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DIVISION III
STATE OF WASHINGTON
By _____

SUPREME COURT NO. _____

COURT OF APPEALS NO. 31465-1-III

91750-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL LEON SHEMESH, Petitioner

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Michael L. Shemesh, asks this Court to review the decision by the Court of Appeals, Division III, referred to in Section B.

B. COURT OF APPEALS DECISION

Mr. Shemesh seeks review of the Court of Appeals Division III published decision that concluded Mr. Shemesh's state and federal constitutional speedy trial rights were not violated despite an over three year span between arraignment and trial. Mr. Shemesh was held in the local jail the entire time. The Benton County office of public defense (BCOPD) assigned and reassigned 5 different attorneys to Mr. Shemesh, 3 of whom were removed by BCOPD for its own reasons. The unilateral decision to change attorneys contributed significantly to the length of delay, as well as the failure of assigned counsels to review the evidence and move the case forward. The Court of Appeals determined the delays were attributable to Mr. Shemesh, rather than a systemic breakdown in the BCOPD. The Court of Appeals decision is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

(1) Mr. Shemesh speedy trial right is guaranteed under the Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington. Where there is a pretrial delay of over 38 months as a result, in large measure, because the Benton County Office of Public Defense made unilateral decisions to reassign his attorneys, has the petitioner established a violation of his right to a speedy trial as a result of a systemic breakdown in the public defender system?

D. STATEMENT OF THE CASE

Michael Shemesh was charged by information on August 4, 2009, with two counts of first degree child rape and one count of sexual exploitation of a minor. (CP 1-2). He was assigned an attorney at the district court, but was appointed new counsel at arraignment eight days later. (RP 3-4)¹. Trial was set for September 28, 2009. (CP 7).

¹ The Report of Proceedings spans over 3 years and was compiled by different court reporters. For purposes of this brief, the volumes are designated as follows:

The following hearing dates will be designated as RP page no. 8/12/09, 1/6/10, 1/13/10, 2/17/10, 3/3/10, 4/7/10, 10/20/10, 11/17/10, 2/9/11, 5/4/11, 5/18/11, 6/22/11, 8/3/11, 8/17/11, 8/24/11, 1/11/12.

The following hearing dates will be referenced as 1RP page no.: 8/19/09, 9/23/09, 2/3/10, 4/14/10, 5/19/10, 5/26/10, 6/9/10, 9/1/10, 9/22/10, 12/8/10, 12/15/10, 6/15/11, 8/10/11, 9/21/11, 10/5/11,.

The following hearing dates will be referenced as 2RP page no. 9/29/09, 11/18/09, 1/20/10, 5/5/10, 7/14/10, 8/4/10, 9/29/10, 10/6/10, 11/3/10, 4/13/11, 4/27/11, 7/20/11, 8/31/11, 9/7/11, 9/14/11,

Over the next 39 months, 87 pretrial hearings were held. Mr. Shemesh was assigned and reassigned five different attorneys. (CP 7, 5RP 2, 2RP 10, RP 20, 3RP 27). He was twice evaluated for competency to stand trial and hospitalized for medical reasons once. (CP 19-27; 50; 1RP 10). The charging information was amended three times. (CP 10, 15, 180). Mr. Shemesh's fifth assigned attorney made dismissal motions based on speedy trial violations, mismanagement by the BCOPD, and inability to obtain discovery from the State. The motions were denied. (Vol. 2RP 153-311; Vol. 11RP 1838-1858).

10/26/11, 11/9/11, 11/16/11, 11/23/11, 11/30/11, 12/21/11, 12/28/11, 1/4/11, 4/25/11, 1/9/13.

The following hearing dates will be referenced as 3RP page no.
11/4/2009, 11/25/09, 1/27/10, 3/31/10, 6/16/10, 6/30/10, 3/16/11, 10/12/11

The following hearing dates will be referenced as 4RP page no. 12/23/09, 8/11/10, 10/13/10, 5/8/12, 7/10/12, 8/30/12, 10/30/12

The following hearing dates will be referenced as 5RP page no.
4/28/10, 6/2/10, 8/18/10, 8/25/10, 12/1/10, 1/5/11, 1/19/11, 2/23/11, 3/2/11, 7/6/11, 2/29/12, 4/11/12, 8/22/12

Hearing date 11/9/12 will be referenced as Vol. 2 RP page no.

Hearing date 11/26/12 will be referenced as Vol. 3 RP page no.

Hearing date 11/27/12 will be referenced as Vol. 4 RP page no.

Hearing date 11/28/12 will be referenced as Vol. 5 RP page no.

Hearing date 11/29/12 will be referenced as Vol. 6 RP page no.

Hearing date 11/30/12 will be referenced as Vol. 7 RP page no.

Hearing date 12/3/12 will be referenced as Vol. 8 RP page no.

Hearing date 12/4/12 will be referenced as Vol. 9 RP page no.

Hearing date 12/5-6/12 will be referenced as Vol. 10 RP page no.

Hearing date 12/7-11/12 and 1/31/13 will be referenced as Vol. 11 RP page no.

