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NO. 86633-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON OLLIVIER,

Petitioner.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

PETITIONER'S SUPPLEMENTAL BRIEF

---

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ORIGINAL

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A. INTRODUCTION

Detective Dena Sario obtained a search warrant for Brandon Ollivier's home by deliberately misrepresenting what she learned from Eugene Anderson, a sex offender detained in the jail's psychiatric ward. Her warrant application exaggerated Anderson's accusations against Ollivier, omitted reasons she knew to discount Anderson's credibility, and did not explain why Anderson's allegations should be believed. Days after the search, Sario was put on leave and then lost her job.

Ollivier spent two years in jail waiting for his trial. Over one year passed before his attorney knew Sario had been terminated from the police department due to dishonesty. His attorney requested 19 continuances over Ollivier's strenuous objection, most of which were based on her need to obtain information about Anderson and Saario from the government. The unreasonable pretrial delay, as well as the inadequacies in the search warrant and its execution, require dismissal of the charges and suppression of the evidence.

B. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. Brandon Ollivier's trial was delayed for two years while his attorney tried to obtain information from the government, over his

consistent objections to the delays. Did the unnecessary delay violate Ollivier's constitutional right to a speedy trial?

2. Did the court fail to comply with the speedy trial rule CrR 3.3's requirement that it may not extend the time for trial without a signed written agreement or expressly finding that the delay does not prejudice the defense?

3. A search warrant application based on an informant's uncorroborated allegations must explain why the informant is credible. When the application does not say why the informant is believable and omits known reasons to question his credibility, is there insufficient information to issue a search warrant?

4. When executing a search warrant, police must give a copy of the warrant to the person whose property is being searched, upon his request, to insure the officers do not exceed their authority. Does the deliberate refusal to give the warrant to the property's owner undermine the legality of the search?

#### C. STATEMENT OF THE CASE.

On April 5, 2007, police officers executed a search warrant for the apartment Brandon Ollivier shared with several others. CP 228. The warrant was based on sex offender Eugene Anderson's allegation that

Ollivier had child pornography. CP 22-23. The police handcuffed Ollivier, forced him outside, and put him in a police car during the three hour-long search. CP 228. They refused to give him a copy of the search warrant despite his requests. CP 229.

Ollivier was charged with possession of child pornography based on computer images found as a result of the search. CP 1. He spent two years of pretrial proceedings in jail. CP 270; 1RP 12.

Ollivier was represented by court-appointed attorney Leona Thomas. She asked for 24 continuances that reset the 60-day time for trial clock. Appendix A (list of continuances). Ollivier agreed to the first two continuances, albeit reluctantly to the second. 1RP 8. Thereafter, he objected to every continuance but one. 1RP 12, 18, 24, 27, 35, 41, 43, 46, 48, 51, 54, 58, 62, 65, 69; 2RP 9. The prosecution either agreed or voiced no objection to each delay. *Id.* The court declared the delays served the “administration of justice,” but rarely acknowledged the prejudice to Ollivier. *See* App. A.

By the time Ollivier’s trial started, the police officers “had no recollection of some of the events;” Ollivier could not arrange testimony from Shilo Edwards, whose testimony would have cast doubt on Anderson’s claims against Ollivier; and witness Daniel Whitson had

suffered from memory loss from a degenerative brain disorder. CP 229; 1RP 65; 5RP 24; 7RP 104; 9RP 94, 98. Ollivier was convicted of possession of child pornography and received an indeterminate sentence of 30 to 120 months in prison. CP 253-67.

**D. ARGUMENT.**

1. **The extraordinary, unnecessary two-year delay in bringing Ollivier to trial, over his repeated objections and in spite of his incarceration, violated his right to a speedy trial**
  - a. The constitutional right to a speedy trial guards against trial delay in the face of the defendant's repeated objections and inaction by the court and prosecution

The right to "a speedy trial" is guaranteed by the Sixth Amendment and article I, section 22 of the state constitution. State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009).<sup>1</sup> Article I, section 10 further dictates that "[j]ustice in all cases shall be administered . . . without unnecessary delay."

