68662-3-I

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Court of Appeals
Division I
State of Washington

NO. 68662-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL THREADGILL,

Appellant.

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

The Honorable Cheryl Carey, Judge

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# BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to a speedy trial under CrR 3.3 by granting the prosecution's request for an unjustified continuance over appellant's objection.

2. The trial court's findings in support of the continuance are erroneous.

3. The State violated appellant's constitutional rights when it presented evidence that he refused to consent to a search of his cell phone and records of his calls.

4. The reasonable doubt instruction used at appellant's trial required more than a reasonable doubt to acquit and improperly shifted the burden to appellant to provide the jury with a reason for acquittal.

5. Defense counsel was ineffective and denied appellant his Sixth Amendment right to effective representation at trial.

6. The sentencing court failed to file written findings of fact and conclusions of law in support of an exceptional sentence.

Issues Pertaining to Assignments of Error

1. Under CrR 3.3, a continuance beyond the speedy trial deadline is authorized where "required in the administration of justice," meaning the State has acted with due diligence and

presented "convincing and valid reasons" justifying additional delay. In appellant's case, prosecutors waited until just before trial to obtain a DNA sample they could have obtained anytime during the previous 15 months and after previously acknowledging this evidence was unnecessary for trial. Where the State failed to act with diligence and failed to provide convincing and valid reasons for delay, did the unjustified continuance violate appellant's right to a speedy trial?

2. When granting the State's motion for a continuance, did the trial court err when if found that the DNA sample could not reasonably have been obtained earlier and found that information learned after the omnibus hearing concerning the defense trial strategy also justified a continuance?

3. The State contrasted one witness' compliance and assistance (he volunteered information regarding his phone records) with appellant's noncompliance and resistance (a court order was necessary to obtain his phone records). Did this evidence penalize appellant's lawful exercise of his constitutional rights in violation of due process and the protections of the Fourth Amendment and article 1, section 7?

4. If these constitutional violations were waived by defense counsel's failure to object, should they nonetheless be addressed because this failure denied appellant his Sixth Amendment right to effective representation?

5. The trial court instructed the jury that a "reasonable doubt is one for which a reason exists." Does this instruction require the jury to have more than a reasonable doubt to acquit and impermissibly shift the burden of proof by instructing the jury it must articulate a reason before it can have reasonable doubt?

6. Written findings and conclusions are mandatory when the court imposes an exceptional sentence. None were filed in appellant's case. Is remand necessary?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Daniel Threadgill and Araya McMillon-Cooper with Murder in the First Degree in connection with the August 2010 death of Jennifer Walstrand. The charge included a deadly weapon sentencing enhancement and an aggravating circumstance of deliberate cruelty, which permitted the State to seek an exceptional sentence.

CP 1-9, 537-538. Threadgill's case was later severed from McMillon-Cooper's. 3RP[1] 17.

Threadgill was incarcerated and demanded a speedy trial. 5RP 6; 6RP 17-18. Although the State previously indicated it was prepared to begin trial by the speedy trial deadline, just before trial was set to begin, prosecutors changed their minds and filed a motion to continue trial based on additional forensic testing they could have requested earlier but now desired. 3RP 15-16; Supp. CP ___ (sub no. 88C, State's Motion To Continue Trial). Over Threadgill's strenuous objections, the motion was granted. 7RP 10-16, 20-22; CP 234-356; Supp. CP ___ (sub no. 89, Order Continuing Trial).

A jury convicted Threadgill as charged. CP 661-663. The Honorable Cheryl Carey imposed an exceptional 480-month sentence, and Threadgill timely filed his Notice of Appeal. CP 756-758, 764-774; 30RP 35-38.

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 8/12/11; 2RP – 9/14/11; 3RP – 9/23/11; 4RP – 10/3/11; 5RP – 10/20/11; 6RP – 11/1/11; 7RP – 11/7/11; 8RP – 11/10/11; 9RP – 11/28/11; 10RP (supp.) – 11/29/11 (prior to 10:48 a.m.); 10RP – 11/29/11 (10:48 a.m. and after); 11RP – 12/1/11; 12RP – 12/15/11; 13RP – 1/3/12; 14RP – 1/4/12; 15RP – 1/5/12; 16RP – 1/9/12; 17RP – 1/10/12; 18RP – 1/11/12; 19RP – 1/12/12; 20RP – 1/17/12; 21RP – 1/23/12; 22RP – 1/24/12; 23RP – 1/25/12; 24RP – 1/26/12; 25RP – 1/31/12; 26RP – 2/1/12; 27RP – 2/2/12; 28RP – 2/3/12; 29RP – 2/6/12; 30RP – 3/28/12.

2. Substantive Facts

Just after midnight on the morning of August 31, 2010, Des Moines Police conducted a welfare check at 24005 25th Ave. S. – the center apartment in a triplex – in response to concerns from neighbors immediately to the south over "thumps" coming from the apartment and barking dogs within. 16RP 52-62, 68-70, 106-107. Another neighbor, from a nearby building, had heard two females arguing, one saying "I know you have it, you fucking ho," and one telling the other to "get out." 22RP 186. Officers discovered Jennifer Walstrand's body in a pool of blood just inside her front door. 16RP 112-113.

