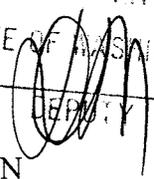


FILED  
COURT OF APPEALS  
DIVISION II

No. 37682-2-II

08 NOV 24 AM 9:43

STATE OF WASHINGTON  
BY \_\_\_\_\_



COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON

V.

DANIEL WAYNE LACKEY

---

BRIEF OF APPELLANT

---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton, WA 98337  
(360) 792-9345

**ORIGINAL**

**TABLE OF CONTENTS**

A. Assignments of Error.....1

B. Statement of the Facts.....2

C. Argument.....16

    1. The trial court erred by denying Mr. Lackey’s motion to dismiss for violation of his right to speedy trial pursuant to CrR 3.3.....16

    2. The repeated delays in Mr. Lackey’s trial resulted in a violation of his constitutional right to a speedy trial.....26

    3. Mr. Lackey was denied his constitutional right to be represented by an attorney on July 23, 2007.....28

    4. The admission of the body wire and body wire transcript violated Mr. Lackey’s constitutional right to confrontation.....30

    5. The prosecutor committed prosecutorial misconduct by failing to disclose exculpatory material about Ms. Halverson’s status.....35

    6. Mr. Lackey’s constitutional right to compel witnesses was improperly impeded by the court and prosecutor.....38

D. Conclusion.....40

## TABLE OF AUTHORITIES

### Cases

<u>Barker v. Wingo</u> , 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....	26
<u>Brady v. Maryland</u> , 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) .....	37
<u>Hamilton v. Alabama</u> , 368 U.S. 52 (1961).....	29
<u>Michigan v. Jackson</u> , 475 U.S. 625, 640 (1986).....	29
<u>State of Vermont v. Brillon</u> , __ Vt. __, 955 A.2d 1108 (2008), <u>cert. granted</u> , __ U.S. __ (2008).....	27
<u>State v. Armstrong</u> , 109 Wn. App. 458, 35 P.3d 397 (2001) .....	36
<u>State v. Benn</u> , 120 Wn.2d 631, 649, 845 P.2d 289 (1993) .....	38
<u>State v. Campbell</u> , 103 Wn.2d 1, 14, 691 P.2d 929 (1984) .....	19
<u>State v. Chhom</u> , 162 Wn.2d 451, 173 P.3d 234 (2007).....	20
<u>State v. Connie J.C.</u> , 86 Wn. App. 453, 937 P.2d 1116 (1997).....	33
<u>State v. Iniguez</u> , 143 Wn.App. 845, 180 P.3d 855 (2008), <u>review granted</u> , __ Wn.2d __ (Oct. 2, 2008).....	26
<u>State v. Kenyon</u> , 143 Wn.App. 304, 177 P.3d 196 (2008), <u>review granted</u> , __ Wn.2d __ (Sept. 4, 1008).....	24
<u>State v. Kokot</u> , 42 Wn. App. 733, 736-37, 713 P.2d 1121, review denied, 105 Wn.2d 1023 (1986).....	23
<u>State v. Mack</u> , 89 Wn.2d 788, 794, 576 P.2d 44 (1978).....	23
<u>State v. Martinez</u> , 105 Wn.App. 775, 20 P.3d 1062 (2001) .....	34
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996) .....	39

<u>State v. Rohrich</u> , 132 Wn.2d 472, 939 P.2d 697 (1997).....	33
<u>State v. Smith</u> , 101 Wn. 2d 36, 677 P.2d 100 (1984) .....	39
<u>State v. Talley</u> , 134 Wn.2d 176, 949 P.2d 358 (1998) .....	37
<u>State v. Warren</u> , 96 Wn. App. 306, 310, 979 P.2d 915, 989 P.2d 587 (1999).....	24
<u>United States v. Agurs</u> , 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).....	38
<u>United States v. Beamon</u> , 992 F.2d 1009, 1012-13 (9th Cir. 1993) .....	26
<u>United States v. Hamilton</u> , 391 F. 3d 1066, 1070-1072 (9 <sup>th</sup> Cir. 2004).....	29,30
<u>United States v. Vassell</u> , 970 F.2d 1162, 1164 (2d Cir. 1992) .....	26
<u>United States v. Wade</u> , 388 U.S. 218, 225 (1967).....	29
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) .....	38, 39

## A. Assignments of Error

### Assignments of Error

1. The trial court erred by denying Mr. Lackey's motion to dismiss for violation of his right to speedy trial pursuant to CrR 3.3.

2. The repeated delays in Mr. Lackey's trial resulted in a violation of his constitutional right to a speedy trial.

3. Mr. Lackey was denied his constitutional right to be represented by an attorney on July 23, 2007.

4. The admission of the body wire and body wire transcript violated Mr. Lackey's constitutional right to confrontation.

5. The prosecutor committed prosecutorial misconduct by failing to disclose exculpatory material about Ms. Halverson's status.

6. Mr. Lackey's constitutional right to compel witnesses was improperly impeded by the court and prosecutor.

### Issues Pertaining to Assignments of Error

1. Did the 323 day period between arraignment and trial over the defendant's repeated objection violate his right to a speedy trial pursuant to CrR 3.3 and the Sixth Amendment of the United States Constitution? (Assignments of Error 1 and 2)

2. Was Mr. Lackey denied his constitutional right to be represented by an attorney on July 23, 2007 when the Court caused him to sign a

speedy trial waiver after appointing an attorney but without the attorney's presence? (Assignments of Error 3)

4. Did the admission of the body wire and body wire transcript violate Mr. Lackey's constitutional right to confrontation when the declarant did not testify about the content of the body wire? (Assignments of Error 3)

5. Did the prosecutor commit prosecutorial misconduct and thereby impair Mr. Lackey's Sixth Amendment right to compel witnesses by failing to disclose exculpatory material about Ms. Halverson's status, causing the Court to erroneously sustain her claim of Fifth Amendment privilege? (Assignments of Error 5 and 6)

#### B. Statement of the Facts

Daniel Lackey was charged by second amended information with two counts of delivery of a controlled substance within 1000 feet of a school zone on April 2 and April 9, 2007. CP, 71. Both deliveries involved the use of a police informant named Joey Morris. He was convicted after a jury trial. CP, 106-09. He appeals his convictions.