"The right to a speedy trial is 'as fundamental as any of the rights secured by the Sixth Amendment.'" Iniguez, 167 Wn.2d at 290 (quoting Barker v. Wingo, 407 U.S. 514, 515 n.2, 92 S.Ct. 2182, 33 L.Ed.2d 101

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<sup>1</sup> The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." Article I, section 22 similarly provides, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial."

(1972), Klopper v. North Carolina, 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)). The “right has its roots at the very foundation of our English law heritage,” where, “the delay in trial, by itself, would be an improper denial of justice.” Klopper, 386 U.S. at 223-24.

There is no “fixed point” in time at which a speedy trial violation occurs in every case. Barker, 407 U.S. at 521. On one hand, “[a] defendant has no duty to bring himself to trial; the State has that duty.” Id. at 527. Because “society has a particular interest in bringing swift prosecutions, . . . society’s representatives are the ones who should protect that interest.” Id. On the other hand, some cases require more time to prepare with reasonable diligence. Doggett v. United States, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); see Barker, 407 U.S. at 531 (“the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge”).

This Court has adopted the multi-factor test set forth in Barker to determine whether speedy trial rights have been violated, Iniguez, 167 Wn.2d at 290. First, the Barker inquiry requires a threshold showing that the delay is longer than ordinary. Id. at 283. The prosecution conceded Ollivier meets this threshold, and the Court of Appeals agreed. State v. Ollivier, 161 Wn.App. 301, 314, 254 P.3d 833 (2011), rev. granted 173

Wn.2d 1014 (2012). The two year span of Ollivier's case from arrest to the start of jury selection, the entirety of which he spent in jail, "crossed a line from ordinary to presumptively prejudicial." Iniguez, 167 Wn.2d at 283.

The court next considers the nature of the delay based on four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) the prejudice caused the accused by waiting for trial for a long time. Id.

i. The pretrial delay was longer than any case defense counsel had ever had.

In this context, the "longer the pretrial delay, the closer a court should scrutinize the circumstances surrounding the delay." Iniguez, 167 Wn.2d at 293. In Iniguez, the delay was eight months, which was "just beyond the bare minimum" needed to cross the threshold of a presumptively prejudicial delay. Id.

Ollivier's attorney told the court, "I've never had a case this old in my case load, ever," and she made that statement while requesting yet another continuance. 2RP 8. Ollivier spent the entire two years of pretrial delay incarcerated. On November 19, 2007, Ollivier's attorney promised the court that there would be "no more" continuances, and on that basis, the court denied Ollivier's release. 1RP 27. Jury selection did not start

until April 2, 2009. 1RP 28.<sup>2</sup> The length of delay weighs in Ollivier's favor, particularly because the delay was not reasonably necessary.

- ii. The delay was largely unnecessary and avoidable had the prosecution or court had taken action to bring the case to trial.

The reason for the delay looks to who was to blame for the delay and “assign[s] different weights to the reasons for delay.” Iniguez, 167 Wn.2d at 294. The court considers “whether the reasons for the delay are of a sort that work for the good of the accused, or against him.” United States v. Graham, 128 F.3d 372, 374 (6<sup>th</sup> Cir. 1997).

While deliberate delay by the prosecution is impermissible, prosecutorial negligence also falls to the wrong side of the line and weighs against the State. Doggett, 505 U.S. at 657. A prosecutor must be reasonably diligent in pursuing a prosecution. Id. Prosecutorial “neglect” of a case “indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.” Id.; Barker, 407 U.S. at 527 (“A defendant has no duty to bring himself to trial; the State has that duty.”).

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<sup>2</sup> Jury selection marks the start of the trial for speedy trial purposes under the Sixth Amendment. United States v. Young, 657 F.3d 408, 416 (6<sup>th</sup> Cir. 2011).

