Case # 30222-9

Statement of Additional Grounds For Review

State of Washington
v.

Jose Leonel Mendez Moncada

COPY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30222-9-III
	)	
Respondent,	)	ADDITIONAL GROUNDS FOR REVIEW
	)	RAP 10.10
v.	)	
	)	
JOSE L. MENDEZ-MONCADA,	)	
	)	
Appellant.	)	

A. IDENTITY OF MOVING PARTY

1. COMES NOW the Appellant, Jose Leonel Mendez-Moncada, and hereby submit's the following additional grounds for review pursuant to RAP 10.10.

B. STATEMENT OF RELEVANT FACTS

2. The appellant, Jose Leonel Mendez-Moncada, was found guilty after jury trial of first degree rape of a child (Count 1) and attempted first degree child molestation (count 3). CP 96. As to both counts, the jury found by special verdict the aggravating circumstances of use of a position of trust to facilitate the commission of the crime. CP 5, 59.

3. Pursuant to RCW 9.94A.507, the court imposed confinement of concurrent terms of life with a minimum term of 140 months plus 35 months of aggravating circumstance (count 1) and life with a minimum term of 60 months plus 15 months on aggravating circumstances (count 3). Moncada filed a timely notice of appeal.

4. In the Brief of Appellant, appellate counsel raises three grounds for relief:

> 1. The findings that Mr. Moncada has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence;

2. The sentencing condition prohibiting the purchase, possession or viewing of "any pornographic material in any form as defined by the treatment provider or the supervising community corrections officer" is unconstitutionally vague;

3. The condition of community custody requiring Mr. Moncada to undergo plethysmograph testing as required by his community corrections officer violates Mr. Moncada's constitutional right to be free from bodily intrusions.

See, Brief of Appellant.

5. This is Moncada's pro se Statement of additional Grounds for Review pursuant to RAP 10.10.

C. FIRST ADDITIONAL GROUND FOR REVIEW

6. Ineffective Assistance of Appellant Counsel. The Sixth Amendment to the Constitution of the United States provides that a criminal defendant "shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. Amend. VI. To establish a claim of *ineffective* assistance of counsel, a *defendant* must show that his counsel's performance *was* deficient, and that he *was* prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, in cases where an *appellant* claims ineffective assistance of *appellant counsel*, the performance component of the Strickland *test* need not be addressed first "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland v Washington, 466 US, at 697, 80 L Ed 2d 674, 104 S Ct 2052. In order to prevail on his ineffective assistance of appellate counsel claim, Moncada must demonstrate that the legal issue which appellate counsel failed to raise had merit, and that he was actually prejudiced by appellant counsel's failure to raise the issue. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). In short, Moncada must establish that there is a reasonable

probability that, but for appellate counsel's deficient performance, the result of the proceeding would be different.

D. FIRST LEGAL ISSUE COUNSEL FAILED TO RAISE

7. Article I, section 22 of the Washington Constitution provides that ``[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial." Until State v. Iniguez., 167 Wn.2d 273 (2009), the Supreme Court of Washington had not yet determined what a "speedy public trial" requires under Article I, section 22 of our state constitution. In doing so for the first time, the Court found it useful to review the speedy trial protections guaranteed by the Sixth Amendment to the United States Constitution as a backdrop to the analysis of our own constitution. *See State v. Fortune*, 128 Wn.2d 464, 474-75, 909 P.2d 930 (1996) (noting that while federal cases are not binding for purposes of interpreting our state's constitution, they can be '''important guides'" in our analysis (quoting *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986))).

8. The Sixth Amendment reads in relevant part, ``In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a speedy trial '''is as fundamental as any of the rights secured by the Sixth Amendment.'" *Barker*, 407 U.S. at 515 n.2 (quoting *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). If a defendant's constitutional right to a speedy trial is violated, the remedy is dismissal of the charges with prejudice. *Id.* at 522.

9. It is recognized that some pretrial delay is often ``inevitable and wholly justifiable." However, the nature of the speedy trial right, which has been described as '''amorphous,' 'slippery,' and 'necessarily relative,'" makes it difficult to articulate at what point too much delay has occurred. *Vermont v. Brillon*, ___ U.S. ___, 129 S. Ct. 1283,

1290, 173 L. Ed. 2d 231 (2009) (quoting *Barker*, 407 U.S. at 522). As the United States Supreme Court noted:

> It is . . . impossible to determine with precision when the right [to a speedy trial] has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. . . . Thus . . . any inquiry into a speedy trial claim necessitates *a functional analysis of the right in the particular context of the case*. Barker, 407 U.S. at 521-22 (emphasis added) (footnote omitted). To provide guidance, the Court in *Barker* adopted an ad hoc balancing test that examines the conduct of both the State and the defendant to determine whether speedy trial rights have been denied.

