SUPREME COURT No.: 90734-0

COA NO. 31168-6-III

SUPREME COURT OF WASHINGTON

ELVIS CAMILLO R. LOPEZ, Appellant,

v.

STATE OF WASHINGTON, Respondent,

Petition for Review

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I. THE PETITIONER & THE COURT OF APPEAL'S OPINION

Elvis Lopez was tried for and convicted of numerous felonies in Benton County. He appealed those convictions to Division III of the Court of Appeals under case number 31168-6-III. In an unpublished opinion, the Court of Appeals affirmed each of Mr. Lopez's convictions.[1] A copy of this opinion is attached as Appendix A (hereinafter "Opinion").

II. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals misapplied the four *Barker* factors when it failed to recognize that the State shoulders the burden of proving a valid reason for pretrial delay under the Constitutional Speedy Trial Rule.

B. Whether the Court of Appeals can blame a defendant for a thirteen month delay based upon "competency issues," even when the record fails to show that there was a genuine issue about the defendant's competency to stand trial.

C. Whether this case presents an issue of substantial public interest when the State is allowed to delay a defendant's trial for over a year for so-called "competency issues," claiming that the defendant is mentally-ill and suicidal, despite being clearly competent to stand trial.

III. STATEMENT OF THE CASE

On April 13, 2010, Elvis Lopez woke up in Benton County Jail without any recollection about how he got there. Three days later, Mr. Lopez was charged with several crimes relating to an incident that

[1] The Opinion did, however, find that Mr. Lopez's offender score may have been miscalculated and remanded the case back to the trial court for resentencing. Opinion at 1.

involved his girlfriend. During the incident, the State alleged that Mr. Lopez stole his ex-girlfriend's vehicle and was subsequently chased by police. The chase ultimately ended when Mr. Lopez crashed the car and was arrested.

Throughout the encounter, Mr. Lopez was highly intoxicated and could not remember anything about what had happened on April 13, 2010. Apparently, based upon Mr. Lopez's level of intoxication, and other vague, unexplained competency concerns, the trial court ordered a competency hearing, staying the proceedings indefinitely.

Mr. Lopez's case was put on hold for a total of thirteen months after the court ordered a competency review two months after charges were filed. The record is lacks the specific details as to why it took thirteen months to finally determine that Mr. Lopez was competent, but the unexplained gaps in the record are significant and revealed in the timeline below:

- June 9, 2010 - - The Court orders that Mr. Lopez submit to a competency evaluation. In so doing, the court stayed Mr. Lopez's case indefinitely, waiting for a competency evaluation so that it could find him competent to stand trial.
- August 5, 2010 - - The trial court received the competency evaluation from Dr. Nathan Henry of Eastern State Hospital. Dr.

Henry finds that Mr. Lopez was clearly competent to stand trial.[2]

- May 25, 2011 - - The expert files his report in which he agrees that Mr. Lopez was clearly competent to stand trial.[3] Despite there being no real dispute over Mr. Lopez's competency, Mr. Lopez's case is delayed three additional months without holding a competency hearing and without any explanation in the record.
- July 22, 2011 - - At the request of the State, the court finally holds what appears to be a pointless competency hearing, as neither party disputed Mr. Lopez's competency at this point. After the hearing, the court set Mr. Lopez's case for trial. During that time, the court held at least nineteen different status hearings regarding the defendant's competency.
- August 17, 2011 – After being found competent to stand trial, Mr. Lopez decided to hire new counsel, Mr. Etherton appears in court on Mr. Lopez's behalf. The court then orally allowed Mr. Etherton to substitute in as counsel.[4]

After being declared competent to stand trial, Mr. Lopez objected to every continuance of his trial thereafter. Over his objection, the trial court continued his trial four times. Ultimately, Mr. Lopez was not tried

[2] CP 19, 20, 28
[3] RP (Munoz) 5/25/11 at 10; CP 44-49.
[4] Opinion at 7-8. Though he did not file his notice of appearance until months later, Mr. Etherton continued to appear in court for Mr. Lopez.

until two years after his arraignment. Finally, despite his numerous objections, the trial court allowed Mr. Lopez's case to linger in the trial court for an additional 131 days before Mr. Lopez was finally sentenced on September 4, 2012.[5]

IV. WHY THIS COURT SHOULD ACCEPT REVIEW

A. THE OPINION CONFLICTS WITH *BARKER* AND VIOLATES MR. LOPEZ'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

In *Barker v. Wingo*,[6] the United States Supreme Court articulated a four-part test to determine when government delay has abridged the Sixth Amendment right to a speedy trial. The factors to be considered include: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of the right to speedy trial; and (4) the prejudice caused by the delay. No single factor is necessary or sufficient.[7]

Here, the Opinion properly recognizes that these factors apply, but it fails to properly apply them throughout the Opinion. In particular, the Opinion ignores material facts and vital rules of law under *Barker*, such as the burden of proof. These obvious mistakes are discussed in detail below.