### **Procedural Facts**

Mr. Lackey was arraigned on May 7, 2007. RP, 4.<sup>1</sup> Trial commenced on March 25, 2008, 323 days later. Because Mr. Lackey filed affidavit of prejudice against Judge Verser, all proceedings were heard by court commissioners or visiting judges. RP, 5 (June 22, 2007). The sequence of events was as follows:

May 7, 2007	Arraignment. Trial is set for July 2. RP, 10.
June 22, 2007	Defense counsel moves to withdraw. RP, 3. Court denies the motion without prejudice. RP, 6.
July 20, 2007	Defense counsel renews motion to withdraw due to conflict of interest. RP, 3. Court grants the motion. RP, 6.
July 23, 2007	Mr. Lackey appears without counsel. After a short discussion of Mr. Lackey's finances, the court

---

<sup>1</sup> Each reference to the report of proceedings refers to the appropriate date, when possible, with the exception of the jury trial, which is referred to as TRP. Where the appropriate date is not apparent, the date is referenced in parenthesis.

appoints attorney James Gilmore to represent Mr. Lackey. RP, 5. The prosecutor references CrR 3.3(c)(2)(viii) represents her understanding that the speedy trial clock starts anew due to the withdrawal of the first defense attorney. RP, 6. Mr. Lackey asked for an “earlier” trial date, although he recognized the need to give his new attorney time to prepare. RP, 6. The court asks Mr. Lackey if he wants to waive his right to a speedy trial, which the court defined as a “potentially valuable right.” RP, 7. The court suggests that a trial could take place as early as August 28. RP, 7. Mr. Lackey complained that he felt “forced” into signing the waiver and asked to speak to his attorney first prior to signing. The court denied the request saying, “Well, we’re going to set dates this morning.” RP, 7. Mr. Lackey continued to express confusion about his right to a speedy trial. RP, 9. Eventually, Mr. Lackey signed the waiver. RP, 9. The speedy trial waiver does not list an expiration date. CP, 18.

August 10, 2007      The State moves to continue the trial due to the illness of a material witness, Detective Miller. RP, 3. The State asks for a trial date of October 1 because of “some prior commitments.” RP, 4. Defense counsel states that the defense is unwilling to waive speedy trial. RP, 4. Mr. Lackey objects to any continuance that is beyond the speedy trial expiration date. RP, 5. The Court grants a continuance to October 1, 2007. RP, 6.

August 31, 2007      The State again moves to continue due to “one of [its] officers is unavailable.” RP, 3. The next trial date available for a visiting judge is October 29, 2007. RP, 6. Mr. Lackey did not object to that date. RP, 6. Mr. Lackey signs a speedy trial waiver. RP, 9. The speedy trial waiver does not reflect an expiration date, but Mr. Lackey consents to a trial date of October 29, 2007. CP, 19.

September 21, 2007      Discussion of Mr. Lackey’s conditions of release. RP, 1 et. seq.

October 10, 2007      Court increases bail by \$20,000. RP, 20.

October 12, 2007      More discussion of conditions of release. RP, 1 et. seq.

October 19, 2007      Mr. Lackey appears in court. RP, 4. Defense counsel Gilmore, appearing by telephone, announces his intention to file several pre-trial motions and needs a short continuance to properly prepare the motions. RP, 4. He asks to move the trial date to November 5. RP, 3-4. Mr. Lackey, through Mr. Gilmore, expresses concerns about the many delays in his case and the “scheduling and his speedy trial issue.” RP, 7. Mr. Gilmore asks to schedule the trial for November 5 so “we don’t lose that” date. RP, 7. The court treats the request as waiving the right to speedy trial for the period covered by the motion. RP, 9. The Court set a pre-trial review date for October 26 to decide when the trial date should be. RP, 11.

October 26, 2007      Mr. Lackey appears in person. Mr. Gilmore, appearing again by telephone, reiterates his request for a November 5 trial. RP, 4. The clerk announces that the November 5 date has been taken by another case. RP, 4. The next available date with a visiting judge was December 10. RP, 4. Mr. Gilmore is unavailable on December 10 due to another trial in Alaska. RP, 4. The clerk stated that the next available date after December 10 is in March. RP, 5. Mr. Gilmore expresses no opposition to a March trial. RP, 6. Mr. Lackey, however, opposes the continuance. RP, 8. He states he had arrived at court expecting to go to trial on November 3 or 4. RP, 8. He states that he has a job opportunity, but the pending trial makes it impossible for him to take the job because the job requires out-of-state travel. RP, 8, 10. After speaking privately with Mr. Lackey, Mr. Gilmore asks for a hearing in front of the visiting judge on November 5. RP, 11. The court sets a status hearing for that date. RP, 11.

November 5, 2007      When Mr. Lackey appears on November 5, he is in custody, having been recently arrested for an unrelated burglary charge. RP, 3. Mr. Lackey is not personally present in court, but appears by video from the jail. RP, 6 (Feb. 4, 2008). The record shows that Mr. Gilmore and Mr. Lackey were having communication problems. RP, 5. This leads Mr. Gilmore to state that he and Mr. Lackey “have some conflicting issues on the status of the speedy trial clock ticking.” RP, 7. Mr. Gilmore states Mr. Lackey is available for trial on December 10, but he is not. RP, 7. Mr. Lackey refuses to waive his right to speedy trial. RP, 8. He expresses his understanding that he was supposed to be in trial, saying, “Today I was supposed to be in trial for this – for this case.” RP, 10. When Mr. Lackey tries to make an additional record on the speedy trial issues, the court cuts him off and sets dates. RP, 12. The court, expressing the opinion that Mr. Gilmore “is speaking eloquently for you and invoking all the

rules that apply,” sets the trial for January 7. RP, 12.  
Mr. Lackey remains in custody pending trial on the  
burglary charge. RP, 5 (Feb. 4, 2008).

December 19, 2007 Mr. Lackey goes to trial for the unrelated burglary  
charge and is acquitted. RP, 5 (Feb. 5, 2008). Mr.  
Lackey is released from jail pending trial for the  
drug charges. RP, 5 (Feb. 5, 2008).

December 28, 2007 Mr. Gilmore advises he has “previously preserved  
our speedy trial right” and is ready to go to trial on  
January 7. RP, 4. The State advises the court that  
another case with priority is also scheduled to go to  
trial on January 7. RP, 3. The court schedules a trial  
date for February 4. RP, 6.