Id. at 530.

10. As a threshold to the *Barker* inquiry, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial. Barker, 407 U.S. at 530. This inquiry is necessarily dependent on the specific circumstances of each case. Barker, 407 U.S. at 530-31. For example, the Court noted that a tolerable delay for trial on ``an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531. Because drawing the line is a fact-specific inquiry, the Court expressly rejected the notion that the constitutional speedy trial right can be quantified into a specific time period. *Id.* at 523. Moreover, a showing of presumptive prejudice cannot, by itself, prove a speedy trial violation-more is required. United States v. Loud Hawk, 474 U.S. 302, 315, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986)).

11. Under the Sixth Amendment analysis, once the defendant demonstrates a delay is presumptively prejudicial, that showing triggers the remainder of the *Barker* inquiry, which then examines the nature of the delay to determine if a constitutional violation occurred. *See id.* at 651. Some of the factors relevant to this determination are the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay causes prejudice to the defendant. Barker, 407

U.S. at 530. These are not the exclusive factors, as other circumstances may be relevant in the inquiry. *Id.* at 533. Nor are any of the factors, by themselves, necessary or sufficient. *Id.*

12. The first factor in the *Barker* inquiry, the length of the delay, focuses on the extent to which the delay stretches past the bare minimum needed to trigger the *Barker* analysis.

13. The second factor in the inquiry is the reason for the delay. Barker, 407 U.S. at 531. ``'[D]ifferent weights [are to be] assigned to different reasons' for delay." Barker, 407 U.S. at 531. If the defendant asks for the delay or agrees to the delay, then the defendant is deemed to have waived his speedy trial rights as long as the waiver is knowing and voluntary. Barker, 407 U.S. at 529. On the other hand, a deliberate delay caused by the government to frustrate the defense will be weighted heavily against the State. *Id.* at 531. If the State is merely negligent or the delay is due to overcrowded courts, the delay will still be weighed against the State, though to a lesser extent. *Id.*

14. The third factor is the extent to which the defendant asserts his speedy trial right. *Id.* The Court in *Barker* recognized that a defendant is more likely to complain the more serious the deprivation is. *Id.* Therefore, the defendant's assertion of his speedy trial right is entitled to ``strong evidentiary weight." *Id.* at 531-32. The defendant's assertions are ' objectively' examined in light of the defendant's other conduct. Loud Hawk, 474 U.S. at 314. If the defendant fails to assert the right, it will be more difficult to prove a violation. Barker, 407 U.S. at 532.

15. The fourth factor is prejudice to the defendant as a result of the delay. *Id.* Prejudice generally involves (1) ``'oppressive pretrial incarceration,'" (2) ``'anxiety and concern of the accused,'" and (3) ``'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Barker, 407 U.S. at

532. Pretrial incarceration disadvantages the accused because it often means job loss and disruption to family life. *Barker*, 407 U.S. at 532. It also has a practical effect of hampering a defendant's preparation of his defense because he cannot gather evidence or contact witnesses on his own behalf. *Id.* at 533.

16. While impairment to the defense is the most serious form of prejudice, it is often the most difficult to prove because ``what has been forgotten [or lost] can rarely be shown." *Id.* at 532. Accordingly, the United States Supreme Court held that a defendant is not required to substantiate actual prejudice to his ability to defend himself because ``excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655. Courts presume this prejudice to the accused ``intensifies over time." *Id.* at 652.

17. While the statutes and court rules governing speedy trial rights were enacted for the purpose of enforcing the constitutional right to a speedy trial, they are not themselves a *guaranty* of constitutional rights. *State v. Brewer*, 73 Wn.2d 58, 62, 436 P.2d 473 (1968) (interpreting CrR 3.3's precursor, RCW 10.46.010). Instead, CrR 3.3 provides a framework for the disposition of criminal proceedings without establishing any constitutional standards. See, 5 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure 1207, at 256 (3d ed. 2004). As a result, ``a violation of the rules is not necessarily a constitutional deprivation." *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (citing *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980)). In enacting these time-for-trial rules, the legislature did not conceive or contemplate that the limitation so established should become an inflexible yardstick by which the constitutional guarantees to a speedy trial of felony charges would be measured. *State v. Moore*, 60 Wn.2d 144, 372 P.2d 536 (1962); *State v. Silver*, 152 Wash. 686, 279 P. 82 (1929).