The court shares the prosecution's "affirmative constitutional obligation to try the defendant in a timely manner." Graham, 128 F.3d at 374. "[D]ilatory [trial] court action may justify granting a defendant's speedy trial claim." Young, 657 F.3d at 414. The trial court "should be vigilant" and "assert itself in an attempt to move the process along." Id. (citing Graham, 128 F.3d at 373).

In Graham, "every party [bore] some responsibility for elements of the delay." 128 F.3d at 374. But the court refused to blame Graham for delay based on his request for additional discovery. "Ultimately, the court bears the responsibility of resolving discovery disputes of this sort. If the court had stepped in," the discovery issue could have been settled far more quickly. Id.

The prosecution remained passive throughout Ollivier's pretrial proceedings. It never objected to any continuances and joined eight continuance requests. See App. A. The prosecution conceded that Ollivier's case was a lower priority because it viewed his case as one without "a victim." IRP 46.

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Starting pretrial motions does not satisfy the Sixth Amendment right to a speedy trial, although they may signify the start of trial under CrR 3.3. See State v. Mathews, 38 Wn.App. 180, 183, 685 P.2d 605 (1984) (preliminary motions mark start of trial in context of CrR 3.3).

The prosecution's passivity extended to discovery. The bulk of the delay occurred because Thomas wanted two pieces of information: (1) records from the Department of Corrections (DOC) about Anderson's computer skills to impeach his claim he was computer illiterate; and (2) records from the King County Sheriff's Office about the firing of the lead detective who was accused of dishonesty. 1RP 26-27, 50; see App. A. The prosecution had a far superior ability to obtain information from law enforcement, and a constitutional obligation to do so, yet it did not help the defense.

The prosecution has a continuing obligation to produce all evidence material to guilt, including evidence impeaching a State witness. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). It must supply information favorable to the defense if it is known to the police. Kyles v. Whitley, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed. 490 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf . . ., including the police."). Where doubt exists as to the usefulness of the evidence to the defense, the prosecution should resolve its doubts in favor of full disclosure. See United States v. Paxson, 861 F.2d 730, 737 (D.C. Cir. 1988).

Saario was the detective who obtained the search warrant for Ollivier's apartment. CP 20-26. But within days of the search, she was put on administrative leave due to an investigation into her dishonesty. 3RP 106. She resigned in lieu of being fired on September 19, 2007, five months after searching Ollivier's home. CP 32-35, 201, 228. It appears Thomas did not know about Saario's predicament for over a year, because she first asked for information about Saario's firing on September 5, 2008. 1RP 50. Thomas requested continuances again on October 10, November 7, 13, and 21, 2008, to obtain and review records about Saario's misconduct. 1RP 53, 5, 61, 64. The prosecution is imputed to know of the investigation into Saario's dishonesty and should have timely provided information material to her credibility. Kyles, 514 U.S. at 437-38.

From November 30, 2007, until approximately November 7, 2008, Thomas requested continuances to obtain DOC records to impeach Anderson. 1RP 26, 34, 39, 46, 55. The State did not assist her and the court did not intervene to speed the pace of obtaining records from the police or DOC.

The delay is not justified by issues of great complexity. On November 2, 2007, the prosecutor said she expected a short trial "because we don't have competency issues, we don't have a child testifying." 1RP

24. The case involved computer images and there were few witnesses to interview. The defense had concluded by November 30, 2007, that it would not use an expert to testify about the computer images. 1RP 26-27. This left two trial issues: whether the images on the computer were Ollivier's; and whether the seizure of the computers from Ollivier's home was lawful.

Ollivier did not waive his right to a speedy trial because his own attorney requested the continuances. A defendant does not forgo his right to a speedy trial without intelligently and understandably waiving this right. Barker, 407 U.S. at 526. If he fails to demand a speedy trial, his contribution toward the delay is weighed alongside the case-specific factors. Id. at 528.