Walstrand had been stabbed 65 times and suffered blunt trauma to the head, resulting in a fractured jaw and several missing and loosened teeth. 25RP 117, 131-132. Blood spatter, drops, and stains were found primarily throughout the dining and living room areas, on the front door and an outer security door, on the front threshold and walkway just beyond the front door, and on the sidewalk that runs in front of the building along the public street. 17RP 142-175. The blood trail appeared to end where a car would park in front of the triplex. 16RP 123-124.

The scene revealed significant violence directed at Walstrand. It appeared she had been upright and moving for some period of the attack. 17RP 175. The person or persons who killed Walstrand would have been covered in her blood. 17RP 165. Bloody footwear impressions were found inside the apartment and heading outside, ending at a point along the front sidewalk. 16RP 116-117; 17RP 171-173, 177. It appeared that whoever left the prints got into a car that had been parked in front of the building. 16RP 123-124.

Walstrand was a known prostitute, and police believed her death might be connected to her work. 17RP 43; 19RP 102, 107. They identified several men who had recently used her services, interviewed them, and obtained samples of their DNA. 19RP 109-110, 118-119. Police spoke to Walstrand's pimp – Calvin Davis. 18RP 27, 81-82; 22RP 34-37. Police also spoke to Araya McMillon-Cooper, another prostitute who worked for Davis and lived in the same triplex as Walstrand in the apartment immediately to the north of her unit. 18RP 27-33, 79-82; 22RP 37-43, 112-113; 24RP 78-79, 83. McMillon-Cooper was not considered a suspect at the time. 18RP 28.

Another person to whom police spoke was Daniel Threadgill, whose name they obtained from McMillon-Cooper. 19RP 4. Threadgill was not a suspect, either. McMillon-Cooper merely mentioned to police that he had been spending time at her apartment. 19RP 5. Threadgill was a student at Bellevue College and owner of Five Star Entertainment, a business that promoted local clubs and generated customers for them. 19RP 11. McMillon-Cooper worked for Five Star in addition to her prostitution activities. 19RP 12; 24RP 91-92.

Police believed that Walstrand's attacker likely applied significant force to her neck area in an attempt to stabilize her while stabbing her. 23RP 143-144. Consistent with this belief, there was an absence of injuries on the upper left side of Walstrand's back and shoulder. 25RP 155-156. And police were excited to learn that male DNA has been found on the left side of Walstrand's neck. 19RP 44-45; 23RP 45-48, 131-133, 140-141. Testing on this sample revealed a minimum of four male contributors. 24RP 46. One individual – labeled "male individual A" – was considered the primary contributor based on the amount of his DNA at that location of Walstrand's body. 24RP 46-48.

Des Moines Police received what they considered a break in the case on May 17, 2011, approximately nine months after Walstrand's murder, when a Crime Stopper's tip suggested Marian Kerow and Fardosa Mohamed had useful information that involved McMillon-Cooper. 19RP 47-49, 131. When questioned, Mohamed twice denied any knowledge of the matter before changing her story and admitting she was actually present when Walstrand died. 19RP 55-61, 128-130; 20RP 26-28, 87-88. Kerow spoke to police that same day and also confessed her presence. 20RP 30; 21RP 134-138. The women's statements implicated Threadgill. 19RP 159.

Kerow subsequently agreed to wear a hidden wire and, on June 16, 2011, visited Threadgill at his work and engaged him in conversation in an attempt to gain a confession to the crime. 19RP 75-84; 21RP 19-39, 144-161. Threadgill did not confess, however, and denied any involvement. Exhibits 53, 59.

On June 21, 2011, a detective attempted to get a reaction from Araya McMillon-Cooper by calling her and asking if she knew "Veah" or "Destiny," names that Kerow and Mohamed sometimes used. 19RP 85-87, 165; 21RP 54-57. After that call, McMillon-

Cooper attempted to call Kerow and texted her. 19RP 87-90. The text reads:

> Hey, we all need to meet ASAP. If anyone asks, you don't know Araya and I don't know Veah or Destiny. I will say your real name, K? Gotta meet. Don't panic.

19RP 90; 25RP 31. McMillon-Cooper also sent a series of text messages to Mohamed asking her to call as soon as possible. 20RP 69-70; 25RP 34-35. And Threadgill received a similar text. 19RP 91; 25RP 39-40. Both McMillon-Cooper and Threadgill were arrested later that same day. 19RP 91.

An expert scoured Walstrand's electronic devices (her cell phones and computer), but found no evidence she and Threadgill had ever contacted one another. 19RP 107-108; 25RP 48-51. The crime lab also compared Threadgill's DNA to DNA found at the murder scene. Threadgill's DNA was not found on Walstrand or anywhere else at the murder scene, and he was excluded as a source of the male DNA found on her neck. 23RP 125, 152-154; 24RP 44, 49. His fingerprints were not found on any evidence, either. 24RP 11, 26. And a search of the Bellevue apartment where Threadgill had lived with his aunt at the time of the murder similarly turned up nothing tying him to the crime. 17RP 190-194; 19RP 91-93.

In the absence of any physical evidence implicating Threadgill in Walstrand's murder, prosecutors relied largely on the trial testimony of Mohamed and Kerow.

Mohamed and Kerow had known each other since middle school and considered themselves sisters. 19RP 163-164. Kerow worked for Threadgill as a promoter and had introduced Mohamed to him. 19RP 167-168; 21RP 60-61. Kerow and Mohamed also met McMillon-Cooper through promotions activities. 19RP 176-177; 21RP 72-73.

