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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The findings of fact and conclusions of law are adequate and any deficiency therein may be corrected by reference to the copious record in this case.
2. The trial court's reasons for upholding the warrant were accurate but the inquiry is moot, as this court does not review the trial court's reasons for upholding the warrant – rather, it reviews the magistrate's initial probable cause determination.
3. Evidence is sufficient to convict the defendant herein.
4. The defendant's incriminating statements were properly used against him.
5. The State was not required to disclose the names of the discoverers of the defendant's marijuana growing operation.
6. The defendant brought about any unreasonable delay in his own trial; neither his constitutional nor rule-based speedy trial rights were violated.
7. All substitutions of counsel herein were proper, and many of those complained of were brought about by the defendant himself.
8. The defense complains that plea bargaining constitutes prosecutorial vindictiveness; this is incorrect.
9. Evidence that the school bus stop zone sentencing enhancement applied herein was competent and sufficient.
10. The school bus stop zone enhancement is constitutional.
11. There was no prosecutorial misconduct in the jury trial.
12. There being no error, no error accumulates.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether appellant properly relies upon State v. Glenn, *infra*; or whether, in fact, no precedent whatever backs up his assertions as to the state of the law of findings of fact and conclusions of law.
2. Appellant relies on State v. Thein, *infra*, arguments regarding the warrant. Thein is distinguishable both factually and legally.
3. The warrant was not stale.
4. The appellant's argument that the warrant is "inapplicable on its face" consists entirely of the statement that the warrant is "inapplicable on its face," and should therefore be disregarded.
5. The appellant's argument regarding the trial court's methods for determining the validity of the warrant are irrelevant to this court's inquiry whether the warrant was valid.
6. The appellant's argument that evidence was insufficient to convict depends on the inadmissibility of evidence seized during warrant service and thus stands or falls based upon this court's ruling there.
7. The appellant's argument that his statements were unlawfully admitted depends on the proposition that evidence used to arrest him was inadmissible or inadequate, neither of which is the case.
8. Whether cast as a Brady argument, a discovery argument, a court rule argument or a Constitutional argument, the State was not

required to give the defense the names of the hunters who initially discovered appellant's grow operation.

9. Appellant and/or the defense brought about the delayed trial now complained of; he was not prejudiced by the delay; his constitutional speedy trial rights were not violated.
10. It is not prosecutorial vindictiveness to offer a plea bargain in which the State offers to give up the right to argue against an appeal bond, and for the State then to exercise that right when the defendant rejects the deal.
11. Evidence that the appellant produced drugs within a school bus stop enhancement zone was sufficient.
12. The school bus stop zone enhancement is constitutional as applied.
13. The appellant has cited no precedent to the effect that an "abiding belief" is not a feeling; nor has he proved prejudice; and in any event there was no objection at the trial level.

III. FACTS

On September 12, 2007, a Wahkiakum County magistrate signed a search warrant based on an affidavit that is before the court as CP 1. The affidavit set out the following facts:

On August 12, 2007, a pair of bear hunters on West Valley Road in Wahkiakum County, watching for bear from a ridge, saw a white pickup pull over to the side of the road below and watched as a man got out carrying some jugs. CP 6. The man took the jugs up the bank from the road, bent over, and did something they could not see in the brush next to the road. Id.

The man left after five minutes, but the hunters heard his car make more short stops at other places along the road. Id. The hunters reported this suspicious activity, and Dep. Gary Howell of the Wahkiakum County Sheriff's Office met with them and travelled with them back to the area where it occurred. Id. They showed him the clay bank where the man had stopped with the jugs, and Dep. Howell saw that two marijuana plants were there in the brush, one planted and the other in a green plastic pot. Id. More empty green plastic pots were also nearby. Id.

Deputy Howell took the hunters away from the area for their safety and returned the following day to make a more thorough search of the area. CP 6-7. During that search and later surveillance, eight more plants were discovered growing in the area. CP 7. On September 5, 2007, as surveillance continued, a pickup truck belonging to the defendant and present appellant, Randall Montgomery, was visually recorded pulling in to the area and stopping where the largest number of marijuana plants were growing. Id. Within three minutes of stopping, Montgomery himself (who Dep. Howell knew by sight) was recorded as he approached and plucked parts of a marijuana plant. Id. The same pickup truck Montgomery drove to the marijuana grow was observed two days later at his home on 629 East Valley Road (also in Wahkiakum County). Id.

Based on this information, Dep. Howell received a search warrant to search Montgomery's car, home, and named outbuildings for the clothing Montgomery was recorded wearing and for any contraband; and while executing the warrant, he smelled the odor of marijuana coming from a

garden shed that had not been named on the warrant. He got a new warrant for that shed. Id.