Hearing date 2/26/13 will be referenced as Vol. 12 RP page no.

1. First Appointed Attorney: August 12, 2009 through April 28, 2010.

Counsel was appointed on August 12, 2009. (CP 7). On September 23, 2009, five days before trial, an ex parte order was entered for Mr. Shemesh to undergo a mental health evaluation. (CP 19-27). Defense counsel requested a two-week continuance. (1RP 4). The proceedings were stayed. Prior to the stay, fifty-one days had passed and the speedy trial date was set to expire on October 2, 2009.

Forty-two days later, defense counsel asked for another two-week continuance to have time to obtain the already completed mental health evaluation. (3RP3). The evaluation was filed on November 12, 2009. (CP 28). The order of competency was entered November 25, 2009. (CP47). Accounting for the stay, there were 9 days left under speedy trial, however, the trial was instead reset to January 13, 2010. (3RP 6).

On December 23, 2009, defense counsel again requested and was granted a continuance to review the evidence. (4RP 21). January 6, 2010 counsel again requested and was granted a week's continuance to review evidence. (RP 8). A week later, counsel still had not looked at the evidence. (RP 9). Mr. Shemesh signed a waiver of speedy trial, with a new commencement date of January 13, 2010. A trial date was set for February 1, 2010. (CP 48; RP 9). January 27, 2010 counsel told the court

she had viewed the evidence and was in the process of a plea bargain.
(3RP 10).

On February 3, 2010, after six months of confinement, Mr. Shemesh asked the court to appoint a new attorney for him. (1RP5). He cited differences in the way the case was to be handled and his concern that he had not seen the information against him or any discovery. Defense counsel reported to the court that she did not there was a conflict. Without further inquiry, the court denied the request. (1RP 5). The court set March 1, 2010 as the new trial date. (1RP 7).

On February 17, 2010, Mr. Shemesh again signed a waiver, consenting to a date of March 29, 2010: with the order reading "the time from today's date to the next trial setting be excluded from computing the time for trial." (CP 49). On March 3, 2010, defense counsel asked for another order for a competency evaluation. (CP 50). The proceedings were again stayed.

The evaluation was received on March 31, 2010, but defense counsel was not available until April 7, 2010. (3RP 13). At that time she stated there was going to be a substitution of counsel. (RP 17). In a later hearing, counsel reported her contract with BCOPD had ended on March 15, 2010. (Col. 2 RP 165-66). The case remained on stay, as the order of competency was not entered. (1RP 9).

2. Second Appointed Attorney: April 28, 2010 through May 5, 2010.

On April 28, 2010, new counsel requested a continuance because a third attorney was going to be assigned. (5RP 2). In a later hearing, the indigent defense coordinator for the county testified the newly appointed counsel had requested an hourly payment, so the case was assigned to someone else. (Vol. 2RP 179;266).

3. Third Appointed Attorney: May 5, 2010 through October 20, 2010.

On May 5, 2010, the third appointed attorney requested a two-week continuance. (2RP 9-10). Although the order of competency was prepared, no one signed it. (Id.). On May 19, 2010, Mr. Shemesh was hospitalized for medical reasons. (1RP 10). His attorney later testified that he made a tactical decision to not enter the order of competency on either June 2 or June 9, 2010. (Vol. 2RP 196-97). Between June 9, 2010 and July 14, 2010, he asked for continuances to discuss the possibility of a resolution. The order was finally entered on July 14, 2010. (CP 65). The proceedings had been stayed for 134 days.

At the same hearing, counsel raised the problem for the first that he did not have a complete file, and had not been able to meet with Mr. Shemesh to review the video evidence with him. (2RP 10-13).

By August 11, 2010, Counsel had only seen part of one tape that was going to be used at trial. He requested continuances from August 4, 2010 and up through September 22, 2010. (4RP 22; 5RP 6-8; 1RP 13-14). On September 1, 2010, Mr. Shemesh again signed a waiver of speedy trial with a new trial date of October 25, 2010. (CP 67).

On September 22, 2010, a month before trial, counsel brought up the fact that he had not seen all the DVDs the State intended to use. Because previous counsel had not returned all the DVDs that were under the protective order, the State refused to issue another copy. (1RP 14). Eventually it was determined the DVDs were lost and the State was ordered to make another copy. (CP 68-70). On October 20, 2010, Mr. Shemesh moved for appointment of new counsel. He reported that nothing had been done to move his case forward and his attorney was still not up to speed on the evidence against him. (RP 20). This was the only attorney who was replaced at Mr. Shemesh's request. The court appointed a fourth attorney and set a trial date of December 6, 2010. (RP 30).

4. Fourth Appointed Attorney: October 20, 2010 through October 12, 2011.

With the appointment of new counsel, the speedy trial date was again moved forward another 60 days. (Vol. 2RP 276). Trial was set for December 13, 2010. (2Rp 21). On December 8, newly assigned counsel

moved for an extension of time, Mr. Shemesh signed a waiver, and a new trial date of December 27, 2010, was set. (1RP 16; CP 81). On December 15, 2010, the State argued the case had been set for trial 16 times previously. (1RP 18). Mr. Shemesh again was asked to sign a waiver for speedy trial and a new trial date of February 4, 2011 was set. (CP 82).