January 17, 2008 Mr. Lackey files a motion to dismiss for violation of  
his right to speedy trial. CP, 50.

January 25, 2008 The State brings a motion to continue the trial  
because Detective Miller is in the hospital with a

heart condition. CP, 51; RP, 3. The motion states that Detective Miller will be on “medical leave for approximately four weeks.” CP, 52. Mr. Gilmore states the defense position that every day that has passed since November 5 is in violation of Mr. Lackey’s speedy trial rights. RP, 4. Mr. Lackey continues to object to any trial continuances. RP, 4-5. The court grants the motion to continue. RP, 7. Trial is set for March 24.

February 4, 2008

The court hears Mr. Lackey’s motion to dismiss for violation of his speedy trial rights. CP, 90. After reviewing the procedural history of the case, the trial court rules that the last commencement date under CrR 3.3 was December 19 and that the State had 90 days from that date to bring Mr. Lackey to trial. The court sets the last day for trial under CrR 3.3 as March 18, 2008. RP, 28.

The court then deals with the issue that the trial is scheduled for March 24. RP, 29. Mr. Lackey

objects to the trial date of March 24 on the ground that it exceeds the speedy trial expiration of March 18, as determined by the court. RP, 35. The court reviews a letter from Medrona Family Medicine that Detective Miller “is recovering from hospitalization and illness [and it] is appropriate to defer trial and works assignments until March 2008.” RP, 37-38. The court finds there is good cause to continue the trial in the administration of justice. RP, 39. The March 24 trial date remains unchanged.

March 24, 2008      Trial commences with pre-trial motions. RP, 1.

### **Substantive Facts**

Joey Morris had an arrest warrant. TRP, 44. Deputy Brett Anglin located Mr. Morris on Second Street in Port Townsend on March 23, 2007. TRP, 45-46, 75. When Deputy Anglin arrested Mr. Morris, he had methamphetamine on his person. TRP, 45. Rather than charge him with drug possession, however, Deputy Anglin offered him the chance to work as an informant for the Sheriff’s Office. RP, 45. As an informant, he was

required in part to report daily to Detective Miller and obey all laws. TRP, 81. Mr. Morris was not consistent in his reporting. TRP, 85. Of more concern is a May 3, 2007 allegation that Mr. Morris was selling drugs. TRP, 82. When initially confronted about the drug sells, Mr. Morris denied the allegation, but later admitted its truth. TRP, 83-84. As a result of the drug sale, the sheriff's office terminated their contract with him. TRP, 140.

The State's theory was that Mr. Morris performed two controlled buys of methamphetamine on April 2 and April 9, 2007. Under the State's theory, Mr. Lackey was acting as an accomplice on April 2 and as a principal on April 9. The first buy was done at 190 Second Street in Port Townsend. TRP, 50. Mr. Morris lived at that address with his girlfriend, Bonita Halverson.<sup>2</sup> TRP, 70-71. Mr. Morris was not wearing a body wire on April 2, but he was on April 9. TRP, 54, 68.

On April 2, 2007, Mr. Morris was strip searched and provided with photocopied buy money. TRP, 67-68. The buy money was two twenty-dollar bills. TRP, 68, Exhibit 11. Deputy Anglin watched as Mr. Morris approached 190 Second Street. TRP, 69. Reserve Deputy Bruce Turner was able to see Mr. Morris enter the house. TRP, 70-71. Ten minutes later, Mr. Morris came out of the house and returned to Deputy Anglin.

---

<sup>2</sup> Ms. Halverson also uses the name of Newton in the record.

TRP, 71. He was in possession of methamphetamine that he said he had purchased. TRP, 72.

Mr. Morris was asked to testify at trial about what happened inside the house. Mr. Morris was asked a leading question whether he went to Mr. Lackey's house on April 2, 2007. RP, 203. He answered he could not remember the exact date. RP, 203. After determining that he had been to Mr. Lackey's house several times to buy drugs, Mr. Morris was asked by the prosecutor the following leading question, "On the day that you went to Mr. Lackey's house to buy drugs, which we have down as April 2<sup>nd</sup>, one of the Deputies testified that they took you out close to his house. Do you agree with that?" RP, 204. Mr. Morris answered in the affirmative. RP, 204.

Mr. Morris was asked who was there when he arrived. He answered, "I guess probably Dan." RP, 204. Asked if anyone else was there, he said, "Probably Bonnie." RP, 204. He was then asked, "Do you remember who handed you the drugs?" RP, 204. He answered, "I believe it was Bonnie." Then, according to his testimony, Mr. Morris left the house. RP, 204.

Defense counsel asked Deputy Anglin about Mr. Morris' account of events immediately after the alleged buy. According to what Mr. Morris told Deputy Anglin, Mr. Morris asked Mr. Lackey, "Hey, how's it

going? Anything going on?” TRP, 129. Ms. Halverson then volunteered, “We’ve got something.” TRP, 129. Mr. Lackey used the phrase, “Yeah, you know it’s happening.” TRP, 130. Mr. Lackey did not touch any drugs or money that day. TRP, 130. Defense counsel offered for admission a transcript of Mr. Morris’ debriefing from April 2. TRP, 133, Exhibit 12. The transcript was admitted without objection from the State. TRP, 133.<sup>3</sup>

Between April 2 and April 4, Mr. Morris moved out of Ms. Halverson’s house. TRP, 89. A controlled buy was completed on April 4 at the house during that week utilizing a body wire. TRP, 90. On the wire, Ms. Halverson can be heard selling drugs to Mr. Morris. TRP, 90; CP, 56. Mr. Lackey was not present. TRP, 90. Ms. Halverson later pled guilty to delivery of a controlled substance stemming from this investigation. TRP, 71.