18. Under CrR 3.3(b)(1)(i): "A defendant who is detained in jail *shall* be brought to trial within 60 days after the commencement date specified in this rule". CrR 3.3(b)(1)(i). Pursuant to CrR 3.3(c): "The initial commencement date *shall* be the date of arraignment as determined under CrR 4.1". Moncada was arraigned on April 08, 2010.

19. Pursuant to CrR 3.3(b)(1)(i), Moncada argues, his CrR 3.3 time-for-trial rights were violated when the trial court granted multiple continuances beyond the time-for-trial expiration date. On February 15, 2011, Defense counsel moved Judge Michael G. McCarthy to grant a seven day continuance of the trial. The purpose of counsel's request for a continuance was two fold. First counsel needed additional time because he was involved in an[other] trial. See, CD Proceedings, February 15, 2011, pg. 16. Second, counsel needed additional time to transcribe a victim interview. See, CD Proceedings, February 15, 2011, pg. 16. Moncada not join in his attorney's request for a continuance. See, CD Proceedings, February 15, 2011, pg. 16. The State, however, joined in defense counsel's request for a continuance. See, CD Proceedings, February 15, 2011, pg. 16. Whereupon the following exchanges occurred:

> THE COURT: All right. And, Mr. Moncada, you're objecting to having this matter set over to next week; is that your position?
>
> MR. MONCADA: Well, I think I'm okay with just this one week, but I wouldn't want to sign any other continuances.
>
> THE COURT: Yes. All right. Well, I'll note that Mr. Moncada is not objecting to the reset of one week. I'll go ahead and do that. This doesn't push speedy trial back out another 30 days. I think everybody is in agreement on that?
>
> MS. HANLON: Well, actually, it's my understanding that a continuance would 30-day period, but I believe this does --

THE COURT: Well, I don't think an *administrative continuance* in order to accommodate Mr. Crowley's trial scheduled because he's starting another trial today. It (sic) pushes out till the end of March.

MS. HANLON: Well, I guess - -

THE COURT: But that's not my understanding, otherwise it's just these administrative continuances in order to accommodate trial schedules become meaningless.

MR. CROWLEY: Your Honor, is the Court finding good cause also for the need to produce the discovery as well?

THE COURT: - - and the need to produce the discovery. I'm going to note on here that speedy trial will continue - - will expire at this point. I believe the expiration was tomorrow (February 16, 2011), so I'll move it out to the 22nd (February 22, 2011).

MS. HANLON: Your Honor, I would just object for the record to the Court's calculation of speedy trial. I believe that any continuance granted on the rule would result in a 30-day buffer.

THE COURT: I - - you know, that - - I understand your position. However, it doesn't make sense to me if you just kept moving a case in order to pass accommodate somebody else's unavailability, that then creates a big bubble again in 30 days. So I may be wrong, but that's the way I read it, that it doesn't.

See, CD Proceedings, February 15, 2011, pg. 16-19.

20. Three days after the above referenced hearing, the State appeared before Judge Ruth E. Reukauf, ex parte, and handed up an order for the judge to sign reflecting a new speedy trial time of March 24, 2011 based on the seven day continuance granted by

Judge McCarthy on February 15, 2011. See, CD Proceedings, February 15, 2011, pg. 16.*

21. On February 28, 2011, the parties appeared before Judge McCarthy for a hearing. At that hearing defense counsel, Mr. Crowley, informed Judge McCarthy:

> MR. CROWLEY: Your Honor, this matter came on before, actually Your Honor in this Court on February 14. At that time both parties believed - - and I still believe - - that the expiration date on the date that we last appeared was February 15. Both parties informed the Court of that.
>
> I started trial on that same day in Judge Gavin's courtroom on a case captioned State of Washington v. Fidel Medina. That was a two day trial that took about eight days or nine.
>
> At the last appearance we asked for a five day - - well, it wasn't a five day extension, we asked for the Court to find good cause to continue, I believe, one week at that time, and Your Honor wrote on the order that it was excluding the five days. Therefore, I think it's fair to say that the current expiration period was February 22.
>
> I was in Judge Gavin's courtroom and have not until this date asked the Court reset the proper trial date, but I believe that today is the expiration period. I've informed Ms. Hanlon of that on Friday - - or Thursday, actually. We spoke about it on Friday. I think there's just a simple disagreement as to the applicability of the rules.
>
> But I should state that Mr. Moncada at the last hearing did not sign an extension or a waiver that would therefore set a new commencement date, and I think I'll leave it at that. We believe that without a motion by the State the speedy trial expires today.
>
> MR. CLEMENTS: I guess not knowing all of the facts, Ms. Hanlon asked me to stand in today. My understanding is under the new court rules, Court Rule 3.3 - - I'm looking at specifically time for trial, 3.3(B)(5), allowable time after excluded period, any period of time that is excluded pursuant to Section E, the allowable time for trial shall not expire earlier than 30 days after the end of the excluded period.

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* It should be noted that Judge McCarthy extended the speedy trial expiration until February 22, 2011. The order the State took to Judge Reukauf on February 18, 2011, (see CD Proceedings, February 18, 2011) reflected a speedy trial expiration of March 24, 2011. The order the *State* took to Judge Reukauf, on February 18, 2011, extended the speedy trial expiration 30-days pass the expiration set by Judge McCarthy.

> The order that he – well, he refused to sign – and I stated refused on the order, and that's why we think the F section applies. Your Honor's original calculation is correct, but I have to demand that current trial date or a speedy trial date be set. I'm making that demand today and I think that the expiration date is today.

See, CD Proceedings, February 28, 2011. Pg. 20-28. An affirmative answer to either of the following questions, Moncada submits, requires vacation of his underlying felony convictions.

22. The first question presented is:

> Whether Judge McCarthy incorrectly applied the law and abused his discretion when ruled from the bench on February 15, 2011, that a one week extension of time for trial to accommodate counsel's trial schedule *doesn't push speedy trial back out 30-days.*

See, CD Proceedings, February 15, 2011, pg. 17.

23. The second question presented is:

> Whether Deputy Yakima Prosecuting Attorney Tamara Hanlon committed prosecutorial misconduct when three days after Judge McCarthy ruled that *a one week extension of time for trial to accommodate counsel's trial schedule doesn't push speedy trial back out 30-day* she appeared before another judge, Judge Reukauf, that she had spoken to Moncada's defense lawyer about the proposed order which reflected a speedy trial continuance to *March 24, 2011,* when in fact Judge McCarthy had ruled, and the defense had agreed, to a continuance to *February 22, 2011.*

(a) Standard of Review

24. The trial court may grant a continuance when it is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense". CrR 3.3(f)(2). This Court reviews a decision to grant a continuance for an abuse of discretion. *State v. Yuen*, 23 Wn. App. 377, 378-89, 597 P.2d 401 (1979). The trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Downing*, 151 Wn. 2d

When you look to Section E, excluded periods, that would be 3.3 under excluded period, Sub E, the - - Subsection 1.3 - - excuse me, Section 3 Continuances, delay granted by the court pursuant to Section F, and then F, a motion of the court or party - - this is F(2) - - on motion of (sic) the court or the party, the court may continue the trial date to a specified date and such a continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial's expired and the court must state on the record or in writing the reasons for the continuance.

It would be the State's position that that is a continuance under the rules and excluded period which triggers that the new setting of the trial date, speedy trial, under the court rules says, shall not expire earlier than 30 days after the end of that excluded period. It'd be the State's position there's 30 days from the new continued trial date based on unavailability. . . .

THE COURT: Okay. Well, here's part of the problem, so that - - there's dueling orders here. I signed one on 2/15. It says speedy trial expires 2/22. That was the administrative continuance to accommodate Mr. Crowley's being in trial on the Medina case.

Judge Reukauf cited his trial status (sic) over three days later saying that the speedy trial expires on 3/24.

MR. CLEMENTS: Yeah. So it would be the State's position that 3/24 would be the expiration date based on the Court rule.

THE COURT: Okay. Well, that seems to be that - - what Judge Reukauf put. Now I don't know if Mr. Crowley was present or not. His signature isn't on the order.

MR. CROWLEY: No, I was not. And we believe that Your Honor had the correct calculation of 3/22, but we - - I believe - -

The Court: 2/22.