The reason for the delay boiled down to the defense attorney's inability to obtain documents from the police and DOC, two agencies that work closely with the prosecution. Yet neither the court nor the prosecution tried to rectify this unnecessary delay. Their lack of effort to minimize the delay, be it out of negligence, disinterest, or the low priority accorded the case, are egregious in light of Ollivier's consistent objections to this pretrial delay.

iii. Ollivier repeatedly objected to the delays and the violation of his speedy trial rights.

The “defendant’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that right.” Barker, 407 U.S. at 531-32. The court looks to whether a defendant has objected frequently and forcefully to the delay, was silent, or objected in an insincere way. Id. at 529.

Ollivier vocally and consistently objected. More than 17 months before his trial started, he wrote in a letter to the court, “I object to any continuance in this matter whatsoever,” and he explained the onerousness of his pretrial incarceration and trial delay. CP 271-76. He complained that the delays were unjustified. See e.g., 1RP 22, 29, 51. Due to Ollivier’s clear assertion of his right to a speedy trial, this factor weighs heavily against the State.

iv. Ollivier was prejudiced from his pretrial incarceration and trial delay.

The primary driving force of the accused person’s right to a speedy trial is the oppressive nature of pretrial incarceration. Doggett, 505 U.S. at 659 (Thomas, J., dissenting). The jailed defendant cannot gather evidence or witnesses to aid in his defense. Barker, 407 U.S. at 533. He suffers prejudice from the anxiety of unresolved charges, job loss, and deprivation

of a person's private life. United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971) (criminal charges "may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."); see also State v. Haq, \_ Wn.App. \_, 268 P.3d 997, 1015 (2012) (jail routinely records inmate's telephone calls due to inmate's reduced privacy rights).

Ollivier's pretrial incarceration establishes prejudice. He sat in jail for two years while he begged his attorney to prepare for trial. CP 271-76. He had unpaid bills. CP 275. He was extremely anxious and his time in jail caused medical issues. CP 274.

While the most serious form of prejudice is the "possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence," no specific proof of lost evidence is required to establish a violation of the right to a speedy trial. Doggett, 505 U.S. at 654; Iniguez, 167 Wn.2d at 295.<sup>3</sup> "Loss of memory" is hard to prove, "because what has been forgotten can rarely be shown." Barker, 407 U.S. at 532.

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<sup>3</sup> The Court of Appeals misapplied the Barker analysis by insisting "[a]ctual prejudice to the defense is required" to show a violation of the constitutional right to a speedy trial. 161 Wn.App. at 315.

Prejudice occurs when the defendant has a lessened ability to probe the details of the witnesses' recollection. Graham, 128 F.3d at 376.

There is tangible evidence of prejudice to Ollivier's ability to contest the charges against him. The court found that the two-year delay had impaired the police officers' memories about executing the search warrant, which was a significant legal issue in Ollivier's case. CP 229. Whitson, Ollivier's former roommate who could testify about Ollivier and Anderson's computer usage, had a degenerative brain disorder which impaired his memory. 1RP 65; 9RP 94, 98. The defense had expected Edwards to testify that Anderson attempted to sell him child pornography, but when trial finally began, the defense was not able to secure Edwards' presence. 5RP 24; 8RP 107. Edwards' testimony would have cast doubt on Anderson's insistence that the pornography was not his. 5RP 24. This factor weighs against the State.

b. The *Barker* factors considered together demonstrate the inordinate delay denied Ollivier his right to a speedy trial.

Ollivier's trial was delayed for two years despite his objections and incarceration. The delay was mostly due to the defense attorney's struggles to receive requested documents from DOC and the King County Sheriff, agencies that work closely with the prosecution and routinely appear in court, together with passive agreement to delay by the prosecution.

Prejudice is palpable from pretrial incarceration in and of itself, as well as lapsed witness memories and difficulty obtaining witnesses. When these factors are considered alongside Ollivier's repeated objections to the unnecessary delay, Ollivier was denied his constitutional right to a speedy trial. The remedy is dismissal. Barker, 407 U.S. at 522.

