



**TABLE OF CONTENTS**

	Page
<b>I. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>1. THE TRIAL COURT ERRED IN CONCLUDING THAT THE UNAVAILABILITY OF THE PROSECUTOR AND THE UNAVAILABILITY OF A TRIAL JUDGE CONSTITUTED COURT CONGESTION AND ONLY ALLOWED FOR A FIVE-DAY CONTINUANCE BEYOND THE DEFENDANT’S SPEEDY TRIAL DATE.....</b>	<b>1</b>
<b>2. THE TRIAL COURT ERRED IN DENYING A CONTINUANCE OF THE TRIAL DATE BECAUSE THERE IS A VALID REASON FOR THE UNAVAILABILITY OF A MATERIAL STATE WITNESS, THE MATERIAL STATE WITNESS WILL BECOME AVAILABLE WITHIN A REASONABLE TIME, AND THERE IS NO SUBSTANTIAL PREJUDICE TO THE DEFENDANT.....</b>	<b>1</b>
<b>II. ISSUES.....</b>	<b>1</b>
<b>1. IS A 30-DAY CONTINUANCE OF A TRIAL DATE JUSTIFIED AND REQUIRED FOR THE ADMINISTRATION OF JUSTICE WHEN THE PROSECUTOR IS NOT AVAILABLE TO TRY THE CASE? .....</b>	<b>1</b>
<b>III. SHORT ANSWERS.....</b>	<b>1</b>
<b>IV. FACTS .....</b>	<b>2</b>
<b>V. STANDARD OF REVIEW .....</b>	<b>11</b>
<b>VI. ARGUMENTS.....</b>	<b>11</b>
<b>VII. CONCLUSION .....</b>	<b>16</b>

**TABLE OF AUTHORITIES**

	Page
<b>Cases</b>	
<u>State v. Flinn</u> , 154 Wash.2d 193, (2005) .....	11
<u>State v. Iniguez</u> , 143 Wash.App., 845 (2008).....	14, 15
<u>State v. Johnson</u> , 132 Wash.App. 400 (2006) .....	12, 13
<u>State v. Mack</u> , 89 Wash.2d 788, (1978).....	14
<u>State v. Nguyen</u> , 68 Wash.App. 906 (1993) .....	14, 15
<u>State v. Rohrich</u> , 149 Wash.2d 647, (2003).....	11
<u>State v. Torres</u> , 111 Wash.App. 323, (2002) .....	11
<u>State v. Williams</u> , 104 Wash.App. 516 (2001) .....	12, 13
<b>Other Authorities</b>	
Cr.R 3.3(e)(3).....	12
Cr.R 3.3(f)(2) .....	12
CrR 3.3(b)(5).....	12, 13

## **I. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED IN CONCLUDING THAT THE UNAVAILABILITY OF THE PROSECUTOR AND THE UNAVAILABILITY OF A TRIAL JUDGE CONSTITUTED COURT CONGESTION AND ONLY ALLOWED FOR A FIVE-DAY CONTINUANCE BEYOND THE DEFENDANT'S SPEEDY TRIAL DATE.**
- 2. THE TRIAL COURT ERRED IN DENYING A CONTINUANCE OF THE TRIAL DATE BECAUSE THERE IS A VALID REASON FOR THE UNAVAILABILITY OF A MATERIAL STATE WITNESS, THE MATERIAL STATE WITNESS WILL BECOME AVAILABLE WITHIN A REASONABLE TIME, AND THERE IS NO SUBSTANTIAL PREJUDICE TO THE DEFENDANT.**

## **II. ISSUES**

- 1. IS A 30-DAY CONTINUANCE OF A TRIAL DATE JUSTIFIED AND REQUIRED FOR THE ADMINISTRATION OF JUSTICE WHEN THE PROSECUTOR IS NOT AVAILABLE TO TRY THE CASE?**
- 2. SHOULD A TRIAL JUDGE GRANT A CONTINUANCE OF A TRIAL DATE WHEN THERE IS A VALID REASON FOR THE UNAVAILABILITY OF A MATERIAL STATE WITNESS, THE MATERIAL STATE WITNESS WILL BECOME AVAILABLE WITHIN A REASONABLE TIME, AND THERE IS NO SUBSTANTIAL PREJUDICE TO THE DEFENDANT?**

## **III. SHORT ANSWERS**

- 1. YES. A 30-DAY CONTINUANCE OF A TRIAL DATE IS JUSTIFIED AND REQUIRED FOR THE ADMINISTRATION OF JUSTICE WHEN THE PROSECUTOR IS NOT AVAILABLE TO TRY THE CASE.**