The Wahkiakum County Sheriff's Office served the search warrant on Montgomery's residence on the same day – September 7, 2007 – and at the same time that they seized evidence at the site of the outdoor growing operation. RP 216, 279 (Montgomery's residence), 280-281. At the outdoor grow operation, among other items of evidence, officers seized marijuana plants the root balls of which were encased in a green mesh. RP 180. Also discovered at the outdoor grow was a bag of Miracle-Gro fertilizer (RP 175) and green pots such as those described in the affidavit for search warrant (RP 178).

Meanwhile, the search of Montgomery's residence and outbuildings yielded, inter alia, methamphetamine in a glass pipe (RP 220, 250), marijuana plants the root balls of which were encased in a green mesh (RP 350), Miracle-Gro (RP 322), and at least one green pot of the same type as was found at the outdoor site (RP 325). Later, at trial, both Deputy Fithen and marijuana expert Pat Carpenter testified that cultivating marijuana by covering the root ball in a mesh is unusual: Fithen noted that "we've never seen a root ball with that mesh covering before" at RP 182, and, at RP 334, Carpenter echoed that she had never seen such a thing either.

Montgomery was not at home when the warrant was served. RP 281. However, he was arrested nearby while officers were serving the search warrants. RP of 5/17/10, 47-48. When questioned, he admitted but minimized his involvement in drug activities. He said he was aware of the

outdoor marijuana grow, but had only been there once in the past few months and only knew of two plants. RP 350. When asked about the methamphetamine in his bedroom, he said he only used methamphetamine every couple of weeks. Id. And when asked about the marijuana discovered in the shed by his house, he said it was an “experiment” than an unnamed friend had given him. Id.

Police measured the distance between the grow at Montgomery’s residence and the nearest school bus stop, coming up with a distance of less than a thousand feet between that bus stop and the growing operation. RP 352. At trial, this measurement was confirmed by photogrammetry, RP 42, and the testimony of a school bus driver and that driver’s administrator that the school bus stop had been established years before 2007. RP 22, 58.

PROCEDURAL HISTORY:

Montgomery secured a bail bond on September 24, 2007. RP 322. He spent the next three years free on bail. During that time he waived speedy trial nine times, such waivers often being necessary for new counsel to get up to speed, as he went through as many publicly appointed attorneys as he made speedy trial waivers – nine – before attorney number ten brought him to jury trial on August 30, 2010. RP 322 et. seq. (waivers and substitutions of counsel). Further details on these developments will be set out infra as required by argument. Meanwhile, suffice it to say that Montgomery was convicted on September 2, 2010, of two counts of possession of marijuana with intent to manufacture or distribute (one within

a school zone), one count of possession of methamphetamine, and one count of use of drug paraphernalia, and that he timely appealed.

IV. ARGUMENT

1. **Sufficiency of Findings of Fact and Conclusions of Law**

Montgomery states, “The Court of Appeals will reverse if an appellant is prejudiced by the lack of appropriate findings and conclusions.” Montgomery cites State v. Glenn, 140 Wn.App. 627, 640, 166 P.3d 1235 (2007), for this proposition. But Glenn makes no such holding, instead noting only that “This court has reversed a conviction for failure to comply with Criminal Rule 3.6 when no findings and conclusions were ever entered.” State v. Glenn, 140 Wash. App. 627, 640, 166 P.3d 1235, 1241 (2007) (emphasis in original). The Glenn court also reported that even in the case before it, the Court of Appeals could have affirmed based on the trial court’s oral opinion had that opinion not been a “far cry from the ‘comprehensive opinion’ which has been fundamental to every case in which the court proceeded to address the merits of a ... suppression issue in the absence of findings required by ... CrR 3.6.” State v. Glenn, 140 Wash. App. 627, 640, 166 P.3d 1235, 1241 (2007). Thus, Glenn does not stand for the proposition that unless findings and conclusions are “appropriate,” a case should be reversed. Rather, it stands for the proposition that as long as there is sufficient information before the court to review a ruling, it does not matter whether there are findings and conclusions at all.

Here, the search and seizure issues were addressed myriad times over the years. E.g., RP 5/17/10, RP 5/21/10, RP 1/7/08, RP 5/8/08. There is no paucity either of written or oral avenues through which to determine the trial court's mind on the matter. So the assigned error is not only unsupported by any authority (since Glenn does not in fact stand for the proposition for which it is offered), but neither are there any reasonable grounds for any similar objection. If any additional proof be needed, note that the defense was able to fill eleven pages – a full twenty percent of its brief – with arguments regarding search and seizure issues, and five pages out of ten in Montgomery's statement of the case is also devoted to facts surrounding search and seizure issues. Any argument that there is insufficient information to determine search and seizure issues rings hollow in the face of the copious record cited by the defense itself.