**2. By granting 22 continuances with minimal inquiry into the need for such delay, the court violated Ollivier's speedy trial right under CrR 3.3**

Unlike the constitutional speedy trial rule, CrR 3.3 sets a definite time line in which a trial must occur. The purpose of CrR 3.3 is "to protect a defendant's constitutional right to a speedy trial." State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Speedy trial rules ensure trial occur within a "reasonable period consistent with constitutional standards." Barker, 407 U.S. at 523.

The trial court must ensure a defendant receives a timely trial under CrR 3.3. Kenyon, 167 Wn.2d at 136; CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."). A trial for a person who is held in custody must occur within 60 days of arraignment. CrR 3.3(b)(1)(i). Failure to comply requires dismissal of the charge with prejudice if the defendant timely objects. CrR 3.3(d)(3), (h).

One permissible basis for a court to continue a case beyond the 60-day time limit is “unavoidable or unforeseen circumstances” that are “beyond the control of the court or parties” under CrR 3.3(e)(8). In Kenyon, the trial court declared that the lack of an available judge was an unavoidable or unforeseen circumstance under CrR 3.3(e)(8). This Court ruled that CrR 3.3 prohibits a judge from treating circumstances as “unavoidable” without first trying to ameliorate the problem. Kenyon, 167 Wn.2d at 138-39. The failure to seek alternatives undermines the court’s authority to extend the time for trial under CrR 3.3. Id.

Another reason a judge may continue the time for trial is based on the “written agreement” of the parties, but such an agreement “must be signed by the defendant.” CrR 3.3(f)(1). On May 6, 2008, July 25, 2008, and March 9, 2009, the court justified the trial delay as agreed under CrR 3.3(f)(1), but Ollivier did not sign the written orders. CP 283, 287, 295. Two of the orders state that Ollivier objected and the record of the third hearing shows Ollivier objected. CP 287, 295; 1RP 43. Without Ollivier’s signed agreement, the court was not permitted to delay Ollivier’s trial under CrR 3.3(f)(1).

Under CrR 3.3(f)(2), the court may continue a trial if it finds “such continuance is required in the administration of justice and the defendant

will not be prejudiced in the presentation of his or her defense.” But the court may not simply declare that the delay is required in the “administration of justice.” State v. Saunders, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009). The court must also assess the reasons for the delay and the prejudice to the defense. Id.

The court’s continuance orders did not comply with CrR 3.3(f). On November 30, 2007, December 28, 2007, and January 18, 2008, the court’s orders continued the case without any express finding the delays were either in the administration of justice or based on the parties’ written agreement. CP 278-80.

On 11 dates, the court cited the “administration of justice” as authority for delay but did not comply with the requirement of CrR 3.3(f)(2) that the delay does not prejudice the defense. App. A (10/19/07; 3/7/08; 6/4/08; 7/3/08; 9/5/08; 10/10/08; 11/7/08; 11/13/08; 11/21/08; 12/23/08; 1/21/09).

Ollivier’s consistent objections to the continuances should have triggered a far more rigorous assessment of whether the delay prejudiced the defense. Saunders, 153 Wn.App. at 220. Ollivier decried the “tortoise pace” of the trial preparation, 1RP 22; explained his lawyer had promised no more continuances, 1RP 29; and expressed dismay that the

investigation could take as long as counsel claimed. 1RP 65. Yet the judge did not take any action to resolve the discovery or investigation delays. CrR 3.3 requires the court to examine whether there are alternatives to multiple resettings of the time for trial. It is the court's obligation to enforce the speedy trial rules under CrR 3.3(a). By continuing Ollivier's case long past the 60-day time for trial, without complying with the requirements of CrR 3.3, the court denied Ollivier his right to a speedy trial under CrR 3.3.

**3. The facially invalid search warrant, coupled with the deliberate refusal to properly serve the warrant, undermine the lawfulness of the police search of Ollivier's home**

- a. After striking the detective's deliberate falsehoods from the search warrant, the allegations of an untrustworthy informant undermine the basis of the warrant.