1. LENGTH OF THE DELAY

The first *Barker* factor, when properly applied, requires the court

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[5] RP Munoz (9/4/12) at 498-500.
[6] *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972),
[7] *Id.*

to engage in a dual inquiry. The first inquiry—whether the length of the delay is "presumptively prejudicial"—requires the court to determine whether the case was delayed long enough to warrant further inquiry.[8] Delays of eight months to one year are presumptively prejudicial. The second inquiry requires the court to balance "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim."[9]

Here, the Opinion correctly cites these general rules. It also correctly admits that the over two-year-long delay of Mr. Lopez's trial is "presumptively prejudicial." [10] Where the Opinion fails, however, is applying the second inquiry, which required the Court of Appeals to consider how long past the "bare minimum" for a speedy trial violation.[11]

As the Opinion conceded, an eighth month delay is sufficient to warrant discussion about whether there was a speedy trial violation. And here, it took the State ***three*** times that amount of time to bring Mr. Lopez to trial. But the Opinion completely fails to perform this required comparative analysis as required under *Barker*.

Instead, the Opinion merges its analysis under the "length of the

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[8] *Id.* ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance[.]").
[9] *Doggett v. U.S.*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).
[10] *See Doggett*, 505 U.S. at 652.
[11] *Id.*

delay" with the inquiry it must perform under the second *Barker* factor ("the reasons for the delay").[12] And even worse, this improper analysis allowed the Court of Appeals to incorrectly hold that the 25 month delay in the trial weighed in favor of the State. Under the proper analysis, numerous other courts have held that delays of more than two years have consistently weighed in favor of *the defendant*, not the State, as the Court of Appeals held here.[13]

But, the Opinion fails to even recognize this burden, and thus fails to properly apply it.

2. REASONS FOR THE DELAY

The second *Barker* factor ("the reasons for the delay") requires the court to answer this important question: "whether the government or the criminal defendant is more to blame for th[e] delay."[14] The Supreme Court has grouped possible reasons for delay into three general categories: valid,

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[12] See Opinion at 13. (citing *Ollivier*, 178 Wn. 2d at 830-31)

[13] U.S. v. Gregory, 322 F.3d 1157, 1162 (9th Cir. 2003) ("Given that the [22 month] delay was not excessively long, however, it does not weigh heavily in Gregory's favor[.]"); U.S. v. Murillo, 288 F.3d 1126, 1132, 59 Fed. R. Evid. Serv. 23 (9th Cir. 2002) (13-month delay militated only slightly in defendant's favor); U.S. v. Tanh Huu Lam, 251 F.3d 852, 857 (9th Cir. 2001), as amended on denial of reh'g and reh'g en banc, 262 F.3d 1033 (9th Cir. 2001) (14½ month delay "militates slightly" in defendant's favor); U.S. v. Trueber, 238 F.3d 79, 88 (1st Cir. 2001) (22 month delay in case that was more complicated than "an ordinary street crime," but less so than "a serious, complex conspiracy charge," arguably was long enough to tip the scales slightly in favor of defendant); U.S. v. Munoz-Amado, 182 F.3d 57, 61–62 (1st Cir. 1999) (19-month delay in cocaine importation conspiracy enough to tip balance slightly in favor of defendant).

[14] *Doggett v. U.S.*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

improper, or neutral.[15] Valid reasons—such as missing witnesses—weigh in favor of the government, and all other reasons weigh in favor of the defendant.[16]

The Court offered two supposedly "valid" reasons: (1) "every time he got close to trial," Mr. Lopez was represented by multiple attorneys throughout the case, and (2) Mr. Lopez's third attorney needed time to prepare for trial.[17] More importantly, these delays fail to account for the most significant reason why Mr. Lopez's trial was delayed: Mr. Lopez's so-called competency issues.[18]

This mistake is an obvious and fatal misapplication of *Barker* for two notable reasons.