Kerow and Mohamed attended a birthday party for Kerow at McMillon-Cooper's apartment on the night of August 28, 2010. Threadgill also was there. 19RP 178; 21RP 76-78. Kerow and Mohamed testified that, two days after that party, on the evening of August 30, McMillon-Cooper invited them back to her apartment for a "smoking party." 19RP 190-191; 21RP 82-85. According to the two women, after parking Kerow's car in front of McMillon-Cooper's triplex, they saw Threadgill hurriedly enter Walstrand's apartment and then heard a commotion coming from inside. 19RP 194-199; 20RP 12; 21RP 85, 88-90. Kerow and Mohamed ran to the front door of that apartment and saw Threadgill repeatedly stabbing Walstrand as McMillon-Cooper watched. 19RP 199-201; 21RP 90-

95. Walstrand was fighting back and saying "Araya, please stop" while looking at McMillon-Cooper. 19RP 202-203; 21RP 93. According to the women, at some point McMillon-Cooper said, "she's not dead" and Threadgill began stomping on Walstrand's head. 19RP 204; 20RP 18-19; 21RP 97-98. Both women ran before leaving the area in Kerow's car. 20RP 19-20; 21RP 97-100.

Kerow and Mohamed both denied any involvement in Walstrand's death.[2] 20RP 34-35; 21RP 167. In fact, not only did Kerow deny participating, a few weeks before trial she began to claim that, rather than merely watching what happened from close to the front doorway, she actually entered, tried to intervene on Walstrand's behalf, and was cut in the process. See 21RP 95-96, 139-141, 186-188; 22RP 51, 59; 26RP 86.

To bolster the testimony of Kerow and Mohamed, prosecutors made a deal with McMillon-Cooper. In exchange for her guilty plea to Conspiracy to Commit Murder in the Second

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[2] No effort was made to determine whether Kerow or Mohamed had physical contact with Walstrand. Although some 34 evidence samples from the scene showed the presence of female DNA in sufficient quantities to create a genetic profile, the crime lab did not investigate whether this DNA matched any woman known to be present for Walstrand's killing. 23RP 163-164. Instead, the lab focused on finding and typing male DNA. 23RP 166-167; 26RP 83. Law enforcement did not even ask for DNA reference samples from Kerow or Mohamed. 26RP 87.

Degree and the State's recommendation that she receive a sentence of 100.5 months (thereby avoiding a possible murder sentence in excess of 30 years), McMillon-Cooper testified against Threadgill. 24RP 78; 26RP 27-28.

According to McMillon-Cooper, she had a falling out with her pimp, Davis, in August 2010. 24RP 97-98. He had previously arranged for her to live next to Walstrand, but he began pressuring her to move out. 24RP 83, 103. Moreover, Walstrand had begun reporting McMillon-Cooper's activities to Davis, who had recently beat her up and was continuing to intimidate her verbally and physically.[3] 24RP 98-103, 107-111. McMillon-Cooper eventually revealed to Threadgill that she was a prostitute and told him about how Davis would beat her. 24RP 117-118. She also expressed fear about going to her apartment because Walstrand might tell Davis she was there. 24RP 118-119. According to McMillon-Cooper, Threadgill assured her that no one would hurt her because she was now part of the Five Star family and, referring to Davis and Walstrand, said "fuck him" and "fuck that bitch." 24RP 127-129.

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[3] A few weeks before Walstrand's murder, Mohamed had overheard McMillon-Cooper complaining about "a pimp and his ho" and how "that bitch was going to get it." 19RP 184-186; 20RP 77-78.

McMillon-Cooper testified that, on the evening of the murder, Threadgill communicated with Mohamed and Kerow about getting together to smoke. 24RP 140-142. McMillon-Cooper then stopped by her apartment to grab some clothes. 24RP 143. While inside her apartment, Threadgill – who had stayed behind in McMillon-Cooper's car parked just north of the triplex – phoned and said that Walstrand was out front. 24RP 143-145. McMillon-Cooper stuck her head out the front door. 24RP 146. Walstrand saw her and invited her over to talk. McMillon-Cooper accepted the invitation and, while there, Walstrand told her that if Davis wanted her to move out, she had to move out. Both women raised their voices while discussing the matter. 24RP 146-147.

According to McMillon-Cooper, she and Walstrand heard someone approaching from outside. 24RP 148-149. Threadgill then entered the apartment and immediately began stabbing Walstrand, who was asking McMillon-Cooper for help. 24RP 149-151. Threadgill held her with his left hand while he repeatedly stabbed her with his right hand. 24RP 151, 157-158. As Walstrand fell to her knees, Mohamed and Kerow appeared at the front door. 24RP 151. And when Walstrand fell to the ground, Threadgill stomped on her head. 24RP 152-153.

According to McMillon-Cooper, after the killing, she and Threadgill drove in her car to Threadgill's Bellevue apartment, where he changed out of his bloody clothing. 25RP 68-69, 72-73. She testified that Threadgill never explained why he killed Walstrand. 26RP 15. The only thing he ever said was, "it was either [you] or her." 26RP 16. McMillon-Cooper denied that she, Kerow, or Mohamed participated in or carried out the murder. 26RP 30.