This argument rings hollower still in light of Montgomery's separate argument just two pages later (Appellant's Brief—hereafter AB— at 13) that the legality of the search herein is to be judged entirely in light of the information found within the four corners of the search warrant. The warrant itself is part of the record. CP 1 et. seq. So either we have all we need to determine the legality of the search, as Montgomery argues in his brief at 13, or none of the information we need, as Montgomery argues at 11. By operation of logic we know this: it is impossible for both of these arguments to be right, but it is possible for them both to be wrong.

2. Search Warrant:

Thein:

Appellant appears to concede at AB14-15 that the clothing Montgomery wore when he was photographed pocketing marijuana from his grow are relevant items of evidence. However, he says “the State did not need the clothes to identify Montgomery because the video did that.” Id. From this he claims to have proved the request for a warrant to seize those clothes was a “pretext.” Id. All this without citation to authority of any kind. The novel notion that if the State has one item of evidence identifying a suspect, it has no legal right to seek any more, should be supported by some authority. And the connection between that and pretext cannot be made by fiat.

Argument unaccompanied by citation to authority need not be considered by this court. E.g., State v. Dukowitz, 62 Wn.App. 418, 423, 814 P.2d 234 (1991).

Further,

Without supporting argument or authority, “an appellant waives an assignment of error,” Bercier v. Kiga, 127 Wash.App. 809, 824, 103 P.3d 232 (2004), review denied, 155 Wash.2d 1015, 124 P.3d 304 (2005), 127 Wash.App. at 824, 103 P.3d 232 (citing Smith v. King, 106 Wash.2d 443, 451-52, 722 P.2d 796 (1986)); and “We need not consider arguments that are not developed in the briefs

for which a party has not cited authority.”
Bercier, 127 Wash.App. at 824, 103 P.3d 232
(citing State v. Dennison, 115 Wash.2d 609,
629, 801 P.2d 193 (1990)).

Collins v. Clark County Fire Dist. No. 5, 155 Wash. App. 48, 96, 231
P.3d 1211, 1236 (2010), as corrected on denial of reconsideration (Apr. 20,
2010).

Thus, the defense’s assertion that the police have to stop looking for
evidence after they find what the defense considers to be enough of it, made
without argument or authority, need not and should not be considered.

When Montgomery cites to authority, the results are as unhappy for
him as when he fails to do so. At 15, Montgomery baldly states that State v.
Thein, 138 Wash. 2d 133, 149, 977 P.2d 582, 590 (1999), n. 4, “holds that
searching a home for clothing as evidence of a drug offense committed
elsewhere is not justified.” Here is that footnote in its entirety:

Thus, we distinguish State v. Herzog, 73
Wash.App. 34, 56, 867 P.2d 648 (1994), cited by the
State, on its underlying facts. Herzog involved the rape
of six women. At least three of the victims described
the defendant as wearing a striped polo shirt. Herzog,
73 Wash.App. at 38-40, 867 P.2d 648. Based on
detailed evidence, police arrested a suspect. After the
arrest, police obtained a warrant to search the
defendant's room for clothes and towels described by
the victims. Herzog, 73 Wash.App. at 56, 867 P.2d
648. The evidence, therefore, connected specifically
described personal items used repeatedly in the
commission of multiple crimes to the defendant. We

do not find it unreasonable to infer these items were in the possession of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating. Under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives. See Wayne R. LaFave, Search and Seizure § 3.7(d), at 381-85 (3d ed. 1996) (“Where the object of the search is a weapon used in the [commission of a] crime or clothing worn at the time of the crime, the inference that the items are at the offender's residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to police.”). See also State v. Condon, 72 Wash.App. 638, 644, 865 P.2d 521 (1993).

State v. Thein, 138 Wash. 2d 133, 151, 977 P.2d 582, 590 (1999).

Here, all criteria laid out in Thein are met. “The evidence,” to wit, the videotape of Montgomery at the marijuana grow, “connected specifically described personal items used” in the commission of the crime – to wit, the clothes he was wearing. It was reasonable “to infer these items were in the possession of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating.” And, pursuant to LaFave, the object was an item of clothing worn at the time of the crime, so “the inference that the items are at the offender’s residence is especially compelling,” especially in cases such as this “where the perpetrator is unaware the victim [or, in our case, the state] has been able to identify him...”