First, *Barker* obviously requires the court to consider any significant factor—especially the most significant reason—and decide who to blame for that delay. But here, the Opinion failed to do that. And, if the courts were allowed to simply ignore significant delays in bringing the defendant to trial, as the Court of Appeals did here, the right to a

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[15] *U.S. v. Battis*, 589 F.3d 673, 680 (3d Cir. 2009).

[16] *Vermont v. Brillon*, 556 U.S. 81, 90, 129 S.Ct. 1283, 1290, 173 L.Ed.2d 231 (2009) ("More neutral reasons such as negligence or overcrowded courts" weigh less heavily "but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.").

[17] Opinion at 12-13.

[18] Opinion at 13. In holding that the length of the delay weighed in favor of the State, the Opinion briefly mentions, that "Mr. Lopez's ongoing competency issues" as another valid reason for blaming Mr. Lopez for delaying his trial. This "additional obstacle"—according to the Opinion—prevented the State form bringing Mr. Lopez to trial within a reasonable amount of time. *Id.*

speedy trial would have little meaning.

Second, the Opinion misapplies *Barker* because it fails to recognize that the State, not the defendant, shoulders the burden to prove that any particular reason for delay—such as delays due to competency issues—is "valid" and therefore attributable to the defendant.[19] This burden is evident in the *Barker* decision itself and has been universally recognized by many lower courts.[20] The Opinion here completely fails to recognize this burden.

More importantly, this oversight matters, especially when the court, as happened here, failed to consider the longest contributor to why Mr. Lopez's trial was delayed: so-called "competency issues" that delayed Mr. Lopez's trial for 13 months. In fact, the Ninth Circuit has, under almost identical circumstances, found a speedy trial violation when the prosecutors could not prove that an allegedly incompetent defendant was responsible for significant, but unexplained delays in his trial.

In such a case, *McNeely*,[21] the defendant was arrested and charged in a pending California state felony case. His case, like Mr. Lopez's, was repeatedly continued due to a combination of competency hearings,

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[19] *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004)("The Supreme Court places the burden on the state to provide an inculpable explanation for delays in speedy trial claims[.]"); *McNeely v. Blanas*, 336 F.3d 822 (9th Cir. 2003).
[20] *Id.*
[21] *Id.*

replacements of counsel, commitment to a state hospital and numerous other continuances.[22] The Ninth Circuit held that the California State prosecutors had violated McNeely's constitutional right to a speedy trial. Most notably, they had failed to adequately explain why the defendant, rather than the Government, had failed to bring McNeely to trial over that three year period, and it did so under circumstances that are virtually identical to those that we have here.

In *McNeely*, the District Court, like the Court of Appeals here, "attributed the majority of the delay to Petitioner's actions and competency issues."[23] But, the Ninth Circuit reversed, holing that "the district court clearly erred" in blaming McNeely for the delays, because "the record [on appeal did] not support such a finding" and that mistake must be placed on the Government[24] The Opinion here makes this very same mistake and its reasoning should be corrected.

3. DEMAND FOR A SPEEDY TRIAL

The opinion claimed to recognize that a defendant's assertion of his speedy trial right is often "entitled to strong evidentiary weight in determining whether a defendant is being deprived of the right."[25] This rule exists "because a timely demand for a speedy trial often supports an

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[22] *Id.* at 825.
[23] *Id.* at 828.
[24] *Id.*
[25] *Barker v. Wingo*, 407 U.S. 514, 531–32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

inference that the defendant was not at fault for the delay and that the delay prejudiced the defendant."[26] That is what happened here.

Over the course of 30 months, Mr. Lopez never signed a waiver of his right to his speedy trial or speedy sentencing. His case was stayed initially for a period of 13 months, during which time the trial court was allowed to continue Mr. Lopez's case without having to worry about Washington's own speedy trial rule. And finally, once that stay was lifted, and Mr. Lopez was given his first real tangible trial date, from then on, he repeatedly objected to every continuance.