During closing argument, the State asked jurors to approach this as an eyewitness case rather than a DNA case and to find that Threadgill alone stabbed and stomped on Walstrand until she was dead because he did not like the way McMillon-Cooper was being treated. 27RP 3-44.

The defense focused on the absence of Threadgill's DNA in Walstrand's apartment, on her body, or in his Bellevue apartment, which showed he was not present for the murder. Counsel argued that McMillon-Cooper, Kerow, and Mohamed (friends who couldn't keep their stories straight) were lying, McMillon-Cooper alone had the motive to kill Walstrand, the bloody footprints that led from the apartment to where Kerow had parked her car undermined the prosecution's theory, and the presence of "male individual A's,"

DNA – found precisely where one would expect to find the killer's DNA – suggested this unidentified man (rather than Threadgill) participated in Walstrand's killing. 27RP 45-82.

Threadgill now appeals to this Court.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THREADGILL'S RIGHT TO A SPEEDY TRIAL.

Daniel Threadgill was arrested on June 21, 2011. CP 246. On August 12, 2011, the State obtained an order authorizing law enforcement to collect a sample of his DNA, and a sample was obtained on August 18, 2011. 1RP 12; CP 246. At the case setting hearing on September 14, 2011, Threadgill made it clear that he was exercising his right to a speedy trial and wanted a trial in November. 2RP 4. Speedy trial expired on November 12. Trial was set to begin November 7. 2RP 11.

The parties appeared in court again on September 23 to address a defense motion to sever Threadgill's case from McMillon-Cooper's. 3RP 2. The State did not oppose the motion, which was granted. 3RP 2, 17. Prosecutors stated on the record they would be ready to begin trial November 7 assuming they received results from the crime lab on Threadgill's DNA, as

expected, by October 17. 3RP 15. Threadgill again stated he was exercising his right to a speedy trial. 3RP 3. The court set a discovery deadline of October 20 subject to "unforeseeable circumstances." 3RP 20.

At a hearing on October 3, Threadgill reiterated that he wanted his trial to begin on November 7. 4RP 13. On October 17, 2011, the parties learned that Threadgill was excluded as a possible contributor of the DNA found on Walstrand's body. CP 246. At a status hearing on October 20, defense counsel confirmed they would be ready for trial by November 7. 5RP 6. The court scheduled omnibus for November 1 and ordered all trial briefs to be filed by November 2. 5RP 11, 15.

At the omnibus hearing on Tuesday, November 1, prosecutors disclosed for the first time that, the previous day, they had submitted additional DNA samples to the crime lab – from Calvin Davis, Araya McMillon-Cooper, and Lawrence Jungers[4] – to exclude them from evidence at the scene. Prosecutors acknowledged the results might not be ready in time for trial.

[4] Jungers was one of Walstrand's customers just prior to her murder. See 19RP 25-26.

6RP 15-16. The defense was surprised by this revelation. 6RP 16-17. Prosecutors admitted they had not taken Davis' DNA sample until the prior Friday. 6RP 17. But they assured opposing counsel and the court that the State was prepared to proceed to trial on November 7 without these results if not received by that date. 6RP 15-16. The defense again confirmed it was ready for trial November 7 and indicated a desire to finish pretrial hearings and start jury selection before November 12. 6RP 17-18.

Unexpectedly, on the afternoon of Friday, November 4, the State filed a Motion to Continue Trial until December 1 and indicated that it was now "unwilling to proceed to trial" without results from the crime lab comparing Davis' DNA to the male DNA found at the crime scene. Supp. CP ___ (sub no. 88C, State's Motion to Continue Trial, at 4, 12). The defense filed a lengthy response vigorously opposing the motion. CP 234-356.

The parties argued the State's motion on November 7 – the day trial was set to begin. 7RP 2. The State conceded prior knowledge that the defense planned to argue Davis was involved in the killing, but changed its mind about wanting his DNA evidence

for trial once it received defense briefing focusing on Davis.[5] 7RP 4-5. The State also maintained it had not been possible to obtain Davis' DNA until he voluntarily agreed to provide a sample in October 2011 based on the following circumstances set out in its motion:

> 8. Mr. Davis was charged in March 2010 in an unrelated case with promoting prostitution, assault, intimidating a witness and tampering with a witness, King County Superior Court #10-1-01056-1 KNT. He was convicted of all charges in April 2011 but made a motion for a new trial based on ineffective assistance of counsel. That motion was pending when the State filed charges against Daniel Threadgill for the murder of Jennifer Walstrand.
>
> 9. The State approached Mr. Davis about assisting in the prosecution of Mr. Threadgill since Mr. Davis had information about possible motive for the murder that could assist the State. Due to the pending motion for a new trial, Mr. Davis's counsel, David Gehrke, advised Mr. Davis not to assist the State in the murder case because such assistance would expose Mr. Davis to potential additional criminal liability and potentially require him to admit to crimes that would affect his motion for new trial.
>
> 10. On October 13, 2011, Mr. Davis's motion for new trial was resolved when he and the State entered an agreement by which he would

[5] The defense filed a Trial Brief and Motion to Admit Other Suspect Evidence on November 2 and November 3, respectively, both of which addressed plans to convince jurors Davis was involved in Walstrand's murder. See CP 13-27, 82-221.