Thus, the Thein decision that Montgomery relies upon for the proposition that it is impermissible to grant a warrant to seize clothing that may be used to identify the defendant is actually authority for the exact opposite proposition.

There can, therefore, be no question that the warrant was adequate as to the clothing Mr. Montgomery was wearing while captured on video. And, of course, while officers are in a place they have a right to be, they “are free to keep their eyes open.” State v. Seagull, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981). The contraband at the house was within their open view. And that argument grants Thein’s application to the case at hand. But Thein is factually distinguishable. In that case, officers found a complete marijuana grow operation at a house linked to Thein:

The front room was the woodwork shop and the backroom was the storage area. In the back storage area, police found materials they believed to be commonly associated with the cultivation of marijuana. These included fluorescent lights, halide bulbs, heat shields, bottles of carbon dioxide, electric timers, plant trays, a watering can, a fan, potting soil, a humidifier, and charcoal. Adjacent to these materials was a “Clean-air” system with a packing slip addressed to Stephen Thein at the South Brandon address (the location currently being searched)...

Next to the door used to enter the basement area was a trash can. (It is unclear from the affidavit whether the can was located inside or outside this door.) Inside the can was a plastic bag and, inside that bag, two yellow plastic bags. One of the yellow bags

contained approximately five pounds of marijuana “shake,” material typically pruned from cultivated plants. The other bag contained a round chunk of potting soil, apparently pulled from a potting container, and a used oil filter matching those found in the woodwork shop.

State v. Thein, 138 Wash. 2d 133, 137, 977 P.2d 582, 583 (1999).

Note that the facts of the Thein case negate Montgomery’s sweeping description of its holding. He cites it for the proposition that “it is well settled linking a person to an outdoor grow operation is not probable cause to search for evidence of trafficking in the home...” AB 15. But Thein concerned an indoor operation. No holding regarding links from outdoor growing operations to suspects’ homes were considered. Thein, supra.

Under the facts of Thein, where police found a complete indoor base of operations for a marijuana growing enterprise, there may have been no reason to seek elsewhere for such a base. But our case is not Thein. Here, the marijuana plants were in the woods, where storage of additional supporting material and smaller plants would be more difficult than in the private building in Thein. CP 6. Here, there were indications that the marijuana plants originated elsewhere: some were in pots, not planted in the ground. Id. Here, there was evidence that someone who tended the plants brought jugs into the area that were not found at the scene: water or other cultivation materials that must be somewhere other than the site at which the drugs were found. Id. Add to that the fact that the defendant’s automobile, a pickup truck (adequate for the purpose of servicing a marijuana grow), was recorded at the

scene and at his residence. Id. Atop all this is the officer's knowledge that drug traffickers frequently conceal drugs "within their residences and surrounding curtilage." CP 3. Even the Thein court does not encourage disregarding this information; it just says that police experience *by itself* is insufficient for a warrant. Thein, 138 Wn.2d at 143. Here, unlike the Thein case, there is more. (And let us not forget that the officer's experience, as applied to the facts, was absolutely correct. The evidence the affiant sought was where he said it would be.)

3. **Staleness:**

"Search warrants are to be tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense. See United States v. Turner, 770 F.2d 1508, 1510 (9th Cir.1985), cert. denied, 475 U.S. 1026, 106 S.Ct. 1224, 89 L.Ed.2d 334 (1986)." State v. Perrone, 119 Wash. 2d 538, 549, 834 P.2d 611, 617 (1992).

The issue of staleness depends entirely on the defense's characterization of the facts. If the court accepts as gospel what the trial court and jury manifestly did not – that since "only a single plant was videotaped... the known criminal conduct was merely pocketing a small amount of material..." – then Montgomery has an argument to make. AB 16. Because Montgomery does not dispute the well-settled principle, which accords with common sense, that a marijuana growing operation is the sort of thing that stays in one place for a while. See, e.g., State v. Petty, 48 Wash. App. 615, 621-22, 740 P.2d 879, 883 (1987):

The facts in the present case indicate that the trial court erred in ruling that the information was stale because there was a 2-week lapse between the informant's observation and the request for a warrant. While 2 weeks may be too long where the suspected criminal activity is the sale of small amounts of marijuana... it is sufficient to establish probable cause where an informant observes "an extensive growing operation." State v. Smith, 39 Wash.App. 642, 651, 694 P.2d 660 (1984).

Petty, supra (citation omitted).