On April 27, 2011, six months after being assigned, counsel had still not looked at all the discovery. (5RP 14;16;18;22; 3RP 22; 2RP 20; RP 35). On May 18, 2011, counsel requested another continuance to hire an expert. (RP 37-39). Mr. Shemesh signed a waiver thru July 18, 2011. (CP 84). On June 22, 2011, counsel reported he was still waiting for authorization from BCOPD to hire an expert and he was still conducting discovery. (RP 42). The coordinator for BCOPD later testified that the first request for an expert that he received from counsel was dated August 2, 2011. (Vol. 2RP 275). By that time, Mr. Shemesh had been confined at the jail over 24 months.

On August 17, 2011, defense counsel reported that BCOPD had rejected all the experts he requested. The court kept the trial date of September 12, 2011. (RP 47). However, on August 31, 2011, Mr. Shemesh again was asked to sign a waiver of speedy trial consenting to a trial date of October 3, 2011. (CP 91). In September the State made

another plea offer and counsel requested and the court granted another two week extension. (1RP 23).

5. Fifth Appointed Attorney: October 12, 2011 through February 26, 2013.

On October 12, 2011, defense counsel was replaced by yet another attorney. (3RP 27). The coordinator of BCOPD testified the reason for the change was because defense attorneys on the Thursday docket complained their caseloads were too high compared to the Wednesday docket attorneys. To balance the caseloads, the coordinator the attorney was reassigned. (Vol. 2 RP 276-78). Mr. Shemesh signed another waiver through January 23, 2012. (CP 92).

On January 11, 2012, Mr. Shemesh again was asked to sign another waiver, with a new trial date of April 28, 2012. (CP 96). Because of counsel's schedule, trial was set to May 7, 2012. (5RP 35). On May 8, 2012, counsel requested more time for trial preparation. Mr. Shemesh signed another speedy trial waiver setting the trial to July 16, 2012. (4RP 32-35; CP 98). On July 20, 2012, the trial was reset, once again, to September 4, 2012. (4RP 37). On August 30, 2012 Mr. Shemesh was again asked to sign a waiver of time for trial to November 26, 2012. (CP 185). After a jury trial, Mr. Shemesh was found guilty on all counts. (CP 557;571-78). On December 11, 2012, defense counsel filed a motion and

supplemental declaration and offer of proof in support of CrR 8.3 motions he had made earlier. (CP 498-505; Vol. 11RP 1837-1863). The court denied the motion. (Vol. 11 RP 1860).

The court imposed sentence on February 26, 2013. The standard range sentence was 240 to 318 months. The trial court imposed a 600-month sentence based on aggravating circumstances of abuse of position of trust and pattern of sexual abuse. (CP 180-184; 557-559). No findings of fact and conclusions of law were entered regarding the imposition of the exceptional sentence. On appeal, the Court of Appeals ordered a remand for entry of findings of fact and conclusions of law. Slip Op. at 12-13.

In its opinion, the Court of Appeals reasoned that although there was a 40-month delay between accusation and trial, because the delay was the result of defense counsel requests for time, it was not so excessive as to warrant a presumption of prejudice. Slip Op. at 10. The Court also determined that "...Mr. Shemesh requested nearly every continuance... and delay caused by defense counsel is chargeable to the defendant." Slip Op. at 10. The Court also held the appellant's argument regarding the "alleged systematic OPD breakdown lacks merit since some of those delays were due to his uncooperativeness and, given the lengthy delays, OPD personnel changes and attorney-client frictions could be expected."

Slip Op. at 10. The Court concluded that “[g]iven all, the delays were mainly caused by Mr. Shemesh’s conduct in asking for them...None of the delays were attributed to the State.” *Id.* The Court also noted that Mr. Shemesh did not assert his speedy trial rights under CrR 3.3, and that he did not show he suffered actual and particularized prejudice during the 40 months of incarceration. Slip. Op. at 12.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should address the issues raised in Mr. Shemesh’s petition because it raises a significant constitutional issue under Washington State Constitution and the U.S. Constitution, and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

Mr. Shemesh’s state and federal constitutional rights to a speedy trial were violated when the unreasonable delay resulted from a systemic breakdown in the public defender system and continued postponement of trial by defense counsels, who were unprepared, despite lengthy extensions of time. U.S. Const. Amend. VI; Wash. Const. Art. 1, §22.²

² The Sixth Amendment provides “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.” The analysis is identical with Art. 1, §22. *State v. Iniguez*, 157 Wn.2d 273, 280, 217 P.3d 768 (2009).