> withdraw his motion for a new trial and his right to appeal in exchange for the State recommending a standard range sentence of 89.5 months.
>
> 11. Mr. Davis was sentenced on October 19, 2011. After his sentencing was completed, Mr. Gehrke, Davis's counsel, agreed to allow Mr. Davis to cooperate in the present case.

Supp. CP ___ (sub no. 88C, State's Motion to Continue Trial, at 2-3; see also 7RP 5-10 (summarizing these events). The State obtained a DNA sample from Davis October 28 and sent it to the crime lab October 31. 7RP 5.

The State argued it would be unfair to start trial without the DNA results concerning Davis because, in their absence, the defense could argue that Davis' DNA might be on the victim and the State would be unable to rebut that argument. 7RP 5-6. The State also argued the results might show that Davis' DNA was on the victim, leading to a mistrial if discovered during trial or a defense motion for new trial should Threadgill be convicted without that evidence. 7RP 5-6.

The defense argued that, in light of the failure to even ask Davis for a sample of his DNA prior to October 28, the State could not establish that it had acted with due diligence and could not establish good cause for a continuance. CP 235-237. Davis' own

attorney – David Gehrke – disputed prosecutors' version of events. In a sworn declaration, Gehrke indicated that prosecutors never asked Davis for a DNA sample prior to October 28, 2011, and he never advised Davis to withhold a sample. CP 295. Gehrke continued:

> 5. Had the State asked for Mr. Davis' DNA, I would have advised my client that, in light of his multiple previous felony convictions, there would be no reason for him to withhold giving a sample of his DNA as the State would already have a DNA sample from those convictions.
>
> 6. Nothing that I did as Mr. Davis' attorney would have prevented the State from seeking to obtain a sample of his DNA prior to October 28, 2011. Any assertion by the State that Mr. Davis would not provide a DNA sample prior to October 28, 2011 based on my counsel is not a correct statement.

CP 296.

Faced with Gehrke's sworn declaration, prosecutors expressed regret they did not ask sooner "because we would have had it sooner, but we didn't."[6] 7RP 8. Prosecutors also indicated that, according to the crime lab, "they are not allowed to pull a sample from CODUS to compare to DNA at the scene" and had no choice but to obtain a new reference sample from Davis. 7RP 9.

The defense pointed out that the prosecution had long known the defense would be painting Davis as a suspect in this case. 7RP 13 ("that was something the state was well aware of from the beginning"). Indeed, a majority of defense interviews with witnesses had involved connecting Davis to Walstrand and, even in law enforcement's mind, Davis had been a person of interest following the murder. 7RP 11-16; CP 243-245. The defense also argued that, as a convicted felon, Davis' DNA should already have been available to prosecutors and, if not, they could have collected it at any time. 7RP 12; CP 245-246. Yet, they did nothing until just before trial. 7RP 14-15.

In granting the State's motion to continue, the court indicated it was taking prosecutors at their word that any prior sample of Davis' DNA would not have sufficed and found that a new sample could not reasonably have been obtained earlier. The court also justified the continuance with prosecutors' recent realization (after the omnibus hearing) that it was very important to compare Davis' profile against DNA found at the scene. 7RP 20-21. Trial was continued to December 1. 7RP 21; Supp. CP ___

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[6] A short time later, however, prosecutors changed strategy and questioned Gehrke's veracity on this subject. 7RP 17 ("I don't think that's realistic or genuine on his part.").

(sub no. 89, Order Continuing Trial). On that date, prosecutors informed the court that the crime lab had excluded Davis as the source of male DNA found at the scene. 11RP 2.

By continuing trial beyond the speedy trial deadline, over Threadgill's objection, and without sufficient justification, the trial court erred. Reversal is the proper remedy.

CrR 3.3(b)(1)(i) requires trial within 60 days for a defendant detained in jail. The rule is designed to protect the constitutional right to speedy trial. State v. Mack, 89 Wn.2d 788, 791-792, 576 P.2d 44 (1978). "[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976). A violation of the rule requires dismissal of the charge with prejudice. CrR 3.3(h); State v. Saunders, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009).

Delays for continuances are excluded from the 60-day period and may be granted on motion of a party where "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(e)(3), (f)(2). If a continuance is properly granted and results in an

excluded period, "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5).

This Court reviews an alleged violation of the speedy trial rule de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). The decision to grant a continuance is reviewed for an abuse of discretion and will be overturned where clearly unreasonable or exercised on untenable grounds or for untenable reasons. Kenyon, 167 Wn.2d at 135; Saunders, 153 Wn. App. at 216. A trial court abuses its discretion when it grants a continuance without "convincing and valid reasons." Saunders, 153 Wn. App. at 221. Moreover, where the State fails to exercise due diligence in obtaining evidence, it cannot rely on the absence of that evidence as valid grounds for a continuance. See State v. Adamski, 111 Wn.2d 574, 578-579, 761 P.2d 621 (1988); State v. Ross, 98 Wn. App. 1, 4, 981 P.2d 888 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000); State v. Gowens, 27 Wn. App. 921, 925, 621 P.2d 198 (1980).

Undoubtedly, there are circumstances where the prosecution's desire to obtain crime lab results is required in the administration of justice and warrants a continuance over the defendant's assertion of his right to speedy trial.