Mr. Lopez repeatedly asserted his speedy trial right. But "his objections cannot be given effect when his own counsel sought the continuances to prepare for trial."[27]

But here, there is no evidence that a 13-month delay was at all necessary to prepare for trial. In fact, the limited record belies that conclusion. After all, Mr. Lopez was found to be competent only two months after the court ordered an evaluation. And although the defense did obtain an expert on its own to investigate Mr. Lopez's competency, he too

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[26] *U.S. v. Villarreal*, 613 F.3d 1344, 1353–54 (11th Cir. 2010) (citing *Barker v. Wingo*, 407 U.S. 514, 531, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) ("The strength of [the defendant's] efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences[.]"))

[27] Opinion at 14 (citing *Ollivier,* 178 Wn.2d at 840).

concluded that Mr. Lopez was in fact competent to stand trial. Yet, both before and after that second determination, Mr. Lopez's case was allowed to float around for months without a trial date set, without explanation, until the court finally held a pointless competency hearing.

4. PREJUDICE TO THE DEFENDANT

The Right to a Speedy trial, when properly applied, serves three purposes: (1) it prevents oppressive pretrial incarceration, (2) it minimizes the accused's anxiety and concerns while he waits for his day in court, and (3) it reduces the risk that significant delays will hinder the defendant's ability to defend himself.[28]

These purposes are reflected in *Barker*'s prejudice prong. To show prejudice under this rule, the defendant must show, in the record, that he suffered specific prejudice, such as elevated anxiety and concerns or specific prejudice to the defense, that coincides with these purposes.

The Court of Appeals held that Mr. Lopez suffered no such prejudice, but nothing could be further from the truth. Mr. Lopez suffered prejudice in two very obvious ways, both of which are evident from the record on appeal.

First, contrary to what the Opinion says, the State's reckless failure to disclose exculpatory evidence did cause prejudice under *Doggett*. A

[28] Barker, 407 U.S. at 532.

long pre-trial delay can cause prejudice to the defendant if it creates the "possibility that the accused's defense will be impaired."[29] Here, the State failed to disclose material, exculpatory evidence that it had in its possession for well over a year. On appeal, Mr. Lopez argued that failing to disclose this evidence prejudiced Mr. Lopez under *Doggett*, but the Court of Appeals rejected that argument,

According to the Opinion, the failure to disclose this evidence did not cause prejudice, because when the State finally disclosed this evidence, "neither party had reviewed the State's newly discovered video evidence"[30] The Opinion thus holds that this delay did not prejudice Mr. Lopez, and in fact appears to hold that it somehow benefitted him[31] In other words, even though the State withheld material exculpatory evidence from the defense for 18 months while Mr. Lopez awaited trial, Mr. Lopez suffered no prejudice because *the evidence* itself turned out to be favorable. Under this logic, whenever the State withholds favorable evidence, the defendant will never suffer prejudice because, when that evidence is finally disclosed, the defendant will be able to use that evidence in his own defense. This logic conflicts with *Dockett* and ignores the State's duty to disclose exculpatory evidence.

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[29] Opinion at 15.
[30] Opinion at 15.
[31] Opinion at 15 ("See Olivier, 178 Wn.2d at 845) (, "We weigh any impairment to Mr. Lopez's defense against this benefit.").

Second, contrary to what the Opinion states,[32] delaying Mr. Lopez's case for over two years resulted in "anxiety and concern" that was far more severe than the usual case. To begin, Mr. Lopez's obvious mental issues, which never really raised an issue of competency, were obvious to the Court and the State from the time he was charged, and from there, Mr. Lopez's mental condition only deteriorated over time. In fact, Mr. Lopez's mental condition got so bad that, while on pretrial detention he tried to commit suicide, *TWICE*. This prejudice is both "actual and particularized" as required by *Ollivier* and *Barker*.[33]

Further, both the Court and the State were aware of these facts, but chose to simply ignore them. While objecting to the repeated continuances, Mr. Lopez tried to complain about these very serious issues to the Court, only to be summarily dismissed by the Court. On October 19, 2011, for instance, Mr. Lopez objected to another continuance, telling the Court that he's "been in county for 18 months and never [once] signed [a] waiver" of speedy trial.[34] Then, he goes on to tell the Court that he was currently on suicide watch in the County Jail because he had already once tried to kill himself. Yet, upon hearing this complaint, both the State and

[32] Opinion at 15.
[33] Opinion at 15.
[34] RP (October 19, 2011 - - Omnibus Hearing) at 10.

the Court did nothing to help him.[35]

B. THIS COURT SHOULD ACCEPT REVIEW, BECAUSE THE SIGNIFICANT, YET ENTIRELY UNEXPLAINED DELAY FOR "COMPETENCY ISSUES" THAT OCCURRED IS NOT ISOLATED TO THIS ONE CASE. THUS, THIS CASE RAISES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT NEEDS THIS COURT'S GUIDANCE.