On April 9, 2007, Deputy Anglin picked Mr. Morris up at his home. TRP, 48. Mr. Morris was strip searched, as was his van, and he was provided with photocopied buy money. TRP, 48. Mr. Morris tried to

---

<sup>3</sup> In Exhibit 12, Mr. Morris describes contacting Mr. Lackey and conversing with him . He asked Mr. Lackey, “Got anything happening?” Mr. Lackey said, “Yeah.” Ms. Halverson then said, “Well, I’ll go ahead and take care of it. You know, how much you want?” Mr. Morris asked for “40.” Ms. Halverson then said, “I’ll be right back.” Ms. Halverson left, returned with methamphetamine, and exchanged the drugs for money. Mr. Lackey was close enough to observe the exchange.

call Mr. Lackey, but received no answer. TRP, 50. Mr. Morris was equipped with a body wire on this transaction. RP, 51. Mr. Morris was unable to make a methamphetamine purchase. RP, 51. Mr. Morris tried later that day to call Mr. Lackey. TRP, 52. After two attempts, Mr. Lackey answered the phone and agreed to meet Mr. Morris on Foster Street. TRP, 52.

The contact between Mr. Morris and Mr. Lackey was recorded by the body wire. Both the tape and the transcript of the tape were admitted into evidence without objection. TRP, 54, 61. Deputy Anglin watched Mr. Morris approach Foster Street. TRP, 64. Deputy Anglin was monitoring the body wire from his vehicle. TRP, 64. Mr. Morris said, "Here he comes." TRP, 64. As Mr. Morris said that, Deputy Anglin was driving by in his vehicle and he momentarily could see Mr. Morris and Mr. Lackey approaching each other. TRP, 64.

On the tape, Mr. Morris can be heard counting out money. TRP, 121.<sup>4</sup> The bills were a twenty dollar bill, a ten dollar bill, and four five

---

<sup>4</sup> The transcript is two pages long, most of which involves Mr. Lackey and Mr. Morris discussing the recent break up with Ms. Halverson. The relevant portion of the transcript is as follows (Exhibit 10):

Morris: Here he comes, here he comes. Yeah.  
Dan: Perfect timing.  
Morris: Uh.  
Dan: It's in the timing.  
Morris: It's in the timing. How you been.

dollar bills. TRP, 121. This was in contrast with the buy money provided by the police, which were a twenty dollar bill and four five dollar bills. TRP, 119, Exhibit 9. Defense counsel suggested in his cross-examination that Mr. Morris owed Mr. Lackey \$50 for some tires. TRP, 115.

After the contact, Mr. Morris rejoined Deputy Anglin. TRP, 65. Mr. Morris was in possession of methamphetamine. TRP, 65. When Mr. Morris testified at trial, he was asked no questions by the prosecutor about what happened on April 9, 2007. TRP, 201-04. None of the buy money from either transaction was ever recovered on Mr. Lackey. TRP, 124.

Mr. Lackey did not testify and called no witnesses. TRP, 278. Mr. Lackey tried to call Ms. Halverson to testify about the events of April 2, but the trial court sustained her invocation of her right to remain silent. TRP, 218, 272.

### C. Argument

#### **1. The trial court erred by denying Mr. Lackey's motion to dismiss for violation of his right to speedy trial pursuant to CrR 3.3.**

---

Dan: Pretty good.  
Morris: Here's 20, and 10 four 5's.  
Dan: Okay, what, oh okay good.  
Morris: Forty. So what's up with you and Bonnie?  
Dan: Yeah I've been fighting with her.

Mr. Lackey waited nearly eleven months for his trial, 323 days from arraignment to trial. This delay violated his statutory and constitutional right to a speedy trial.

Turning first to CrR 3.3, the 323 day period from arraignment to trial exceeds the permissible period. CrR 3.3 normally contemplates that an out-of-custody defendant will be tried within 90 days of arraignment. In Mr. Lackey's case, there were repeated delays, most of them caused by events out of Mr. Lackey's control.

The first series of delays was caused by Mr. Lackey's first defense attorney. Although his defense counsel had a conflict of interest, he did not raise the conflict until 46 days after arraignment. Even then, the attorney did not adequately argue the motion to withdraw, causing the court to deny the motion. The attorney raised anew the issue a month later, this time successfully. Therefore, Mr. Lackey found himself 84 days after arraignment without an attorney and no closer to trial than he had been at the time of his initial plea. On July 23, 87 days after arraignment, Mr. Lackey appeared without counsel. The Court causes him to sign a speedy trial waiver under the pretext that he would have a trial on August 20. The waiver was legally immaterial, however, because the appointment of a new attorney restarts the statutory time for trial period. CrR 3.3 (c)(2)(vii).

The next delay was caused by the medical issues of Detective Miller. The State moved to continue the trial date from August 20 to October 1. At that time, Mr. Lackey lodged the first of seven objections to the extension of his trial date. The Court continued the trial over Mr. Lackey's objection. Although an October 1 trial date was 147 days after his arraignment, it was 73 days after the July 20 disqualification of his first attorney, which would have been within CrR 3.3's time for trial.

But on August 31, the State reported that Detective Miller was still ill. Mr. Lackey waived his right to a speedy trial for the second and last time, agreeing to a trial date of October 29.

On October 19, Mr. Lackey's trial counsel moved for a short continuance of the trial to prepare some pre-trial motions. Mr. Lackey objected. There is some discussion on the record that judge availability was a continuing issue, but that there was a visiting judge available on November 5. Defense counsel assured the court that he would be ready on November 5 and asked that the trial be scheduled for that day so the parties did not "lose" the date. Rather than schedule a trial for November 5, however, the court set another status hearing for October 26.

By October 26, however, the November 5 date had been taken by another case. The parties were put in a position of continuing the trial once again. The clerk suggested December 10, but defense counsel (who

was apparently in the process of transitioning his law practice from Alaska to Jefferson County) was scheduled to be in Alaska trying a case. The next available trial date with a visiting judge was not until late March. Mr. Lackey, on behalf of himself, objected to any trial dates after November 5, his third objection. Ultimately, the parties decided to wait until November 5 to see if a judge became available. If so, trial would commence on that day.

On November 5, no judge was available. This was 182 days after arraignment and 108 days after the disqualification of the first defense attorney. Calculating the exact time for trial expiration date is difficult in this case because of Mr. Lackey's August 31 waiver of speedy trial to a date certain. CrR 3.3 (f)(1) permits continuances to a date certain, in this case October 29, and the one additional week requested by defense counsel (over Mr. Lackey's objection) was a reasonable exercise of the trial court's discretion under State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984) (court did not abuse discretion by continuing case over defendant's objection to allow defense counsel sufficient time to prepare). For purposes of this appeal, Mr. Lackey's position is that the last allowable date pursuant to CrR 3.3 was November 5. In any event, due to court congestion, no trial took place on that date and the case was continued again.