In State v. Osborne, 18 Wn. App. 318, 320, 569 P.2d 1176 (1977), review denied, 89 Wn.2d 1016 (1978), substantial physical evidence – including items in the defendant's possession soaked in what was believed to be the victim's blood – were timely sent to the crime lab for testing, but could not be completed by the scheduled trial date. In affirming the trial court's decision to continue trial at the prosecution's request, this Court noted:

> substantial efforts had been made to analyze the physical evidence, which had been sent to the laboratory a few days after the victim was discovered, but because of the large number of items to analyze, the sophisticated analysis required, and the heavy workload from other cases, the analysis was incomplete. The criminalist indicated the analysis could be finished by January 5, 1976. The trial court granted the prosecution's motion, continuing the trial to January 5, 1976.
>
> . . . . The expert analysis of raw physical exhibits is an important, often crucial, form of the prosecution's evidence. The criminalist's affidavit established that expert analysis of the physical evidence was unavailable, that the State had exercised due diligence, and that there were reasonable grounds to believe that the analysis would be available in a reasonable time. Therefore the delay resulting from the continuance is excluded from the speedy trial period . . . .

Osborne, 18 Wn. App. at 320-321.

Among the relevant considerations in assessing a motion to continue are notions of surprise and diligence. State v. Eller, 84

Wn.2d 90, 95, 524 P.2d 242 (1974). In Osborne, the continuance was proper because prosecutors had acted with timeliness and diligence and could hardly be faulted because the case involved a surprisingly large number of evidence items requiring sophisticated analysis.

In contrast, prosecutors handling Threadgill's case failed to exercise diligence and could hardly claim surprise that Davis' DNA profile might be important at trial. Although prosecutor's claimed that, because Davis was represented by counsel, they could not obtain a reference sample from him until after they made a deal with him in October 2011, they were forced to concede that they never even bothered to ask for a sample earlier. See 7RP 8. Davis' attorney, David Gehrke, submitted a sworn declaration signed under penalty of perjury stating that, had prosecutors asked about Davis' willingness to provide a DNA sample any time during his representation (April to October 2011), he would have advised Davis there was no reason to refuse. Gehrke rejected any notion that he would have advised Davis to decline a request. CP 295-296. Prosecutors were not diligent.

Prosecutors also failed to demonstrate that notions of surprise justified a continuance. While prosecutors emphasized

the defense briefing of November 2 and 3 focusing on Davis as a possible suspect, they conceded they had prior knowledge of this focus. See RP 7RP 4-5. In fact, prosecutors had already obtained Davis' DNA sample (October 28) and sent it off to the lab (October 31) prior to the filing of these defense briefs. See 7RP 5. Indeed, as defense counsel demonstrated, prosecutors knew they were seeking to portray Davis as a suspect "from the beginning" based on numerous defense interviews. 7RP 11-16.

Ultimately, the record belies the trial court's findings that prosecutors could not reasonably have obtained a sample from Davis any earlier and that the defense focus on Davis in its trial briefs necessitated a continuance in the administration of justice. See 7RP 20-21. The State did not act with due diligence when it failed to timely request a DNA sample from Davis at any time between August 2010 and October 2011 and failed to submit it for comparison to evidence at the scene. And while the defense briefing may have highlighted the impact of these strategic failures, neither that briefing nor anything else warranted a continuance denying Threadgill his right to a speedy trial under CrR 3.3. Reversal is required.

2. THE STATE VIOLATED THREADGILL'S CONSTITUTIONAL RIGHTS WHEN IT PRESENTED EVIDENCE THAT HE REFUSED TO CONSENT TO A SEARCH OF HIS CELL PHONE AND RECORDS OF HIS CALLS.

In State v. Gauthier, 174 Wn. App. 257, 263-267, 298 P.3d 126 (2013), this Court held that the State's use of evidence that the defendant refused consent to a search, thereby requiring law enforcement to obtain a court order authorizing the search, violates due process and the protections of the Fourth Amendment and article 1, section 7 by improperly penalizing the lawful exercise of a constitutional right.

Gauthier was suspected of rape and, when asked to provide a DNA sample to compare with evidence found on the victim, declined. A detective then obtained a court order authorizing a DNA cheek swab. Gauthier, 174 Wn. App. at 261. At trial, the prosecution elicited evidence of Gauthier's refusal and contrasted that refusal with the cooperation of another suspect, who had volunteered a DNA sample. Id. at 260-262. This Court found that "the prosecutor's use of Gauthier's invocation of his right to refuse consent to a warrantless search as substantive evidence of his guilt was a manifest constitutional error properly raised for the first time on appeal." Id. at 267.

The same violation occurred at Threadgill's trial. During the State's examination of Chuck Pardee – the King County Prosecutor's forensic investigator – the following exchange occurred regarding Pardee's examination of phone records for McMillon-Cooper, Davis, and Threadgill:

> Q: Specifically, how many phones did you review with respect to Ms. Araya McMillon-Cooper?
>
> A: Two, an LG and a Samsung.
>
> Q: And did you review a phone that purported to belong to Daniel Threadgill?
>
> A: Yes, a Sanyo.
>
> Q: All right. And one purporting to belong to Calvin Davis?
>
> A: Yes, Blackberry.
>
> Q: Now in reviewing the phone records or the phones for Ms. McMillon-Cooper and Mr. Threadgill, was that pursuant to a court order?
>
> A: Yes.
>
> Q: What about the records or the phone for Mr. Davis?
>
> A: It was consent.
>
> Q: Mr. Davis' consent?
>
> A: Correct.

