay and any resulting prejudice are two of the factors. The other two are the length of delay and the defendant's assertion of his rights. State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009); Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

These factors are given different weights depending on the circumstances. With respect to the reason for delay, the test does not simply consider whether the delay was justified or unjustified. Rather, it treats negligent delay differently from intentional delay. Barker, 407 U.S. at 531. Similarly with regard to prejudice, the test does not simply consider whether there was or was not prejudice – it considers the degree of prejudice. Id. at 534.

Thus, when post-charging delay is involved, the existence of negligence and resulting prejudice does *not* mandate dismissal. The court must still consider how long the delay was, the degree of prejudice, and the extent to which the defendant asserted his rights.

Post-charging delay affects a specific constitutional guarantee – the right to a speedy trial. Pre-charging delay only invokes the general “fundamental fairness” aspect of due process. United States v. Lovasco, 404 U.S. 783, 788-90, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). It would make no sense to have generalized due process standards be more stringent than a specific constitutional provision.

In some future case, this court may wish to clarify the misleading language in Frazier. In the present case, however, it is unlikely that the issue could even be reached. The issue arises only if the defendant establishes actual prejudice resulting from the delay. As discussed below, the showing of prejudice here is tenuous at best. Under proper analysis, prejudice was not established. Consequently, this case will not provide a forum for clarifying the analysis that should be performed when prejudice is shown.

## **2. The Trial Court’s Application Of The Standard For Discretionary Dismissal Does Not Warrant Review By This Court.**

The defendant also asks this court to review the Court of Appeals’ refusal to dismiss the case under CrR 8.3(b). Under that rule, a trial court *may* dismiss a case if there has been governmental misconduct that resulted in actual prejudice. The

existence of these factors does not, however, *require* dismissal. Rather, the trial court's decision to dismiss or not dismiss is reviewed for abuse of discretion. State v. Michelli, 132 Wn.2d 119, 239-40, 937 P.2d 587 (1997); see State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002).

In the present case, it is questionable whether the trial court could have properly dismissed under CrR 8.3(b). As discussed in more detail below, the trial court's finding of prejudice was based on a witness's loss of memory. The possibility that memories have dimmed is insufficient to demonstrate actual prejudice. State v. Rohrich, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). Even if the court *could* have dismissed, however, it was not required to do so. Nothing in CrR 8.3(b) precludes the court from considering the *degree* of prejudice in requiring whether to dismiss. The exercise of the trial court's discretion in this case does not warrant review by this court.

## **B. ADDITIONAL ISSUES THAT SHOULD BE CONSIDERED IF REVIEW IS GRANTED.**

### **1. If The Court Grants Review, It Should Determine Whether Actual Prejudice Can Be Established By Speculation That A Witness Might Have Testified Differently.**

If this court nevertheless decides to grant review, it should review the Court of Appeals determination that the delay resulted in

prejudice. As discussed above, that determination is the necessary predicate for both of the issues that the petitioner wishes to raise.

This case involves an alleged violation of Due Process under the Federal constitution. To establish such a violation, the defendant must show that the delay caused prejudice. State v. Salavea, 151 Wn.2d 133, 139, 86 P.3d 125 (2004); Lovasco, 431 U.S. at 790. The prejudice must be actual, not speculative. State v. Potter, 68 Wn. App. 134, 140, 842 P.2d 481 (1992). The burden to prove prejudice is a "heavy one." United States v. Manning, 56 F.3d 1188, 1994 (9<sup>th</sup> Cir. 1995).