MR. CROWLEY: Sorry, 2/22. But I believe also that I have an obligation to come to the Court to ask fore that to be corrected. We're appearing today for that to be corrected. And therefore we believe that the - - today's the last allowable date for trial, unless there's a motion by the State to continue the case.

MS. CLEMENTS: I think after the Court rules - - Supreme Court amended the court rule there *used* to be an administrative continuance. I think under the new rules any time the court for - - its on motion for administrative cause, that triggers under the new rules an excluded period. And that's just how I interpret the rule that whenever there's an excluded period it says under sub 5, 3.3(b)(5), that it shall not expire earlier than 30 days after the excluded period, which would be the setting of the new trial date.

MR. CROWLEY: And if I may add to it, I believe that that only is true if in fact Mr. Moncada agreed to the continuance, which he did not.

265, 272, 87 P.3d 1169 (2004). To answer the first question presented in this motion, the court must decide whether Judge McCarthy acted in a manifestly unreasonable manner when he continued trial from February 15, 2011, to February 22, 2011, *without* extending the time for trial by 30-days as required by CrR 3.3(5) if any period is excluded pursuant to CrR 3.3(e).

25. According to CrR 3.3(5):

> *Allowable Time After Excluded Period.* If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

CrR 3.3(5).

26. Here, there is nothing in the record to suggest that Judge McCarthy continued the time for trial pursuant to CrR 3.3(e). Under CrR 3.3(e):

> *Excluded Periods.* The following periods shall be excluded in computing the time for trial:
>
> (1) *Competency proceedings.* All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.
>
> (2) *Proceedings on unrelated charges.* Arraignment, pre-trial proceedings, trial and sentencing on an unrelated charge.
>
> (3) *Continuances.* Delay granted by the court pursuant to section (f).
>
> (4) *Period between dismissal and refiling.* The time between the dismissal of a charge and the refiling of the same or related charge.
>
> (5) *Disposition of related charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) *Defendant subject to foreign or federal custody or conditions.* The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) *Juvenile proceedings.* All proceedings in juvenile court.

(8) *Unavoidable or unforeseen circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) *Disqualification of judge.* A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

27. The trial court is responsible for ensuring compliance with time for trial rules. CrR 3.3(a)(1). The court may grant a continuance where it is ``required in the administration of justice, " provided that the defendant will not be substantially prejudiced in the presentation of his or her defense. CrR 3.3(f)(2). In granting a continuance, the court ``must state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2).

28.``[A]ll relevant factors" may be considered by the trial court in exercising its discretion to grant or deny a continuance. *State v. Heredia-Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003). Such factors may include ``surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004). Pursuant to CrR 3.3, the ``'unavailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension.'" *Williams*, 104 Wn. App. at 522 (quoting *State v. Carson*, 128 Wn.2d 805, 814, 912 P.2d 1016 (1996)). Furthermore, even routine scheduling conflicts may be a

valid basis for granting a continuance. See Heredia-Juarez, 119 Wn. App. at 153-55 (holding that a continuance granted to accommodate a prosecutor's reasonably scheduled vacation was not an abuse of the trial court's discretion).

29. Judge McCarthy acted within the Court's discretion when he continued the commencement of Moncada's trial from February 15, 2011, to February 22, 2011, with[out] extending the time for trial 30-days as specified in CrR 3.3 (b)(5). Although it is true that a period of time *excluded* under CrR 3..3 (e) extends the allowable time for trial 30 days after the end of the excluded period, there is nothing in the record of Moncada's case to support a conclusion that Judge McCarthy excluded a period of time under CrR 3..3(e). Judge McCarthy *continued* Moncada's trial from February 15, 2011 to February 22, 2011 (7-days) *administratively* in order to accommodate defense counsel's (Mr. Crowley's) trial schedule..... (See, CD Proceedings, February 15, 2011, pg. 16-19). In so doing, Judge Mc Carthy specifically refused to extend the time for trial 30-days after February 22, 2011. Although the State noted its objection to Judge Mc Carthy's refusal to extend the trial 30-days after February 22, 2011, , Judge Mc Carthy still refused, concluding, ". . . it doesn't make sense to me if you just kept moving a case in order to pass accommodate somebody else's unavailability, that then creates a big bubble again in 30-days". See, CD Proceedings February 15, 2011, pg. 16-19.