The Supreme Court crafted a test to analyze whether an unconstitutional delay has occurred, weighing both the conduct of the prosecution and the defendant. *Barker v. Wingo*, 407 U.S. 514, 522-530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The factors to be considered are the length of the delay, reasons for the delay, whether the defendant complained about the delay, and any resulting prejudice to the defendant because of the delay. *Id.* at 530. The Washington Supreme Court has held that while the factors assist in determining whether a particular defendant has been denied his right to a speedy trial, *none is sufficient or necessary to a violation.* *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013). (Emphasis Added).

The Court of Appeals correctly laid out the *Barker* analysis, but incorrectly found that the interval between accusation and trial did not cross the threshold dividing ordinary from 'presumptively prejudicial' delay. Slip Op. at 9. In *Iniguez*, this Court followed *Barker*, finding presumptively prejudicial is determined by duration of pretrial custody, complexity of the charges, and the extent to which the case involves a reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292 (internal citation omitted). Using that analysis, this Court found a 23-month delay sufficient to trigger a *Barker* analysis in *Ollivier*, and again in *Iniguez*, an

8-month delay was sufficient to trigger the inquiry. *Ollivier*, 178 Wn.2d at 828; *Iniguez*, 167 Wn.2d at 288-92.

The Court of Appeals cited to two Federal cases. *United States v. Lane*, 561 F.2d 1075 (2d Cir. 1977); *United States v. Porchay*, 651 F.3d 930, 940 (8th Cir. 2011). In *Lane*, the delay was about 58 months. *Lane* at 1078. The Court there noted the variety of reasons the trial was delayed, including defense requests for time, the illness of the judge, death of counsel, and illness of the defendant's wife. *Id.* However, the Court also pointed out that per the speedy trial rules adopted in 1976, the defendant was tried, in accordance with the rules, less than 180 days later. *Id.* Also, there is nothing in the record that showed the defendant, in his willful failure to file federal income tax returns, was in pretrial custody.

Moreover, in *Porchay*, there were two mistrials, before a jury convicted Porchay of the 7 of 8 counts. *Porchay*, at 933. There, one of the arguments on appeal was that the 39 months between her first appearance and her third trial were presumptively prejudicial. *Porchay*, at 940. Unlike Mr. Shemesh's case, there were not two intervening mistrials. Further, Porchay was not in pretrial custody. *Id.* at 943.

Here, Mr. Shemesh was in pretrial custody for the entire 40-month span between accusation and trial. In *Barker*, the Court advised that the longer the pretrial delay, the closer the reviewing court should look at the

circumstances surrounding the delay. *Barker*, at 531. Excluding the time necessary for competency evaluation, there were literally years in which the case simply did not move forward. The problem lay not in the prosecutor's conduct, or Mr. Shemesh, but rather, in the conduct of the BCOPD along with the failure of the assigned public defense counsel to move the case forward.

The Court of Appeals stated, "Mr. Shemesh requested nearly every continuance; mostly over State objections." The Court went on "Delay caused by defense counsel is chargeable to the defendant." Slip Op. at 10. The Court of Appeals held that Mr. Shemesh's argument about the systemic breakdown of the BCOPD lacked merit because some of the delay was due to his uncooperativeness, and "given the lengthy delays, OPD personnel changes and attorney-client frictions could be expected." Slip Op. at 10.

Unfortunately, the Court's assignment of blame to Mr. Shemesh does nothing to resolve the problem of indigent defendants in pretrial custody with assigned counsel unilaterally changed by the BCOPD for financial or logistical convenience of the agency. Nor does it resolve the problem for the indigent incarcerated defendant whose counsel cannot or does not make time to review evidence in a timely fashion. Further, Mr. Shemesh's frustration with one investigator and attorneys who did not

review evidence in a timely manner do not make him an uncooperative defendant.

The Supreme Court considered a similar issue in *Vermont v. Brillion*, 556 U.S. 81, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009). There, the issue as presented was failure of defense counsel to move the defendant's case forward, resulting in a similar three-year delay between accusation and trial. The Court noted that Brillion had fired three of his attorneys and was assigned new counsel six times. *Id.* at 86-88. He also engaged in aggressive behavior toward another, and deliberately attempted to disrupt the proceedings and hamper the trial from moving forward. *Id.* at 94. The Court squarely laid the blame at Brillion's doorstep. However, the Court did note:

"The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system', 955 A.2d at 111, could be charged to the State." *Id.* at 94.

Mr. Shemesh contends the delay in bringing him to trial was indeed the result of a systemic breakdown in the BCOPD system, which should be charged to the State. Unlike Brillion, Mr. Shemesh did not attempt to disrupt or delay the proceedings, and only one attorney was removed for failure to perform over the course of over five months.

BCOPD unilaterally reassigned counsel to Mr. Shemesh, causing numerous extended delays in the case. After eight months as his attorney, the first attorney was removed when for unrecorded reasons her contract was not renewed. The second counsel was quickly dismissed by BCOPD for financial reasons. Third counsel did not realize he did not have a complete file until two months after assignment, and only a few days before the scheduled trial, had still not seen all the evidence the State intended to use at trial. At Mr. Shemesh's request he was appointed new counsel.