25RP 29-30; see also 22RP 37 (detective testifies that Davis consented to a search of his phone and records).

Citizens have a recognized privacy interest in the information on their phones. See State v. Hinton, 179 Wn.2d 862, 867-878, 319 P.3d 9 (2014). As in Gauthier, at Threadgill's trial the prosecutor elicited his lack of cooperation (the necessity of a court order to obtain his phone records) and contrasted that exercise of his constitutional right to refuse a warrantless search with the cooperation of another individual once suspected of involvement in the crime (Davis' consent). Making matters worse, Threadgill was lumped in with McMillon-Cooper as another individual for whom a court order had been required. And, of course, she confessed to being criminally liable in connection with Walstrand's murder. 24RP 78.

The only remaining question is whether the State can demonstrate, as it must, that its violation of Threadgill's constitutional rights was harmless beyond a reasonable doubt. To do so, the State must show that "any reasonable jury would reach the same result absent the error, and [that] the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Gauthier, 174 Wn. App. at 270.

The State cannot make this showing. The attack against Walstrand was brutal and prolonged. She fought back and would have had significant contact with her attacker. Not surprisingly, law enforcement believed the attacker's DNA would be found on Walstrand's body and, in particular, on or near the left side of her neck, where the killer likely grabbed her and controlled her. Threadgill's DNA was not found anywhere on Walstrand or in her apartment. Nor were his fingerprints found anywhere on the premises. Instead, "male individual A" left his DNA on the left side of Walstrand's neck – precisely where law enforcement believed the killer's DNA would be found.

Moreover, despite the State's attempts to obtain a confession from Threadgill, he denied involvement in the crime. And while McMillon-Cooper, Mohamed, and Kerow all eventually testified that Threadgill was the killer, there was reason to doubt all three women. McMillon-Cooper and Mohamed initially denied any knowledge of the murder, Kerow couldn't decide whether she merely stood by the door or intervened and got cut, none of the women implicated Threadgill until police had discovered their involvement, and McMillon-Cooper cut a deal with prosecutors in which she agreed to incriminate Threadgill in exchange for a

greatly reduced charge and sentence. In light of these reasons to doubt, reversal is required. See Gauthier, 174 Wn. App. at 270 (State failed to show jury would have reached same verdict without improper evidence of defendant's refusal to consent to DNA test).

If this Court concludes the above error was not preserved because defense counsel did not raise an argument under the Fourth Amendment or Article 1, Section 7 or otherwise object to the prosecutor's use of this evidence at trial, those failings deprived Threadgill of his constitutional right to effective assistance of counsel. A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas,

109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003) (citing State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 ( 2000)).

Counsel's performance in failing to object and raise a constitutional argument was unreasonably deficient performance in light of the copious case law – predating Gauthier – holding that evidence of denying consent to search violates the Fourth Amendment. See Gauthier, 174 Wn. App. at 263-266 (summarizing federal and state precedent on issue). Indeed, as the Gauthier court noted, in addition to the significant supporting precedent from other jurisdictions, in State v. Jones, "The Washington Supreme Court ha[d] also indicated, though not explicitly held, that using refusal to consent to a search as evidence of guilt is unconstitutional." Id. at 266 (citing State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010)).

Defense counsel clearly knew about Jones. In fact, they expressly relied on Jones to preclude the State from eliciting evidence that law enforcement was forced to get a court order to obtain Threadgill's DNA after Threadgill refused to consent to the taking of a sample. 1RP 12; 9RP 5, 8-9; pretrial exhibit 1, at 47-50.

Prosecutors had argued that the need to get a court order was relevant and admissible to demonstrate Threadgill's consciousness of guilt. 9RP 6-7, 102-104. Judge Carey granted the defense motion to suppress this evidence. 9RP 101-105.

Thus, not only did defense counsel clearly understand the damaging impact of evidence that Threadgill exercised his Fourth Amendment right not to consent to a warrantless search, we know that Judge Carey – based on her ruling concerning the DNA sample – would have sustained a defense objection concerning Threadgill's lack of consent to search his phone records. Counsel's failure to object to the State's evidence on this point was deficient.

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient attorney performance requires reversal whenever the error undermines confidence in the outcome. Id.

As previously discussed, a defense objection to Pardee's revelations about Threadgill's lack of consent would have been sustained. Because there was no defense objection, however,

jurors learned that Threadgill, just like McMillon-Cooper (who had already pled guilty) and contrary to Davis (who clearly did not commit the murder), refused to consent to a search of his cell records, thereby requiring a court order. Jurors would have treated this evidence consistently with the unsuccessful argument prosecutors made for admission of the DNA refusal, i.e., that it demonstrated Threadgill's guilty conscience. In a case where Threadgill's DNA was not found on the victim, others' DNA was, and jurors had reasons to doubt the veracity of those present for the murder, the State's improper evidence undermines confidence in the outcome below.

### 3. THE JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL.

Threadgill's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 670; see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

However, WPIC 4.01 is constitutionally defective for two reasons. First, it instructs jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Because jurors must have more than just reasonable doubt – they must also have an articulable doubt – this makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt is identical to "fill-in-the-blank" arguments, which Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing.

a. WPIC 4.01's language improperly adds an articulation requirement.

Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to acquit. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this significant flaw in WPIC 4.01.

"Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not

ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). Thus, for a doubt to be reasonable, it must be logically derived, rational, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The placement of the article "a" before "reason" in WPIC 4.01 improperly alters and augments the definition of reasonable doubt. In the context of WPIC 4.01, "a reason" means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to "reason," which refers to a doubt based in reason or logic, "a reason" requires reasonable doubt to be capable of explanation or justification. In other words, WPIC 4.01 requires not just a reasonable doubt, but also an explainable, articulable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under WPIC 4.01, reasonable doubt is insufficient. Rather, Washington courts instruct jurors that they must also be able to point to a reason that justifies their reasonable doubt. A juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that a juror with legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. But, despite having reasonable doubt, the juror could not vote to acquit under WPIC 4.01.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, a juror could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3.

b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have prohibited arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Therefore, such arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759-60.

For instance, in State v. Walker, the court held improper a prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you *have* to say: 'I had a reasonable doubt[.]'

What was the reason for your doubt? 'My reason was ____.'" 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (quoting clerk's papers). Likewise, in State v. Venegas, the court found flagrant and ill-intentioned misconduct where the prosecutor argued in closing, "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank.'" 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (quoting report of proceedings); see also State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Although it does not explicitly tell jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt. This is, in substance, the same exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, then it makes no sense to allow the same undermining to occur through a jury instruction.

Outside the prosecutorial misconduct realm, Division Two recently acknowledged that an articulation requirement in a trial

court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. 179 Wn. App. at 422-23. Similarly, in considering a challenge to fill-in-the-blank arguments, the Emery court approved of defining "reasonable doubt as a 'doubt for which a reason exists.'" 174 Wn.2d at 760. But the Emery court made this statement without explanation or analysis. And, neither the Emery nor the Kalebaugh court explained or analyzed why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts.[7] Furthermore, neither court was

[7] The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." 179 Wn. App. at 423. But both errors undermine the presumption of innocence by misstating the reasonable doubt standard. As the dissenting judge correctly

considering a direct challenge to the WPIC language, so their approval of WPIC 4.01 does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

Instead, just like fill-in-the-blank arguments, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt." Emery, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence and is therefore erroneous. WPIC 4.01 is unconstitutional.

In response, the State may argue this issue was already decided in State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975). However, Thompson was decided over 40 years ago and can no longer be squared with Emery and the fill-in-the-blank cases. WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. Because the State will avoid supplying reasons to doubt in its own case, WPIC 4.01 suggests that either the jury or

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surmised, "if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge." Id. at 427 (Bjorgen, J., dissenting).

the defense should supply them, "further undermining the presumption of innocence." Kalebaugh, 179 Wn. App. at 426 (Bjorgen, J., dissenting). Therefore, "[t]he logic and policy of the decision in [Emery] impels the conclusion" that the articulation requirement in WPIC 4.01 is "constitutionally flawed." Id. at 424.

c. WPIC 4.01's articulation requirement requires reversal.

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281 (emphasis in original). Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error." Id. at 281-82 (internal quotation marks omitted).[8]

Threadgill's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. This required more than just a reasonable doubt to acquit; it required a

[8] As a structural constitutional error, this error also qualifies as manifest constitutional error under RAP 2.5(a) and is properly raised for the first time on appeal. See State v. Wise, 176 Wn.2d 1, 18 n.11, 288 P.3d 113 (2012) ("Nothing

reasonable, articulable doubt. This articulation requirement undermined the presumption of innocence. It is structural error and requires reversal. This Court should accordingly reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

4. THE SENTENCING COURT ERRED WHEN IT FAILED TO ENTER WRITTEN FINDINGS AND CONCLUSIONS SUPPORTING THREADGILL'S EXCEPTIONAL SENTENCE.

RCW 9.94A.535 provides, "Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." (Emphasis added). This obligation is mandatory. State v. Friedlund, 182 Wn.2d 388, 341 P.3d 280, 282-284 (2015). At sentencing, the prosecution indicated that it would prepare findings and conclusions in support of the exceptional sentence. 30RP 39. This has never happened. The remedy is remand. Id. at 283-284.

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in our rules or our precedent precludes different treatment of structural error as a special category of 'manifest error affecting a constitutional right.'").

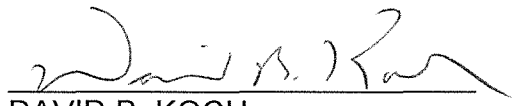
D. CONCLUSION

The unjustified violation of Threadgill's right to a speedy trial requires reversal of his conviction and sentence. Alternatively, his conviction must be reversed both because the exercise of his right to refuse a warrantless search was used against him in violation of his constitutional rights and because the reasonable doubt instruction used at his trial is constitutionally defective. Finally, mandatory findings and conclusions supporting his sentence have never been filed.

DATED this 30th day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

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| STATE OF WASHINGTON | ) | |
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| Respondent, | ) | |
| | ) | |
| v. | ) | COA NO. 68662-3-I |
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| DANIEL THREADGILL, | ) | |
| | ) | |
| Appellant. | ) | |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANIEL THREADGILL
DOC NO. 357673
WASHINGTON STATE PENITENTIARY
1313 N.13TH AVENUE
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL 2015.

X Patrick Mayovsky