The public has a clear interest in bringing those who are mentally ill, but still competent, to trial without unnecessary delay. If the Court doubts the competency of the defendant, it must order a competency hearing. But, even if there is such doubt, the public still has an interest in the prompt administration of justice.

When a defendant is mentally ill and the Court doubts his competency, the Court must delay the trial, order an evaluation, and hold a competency hearing. If found competent, the Court must order that the defendant receive treatment, outside of the county jail, to restore his competency. If the Court finds the defendant competent, the Court must set a trial date and allow the case to proceed to resolution, after which time, the defendant can still obtain treatment, either in the prison system or out of custody.

But until the Court holds a competency hearing, mentally ill defendants in Washington have little to no chance of getting treatment for their illnesses. Most pre-trial detainees are held in county jails. And, as

[35] RP (October 19, 2011 - - Omnibus Hearing) at 11.

noted in a recent news article, these jails are invariably "not equip[ped] to handle the [mentally ill]" or to ensure that they receive treatment.[36] Without such treatment, mentally ill defendants suffer and their mental condition will surely deteriorate. [37]

Unfortunately, such delays in competency hearings appear to be prevalent in Washington. As noted in a recent news article, many other mentally ill defendants are suffering:

> "[W]hat we have here is waitlists for evaluations and for treatment," she said. "We have more than 200 people waiting 20, 40, 60 days in jails. The jails are not equipped to handle these people, and they're suffering."[38]

Just as these people suffered while waiting to be evaluated, so too did Mr. Lopez. Like these other defendants, it took two full months for Mr. Lopez's competency to be evaluated. But, Mr. Lopez's case is much worse than the average case for several reasons.

First, the length of time—13 months—it took to finally hold a competency hearing and to declare Mr. Lopez competent is clearly excessive and not justified by the record. Both experts (the State's and the defendant's) agreed that Mr. Lopez was competent to stand trial. Further, there was nothing in the record that would indicate otherwise. Mr. Lopez

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[36] *See* http://www.komonews.com/news/local/Lawyers-say-jailing-mentally-ill-unconstitutional-278095871.html.
[37] *Id.*
[38] *Id.*

was certainly mentally ill and in need of *treatment*, but there is not a shred of evidence to doubt his *competency*.

Second, the delay in this case is worse because while in county jail—without treatment—Mr. Lopez's mental health deteriorated *significantly*. In fact, it got so bad that Mr. Lopez tried to commit suicide, not once, but twice.[39] And even when Mr. Lopez announced in open court that he was "on suicide watch", the Court continued the case, over Mr. Lopez's objections, leaving Mr. Lopez in county jail to suffer no treatment at all for another seven months until he finally started trial.

V. CONCLUSION

For the reasons stated above, this Court should accept review of this case.

Dated October 15, 2014

Mitch Harrison
Attorney at Law

[39] *See id.*

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

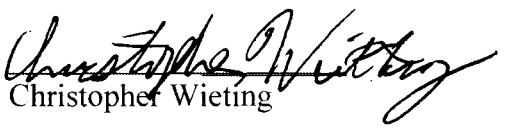
2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this Petition for Review on the following persons in the manner indicated below:

Benton County Prosecuting Attorney's Office 7122 W. Okanogan Place, Bldg. A Kennewick, WA 99336-2359	[X] U.S. Mail [ ] Email: [ ] Fax:
Washington State Supreme Court Supreme Court Clerk Temple of Justice PO Box 40929 Olympia, WA 98504-0929	[X] U.S. Mail [ ] Email: Supreme@courts.wa.gov [ ] Fax:
Elvis Lopez, DOC#813011 Airway Heights Corrections Center (Main) 11919 W. Sprague Avenue PO Box 1899 Airway Heights, WA 99001-1899	[X] U.S. Mail [ ] Email: [ ] Fax:
Court of Appeals Div. III 500 N. Cedar St. Spokane, WA 99201	[ ] U.S. Mail [ ] Email: [X] Fax: 509-456-4288

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED October 16, 2014 at Seattle, Washington.



Christopher Wieting