2. **YES. A TRIAL JUDGE SHOULD GRANT A CONTINUANCE OF A TRIAL DATE WHEN THERE IS A VALID REASON FOR THE UNAVAILABILITY OF A MATERIAL STATE WITNESS, THE MATERIAL STATE WITNESS WILL BECOME AVAILABLE WITHIN A REASONABLE TIME, AND THERE IS NO SUBSTANTIAL PREJUDICE TO THE DEFENDANT.**

#### **IV. FACTS**

On July 23, 2007, Judge Johanson of the Cowlitz County Superior Court found probable cause to charge the respondent, Kristy Lynn Williams, with assault in the third degree for punching a nurse in the face and chest while he was attempting to give the respondent medical assistance. The Office of Public Defense was appointed to represent the respondent. Respondent was out of custody and ordered to appear for her arraignment on August 7, 2007. Transcript, p. 1-2.

On August 7, 2007, respondent retained Duane Crandall as her new attorney and appeared for her arraignment before Judge Warne of the Cowlitz County Superior Court. Rebekah Ward was the assigned prosecutor on the case. The respondent waived formal reading and pled not guilty to the charge of assault in the third degree. Respondent was out of custody, asserted a self-defense claim, and was ordered to appear for her pretrial on September 11, 2007, and for her jury trial on October 24, 2007. Transcript, p. 3-8.

On October 18, 2007, Judge Stonier of the Cowlitz County Superior Court found good cause to continue the trial due to Ms. Ward's medical problems and pregnancy. The respondent did not object to the State's request for a continuance and signed a speedy trial waiver commencing on January 18, 2008. Respondent was out of custody and ordered to appear for her new readiness hearing on January 10, 2008, and new trial date on January 14, 2008. Transcript, p. 5-8, 42, and 48.

On January 8, 2008, Ms. Ward filed a motion to extend the time for a deposition of Dr. Arnsdorf that Mr. Crandall had scheduled for January 8, 2008, at 1:30. The respondent was not present at this court hearing. At an omnibus hearing on September 11, 2007, Mr. Crandall indicated there were no defense witnesses and the defense was that of self-defense. Within the last forty-eight hours, Mr. Crandall notified the State that he intended to call an expert witness, Dr. Arnsdorf, to testify at trial. The State was provided with a brief summary of Dr. Arnsdorf's expected testimony, but did not receive any reports and information pertaining to Dr. Arnsdorf's qualification. Within the last twenty-four hours, Mr. Crandall informed the State that he intended to use a deposition in lieu of trial testimony and gave the State two dates to do the deposition. The first time was for January 8, 2008, which Ms. Ward could not do due to scheduling conflicts, and the second time was for after hours on January

10, 2008, one day before trial. Ms. Ward sought an extension to do the deposition and objected to the deposition being used in lieu of live testimony. Transcript, p. 8-10, 12, and 16.

Mr. Crandall sought to introduce testimony of a doctor who performed a surgery on the respondent subsequent to the incident of the assault. The doctor “opined recently that it would have been extremely painful for [the respondent] to lay on her stomach particularly with a security guard on top of her. It would have been particularly painful and destructive to the tissues that have had been sewn together in her abdomen because they were permanent sutures, much like a hernia repair. A second surgery was necessitated at least in part by this assault. This will validate her struggles on the floor; the wild flopping and frenzy that these security guards want to make such light of. I only knew about this doctor’s willingness to testify probably last week early. I have no chart notes because none exist.” Transcript, p. 10-11. Mr. Crandall was of the opinion that the State only needed five to fifteen minutes to prepare for the deposition and sought to have the deposition go forward as scheduled. Transcript, p. 11 and 13-14.

Judge Warne indicated that while the rule on depositions in criminal cases is fairly broad and nonspecific, he was “not sure that it is appropriate on forty-eight hours notice.” Transcript, p. 12. “It just strikes

me that it is very, very difficult to order a deposition and tell everybody to be prepared less than a week before trial and the deposition has got to be for this afternoon or Thursday afternoon.” Transcript, p. 15. Mr. Crandall indicated that he could not reassign the trial date to accommodate an extension for the deposition without his client being present and the state did not object to a continuance of the trial date. Judge Warne rescheduled the case for January 10, 2008, for the respondent to waive her speedy trial right and set a new trial date. Transcript, p. 16-17.