The fourth assigned counsel reported to the court that after 10 months OPD had just approved and authorized payment for a needed expert. The coordinator for BCOPD stated he had no knowledge of any requests for an expert for that entire 10-month period. (Vol. 2RP 275). One month before trial, BCOPD again unilaterally replaced defense counsel because of a logistic need on the agency's part.

Each time a new attorney was assigned, Mr. Shemesh was placed in the unenviable position of either asserting his right to a speedy trial or accepting the likely possibility he would receive ineffective assistance of counsel due to lack of preparation time. Moreover, at one point, defense counsel tried to arrange viewing of DVD evidence, believing he could

only view it with a police officer and prosecutor present. It took 24 weeks for defense counsel to even look at the evidence. (Vol. 2RP 255-56).

The Court of Appeals concluded that because Mr. Shemesh did not assert his speedy trial rights, by objecting to continuance requests made by his attorneys, this weighs against him because the record shows “no attempt by him to bring this matter to a conclusion more quickly.” Slip Op. at 11. Mr. Shemesh contends he did not sign away his constitutional right to a speedy trial, but rather, as documented, his right to a speedy trial under CrR 3.3. The test is different: waiver of speedy trial by court rule authorizes a trial court to continue a criminal case when “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). In essence, a defendant’s consent is unnecessary as a trial court may grant a continuance even over the defendant’s objection. *State v. Thomas*, 95 Wn.App. 730, 737-38, 976 P.2d 1264 (1999). However, the waiver of the constitutional right to a speedy trial must be knowing, intelligent and voluntary, and will not be presumed. *State v. Davis*, 69 Wn.App. 634, 638, 849 P.2d 1282 (1993). Nothing in the record suggests that Mr. Shemesh ever knowingly, intelligently, and voluntarily waived his constitutional right to a speedy trial.

Lastly, the Court of Appeals dismissed Mr. Shemesh's affidavit of oppressive pretrial incarceration as nothing more than self-serving statements he prepared without cross-examination. Slip Op. at 12. In his affidavit he outlined the difficulty he had practicing his religion at the jail, the non-kosher food he was given, and a duodenal ulcer rupture that was the result of the food and medications he received at the jail. (CP 145-147; 155; 230; (Vol. 2RP 293-94). The 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. Courts presume this prejudice intensifies over time." *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

As this Court held, while the *Barker* factors assist in determining whether a particular defendant has been denied his right to a speedy trial, *none is sufficient or necessary to a violation. Ollivier*, 178 Wn.2d at 827. (Emphasis Added). Mr. Shemesh asks this Court to accept review of this timely petition on the basis that given the number of indigent criminal defendants in Washington, this is a matter of substantial public interest and trial delays substantially affect the constitutional rights of individuals in pre-trial custody.

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Shemesh respectfully asks this Court to accept review of his timely Petition.

Respectfully submitted this 18th day of May 2015.

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APPENDIX

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

STATE OF WASHINGTON,)	No. 31465-1-III
)	
Respondent,)	
)	
v.)	
)	
MICHAEL LEON SHEMESH,)	PUBLISHED OPINION
)	
Appellant.)	

BROWN, A.C.J. – Michael L. Shemesh appeals his convictions for three counts of first degree rape of a child, two counts of second degree possession of depictions of a minor engaged in sexually explicit conduct, and one count of first degree child molestation. The sentencing court orally imposed an aggravated exceptional sentence based on the jury’s finding the crimes were committed as part of ongoing sexual abuse of the victim and Mr. Shemesh abused a position of trust. First, Mr. Shemesh contends his state and federal constitutional speedy trial rights were violated because over three years elapsed before his trial. Second, he contends the court erred by imposing an aggravated exceptional sentence without written findings of fact and conclusions of law. We reject his speedy trial contention and affirm, but, under recent authority, we remand for the trial court to enter necessary written findings and conclusions.

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FACTS

On August 14, 2009, the State charged Mr. Shemesh with three counts of first degree rape of a child, two counts of second degree possession of depictions of a minor engaged in sexually explicit conduct, and first degree child molestation based on alleged 2001 and 2006 events. The rape charges and molestation charge included special aggravating allegations of an ongoing pattern of abuse and violation of a position of trust. Mr. Shemesh was arraigned on August 12, 2009. Tonya Meehan-Corsi was appointed as defense counsel. Trial was set for September 28, 2009.

On September 16, 2009, the court granted the State's request for a mental health evaluation to determine Mr. Shemesh's competency and sanity. The matter was stayed pending a competency determination. The State's expert opined Mr. Shemesh was competent to stand trial; an order of competency was entered on November 25, 2009. The court then set trial for January 25, 2010.

On January 13, 2010, a stipulation for continuance/waiver of time for trial (CrR 3.3) and order of continuance was entered, setting a new trial date for February 1, 2010. The court inquired whether Mr. Shemesh was waiving his right to a speedy trial and Mr. Shemesh responded affirmatively.

On February 3, 2010, Mr. Shemesh requested new counsel, alleging mismanagement of the case. The court denied the motion, finding Ms. Meehan-Corsi reviewed police evidence, conducted victim interviews, and discovered several critical facts. Trial was then continued to March 1, 2010.