When a police officer uses intentional or reckless perjury to secure a warrant, "a constitutional violation obviously occurs" because "the oath requirement implicitly guarantees that probable cause rests on an affiant's good faith." State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595

(2007), citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978); U.S. Const. amend. 4. Const. art. I, § 7.<sup>4</sup>

The trial court ruled that Sario deliberately lied in her search warrant application about what Anderson told her. CP 234-35. Sario had resigned in lieu of termination after an internal investigation showed she had been dishonest, made a false report, and inappropriately used her authority. CP 32, 234. The court struck Saario's false claim that Anderson said a red box that would contain child pornography. Id. But the court summarily concluded the warrant was supported by Anderson's accusations against Ollivier after striking that falsehood. CP 234-35.

In order for an informant's tip to establish probable cause for a search warrant, the officer's affidavit must (1) state the informant's basis of knowledge so the magistrate can independently evaluate the reliability of the manner in which the informant acquired the information, and (2) explain the information from which the officer concluded the informant was credible. State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (citing Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d

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<sup>4</sup> Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

723 (1964); Spinelli v. United States, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)). The credibility and the basis of knowledge prongs must be separately established in the four corners of the search warrant affidavit. Jackson, 102 Wn.2d at 437. “The two prongs of the Aguilar-Spinelli test have an independent status; they are analytically severable and each insures the validity of the information.” Id.

Anderson briefly lived in Ollivier’s house; so he had a basis to know if there was pornography in the home. But Anderson was not a credible source of information, and the issuing magistrate was never informed of the reasons to doubt Anderson’s credibility.

No presumption of credibility attaches to a known informant unless that person is either “uninvolved” in the offense or a victim. State v. Rodriguez, 53 Wn.App. 571, 574, 769 P.2d 309 (1989). A heightened showing of credibility is required when the informant is a criminal informant or has a significant penal interest in the case. Id. at 575-76. One suspect’s allegations against another suspect are inherently suspicious. Lilly v. Virginia, 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (suspect’s claims against another have “presumptive unreliability”).

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place to be searched, and the persons or things to be seized.”

Anderson had not been promised a sentencing benefit if his claims against Ollivier proved true. C.f. State v. Bean, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978) (some credibility attaches to informant who pled guilty and trades information for sentencing benefit). He had no track record of credible claims against others.

When Anderson claimed Ollivier had child pornography, he had been arrested. CP 18; CP 232. He was being held in the psychiatric ward of the jail. 7RP 24; CP 65. He was on community custody and if he was accused of possessing child pornography, he could have been punished. None of this information was in the warrant application. CP 23.

The Court of Appeals decision jumped straight from acknowledging Ollivier's challenge to Anderson's credibility to finding Anderson had a basis of knowledge. 161 Wn.App. at 318. It was Anderson's credibility that was highly suspect and not established by the warrant. Saario implied that Ollivier was the type of person who might possess pornography by listing his prior conviction for child molestation, claiming he did not complete sex offender treatment in prison, and asserting he was caught with "pornographic magazines" in prison some years ago. CP 23. But Saario did not say where she learned this information,

which Ollivier disputed, and thus it was also not shown to be credible on the face of the warrant. CP 38; see Jackson, 102 Wn.2d at 437.

The judge could not determine Anderson's credibility without knowing that Anderson was under psychiatric care and was jailed due to community custody violations when he made his accusations against Ollivier. The warrant application offered no reason to believe Anderson. Since Anderson was the sole source of the allegations in the warrant, the warrant did not meet the dual prongs of Aguilar-Spinelli. Without the warrant, the police lacked authority of law to seize Ollivier's computers and the fruits of the illegal search should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009).

- b. The refusal to provide Ollivier with a copy of the warrant, despite his presence and request, invalidated the execution of the warrant.