On January 10, 2008, Mr. Crandall indicated that he was no longer endorsing the doctor as his expert witness and wanted to go to trial on January 14, 2008. Judge Stonier indicated that the court could only try one case on January 14, 2008, due to the lack of available judges and that another case took priority over the respondent’s case because it was an older case. Respondent proceeded to waive her speedy trial right effective January 10, 2008, and was ordered to appear for a review date on February 7, 2008, and her new trial date on February 13, 2008. Transcript, p. 18-24.

On January 28, 2008, Mr. Crandall sought an order to protect the respondent’s medical records from the State’s subpoena duces tecum that was filed with the court on January 14, 2008. Judge Stonier set the case over to January 31, 2008, for a motion hearing with regards to the State’s

Subpoena Duces Tecum and the Mr. Crandall's motion for an order protecting the respondent's medical records. Transcript, p. 25-28.

On January 31, 2008, the State provided Mr. Crandall with its response to his motion for a protection order. Mr. Crandall asked that the motion hearing be rescheduled for February 7, 2008. Judge Stonier ordered Mr. Crandall to provide the State with a copy of any physical documentary evidence that he intends to use at trial and rescheduled the motion hearing for February 7, 2008. Transcript, p. 29-34.

On February 7, 2008, Mr. Crandall conceded that the State was entitled to the respondent's medical records and indicated that the respondent would sign a release of her medical records to the prosecutor. Ms. Ward asked for a continuance because she needed time to get the respondent's medical records and there was another case already scheduled for the same trial date. The court was only in a position to have one jury trial for February 13, 2008. Judge Warne scheduled a second readiness hearing for February 12, 2008, to consider the State's motion to continue and prioritize which case gets tried on February 13, 2008. Transcript, p. 35-40.

On February 12, 2008, Ms. Ward reiterated her request for a continuance because she just received the respondent's medical records and needed to subpoena some additional witnesses in light of the

respondent's medical records. Additionally, Ms. Ward sought to continue the case due to medical reasons and her pregnancy, which required the case to be reassigned to a new prosecutor. Commissioner Tabbut found there was good cause to continue the trial because of Ms. Ward's medical condition and the lack of an available courtroom to try the case on February 13, 2008. The respondent's trial was rescheduled for March 19, 2008, within the respondent's speedy trial period, and a new readiness hearing was set for March 18, 2008. Transcript, p. 41-45, 48, and 73.

On March 18, 2008, Mike Nguyen was the new prosecutor assigned to the case and he asked for a continuance because a witness was unavailable for trial and he was scheduled to try another case on March 19, 2008. Mr. Nguyen was scheduled to retry an older case that had previously resulted in a hung jury with another defense counsel. Judge Stonier found good cause to continue the trial date and ordered the respondent to appear for her new readiness hearing on April 16, 2008, and for her new trial date on April 17, 2008. Transcript, p. 46-52.

On April 9, 2008, Mr. Crandall asked to continue the trial date due to unavailable defense witnesses. Two of the respondent's witnesses were out of town and were not available for trial. The State did not object and asked that the new date be two weeks out so that it could notify all its witness, most of whom are hospital staff who required two weeks notice.

Judge Warning of the Cowlitz County Superior Court rescheduled the trial for May 19, 2008, and ordered a review date for April 23, 2008, for both sides to confirm their witnesses and address any problems. Transcript, p. 53-54.

On April 23, 2008, the State indicated that one of their witnesses will be out of town and will not be available for trial. Mr. Nguyen was trying another case in another courtroom and was not present at this review hearing. Judge Warning did not find good cause to continue the trial date and left the trial date on for May 19, 2008. Transcript, p. 55-58.

On May 17, 2008, Mr. Nguyen was present in court to address the court's decision to deny the motion for a continuance on April 23, 2008. Mr. Nguyen reminded the court that the most recent request for a continuance was made by Mr. Crandall on April 9, 2008, and the court had set a review hearing for April 23, 2008, to check on the availability of all witnesses for trial on May 19, 2008. Mr. Nguyen indicated that one of his witnesses, a doctor, will be out of town on vacation and will not be available for trial. On April 23, 2008, Mr. Nguyen notified Mr. Crandall of the witness being unavailable and suggested a short continuance within a week of May 19, 2008, to try the case. Mr. Crandall was not receptive to a continuance and did not want to work with the State on figuring out a trial date that works for both parties. Mr. Nguyen also notified the court

that he anticipated on retrying an older case that had resulted in a hung jury on May 19, 2008. Judge Warning allowed the State to depose the unavailable witness and denied the request for a continuance. Transcript, p. 58-64 and 69-70.