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Another continuance was requested in mid-February at which time the court inquired whether Mr. Shemesh was waiving speedy trial and he again responded affirmatively. The new trial date was March 29, 2010.

On March 3, 2010, Mr. Shemesh successfully requested to have a second mental health evaluation performed to determine if he had the competency to proceed. A competency hearing was set for April 7, 2010 but was continued to April 14, 2010; at that time, Ms. Meehan-Corsi advised the court that Shawn Sant would likely be substituting in for her because the Office of Public Defense (OPD) was terminating her employment.

On April 13, 2010, Ms. Meehan-Corsi was removed from Mr. Shemesh's case and Mr. Sant was appointed as counsel. On April 14, 2010, Mr. Shemesh was ill, so the competency matter was continued until April 28, 2010. On April 28, 2010, Mr. Shemesh requested another continuance because OPD was going to reassign his case to another attorney due to a wage dispute between OPD and Mr. Sant.

On May 5, 2010, Ryan Swanberg was assigned as counsel and requested a one week continuance. The State then requested a continuance of two weeks to prepare. Mr. Shemesh did not object. The court granted the continuances and clarified the case was still stayed awaiting entry of an order of competency after the defense evaluation.

Between May 19, 2010 and July 14, 2010, several defense-requested continuances were granted to give counsel time to prepare. On July 14, 2010, the court entered a competency order. Trial was then set for September 7, 2010. No objection

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was made to the setting of this date and no discussion occurred about the date not being in compliance with Mr. Shemesh's right to a speedy trial.

More continuance requests were made by Mr. Shemesh, and granted, in August 2010. Then, on August 18, 2010, the State expressed its displeasure with the ongoing continuances. Nevertheless, another continuance was granted on that day, resulting in a September 13, 2010 trial date. Mr. Shemesh acknowledged the September 13, 2010 trial date was within speedy trial limits. The parties then stipulated to another continuance, with Mr. Shemesh filing another waiver of time for trial, setting trial on October 25, 2010.

At an October 6, 2010 pretrial hearing, the State requested the court compel production of a DVD, which contained interviews of the minor victims by a child forensic interviewer. The State had previously provided copies of the DVDs to defense counsel, Ms. Meehan-Corsi, under an agreed protective order. At the hearing, neither Ms. Meehan-Corsi nor Mr. Sant were able to account for the whereabouts of the items. The October 6, 2010 hearing was continued one week at the request of the court.

At an October 13, 2010 pretrial hearing, the parties again addressed the missing DVDs. One week later, Mr. Shemesh requested reappointment of counsel. Mr. Shemesh argued Mr. Swanberg was delaying reviewing the State's evidence and not actively moving forward with his case. The court granted Mr. Shemesh's motion and disqualified Mr. Swanberg and Gary Metro was appointed as the new attorney. The court advised Mr. Shemesh that if his request for a new attorney was granted, it would

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necessitate a 60-day continuance to allow new counsel to prepare. Mr. Shemesh acknowledged his understanding of that fact and indicated that he would be willing to sign a waiver of speedy trial to be appointed a new attorney. The new trial date was set for December 8, 2010.

More continuances were requested, and granted, in December 2010; Mr. Shemesh submitted another stipulation for continuance/waiver of time for trial. The State voiced its concerns to the court that the matter had been set for trial 16 times at this point. The court noted the State's frustration, but accepted the waiver and extended the trial date to February 14, 2011.

In 2011, the court granted numerous additional continuances, then on October 12, 2011, Mr. Metro was removed as defense counsel due to a reassignment by the OPD and Kevin Holt was assigned to replace him. Mr. Shemesh did not object.

At the time of Mr. Holt's appointment, speedy trial was set to run on the case on December 2, 2011, giving Mr. Holt 51 days to have the matter brought to trial. The alleged victims in the matter had been interviewed on two occasions by Mr. Shemesh's prior counsel and at least one interview had been tape-recorded. Additionally, Mr. Holt informed the court that Mr. Metro would be staying on the case to ease the transition of attorneys and they would work the case together. Mr. Shemesh did not object. Mr. Holt advised the court that even if Mr. Metro had not been removed as counsel of record, the trial would not have proceeded on the scheduled trial date due to Mr. Metro being

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unprepared to proceed. Another stipulation for continuance/waiver of time for trial was entered and, over the State's objection, trial was reset to January 23, 2012.

The trial date was continued numerous times in 2012 at Mr. Shemesh's request with three additional stipulations for continuance/waiver of time for trial entered.

On August 26, 2012, Mr. Shemesh requested dismissal based on violations of CrR 3.3 (speedy trial rule), CrR 4.7 (discovery), and CrR 8.3 (governmental misconduct). This was the first assertion of a speedy trial right violation. The assertion related to the time period surrounding Ms. Meehan-Corsi's removal from the case and Mr. Metro's removal and replacement. The court reserved ruling on the matter until after trial. Mr. Shemesh successfully requested another continuance and trial was reset to November 26, 2012.