Thus, this assignment of error can only be sustained if the court accepts Montgomery's version of the facts, which minimizes his involvement. And the State submits the warrant contains sufficient evidence to show, "interpreted in a common sense, practical manner," probable cause that Montgomery's involvement was greater than that. Doubts are to be resolved in favor of the warrant. State v. Chenoweth, 127 Wash. App. 444, 455, 111 P.3d 1217, 1223 (2005) aff'd, 160 Wash. 2d 454, 158 P.3d 595 (2007). So the court is under no obligation to believe that Montgomery randomly happened upon a hidden marijuana garden. Just the opposite, in fact. "[P]robable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities..." State v. Fore, 56 Wash. App. 339, 344, 783 P.2d 626, 629 (1989).

Furthermore:

Probable cause requires more than suspicion or conjecture, but it does not require certainty. Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred.

State v. Chenoweth, 160 Wash. 2d 454, 476, 158 P.3d 595, 606 (2007) (citations omitted).

Considering the applicable standards, the warrant's allegations that Montgomery drove a pickup truck directly to the site of a hidden marijuana grow, stopped in the part of the road closest to the largest number of those plants, and within three minutes was videotaped tending one of the plants in the grow, should be more than sufficient to raise the inference that he was involved in growing the marijuana. CP 7. And since news of a marijuana growing operation does not grow stale as quickly as the innocent scenario posited by the defense – Petty, supra – the staleness argument is foreclosed.

4. **Exaggeration?**

At AB17, Montgomery devotes a page to denigrating selected facts in the warrant and announcing by fiat that the “warrant was insufficient on its face.” The State responds by reiterating its arguments supra regarding the court's lack of any responsibility to respond to unsupported assignments of error and of this court's obligation to extend all inferences in favor of warrants granted by magistrates, also addressed supra.

5. **Inadmissible Evidence Considered in Determining**

Probable Cause for Warrant:

Montgomery spends ten percent of his brief – five pages – outlining the bewildering course taken by the trial court in determining the validity of the search warrant herein. AB 17-22. Extrinsic testimony, unasked-for Franks hearings, and other irregularities are invoked. Id. The précis written by the defense, sometimes vivid in its characterizations, does frequently capture the flavor of the case as involved practitioners experienced it; and this is particularly praiseworthy as it was written by someone without firsthand experience of these proceedings during their pendency. But, in the end, three legal principles render the entire discussion moot.

First: “[A]t the suppression hearing the trial court acts in an appellate-like capacity; its review, like [the appellate courts’ review], is limited to the four corners of the affidavit supporting probable cause.” State v. Neth, 165 Wash. 2d 177, 182, 196 P.3d 658, 661 (2008).

Second: “Although we [appellate courts] defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo.” Id.

Third: “We [appellate courts] can affirm a trial court's probable cause determination, a question of law, on any correct ground appearing in the record.” State v. Louthan, 158 Wash. App. 732, 743, 242 P.3d 954, 961 (2010).

In short, this court can, must, and will make its own independent review of probable cause in this matter from the four corners of the warrant itself, and when that review is accomplished, this court’s decision will supersede the trial court’s. How the trial court arrived at its decision therefore

no longer matters (except, perhaps, as a historical curiosity).

6. **Insufficiency of the Evidence:**

This ground for relief relies entirely on Montgomery's twin arguments that "the evidence from the woods was insufficient to support a search of the home..." and "[T]he evidence from the woods supports only a single charge of simple possession of less than 40 grams." AB 23. The first of these assertions is argued elsewhere, and the second is made without citation to statute, reference to precedent, or even resort to argument; it should be dispensed with pursuant to Dukowitz, supra.

7. **Incriminating Statements:**

Appellant argues that Montgomery's arrest was unlawful, reasoning that Montgomery's statements expressing his use of methamphetamine and his ownership of the marijuana and growing equipment on his property would be fruit of the poisonous tree and thus excludable if his arrest is invalidated. AB 25.

Again, this argument is based entirely on the argument that the search warrant herein was invalid, which argument has been addressed separately.

8. **Identity of Informants:**

Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.

Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

CrR 4.7(f)(2).