On May 19, 2008, three cases were set for trial and the respondent's case was the one with the least priority. Judge Stonier found that there was good cause to move the respondent's trial because Judge Johanson was the only trial judge and the respondent had affidavited Judge Johanson, Mr. Nguyen was trying another case, and the other case that Mr. Nguyen was trying was older and involved a more serious charge than that of the respondent. Judge Stonier continued the respondent's case over to May 21, 2008. Transcript, p. 65-74.

On May 21, 2008, Mr. Crandall moved to dismiss the case. Judge Warning noted that there was no judge available to try the respondent's case on May 19, 2008, and did not grant Mr. Crandall's request to dismiss the case. Judge Warning noted that court congestion allowed for a five-day cure period and moved the respondent's trial to May 27, 2008. Judge Warning indicated that "it doesn't matter if the witnesses are available or not. That's the point we are at within speedy trial right now is this is a five day bump for court congestion. That's all I can do." Transcript, p. 78 and 73-79.

On May 23, 2008, Judge Warning reviewed the respondent's case because the State would be unable to try the case on May 27, 2008. The victim in the case was scheduled to be out of town until June 8, 2008, and would not be available for trial. The State asked that the case be set for trial on June 9 or June 11, and argued that it had a thirty-day cure period and not just a five-day cure period. Judge Warning struck the trial date of May 27, 2008, and set a review date of May 28, 2008, to consider the State's motion to continue the trial date. Transcript, p. 80-84.

On May 28, 2008, the State renewed its request to move the trial date because the victim was not available for trial and argued that it was entitled to a thirty-day cure period from May 19, 2008. The victim works as a nurse for a hospital and needed two weeks notice of the trial date. The victim was cooperative and available for all the previous trial dates. On May 27, 2008, the victim was working out of town and out of state in Astoria, Oregon, which is about one hour from Longview, Washington. The victim was scheduled to be back in Longview, Washington, on Sunday, June 8, 2008. Judge Warning did not find good cause to continue the case and granted the respondent's motion to dismiss the case. Transcript, p. 1-2, 53-54, and 80-88.

## V. STANDARD OF REVIEW

“The decision to grant a continuance under CrR 3.3 rests in the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion.” State v. Torres, 111 Wash.App. 323, 330 (2002). “We will not disturb the trial court’s decision unless the appellant or petitioner makes “a clear showing...[that the trial court’s] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Flinn, 154 Wash.2d 193, 199 (2005). “In exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.” *Id.* at 200. A decision is manifestly unreasonable if the court takes a position and decides the issues in a way that no other reasonable person would do, despite applying the correct law to facts it found supported by the evidence. If the court’s decision relies on unsupported facts or applies the incorrect legal standard, its discretion is exercised on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wash.2d 647, 654 (2003).

## VI. ARGUMENTS

- 1. A 30-day continuance of a trial date is justified and required for the administration of justice when the prosecutor is not available to try the case.**

Pursuant to CrR 3.3(b)(5), “if any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” Pursuant to Cr.R 3.3(e)(3), delay granted by the court pursuant to section (f) shall be excluded in computing the time for trial. Cr.R 3.3(f)(2) states, “on motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party’s objection to the requested delay.”

In State v. Williams, 104 Wash.App. 516 (2001), the court analyzed whether the defendant’s right to a speedy trial was violated when the trial court granted five continuances primarily because of the unavailability of the assigned deputy prosecutor. Id. at 516-517. In Williams, the court found that a continuance of the trial date based on the deputy prosecutor’s unavailability was justified and required in the administration of justice. Id. at 524. In State v. Johnson, 132 Wash.App. 400 (2006), the trial court continued a trial date, over the defendant’s objection, because the assigned deputy prosecutor was trying a different

case. Id. at 412-413. In Johnson, the court found the continuance was warranted for the administration of justice and that the defendant did not show the continuance prejudiced the presentation of his defense. Id. at 413-415.

“It is worth noting that the current time for trial rules are different from those in effect during [William’s trial in 1998]. The new provisions allow a trial court more flexibility in avoiding the harsh remedy of dismissal with prejudice, while simultaneously protecting a defendant’s statutory time for trial rights. For example, the current rules provide for a 30-day buffer period such that whenever a period of time is excluded from computing the time for trial, the time for trial period “shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5)” 154 Wash.2d at 199-200.