Two additional things of significance happened on November 5. First, Mr. Lackey lodged his fourth, and most vehement to date, objection to the repeated continuances. Second, the court arraigned him on a new, unrelated crime and held him in custody on that offense. Mr. Lackey remained “out-of-custody” on the drug charges. The State argued that Mr. Lackey’s period of incarceration on the unrelated charges was excluded from his time for trial period pursuant to CrR 3.3(e)(2). This was essentially the position taken by the trial court in denying the defense motion at the February 4 hearing.

CrR 3.3(e)(2) excludes from the time for trial calculation the “[a]rraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.” But it leads to absurd results to say that because a defendant appears simultaneously for trial on one offense and arraignment on an unrelated offense that the time for trial restarts on the older offense. See State v. Chhom, 162 Wn.2d 451, 173 P.3d 234 (2007) (“proceedings on unrelated charges” clause should be read to avoid absurd results). Ultimately, the November 5 trial date was continued because of court congestion and not because of his arrest on the unrelated charge. Mr. Lackey’s statutory right to a speedy trial was violated when his case was not tried on November 5.

The trial court concluded, however, that Mr. Lackey's arrest and arraignment on an unrelated charge was an excludable period under CrR 3.3(e)(2). The next significant date is December 19, the date Mr. Lackey was acquitted on the unrelated charge. But instead of treating the period from arraignment and trial on the unrelated charge as an "excluded period," the trial court treated December 19 as a "commencement date." RP, 28 (Feb. 4, 2008). Under the trial court's interpretation, the State had 90 days from December 19 to bring him to trial.

The trial court's interpretation is entirely inconsistent with CrR 3.3. Excluded periods are governed by CrR 3.3(e); commencement dates are governed by CrR 3.3(c). A new commencement date is to be set in seven situations: a written waiver by the defendant, a failure to appear, the granting of a new trial, an appellate stay, the entry of an order in a collateral proceeding, a change of venue, or the disqualification of counsel. None of these seven situations occurred on December 19. The trial court erred by treating December 19 as a commencement date. As defense counsel correctly argued in the trial court, trial on the drug charges should have commenced "as soon as possible after the 19<sup>th</sup> of December." RP, 5 (Feb 4, 2008).

But the trial did not commence as soon as possible after December 19. The next available trial date with a visiting judge was January 7.

Defense counsel requested that date and noted that there had been numerous speedy trial objections to the multiple continuances. RP, 4 (Dec. 28, 2007). This was, in fact, Mr. Lackey's fifth speedy trial objection, either pro se or through counsel. But, once again, due to court congestion Mr. Lackey's case was not scheduled for trial on January 7.

This prompted Mr. Lackey to file a written speedy trial objection (his sixth) and a motion to dismiss. The motion was heard on February 4. The court's ruling has already been discussed insofar as the trial court concluded that December 19 was a new commencement date and the new time for trial expiration date was ninety days thereafter, March 18.

But the trial court's conclusion prompted yet another objection from Mr. Lackey, as his trial was scheduled for March 24, six days after the newly calculated expiration date. The trial court overruled this seventh and final objection. The trial court, noting that Detective Miller was again ill and incapacitated for a month, decided to leave the trial date untouched in the "administration of justice."

The trial court's decision to leave the trial on March 24 is very problematic. First, Detective Miller's incapacity was for one month from February 4. The letter from his doctor indicated that he would be fit for work in March. Assuming arguendo that the trial court was correct and the time for trial expiration was March 18, there were eighteen available

days after Detective Miller's recovery and prior to the expiration of speedy trial.

Second, there was more than ample time for the trial court to find a visiting judge after February 4 but before March 18. But the trial court made no effort to provide Mr. Lackey with a speedy trial, even as defined by the court itself. As a result, Mr. Lackey's trial commenced 323 days after arraignment, 140 days after the November 5 expiration of his time for trial period (as calculated and argued by Mr. Lackey on appeal), and six days after the March 18 expiration of his speedy trial period (as calculated by the trial court on February 4). In every possible scenario, CrR 3.3 was violated and the remedy is dismissal with prejudice. CrR 3.3(h).

Although the procedural history of Mr. Lackey's case is convoluted, making a proper CrR 3.3 calculation difficult, most of the continuances after November 5 were due to court congestion. A trial court abuses its discretion by continuing a case due to court congestion. State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978). And courtroom unavailability was considered synonymous with "court congestion." State v. Kokot, 42 Wn. App. 733, 736-37, 713 P.2d 1121, review denied, 105 Wn.2d 1023 (1986). Furthermore, in order to show that court congestion is "unavoidable," the trial court had to make a careful record of why each

superior court department was unavailable and whether a judge pro tempore could have reasonably been used. State v. Warren, 96 Wn. App. 306, 310, 979 P.2d 915, 989 P.2d 587 (1999). Without “good cause” for the continuance, dismissal was required. Mack, 89 Wn.2d at 794.

The continued viability has been called into question by the 2003 amendments to CrR 3.3. The Court of Appeals discussed this history in State v. Kenyon, 143 Wn.App. 304, 177 P.3d 196 (2008), review granted, \_\_\_ Wn.2d \_\_\_ (Sept. 4, 1008). In Kenyon, the Court of Appeals affirmed the conviction based upon the facts before it saying:

It is clear that the relaxation of the speedy trial rule was meant to transition from a hypertechnical application of the rules to one that allowed more time for the State, defense counsel, and the trial court to prepare for trial. Here, although the trial court did not to look into the availability of pro tempore judges, it is clear that the conflict between the judge's longstanding vacation and Kenyon's trial was due to Kenyon's repeated requests for continuances and extensions—Kenyon's attorney made no fewer than eight requests to continue the trial or reschedule hearings because he was unprepared to move forward.

Kenyon at 313-14. The Washington Supreme Court has granted review of Kenyon and this issue. It remains to be seen whether the Supreme Court will reaffirm the vitality of Mack. If Mack remains good law, then Mr. Lackey's case absolutely must be dismissed.