30. Had Judge McCarthy extended Moncada's time for trial 30-days after February 22, 2011 pursuant to CrR 3.3(b)(5), Moncada would have objected. Pursuant to CrR 3.3 (d):

> (d) *Trial settings and notice - Objections - Loss of right to object.*
>
> (2) Resetting of trial date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the

time limits prescribed and notify each counsel or party of the date set.

> (3) *Objection to trial setting*. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court to set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d).

31. Judge McCarthy specifically ruled that the Court was *not* extending Moncada's time for trial period 30-days from February 22, 2011. As a result, Judge Mc Carthy did *not* provide Moncada notice of an extension of the time for trial period which would have been required under CrR 3.3(d) had the court extended the time for trial period. Accordingly, Moncada did not have an opportunity to object to a new trial setting which he would have had the right to do under CrR 3.3(d). This is further evidence that Judge Mc Carthy did *not* extend Moncada's time for trial period 30-days from February 22, 2011 pursuant to CrR 3.3(e). If Judge McCarthy had extended Moncada's time for trial period pursuant to CrR 3.3(e), Moncada would have objected to the extension and would have requested a hearing on the matter pursuant to CrR 3.3(d)(3).

32. Because there is no evidence in the record to support a conclusion that Judge Mc Carthy extended Moncada's time for trial period 30-days from February 22, 2011 pursuant to CrR 3.3(e), this Court should hold that Judge Mc Carthy acted within his discretion when he rescheduled the starting date of Moncada's trial from February 15, 2011 to February 22, 2011 without extending the time for trial period 30-days from February 22, 2011 pursuant to CrR 3.3(b)(5). The Court should also hold that *if* Judge Mc Carthy had excluded Moncada's time for trial 30-days from February 22, 2011, Moncada had the right to notice and to request a hearing on the matter pursuant to

CrR 3.3(d). However, because Judge Mc Carthy specifically ruled that the court was *not* extending the time to start Moncada's trial in accordance with CrR 3.3(b)(5) b), there was no need for Moncada to exercise his right to object or to request a hearing under CrR 3.3(d). Thus, the Court should rule, *if* Judge McCarthy abused his discretion in failing to extend Moncada's time for trial 30-days from February 22, 2011 pursuant to CrR 3.3(e)(5), the Court also, in abusing its discretion, deprived Moncada of his right to object to a new trial setting and to request a hearing, contravention Moncada's rights to a fair trial and to due process.

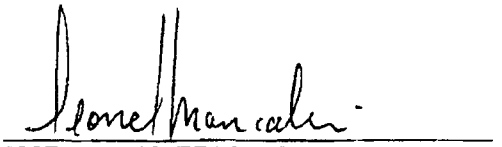
D. SECOND LEGAL ISSUE COUNSEL FAILED TO RAISE

33. In answer to the second question, the Court should find that the state committed prosecutorial misconduct when it appeared before a different judge 3-days after Judge McCarthy reset Moncada's time for trial to begin on February 22, 2011, exparte, and informed the judge that the the parties had agreed to an extension of the time for trial to March 22, 2011. An evidentiary hearing will prove that that was misinformation, and that the allowable time for trial in Moncada's case had expired on or about March 1, 2011. As a result of this issue the Court should vacate Moncada's conviction and dismiss the underlying matter with prejudice.

It Should be so ordered.

DATED this 10th day of September, 2012.

Respectfully submitted,
BY THE APPELLANT:



JOSE L. MENDEZ-MONCADA
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Coyote Ridge Corrections Center
P.O. Box 769
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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Jose Leonel Moncada Mendez, declare and say:

That on the 10TH day of SEPTEMBER, 2012, I deposited the following documents in the Coyote Ridge Corrections Center Legal mail system, by First Class pre-paid postage, under Cause No. 30222-9-III

Enclosed are:

Additional Grounds for Review

Addressed to the following:

The Court of Appeals	Prosecuting Attorney Office	Gasch Law Office
Of the State of Washington	Kevin Gregory Eilmes	Susan Marie Gasch
Division III	128 N. 2nd Street Room # 211	P.O Box 30339
Spokane, WA.	Yakima, WA.	Spokane, WA.
99201	98901	99223-3005

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 10TH day of SEPTEMBER, 2012, in the City of Connell, County of Franklin, and State of Washington.

Jose Leonel Moncada Mendez
DOC # 349000, GA 10-3U
Coyote Ridge Corrections Center
P.O Box 769
Connell, WA. 99326-0769