An essential function of the warrant requirement is to "assure" the person whose property is being searched of the lawful authority of the search and seizure, as well as the limits of the police authority to search. United States v. Williamson, 439 F.3d 1125, 1132 (9<sup>th</sup> Cir. 2006). In Groh v. Ramirez, 540 U.S. 551, 562 n.5, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), the court explained it may be violate the reasonableness required

by Fourth Amendment to “refuse a request to furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission.”

Article I, section 7 “prohibits any disturbance of an individual’s private affairs without authority of law.” State v. Snapp, \_\_ Wn.2d \_\_, 2012 WL 1134130, \*8 (4/5/2012). Unlike the Fourth Amendment, “[t]he authority of law to search under article I, section 7 is not simply a matter of pragmatism and convenience.” Id. at 9. Instead, any evidence seized without the requisite authority of law will be suppressed. State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); see e.g. State v. Cardenas, 146 Wn.2d 400, 411, 47 P.3d 127 (2002) (lack of “strict compliance” with statutory “knock and announce” rule renders entry into home unlawful).

CrR 2.3<sup>5</sup> dictates the means by which a search warrant must be executed. State v. Ettenhofer, 119 Wn.App. 300, 308, 79 P.3d 478 (2003). RCW 10.79.040 authorizes police to search a residence when a warrant has been properly issued. “[T]he warrant requirements evident in CrR 2.3, RCW 10.79.040, and article I, section 7 are interrelated, and each must be interpreted with reference to the dictates of the others.” Id.

CrR 2.3(d) mandates that an officer executing a warrant “shall give [a copy of the warrant] to the person from whom or from whose premises the property is taken.”

The trial court concluded that the police deliberately refused to give Ollivier a copy of the warrant despite his request. CP 230. Ollivier asked for a copy when the police entered his home, but instead, he was taken outside of the apartment in handcuffs. CP 228-29. He was unable to observe the three hour-long search and could not know whether the police were complying with the limitations in the warrant. CP 228.

An illegal governmental intrusion into a person’s private affairs requires suppression of evidence gathered without authority of law. Winterstein, 167 Wn.2d at 636. Article I, section 7 protects the individual’s right of privacy by mandating that “whenever the right is unreasonably violated, the remedy must follow.” Id. at 632 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). For example, the remedy for an unexcused failure to comply with the statutory “knock and announce” rule is suppression of the evidence obtained after the entry. State v. Coyle, 95 Wn.2d 1, 14, 621 P.2d 1256 (1980). Similarly, suppression is the appropriate remedy for the deliberate refusal to provide

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<sup>5</sup> The full text of CrR 2.3 is set forth in Appendix B.

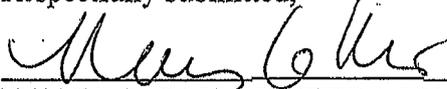
a copy of a search warrant to the person whose property is being searched. See e.g., United States v. Gantt, 194 F.3d 987, 994 (9<sup>th</sup> Cir. 1999), overruled on other grounds, United States v. Grace, 526 F.3d 499 (9<sup>th</sup> Cir. 2008) (holding the deliberate or prejudicial violation of the rule governing warrant execution, including service upon home owner, requires suppression). The court concluded that the police officer's refusal to give Ollivier his requested copy of the search warrant was "deliberate" and he was detained him in a place where he could not witness the three hour search or know about its limitations. CP 229-330. This violation of CrR 2.3 undermines the lawfulness of the search and requires suppression.

E. CONCLUSION.

For the foregoing reasons, Mr. Ollivier respectfully requests this Court hold that the pretrial delay violated his right to a speedy trial as guaranteed by the constitution and CrR 3.3. Furthermore, the improprieties in obtaining and executing the search warrant require suppression of the illegally seized materials.

DATED this 11<sup>th</sup> day of April 2012.