Montgomery's argument concerning disclosure of the names of the hunters at whose report the sheriff's office set up video surveillance of the marijuana grow is strongly based on the twin contentions that, first, Montgomery's actions on video did not constitute cultivation, and second, only the video connected him to the marijuana grow. Appellant's brief is marbled with references to Montgomery as a hapless hiker who just so happened to wander up to a single pot plant and impulsively swipe a piece of the plant. E.g., AB 31. Appellant calls all evidence to the contrary "speculative." Id. However, such contentions fail. First, it is obvious from the verdict that the jury did not see the video in the same light the appellant saw it. Exhibit 23. And second, Montgomery's brief ignores the other evidence connecting him and his indoor grow with the outdoor grow. Montgomery's cultivation techniques were the same across both areas. He used Miracle-Gro at both locations. (E.g.: Woods: RP 387; ex. 102. Home: RP 322, ex. 77.) And his method of growing marijuana with a mesh net around the root ball, characterized as rare by both a sheriff's deputy (RP 182) and marijuana expert Pat Carpenter (RP 333), was in evidence both at the outdoor grow and at home. Exhibits 73 and 74 show mesh-covered root balls from the indoor and the outdoor grows; see also Exhibit 15, peat pod with mesh actually found in Montgomery's master bedroom. RP 294.

So what happened here was that the police became aware of a

marijuana growing operation, put it under surveillance, saw a man tending it, searched that man's home, and found more marijuana growing there that was cultivated with the same unusual methods used at the outdoor grow. A solid case in anyone's book – and one that stands or falls on its own regardless of how the police first became aware of the outdoor grow in question. As it happens, bear hunters who would prefer to remain anonymous found it. RP 258-259. But the case would have been precisely the same if the grow had been discovered through aerial spotting, an undercover officer, or a psychic vision.

As for the courts,

“Our analysis begins with the proposition... that the State has a qualified privilege not to disclose the identity of confidential informants, and that disclosure is required only when the informant's identity is relevant and helpful to the defense or essential to a fair determination of the charge. See Roviaro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); State v. Thetford, 109 Wash.2d 392, 396, 745 P.2d 496 (1987); CrR 4.7(f)(2); RCW 5.60.060(5). Generally, the preferred procedure for making this determination is an in-camera hearing. “No hearing is necessary, however, if the accused's reasons for seeking the informant's testimony are only speculative, though the hearing judge should take into consideration the difficulty of explaining in a vacuum why the testimony is crucial.” State v. Cleppe, 96 Wash.2d 373, 382, 635 P.2d 435 (1981); *see* State v. Fredrick, 45 Wash.App. 916, 921, 729 P.2d 56 (1986) (no error in denying motion for in camera hearing).”

State v. Salazar, 59 Wash. App. 202, 214, 796 P.2d 773, 780 (1990).

A true Brady violation has three components:
(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.

In re Brennan, 117 Wash. App. 797, 805, 72 P.3d 182, 185 (2003).

Montgomery claims further questioning of the bear hunters might have gleaned more information about other people who might have tended it. But it is well established by the state supreme court that, “[t]he mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial ... does not establish ‘materiality’ in the constitutional sense.” accord, State v. Bebb, 108 Wash.2d 515, 523, 740 P.2d 829 (1987).” State v. Blackwell, 120 Wash. 2d 822, 828, 845 P.2d 1017, 1021 (1993) (emphasis in original), quoting State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986). Nor, the State argues, can such speculation prove prejudice under the Brady standard.

In other words, the defense’s speculation about what “might” have happened does not merit reversal. This proposition is borne out by State v. Atchley, 142 Wn. App. 147, 173, P.3d 323 (2007), holding that citizen informants whose knowledge of a marijuana grow initiates a police investigation need not have their identities disclosed to potentially vengeful defendants.

9. **Hunter's Testimony?**

At AB 33, Montgomery states without citation to the record that “the State elicited the hunter’s testimonial statements as hearsay” without objection by defense counsel. If the State is correct, this would be at the trial RP 259 et seq. At 259, Montgomery’s counsel did specifically note, while making a vagueness objection, that he was not objecting to the hunter’s statement on hearsay grounds. RP 260.

But Montgomery’s acknowledgment that “defense counsel apparently made a strategic decision not to challenge the unmitigated hearsay...”, AB 33 (fn. 12), stops the inquiry into this issue in its tracks. Failure to object to hearsay testimony at the trial level waives the objection at the appellate level. RAP 2.5(a), State v. Perez-Cervantes, 141 Wash.2d 468, 483, 6 P.3d 1160 (2000), citing State v. Riley, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993).

Defendant attempts to characterize this issue as constitutional in dimension to avoid the application of RAP 2.5(a), but this also fails. The defense herein not only failed to object to admission of the claimed hearsay, but additionally, as tacitly conceded by Montgomery in his brief at fn. 12, made “strategic” use of the information gleaned through hearsay by using it to try to cast doubt on the defendant’s guilt in closing argument. RP 488. And it is established that a defendant's failure to object to hearsay evidence and his own use of it during argument constitute a waiver of any right of confrontation and cross-examination. State v. Dahl, 139 Wn.2d 678, 687 fn.2, 990 P.2d 396 (1999).