On October 30, 2012, Mr. Shemesh's attorney indicated he was re-interviewing witnesses and notified the court he needed time to secure a new investigator because Mr. Shemesh refused to work with the investigator who had been working the case since Ms. Meehan-Corsi was defense counsel.

On November 21, 2012, just five days before trial, Mr. Shemesh wrote a letter to the State indicating he wished to plead guilty to the crimes as charged. On the day of the hearing on the potential plea, Mr. Shemesh indicated he changed his mind. He, however, advised the court he was not ready for trial. The court did not wish to entertain another continuance request and advised Mr. Shemesh the matter would proceed to trial on November 26, 2012.

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Trial finally commenced on November 26, 2012. The jury found Mr. Shemesh guilty as charged and found the specially alleged aggravating circumstances. On December 11, 2012, the court addressed Mr. Shemesh's prior dismissal motion. Mr. Shemesh focused on the time between the competency evaluation and the entry of the competency order. The court denied the motion, finding "the time period prior to the entry of the actual Order of Competency tolled any time for the trial until an actual Order of Competency was entered." Report of Proceedings (RP) (Dec. 11, 2012) at 1858.

The court sentenced Mr. Shemesh to a 600-month aggravated exceptional sentence. The court did not enter written findings of fact and conclusions of law, but stated, "The jury did find aggravating factors beyond a reasonable doubt. Based on that, the court finds it appropriate to follow the request of the prosecutor and sentence you to the term of 600 months." RP (Feb. 26, 2013) at 38. In the judgment and sentence, the court found "substantial and compelling reasons exist which justify an exceptional sentence" based on "[a]ggravating factors . . . found by a jury by special interrogatory." Clerk's Papers (CP) at 560. Mr. Shemesh appealed.

ANALYSIS

A. Speedy trial was not unreasonably delayed.

The issue is whether, under these facts, Mr. Shemesh's speedy trial rights under the state and federal constitutions were violated. He contends the over three year delay before trial exceeded a reasonable time and requires dismissal of all charges. Mr. Shemesh raises no CrR 3.3 speedy trial issues.

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Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy public trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. Our state constitution "requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights." *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). This court reviews de novo constitutional speedy trial claims. *Id.* at 280.

A defendant's constitutional rights to a speedy trial attach when a charge is filed or an arrest is made, whichever occurs first. *State v. Corrado*, 94 Wn. App. 228, 232, 972 P.2d 515 (1999). Some pretrial delay is often "inevitable and wholly justifiable." *Doggett v. United States*, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). As recognized by Mr. Shemesh at page 12 of his opening brief, the constitutional speedy trial right does not involve a fixed time, but rather focuses on the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). Any constitutional "inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). As first articulated in *Barker*, in deciding reasonableness, we consider (1) the length of pretrial delay, (2) the reason for delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant. 407 U.S. at 530.

But to trigger this analysis, the defendant must first demonstrate that the "interval between accusation and trial has crossed the threshold dividing ordinary from

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'presumptively prejudicial' delay." *Doggett*, 505 U.S. at 651-52 (quoting *Barker*, 407 U.S. at 530-31). We consider the duration of pretrial custody, the complexity of the charges, and the extent to which a case involves a reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292 (citing *Barker*, 407 U.S. at 531 & n.31). In *Iniguez*, our state Supreme Court found "presumptive[] prejudic[e]" based upon a delay of more than eight months. 167 Wn.2d at 291-92. Importantly, (1) the defendant had remained in custody throughout this period; (2) the charges against him were not complex; and (3) such a lengthy delay "could result in witnesses becoming unavailable or their memories fading," thus impairing his defense. *Iniguez*, 167 Wn.2d at 292. The *Iniguez* Court took pains to note this eight-month delay was, however, "just beyond the bare minimum needed to trigger the *Barker* inquiry." *Iniguez*, 167 Wn.2d at 293; see also *State v. Ollivier*, 178 Wn.2d 813, 828, 312 P.3d 1 (2013), cert. denied, 135 S. Ct. 71, 190 L. Ed. 2d 65 (2014) (23-month delay enough to trigger *Barker* analysis).

1. Length of the delay. The first *Barker* consideration is the length of the delay. Here, almost 40 months between being charged and trial is not ordinary. But, as the *Ollivier* court noted, longer periods have been found acceptable. *Ollivier*, 178 Wn.2d at 828; see *United States v. Lane*, 561 F.2d 1075 (2d Cir. 1977) (58-month delay was not excessive); *United States v. Porchay*, 651 F.3d 930, 940 (8th Cir. 2011) (39-month delay was not excessive, given the numerous motions, demands, and general effort by the defendant to delay matters). Moreover, "in numerous cases courts have not regarded delay as exceptionally long . . . particularly when the delay was attributable to

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the defense." *Ollivier*, 178 Wn.2d at 828. Accordingly, the long delay in this case is not alone so excessive as to warrant a presumption of prejudice.