It is rare for a defendant to succeed in establishing prejudice. Lovasco, 431 U.S. at 796-97. In reported Washington decisions, prejudice has been found in only one situation: when the delay resulted in a loss of juvenile jurisdiction. E.g., Frazier, 82 Wn. App. at 587-88; Schifferl, 51 Wn. App. at 270-71; State v. Dixon, 114 Wn.2d 857, 859-60, 792 P.2d 137 (1990); State v. Calderon, 102 Wn.2d 348, 352-53, 684 P.2d 1293 (1984). Absent this circumstance, prejudice has not been found, even when the delay was lengthy. Potter, 68 Wn. App. at 141-43 (12½-year delay); State v. Bernson, 40 Wn. App. 729, 733-35, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985) (3½-year delay); State v. Ansell, 36

Wn. App. 492, 497-99, 675 P.2d 614, review denied, 101 Wn.2d 1006 (1984) (3½-year delay); State v. Haga, 13 Wn. App. 630, 633-34, 536 P.2d 648, review denied, 86 Wn.2d 1007 (1975), cert. denied, 425 U.S. 959 (1976) (5-year delay).

Here, the Court of Appeals found that prejudice resulted from the possibility that Ms. Olson might have identified the lotion used on A.R. as something that could have caused irritation. Slip op. at 9. This possibility is three steps removed from a showing of actual prejudice.

First, there is no evidence that Ms. Olson *ever* identified the lotion used as anything other than Vagisil (which would not cause irritation). She testified that she would never put a perfumed lotion on a child's genitalia. 6/11 RP 54. The Court of Appeals pointed out that Ms. Olson's statement to police was silent on the identity of the lotion. This fact provides no evidence that she would have identified the lotion as something else. Nothing supports that possibility other than speculation.

Second, even if one engages in this speculation, the hypothetical testimony would still not significantly aid the defense. If Ms. Olson had applied a perfumed lotion to A.R.'s genitals, it might explain why they were irritated *the next day*. It would not,

however, explain why Ms. Olson applied the lotion in the first place. The only evidence was that she did so because A.R. complained of soreness. 6/11 RP 51; 6/10 RP 104-05. The irritation thus existed *before* the lotion was applied, so it could not have been caused by the lotion. Had Ms. Olson given this testimony, the defense would still have been left with exactly the same problem as they had at the actual trial – explaining why the irritation existed.

Third, besides being speculative and unhelpful, the hypothetical testimony was unnecessary to the defense. At trial, the State failed to establish any link between genital irritation and sexual abuse. The evidence merely identified abuse as one of many possible causes of irritation. 6/11 RP 165-67. An expert witness testified that such irritation is common in girls of A.R.'s age. 6/11 RP 179. This indicates that the irritation is usually caused by factors unrelated to abuse. Had there been evidence of use of a perfumed lotion, it would have left the defense in the same position as they were actually in. The irritation might have been caused by the hypothetical lotion – or it might have been caused by sexual abuse, or by other events. In short, the Court of Appeals determination of prejudice is (1) based on unsubstantiated speculation (2) about hypothetical testimony that would have *failed* to explain an item of

evidence, when (3) under the evidence at trial, the item of evidence was not incriminatory.

If this is sufficient to establish prejudice, than prejudice exists in essentially all cases where there has been lengthy delay. Such delays will almost always result in some loss of memory. "Possible prejudice is inherent in any delay, however short. . ." United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 455 (1971). One could always speculate that, if questioned earlier, a witness might have testified to some detail that would have aided the defense. If this is sufficient to establish prejudice, that showing will not be rare at all, but exceedingly common. And if the defendant is correct that a negligent delay *requires* dismissal if it results in *any* prejudice, than dismissals for pre-trial delay will be common.

Whether a speculative showing of prejudice is sufficient is a significant question of Federal constitutional law and in issue of substantial public interest. If the court grants the defendant's petition for review, it should review this issue as well under RAP 13.4(b)(3) and (4).

**2. Since This Court Has Never Decided Whether Negligent Delay Can Establish A Due Process Violation, And Most Other Jurisdictions Have Held That It Cannot, The Court Should Decide This Issue If Review Is Granted.**

There is no indication in the record that the delay in this case resulted from anything other than negligence. The Court of Appeals held that “negligent delay may violate due process.” Slip op. at 9. This assertion is not supported by authority from either the U.S. Supreme Court or this court.