Since the defense not only failed to object to, but made beneficial use of, the putative hearsay in question, this issue is waived.

10. **Speedy Trial:**

It should be noted at the outset of this speedy trial argument that Montgomery makes no allegation that CrR 3.3 was violated. AB 34 et. seq. Montgomery's only arguments are constitutional ones, which means that Montgomery is arguing that CrR 3.3 is unconstitutional as applied – an argument made previously with some initial success in State v. Iniguez, 167 Wash.2d 273, 217 P.3d 768 (2009).

It is uncertain whether even the constitutional issue remains, since no particular continuance was designated as being constitutional error; but in the spirit of caution, the State will argue the issue anyway. However, it should be noted that, besides failing to challenge the trial court's application of CrR 3.3 generally, Montgomery fails to assign error to any particular continuance granted by the court. Nowhere in either the appellant's assignments of error or argument is there any statement which points out a particular continuance or waiver and says, "This continuance was an abuse of judicial discretion," or "This waiver was not made knowingly and voluntarily."

"Generally, we will only review claimed error if it is included in an assignment of error. See RAP 10.3(4)." Havlina v. Washington State Dept. of Transp., 142 Wash.App. 510, 515, 178 P.3d 354 (2007). Here, Montgomery has claimed no error in the court's adherence to speedy trial rules.

This court's standard of review for the constitutional argument is de novo, as outlined in Iniguez, supra:

[W]e review a decision to grant or deny a continuance for an abuse of discretion. State v. Flinn, 154 Wash.2d 193, 199, 110 P.3d 748 (2005). However, a court “necessarily abuses its discretion by denying a criminal defendant's constitutional rights.” State v. Perez, 137 Wash.App. 97, 105, 151 P.3d 249 (2007). And we review de novo a claim of a denial of constitutional rights. See Brown v. State, 155 Wash.2d 254, 261, 119 P.3d 341 (2005); see also United States v. Wallace, 848 F.2d 1464, 1469 (9th Cir.1988) (a Sixth Amendment speedy trial claim is reviewed de novo). Because Iniguez argues his constitutional speedy trial rights were violated, our review is de novo.

Iniguez, 167 Wn.2d at 280-81.

In determining whether a defendant's constitutional speedy trial right is violated, the court first makes a threshold determination whether the delay is “presumptively prejudicial.” Iniguez, 167 Wn.2d at 291-292. This is a fact-specific determination in which factors such as the length of delay, the complexity of the charges, and reliance on eyewitness testimony are considered. Iniguez, 197 Wn.2d at 292. If the delay is “presumptively prejudicial,” then the court moves on to determine actual prejudice through application of “a more searching examination of the circumstances, including the length of and reasons for delay, whether the defendant asserted his speedy trial rights, and prejudice to the defendant.” Id. Prejudice to the defendant must be actual and shown. State v. Ollivier, -- Wn.App. --, -- P.3d --, WL 1459594 (Wash. App. Div. 1, April 18, 2011). In making the “more searching examination of the circumstances,” Iniguez, 197 Wn.2d at 292, “the Court has asked “whether the government or the criminal defendant is more to blame for th[e] delay.” Doggett v. United States, 505 U.S. 647, 651, 112

S.Ct. 2686, 120 L.Ed.2d 520. Delay “to hamper the defense” weighs heavily against the prosecution, Barker, 407 U.S., at 531, 92 S.Ct. 2182, while delay caused by the defense weighs against the defendant, id., at 529, 92 S.Ct. 2182.” Vermont v. Brillon, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009), citing Barker v. Wingo, 407 U.S. 514 (1972).

In Ollivier, a 22 month delay of trial while the defendant was imprisoned was found not to be prejudicial. Ollivier cites with approval Vermont v. Brillon, supra, in which a three-year delay in trial in which the defendant was incarcerated but many (though not all) continuances were chargeable to the defense was found constitutional. Brillon is also a case in which a difficult defendant went through an inordinate number of attorneys (“at least six”), so it bears a strong resemblance to our case.

The State does not grant that the delay herein is “presumed prejudicial.” It appears from the cases that more than duration is involved in the determination whether a delay is presumed prejudicial. Ollivier, supra. And no other prejudice has been shown. Montgomery was out on bail throughout the pendency of the case, CP 322, and the only argument regarding prejudice in Montgomery’s brief is an argument at 38 that prejudice can be presumed if a delay is “sufficiently unjustified and egregious.” Id., citing Dogget, supra. In other words, Montgomery cannot point to any actual prejudice, either.