2. Reason given for the delays. Mr. Shemesh requested nearly every continuance; mostly over State objections. "Delay caused by defense counsel is chargeable to the defendant." *Ollivier*, 178 Wn.2d at 832. Mr. Shemesh makes three arguments to explain his excessive continuance requests; first, delays entering the second competency order, second, discovery issues, and third, a systematic OPD breakdown. His first two arguments are unpersuasive because both the delay involved the defense's fault. Moreover, these delays did not amount to a substantial amount of time. Mr. Shemesh's third argument regarding the alleged systematic OPD breakdown lacks merit since some of those delays were due to his uncooperativeness and, given the lengthy delays, OPD personnel changes and attorney-client frictions could be expected.

Given all, the delays were mainly caused by Mr. Shemesh's conduct in asking for them. Indeed, as time passed, the State actively began opposing his delay requests. None of the delays are attributed to the State. As noted by the *Ollivier* Court, "In summary, most of the continuances were sought by defense counsel to provide time for investigation and preparation of the defense. Time requested by the defense to prepare a defense is chargeable to the defendant, and this factor weighs heavily against the defendant." 178 Wn.2d at 837.

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3. Defendant's assertion of his speedy trial rights. "The Court added in *Barker* that 'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" *Ollivier*, 178 Wn.2d 837. "[T]he more serious the deprivation, the more likely a defendant is to complain. 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 the right." *Id.* at 837-38 (quoting *Barker*, 407 U.S. at 531-32). Mr. Shemesh repeatedly requested continuances throughout the proceedings with no mention of a speedy trial violation until three years had passed. Then, Mr. Shemesh requested dismissal on the same day he requested another continuance. His dismissal request was based on a small amount of time in the three year period; the court properly found, "the time period prior to the entry of the actual Order of Competency tolled any time for the trial until an actual Order of Competency was entered." RP (Dec. 11, 2012) at 1858. Given all, this consideration weighs against Mr. Shemesh because our record shows no attempt by him to bring this matter to a conclusion more quickly.

4. Prejudice to the defendant. Prejudice may consist of oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. *Ollivier*, 178 Wn.2d at 840. "A defendant ordinarily must establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." *Id.* Mr. Shemesh alleges oppressive pretrial incarceration, but he offers nothing more than self-serving statements, contained in a declaration he produced for a motion to dismiss

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without cross-examination. No other evidence supports his allegations. His claims were expressly refuted by county jail staff testimony that he was treated the same as any other prisoner. "Moreover, his complaints about jail conditions do not suggest that conditions were oppressive; rather, the conditions are common to incarceration."

Ollivier, 178 Wn.2d at 844.

In sum, balancing the *Barker* factors weighs against Mr. Shemesh. Given these facts, the overall delay, while long, was reasonable under the circumstances and thus, not constitutionally excessive. The reasons for the delay are primarily attributable to the defense because Mr. Shemesh sought numerous continuances to facilitate investigation and prepare his defense; he did not sufficiently assert his rights; the delay was not sufficiently extraordinary to be presumed prejudicial; and Mr. Shemesh fails to show particularized prejudice. Thus, we conclude no violation is shown of Mr. Shemesh's constitutional right to a speedy trial under the Sixth Amendment and article I, section 22.

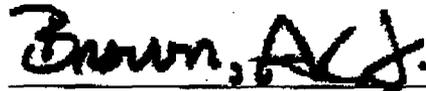
B. Written findings and conclusions are required.

The issue is whether the trial court erred in failing to enter written findings of fact and conclusions of law supporting its imposition of an exceptional sentence. Mr. Shemesh contends the matter must be remanded. Whenever an exceptional sentence is imposed, "the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. The Supreme Court recently decided this issue after our briefing was complete, holding a trial court's failure to enter written findings of fact and conclusions of law to support an exceptional sentence requires

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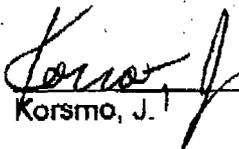
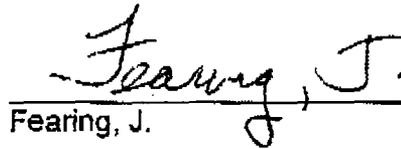
remand. *State v. Friedlund*, ___ Wn.2d ___, 341 P.3d 280 (2015 WL 196506 at *4) (Jan. 15, 2015). There, the court reasoned, "the SRA's written findings provision requires exactly that – *written findings*. Permitting verbal reasoning – however comprehensive – to substitute for written findings ignores the plain language of the statute." *Id.* at ___ (2015 WL 196506 at *3). Accordingly, we remand for the trial court to enter written findings of fact and conclusions of law.

Affirmed and remanded for proceedings consistent with this opinion.



Brown, A.C.J.

WE CONCUR:


Korsmo, J.
Fearing, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Petitioner Michael L. Shemesh, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid or by electronic service by prior agreement between the parties on May 18, 2015 to:

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Total Pages Including Cover 38

Fax

Following is the Petition for Review in the matter of St. v. Michael Shemesh, Court of Appeals No. 31465-1-III. Please let me know if there is any difficulty receiving the pages.

Thanks,

Marie Trombley
Marie Trombley