As in Williams and in Johnson, Judge Stonier found good cause to continue the trial date on May 19, 2008, because the assigned deputy prosecutor was in another trial and not available to try the respondent’s case. A continuance of the trial date due to an unavailable prosecutor is done for the administration of justice and allows the State an additional 30 days to try the case. Therefore, Judge Warning erred when he concluded that the continuance on May 19, 2008, was because of court congestion and that the State only had 5 additional days to try the respondent. Court

congestion is not a valid reason for continuances beyond the time for trial period. State v. Mack, 89 Wash.2d 788, 794 (1978). Therefore, the State was denied the ability to try the respondent within 30 days because the trial court's decision was exercised on untenable grounds or for untenable reasons.

2. **A trial judge should grant a continuance of a trial date when there is a valid reason for the unavailability of a material State witness, the material State witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.**

“The unavailability of a material state witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.” State v. Nguyen, 68 Wash.App. 906, 914 (1993). “These requirements are not satisfied, however, unless the party whose witness is absent proves it acted with due diligence in seeking to secure that witnesses presence at trial. State v. Iniguez, 143 Wash.App., 845, 854 (2008).

In State v. Nguyen, the State requested a continuance because its detective was called to active duty with the Washington Air National Guard, would be gone for at least 30 days, and would not be available for trial. 68 Wash.App. at 914-916. In Nguyen, the court granted the State's request for a continuance and noted that the defendant failed to show that

he sustained any prejudice as a result of the continuance. *Id.* at 915-917.

In *State v. Iniguez*, a material State witness left the country without notifying the State and prompted the State to request a continuance of the trial date until the witness returned. In *Iniguez*, the court found good cause to continue the trial date because of the unavailability of a material State witness and the State acted with due diligence in seeking to secure that witness's presence at trial. 143 Wash.App. at 851-855.

In the present case, Judge Warning erred when he concluded that the continuance on May 19, 2008, was because of court congestion and that the State only had 5 additional days to try the respondent. Therefore, he scheduled a new trial date for May 27, 2008, "regardless of whether witnesses are available or not." Transcript, p. 78. Two days later, the State notified the court that it could not try the respondent's case on May 27, 2008, because the victim was working out of town and out of state until June 8, 2008. The victim was working in Astoria, Oregon, and was not available for trial. The victim is a nurse for a hospital and needs two weeks notice of the trial date. The victim was cooperative and available for all previous trial dates.

As in *Nguyen* and in *Iniguez*, the trial court should have granted a continuance of the trial date within the 30-day cure period so that a

material State witness was available for trial. Not only was there a valid reason for the unavailability of the victim as he was working out of town and out of State, but the State also had no means to compel an Oregon employer to honor a Washington State subpoena to allow the victim to come testify on May 27, 2008. Additionally, the victim was due back in Longview, Washington, on Sunday, June 8, 2008, and was available for trial on Monday, June 9, 2008. A continuance of 13 days is not excessive and would not have prejudiced the respondent's criminal defense. The trial court's setting of a trial date without regards for the availability of witnesses is manifestly unreasonable and is a manifest abuse of discretion.

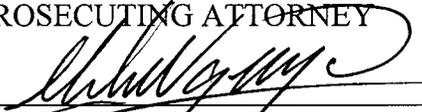
## **VII. CONCLUSION**

The appellant's appeal should be granted and the case should be remanded to the trial court to set a new trial date within the 30 cure period because the trial court's denial of a continuance for the unavailability of a

material State witness was manifestly unreasonable and exercised on untenable grounds or for untenable reasons.

Respectfully submitted this 8<sup>th</sup> day of December 2008.

SUSAN I. BAUR  
PROSECUTING ATTORNEY



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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 KRISTY LENA WILLIAMS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

NO. 37765-9-II  
Cowlitz County No.  
07-1-00978-4

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DIVISION II

I, Michelle Sasser, certify and declare:

That on the 8<sup>th</sup> day of December, 2008, I deposited in the mails  
of the United States Postal Service, first class mail, a properly stamped  
and address envelope, containing Brief of Respondent addressed to the  
following parties:

Court of Appeals  
950 Broadway, Suite 300  
Tacoma, WA 98402

Eric J. Nielson  
Attorney at Law  
1908 E. Madison Street  
Seattle, WA 98122-2842

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

Dated this 8<sup>th</sup> day of December, 2008.

Michelle Sasser  
Michelle Sasser