Even if the 2003 amendments to CrR 3.3 caused the premature interment of Mack, as the Kenyon Court found, then Mr. Lackey's

case should still be dismissed. In Kenyon, the court congestion that caused the trial delay resulted in a two week delay. The court held a status conference on July 17, stated that the court was in trial on an unrelated matter and continued Mr. Kenyon's trial to August 16. Later, when a courtroom came open, the trial court moved the trial date up to August 1. This resulted in a fifteen day continuance. The Court of Appeals found significant that the delay was minor and that the trial court was taking seriously its obligation to provide speedy trials, saying, "[T]here was no unnecessary delay because the court commenced trial as quickly as possible following defense counsel's completion of trial preparation; the trial court scheduled the trial for August 16, but moved it up to the earliest available trial date, August 1." Kenyon at 314.

The exact opposite occurred in Mr. Lackey's case. The trial court flaunted Mr. Lackey's repeated requests for a speedy trial. The most obvious example of this was on February 4. On that date, although 43 days remained on speedy trial (as calculated by the court) and the medical issues with Detective Miller were due to expire on March 1, the trial court made no effort to schedule Mr. Lackey's case before March 18. Mr. Lackey's case is an unusually egregious case of multiple speedy trial violations and his case must be dismissed.

**2. The repeated delays in Mr. Lackey's trial resulted in a violation of his constitutional right to a speedy trial.**

The Sixth Amendment guarantees all criminal defendants the right to a speedy and public trial. The primary case interpreting this clause is Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In Barker, the United States Supreme Court set forth a four part balancing test. The balancing test weighs the conduct of the prosecution and the defendant while examining (1) the length of the delay, (2) the reason for the delay, (3) the extent to which the defendant asserted the right, and (4) the prejudice to the defendant. Applying this balancing test, Mr. Lackey's case must be dismissed.

First, the length of the delay weighs in favor of Mr. Lackey. Most courts have generally found that a delay is presumptively prejudicial if it approaches one year. State v. Iniguez, 143 Wn.App. 845, 180 P.3d 855 (2008), review granted, \_\_\_ Wn.2d \_\_\_ (Oct. 2, 2008). As the Iniguez Court noted, delays of eight months or more are presumptively prejudicial. Iniguez at 859, citing United States v. Beamon, 992 F.2d 1009, 1012-13 (9th Cir. 1993) and United States v. Vassell, 970 F.2d 1162, 1164 (2d Cir. 1992).

The second prong, the reason for the delay, has been discussed at length above. Mr. Lackey's case was repeatedly subjected to delays due

to court congestion and poor planning by the court. As the Vermont Supreme Court has recently noted, “More neutral reasons for delay, such as overcrowded courts, should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government.” State of Vermont v. Brillon, \_\_ Vt. \_\_, 955 A.2d 1108 (2008), cert. granted, \_\_ U.S. \_\_ (2008). This factor weighs in favor of Mr. Lackey.

The third factor is the extent to which the defendant objected to the continuances. As has been noted, Mr. Lackey lodged no fewer than seven objections to the extension of his speedy trial, often over the advice of his counsel.

Finally, there is the issue of prejudice to the defendant. In this case, Mr. Lackey represented several times to the court that he was prevented because of the pending charges and his conditions of release from leaving the State and accepting employment elsewhere. Mr. Lackey explicitly tied the out-of-state employment opportunity to his demand for a speedy trial at the October 26 hearing. This factor also weighs in favor of Mr. Lackey.

Finally, a brief word should be said about the case law horizon in the area of speedy trial. It appears that both the Washington Supreme Court and the United States Supreme Court are concerned about the way

court congestion is contributing to bottleneck in our trial courts. The Washington Supreme Court currently has two cases, Kenyon and Iniguez, and the United States Supreme Court has one case, Brillon, where this is the primary issue. When Washington amended CrR 3.3, it was not intended that the right to a speedy trial would be outright ignored, but that has been the result. More poignantly, that is what happened to Mr. Lackey.

In sum, all four factors outlined in Barker v. Wingo weigh in favor of Mr. Lackey and his case should be dismissed for violation of his Sixth Amendment right to a speedy trial.

**3. Mr. Lackey was denied his constitutional right to be represented by an attorney on July 23, 2007.**

On July 23, 2007, Mr. Lackey appeared pro se for a hearing. The Court had allowed his prior attorney to withdraw three days earlier. Mr. Lackey had never waived his right to counsel. On July 23, the Court appointed James Gilmore to represent him, but he was not present for the remainder of the hearing. Rather than set the case over to another date to allow Mr. Gilmore to be present, however, the court talked Mr. Lackey into waiving his right to a speedy trial and set court dates. Mr. Lackey

requested to be able to speak to his attorney before deciding how to proceed, but the court inexplicitly denied the motion.

The hearing on July 23 was a critical stage in the proceedings. Criminal defendants have a Sixth Amendment right to counsel at all "critical stages" of criminal proceedings. United States v. Hamilton, 391 F. 3d 1066, 1070-1072 (9<sup>th</sup> Cir. 2004). The accused is guaranteed that he need not stand alone against the state at any stage of the proceedings, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. *Id.* In deciding what qualifies as a critical stage, courts "have recognized that the period from arraignment to trial is perhaps the most critical period of the proceedings." *Id.*, quoting from United States v. Wade, 388 U.S. 218, 225 (1967).

A proceeding such as an arraignment is a critical stage if it is one where important rights are preserved or lost. Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963). Implicit in the Court's analysis in Hamilton and White is the principle that anytime a defendant is asked to waive a constitutional right, the hearing is a "critical stage" requiring the presence of counsel. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a medium between him and the State. Michigan v. Jackson, 475 U.S. 625, 640 (1986). Once a person has asserted his right

to act through counsel, the State may “no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.” Jackson at 640. Mr. Lackey explicitly asked to speak to his attorney before signing the speedy trial waiver and the setting of trial dates, but the court refused the request.

Where counsel is absent during a critical phase, the accused need not show prejudice and prejudice is presumed. United States v. Hamilton, 391 F. 3d 1066, 1070-1072 (9<sup>th</sup> Cir. 2004). Nor does harmless error analysis apply. Denial of the right to counsel at a critical phase is structural error that defies harmless error analysis. Hamilton at 1070. The Supreme Court has recognized that the Sixth Amendment right to counsel is among those constitutional rights so basic to a fair trial that a violation can never be harmless error. Hamilton at 1070.

Mr. Lackey’s right to be represented at all critical stages in the case was compromised by the trial court’s decision to proceed with a hearing on July 23 without his court appointed counsel present. This error is structural and reversal is required.