Respectfully submitted,

  
NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

## **APPENDIX A**

CONTINUANCES ORDERED OVER OLLIVIER'S OBJECTION<sup>1</sup>

9/11/07	<i>No prejudice to defendant</i> ; State witnesses not available; defense expert appointed. CP 268; 1RP 14.
10/19/07	Defense needs expert consultation. CP 269; 1RP 20.
11/2/07	<i>No prejudice to defendant</i> ; defense investigation ongoing; defense expert has not completed work; both counsel to be unavailable for trial. CP 277; 1RP 25.
11/30/07	<i>No prejudice to defendant</i> , forcing defense counsel to go to trial would cause greater prejudice; both parties seek additional discovery. CP 278; 1RP 29-32.
12/28/07	"Important" for defense counsel to be prepared; defense investigation incomplete. CP 279, 1RP 35.
1/18/08	Defense seeks records from DOC. CP 280.
3/7/08	Defense investigation incomplete. CP 282; 1RP 42.
5/6/08	Defense still seeks DOC records. CP 283; 1RP 44.
5/16/08	Defense has moved to compel DOC records. CP 295.
6/4/08	Defense investigation incomplete; court "concerned" about case, one of the oldest in county. CP 285; 1RP 46-47.
7/3/08	New defense investigator appointed; defense counsel to be on vacation. CP 286.
7/25/08	Defense investigation on-going; detective vacation. CP 287; 1RP 49.
9/5/08	Defense seeks SPD records regarding Saario and OPD funds for DOC records; prosecutor to be on vacation. CP 288; 1RP 52.
10/10/08	Defense still seeks SPD records. 1RP 53.
11/7/08	Defense counsel still "digesting" discovery; still seeks DOC records. CP 289; 1RP 57-58.
11/13/08	Prosecutor to be on vacation, discovery still incoming. CP 290; 1RP 62.
11/21/08	Defense counsel has not prepared CrR 3.5, 3.6 brief; prosecutor to be on vacation. Granted only to 12/23/08. CP 291; 1RP 66.
12/23/08	Defense counsel has not prepared CrR 3.5, 3.6 brief; will be in trial. CP 292; 1RP 71.
1/21/09	Defense investigation and interviews ongoing; briefing schedule set. CP 294; 2RP 2-5.
3/9/09	Parties acting in due diligence; Note defendant's objection. CP 295; 3RP 38-39.

<sup>1</sup> Each court order referenced herein is attached to Appellant's Opening Brief, Appendix A.

## **APPENDIX B**

## **RULE 2.3 SEARCH AND SEIZURE**

**(a) Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by the court upon request of a peace officer or a prosecuting attorney.

**(b) Property or Persons Which May Be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

**(c) Issuance and Contents.** A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court shall record a summary of any additional evidence on which it relies. The warrant shall be directed to any peace officer. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified. It shall designate to whom it shall be returned. The warrant may be served at any time.

**(d) Execution and Return With Inventory.** The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly

and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

**(e) Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.

**(f) Searches of Media.**

(1) *Scope.* If an application for a search warrant is governed by RCW 10.79.015(3) or 42 U.S.C. §§ 2000aa et seq., this section controls the procedure for obtaining the evidence.

(2) *Subpoena Duces Tecum.* Except as provided in subsection (3), if the court determines that the application satisfies the requirements for issuance of a warrant, as provided in section (c) of this rule, the court shall issue a subpoena duces tecum in accordance with CR 45(b).

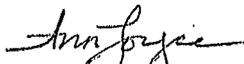
(3) *Warrant.* If the court determines that the application satisfies the requirements for issuance of a warrant and that RCW 10.79.015(3) and 42 U.S.C. §§ 2000aa et seq. permit issuance of a search warrant rather than a subpoena duces tecum, the court may issue a warrant.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached (**Petitioner's Supplemental Brief**), was filed in the **Washington State Supreme Court** under **Case No. 86633-3**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- James Morrissey Whisman  
King County Prosecutor's Office  
W554 King County Courthouse  
516 3rd Ave  
Seattle WA 98104-2362
  
- Brandon Ollivier  
772696  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

Attorney for other party



ANN JOYCE  
Washington Appellate Project

Date: April 11, 2012

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Please accept the attached documents for filing in the above-referenced subject case.

Petitioner's Supplemental Brief

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By  
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