The U.S. Supreme Court has said that a due process violation could be established by “delay undertaken by the Government solely to gain tactical advantage over the accused.” Lovasco, 431 U.S. at 795. The court also suggested that a reckless delay might also violate due process. Id. n. 17. The court has never held or suggested that a mere negligent delay could violate due process. To the contrary, the court has held in another context that “liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.” County of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Most courts that have considered the issue have held that only intentional or reckless pre-charging delay can constitute a due

process violation. United States v. Marler, 756 F.2d 206 (1<sup>st</sup> Cir. 1985); United States v. Sebetich, 776 F.2d 412, 430 (3<sup>rd</sup> Cir.), cert. denied, 484 U.S. 1017 (1985); United States v. Crouch, 84 F.3d 1497, 1522-25 (5<sup>th</sup> Cir. 1996) (en banc), cert. denied, 519 U.S. 1076 (1997); United States v. Duncan, 763 F.2d 220, 222 (6<sup>th</sup> Cir. 1985); United States v. Sims, 779 F.2d 16 (8<sup>th</sup> Cir. 1985); United States v. Engstrom, 965 F.2d 836, 839 (10<sup>th</sup> Cir. 1992); United States v. Benson, 846 F.2d 1338, 1343 (11<sup>th</sup> Cir. 1988); United States v. Mills, 925 F.2d 455, 464 (D.C. Cir. 1991), rev'd en banc on other grounds, 964 F.2d 1186, 1188 n. 3 (D.C. Cir.), cert. denied, 506 U.S. 977 (1992); Commonwealth v. Sher, 569 Pa. 284, 313-14, 803 A.2d 1204 (2002), cert. denied, 538 U.S. 908 (2003); State v. Montgomery, 148 Wis.2d 593, 436 N.W.2d 303, 307 (1989); see Frazier, 82 Wn. App. at 590 n. 14 (citing cases). Although a few cases have held negligent delay sufficient, some of these have been overruled. United States v. Townley, 665 F.2d 579 (5<sup>th</sup> Cir.), cert. denied, 456 U.S. 1010 (1982), overruled by Crouch, 84 F.3d at 1514; State v. Avery, 80 Wis.2d 305, 259 N.W.2d 63 (1977), overruled by Montgomery, 436 N.W.2d at 307.

This court has never determined whether a negligent delay is sufficient to establish a due process violation. In Calderon, the

court said: "It has been suggested that negligently failing to bring charges promptly may also establish a constitutional violation." Calderon, 102 Wn.2d at 353. Subsequent cases, relying on Calderon or its progeny, have said that negligent delay "may" violate due process. Salavea, 151 Wn.2d at 139; Dixon, 114 Wn.2d at 865; State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989); State v Alvin, 109 Wn.2d 602, 746 P.2d 807 (1987). This court has *never* found a due process violation resulting from pre-trial delay, even when the defendant suffered prejudice from loss of juvenile jurisdiction. Dixon, 114 Wn.2d at 864 ("Washington courts have never vacated a conviction due to a loss of juvenile court jurisdiction").

Subsequent to Dixon, Division Two of the Court of Appeals held that due process was violated by a negligent delay that resulted in the loss of juvenile jurisdiction. Frazier, 82 Wn. App. at 589-93. The court acknowledged that the weight of authority was to the contrary. Id. at 590 n. 14. The court believed, however, that the issue had been decided by this court. Id. at 591. As discussed above, this is not true.

In short, at least two divisions of the Court of Appeals believe that this court has decided that that a negligent delay can

establish a due process violation. This belief is wrong. This court has never decided that issue. The weight of authority is to the contrary – that a due process violation can only be established by an intentional or at least reckless delay. Whether this is true is a significant issue of constitutional law and in issue of substantial public interest. If the court accepts review of the case, it should review this issue under RAP 13.4(b)(3) and (4).

**V. CONCLUSION**

The petition for review should be denied.

Respectfully submitted on June 7, 2010.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
SETH A. FINE, WSBA # 10937  
Deputy Prosecuting Attorney  
Attorney for Respondent