**4. The admission of the body wire and body wire transcript violated Mr. Lackey’s constitutional right to confrontation.**

The State's theory was that Mr. Morris on two occasions purchased methamphetamine from Mr. Lackey on April 2 and April 9. But Mr. Morris did not testify about the April 9 purchase. Rather than have Mr. Morris testify about the April 9 buy, the State relied on two pieces of evidence, one circumstantial and the other direct. The circumstantial evidence showed that Mr. Morris was subjected to a strip search both before and after the buy, was in possession of methamphetamine immediately after the buy, and no longer had the photocopied money. The photocopied money totaled forty dollars. After several failed attempts to contact Mr. Lackey, the two were observed by law enforcement momentarily walking towards each other.

By way of direct evidence, the State played for the jury the tape recording produced by the body wire, as well as the transcript of the transaction. On the tape, Mr. Morris, who had been subjected to a strip search and was allegedly in possession of only forty dollars of pre-recorded buy money, can be heard counting out fifty dollars. Because neither Deputy Anglin nor Detective Miller were present at the time of the alleged drug transfer, they were relying like everyone else on the content of the tape to establish the fact of the drug transfer.

Two voices can be heard on the tape: Mr. Morris and Mr. Lackey. To the extent the tape contains Mr. Lackey's statements; those statements

are not hearsay pursuant to ER 801(d). Mr. Morris' statements, however, are hearsay and should have been suppressed unless admissible as a hearsay exception. Any out-of-court statement admitted to prove the truth of the matter asserted is hearsay. ER 801.

Because Mr. Lackey did not object to the admission of Mr. Morris' out-of-court statements, the trial court did not have an opportunity to rule on which, if any, hearsay exceptions might apply. But the obvious exception that would have been considered by the court is the "present sense impression" exception of ER 803(a)(1). State v. Martinez, 105 Wn.App. 775, 20 P.3d 1062 (2001). The present sense impression exception allows hearsay to be admitted when the statement is "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." This exception applies regardless of the availability of the declarant. In Martinez, the trial court admitted hearsay from a drug transaction under very similar circumstances pursuant to the present sense impression rule.

Generally, the failure to object to the admission of hearsay waives the issue for purposes of appeal. Because Mr. Lackey did not object to the admission of the present sense impression statements contained on the body wire, his hearsay objection is waived.

But the fact that the hearsay was admitted without objection does not resolve the matter. The admission of a hearsay statement where the defendant has not had the opportunity to cross-examine the declarant is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Connie J.C., 86 Wn. App. 453, 937 P.2d 1116 (1997). In partial defense of defense counsel, the tape and transcript were admitted prior to Mr. Morris testimony. Defense counsel probably anticipated that Mr. Morris would be testifying as to the events of April 9.

Mr. Morris did not testify about the events of April 9, however. He was not asked a single question by the prosecutor about that date. In fact, after establishing Mr. Morris' name and address (with some difficulty), the prosecutor asked Mr. Morris only 28 questions. RP, 201-04. Because the prosecutor did not put Mr. Morris' testimony about the events of April 9 into issue, Mr. Lackey was deprived of his right to confront his accuser.

Under Washington law, it is insufficient to put a witness on the stand and ask the witness general questions. State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997). If the prosecutor intends to introduce hearsay statements by the declarant, then the prosecutor must also ask the declarant legally relevant questions that put the disputed facts into issue. In Rohrich, the Washington Supreme Court said:

An indispensable component of the Confrontation Clause's preference for live testimony is cross-examination because of its central role in ascertaining the truth. The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses. In this context "not only [must] the declarant have been generally subject to cross-examination; he must also be subject to cross-examination concerning the out-of-court declaration."

...

The constitutional preference for live testimony may be disregarded in only two circumstances: (1) when the original out-of-court statement is inherently more reliable than any live in-court repetition would be; or (2) when live testimony is not possible because the declarant is unavailable, in which case the court must settle for the weaker version. The first exception applies only to those firmly rooted hearsay exceptions which, by their nature, are most reliable when originally made.

Rohrich at 477-79 (citations omitted). Mr. Lackey was not afforded the opportunity to cross-examine Mr. Morris about the events of April 9 because the State did not put those events into issue.

The next issue is whether either of the two exceptions detailed in Rohrich apply. Because Mr. Morris was clearly available, the second exception does not apply.

Nor does the first exception apply. The present sense impression exception to the hearsay rule is not a firmly rooted exception. State v. Martinez, 105 Wn.App. 775, 20 P.3d 1062 (2001). In Martinez, the Court

of Appeals reversed the conviction because the prosecutor did not call the informant to testify about the drug transaction, although his hearsay statements were admitted pursuant to the present sense impression rule. Count II of the second amended information, which convicted Mr. Morris of the events of April 9, should be reversed and remanded for a new trial.

**5. The prosecutor committed prosecutorial misconduct by failing to disclose exculpatory material about Ms. Halverson's status.**

Ms. Halverson was arrested on or about May 4, 2007 for two counts of delivery of a controlled substance. The two counts relate to controlled buys on April 2 and April 4, 2007. See CP, 5 (declaration of probable cause identifying Ms. Halverson as the suspect in two prior buys). Mr. Lackey was originally charged with delivery of controlled substance on April 4, but the State elected not to proceed on that charge because Mr. Lackey was not present. CP, 10, 27. Although Ms. Halverson was arrested for two counts, the State charged Ms. Halverson with only one count of delivery of a controlled substance occurring on April 4, 2007. She eventually pled guilty to that count and was sentenced to serve 16 months in prison.

Mr. Lackey called Ms. Halverson to testify at his trial about the events of April 2. TRP, 218. Ms. Halverson's original attorney, Noah

Harrison, was not available on short notice, so the trial court appointed a different attorney, Ben Critchlow, to represent her. The record shows that Mr. Critchlow had only a short amount of time to review the facts due to the court being under a “tight schedule.” TRP, 269. According to Mr. Critchlow, he “confirmed with Counsel and Counsel’s associate by reviewing the file that there was no written plea offer with her attorney at that time that they would not file on what she’s being asked to testify to today.” TRP, 270. Mr. Critchlow advised Ms. Halverson to invoke her Fifth Amendment right to remain silent, which she did. TRP, 271. Mr. Lackey’s attorney inquired of the State whether it had granted her immunity or was willing to grant her immunity. TRP, 271. The prosecutor responded, “The State is not willing to grant her immunity, based on the belief that she can’t be honest, truthful.” TRP, 272. The court found that Ms. Halverson had a Fifth Amendment right and released her from Mr. Lackey’s subpoena. TRP, 272.

But a more careful review of Ms. Halverson’s file shows that while she was charged with one count of delivery of a controlled substance, there was a second count that the State was holding back. It is a common tactic for the prosecutor’s office to hold back one or more charges in the hope that the defendant will plead guilty. See, generally, State v. Armstrong, 109 Wn. App. 458, 35 P.3d 397 (2001), review denied, 146

Wn.2d 1013. In this case, the plea agreement included the following language, "That if the defendant pled guilty to an information which did not include the totality of possible charges or highest provable degree as a result of plea negotiations, and if the plea of guilty is set aside due to the motion or petition of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution." Supplemental CP.<sup>5</sup>

Mr. Critchlow was of the belief that Ms. Halverson could still be charged with the April 2 delivery. The prosecutor said nothing to correct that misconception. To the contrary, the prosecutor insinuated that Ms. Halverson could still be prosecuted for the events of April 2. The prosecutor's justification for misleading the court was her perception that Ms. Halverson was dishonest and untruthful.

Like all attorneys, prosecutors have a duty of candor to the tribunal. RPC 3.3, State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1998). In addition, prosecutors have an affirmative duty to disclose exculpatory material to the defense pursuant to the Sixth Amendment. Brady v.

---

<sup>5</sup> Mr. Lackey's motion to supplement the record with documents from Ms. Halverson's case was granted. The quoted sentence appears on the last page of Ms. Halverson's Statement of Defendant on Plea of Guilty/Stipulation of Prior Record .

Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). When there is a Brady violation as a result of prosecutorial misconduct, a conviction must be set aside if there is any reasonable likelihood that the undisclosed testimony could have affected the jury's decision. State v. Benn, 120 Wn.2d 631, 649, 845 P.2d 289 (1993), citing United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).

By failing to disclose a material fact to the court and Mr. Critchlow, the State committed prosecutorial misconduct. The prosecutor withheld exculpatory information by failing to advise the court that Ms. Halverson's plea agreement encompassed both charged and uncharged behavior. Had the trial court known that fact, Ms. Halverson's Fifth Amendment claim would not have been sustained. There is a reasonable likelihood that Ms. Halverson's testimony about April 2 would have affected the jury's decision.

**6. Mr. Lackey's constitutional right to compel witnesses was improperly impeded by the court and prosecutor.**

The right to compel witnesses is guaranteed by the Sixth Amendment of the United States Constitution. In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) the Court observed:

The right to offer the testimony of witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lie. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

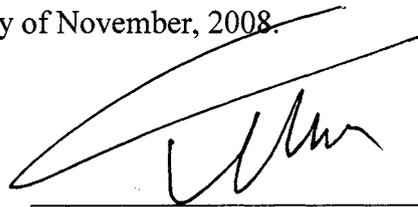
Washington at 19. A witness must be material to the defense case. State v. Smith, 101 Wn. 2d 36, 677 P.2d 100 (1984). The proposed testimony need not totally exonerate the defendant in order to be material. State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) (other suspect evidence, which would not have totally exonerated defendant, was admissible because it would have brought into question the State's version of events). Because a violation of the right to compel witnesses is of constitutional magnitude, reversal is required unless the error is harmless beyond a reasonable doubt. Maupin.

Ms. Halverson was clearly a relevant witness to the events of April 2. Whether she was available as a witness rests on whether she had a Fifth Amendment privilege. As discussed above, the trial court sustained her claim of Fifth Amendment privilege after the prosecutor misrepresented the plea agreement. Mr. Lackey's right to compel witnesses on his own behalf was violated.

D. Conclusion

Mr. Lackey's convictions should be dismissed for violation of the right to speedy trial. In the alternative, this case should be reversed and remanded for a new trial.

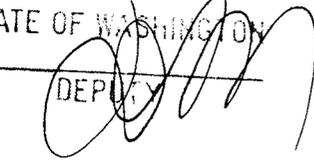
DATED this 21<sup>st</sup> day of November, 2008.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

FILED  
COURT OF APPEALS  
DIVISION II

08 NOV 24 AM 9:43

STATE OF WASHINGTON  
BY   
DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

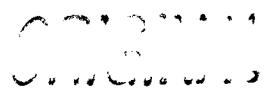
STATE OF WASHINGTON,	)	Case No.: 07-1-00078-5
	)	Court of Appeals No.: 37682-2-II
Respondent,	)	AFFIDAVIT OF SERVICE
vs.	)	
DANIEL WAYNE LACKEY,	)	
Defendant.	)	

STATE OF WASHINGTON )  
COUNTY OF KITSAP )

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

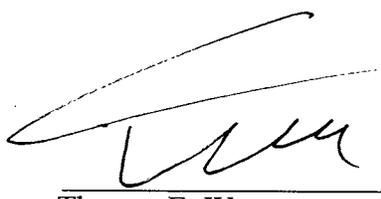
On November 21, 2008, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.



1 On November 21, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT,  
2 to the Jefferson County Prosecutor's Office, 1820 Jefferson Street, P.O. Box 1220, Port  
3 Townsend, WA 98368-0920.

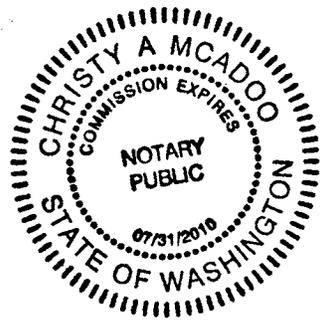
4 On November 21, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT,  
5 to Mr. Daniel Wayne Lackey, DOC# 842082, Washington State Penitentiary, 1313 North 13<sup>th</sup>  
6 Avenue, Walla Walla, WA 99362.

7  
8 Dated this 21<sup>st</sup> day of November, 2008.



9  
10 Thomas E. Weaver  
11 WSBA #22488  
12 Attorney for Defendant

13 SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of November, 2008.



14 Christy A. McAdoo  
15 NOTARY PUBLIC in and for  
16 the State of Washington.  
17 My commission expires: 07/31/2010