In fact, the only prejudice was to the State – justice was delayed by years while the defendant enjoyed his freedom. The State notes that every request for continuance made from the beginning of the case until the one made March 12 and heard March 17 of 2009 - the very first one the defense

designated for review by this court - was made by the defendant. He had by that time moved for continuance at least twice (RP 5/19/08 at 2; RP 11/24/08 at 2) and signed five waivers of speedy trial. CP 323, 325, 326, 334, 336. Furthermore, the request for continuance of the trial date made by the State and heard on March 17, 2009, did not extend Montgomery's speedy trial date, but instead was a move from one date to another within the speedy trial limitation then set by Montgomery's last waiver. RP 3/17/09 at 7. After that, Montgomery requested a continuance and waived speedy trial again. RP 6/8/09 at 2; CP 340. And on July 6, 2009, he again requested a continuance and signed a waiver of speedy trial on the grounds that his attorney was still getting caught up with the case. RP 7/6/09 at 2-3; CP 342. He last waived speedy trial on Feb. 2, 2010. CP 356. He agreed to a commencement date of Feb. 1, 2010, which made his speedy trial deadline May 3, 2010. On March 15, 2010, the court signed an order for the withdrawal of attorney number nine, Brian Berkenmeier, who explained that the defendant had taken to the belief that Berkenmeier "may be... cooperating with the prosecution and not necessarily representing his own interests," RP of 3/4/10 at 5, which made Berkenmeier think, "I've gotta watch my own rear." *Id.* at 6.

Considering that the State moved for one continuance and the defendant waived speedy trial nine times (10/8/07, 11/19/07, 1/28/08, 5/19/08, 11/24/08, 6/8/09, 7/6/09, 11/23/09, 2/1/10), it is clear that this "delay caused by the defense weighs against the defendant." *Brillon, supra*.

The *Brillon* court also observed, as noted *supra*, that "In applying *Barker*, the Court has asked "whether the government or the criminal defendant is more to blame for th[e] delay." *Doggett v. United States*, 505

U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520.” Brillon, 129 SC at 1285-6. And, as in the Brillon case, most of the delay here occurred because the defendant simply could not get along with his attorneys.

After Montgomery’s first attorney, Josh Baldwin, who was appointed September 10, 2007, (CP 3180), withdrew to take a job at the Cowlitz County Public Defender’s Office (RP 2/11/08 at 3), attorney Thad Scudder was appointed on November 5, 2007 (CP 324) and represented him until February 11, 2008 (CP 330). Scudder represented to the court on February 11, 2008 at 2 that he and his client were “at loggerheads.” He said his client “doesn’t accept... my representations...” Id. Montgomery insisted on believing a sinister explanation for what Scudder explained was an “honest mistake” regarding the court’s ruling. “He doesn’t accept that. This morning I got frustrated and told him I didn’t want to hear it anymore and he said he wanted a new attorney. I think maybe at this point, that’s a good idea... certainly he and I are struggling at this point in our relationship.” Id. The court later summed up at 4: “What I’ve heard from Mr. Scudder is that the professional relationship has broken down to such a degree that it probably is not salvageable. Did I overstate that, Mr. Scudder?” Mr. Scudder’s reply: “No.” Id.

While Mr. Baldwin’s move to the public defender was not due to any fault of Montgomery, the Brillon court noted that “delay caused by the defendant’s counsel is charged against the defendant.” Brillon, 129 SC at 1286. Montgomery’s obstreperous behavior towards Mr. Scudder is chargeable directly to him, especially in light of future events.

Thad Scudder was replaced as counsel for Montgomery by Heidi

Heywood. CP 332. She managed to stay on with Montgomery from February 29, 2008 to April 20, 2009 before declaring to the court on that date, “It has gotten to the point where the relationship is strained to the point that I am having substantial difficulty and anticipate in a very short period of time it will have crossed the line to where I cannot provide effective assistance in this matter and I would ask to be relieved.” RP 4/20/09 at 8. Apparently, and not for the last time, Montgomery accused his attorney of secretly acting in concert with the State: “There have been concerns that have arisen with respect to whether or not I have a conflict of interest due to my role as a court commissioner... I have been doing my diligent best to provide adequate representation in this case but would also represent to the court that there has been a deterioration in the relationship.” RP 4/20/09 at 7. After failing to get along with Mr. Scudder because of a lack of trust, thus losing a lawyer who had been with him for three months and six days, a similar streak of paranoia cost him his relationship with Ms. Heywood, who had represented him for over a year (one year, two months, twenty-three days).

Dan Morgan replaced Ms. Heywood on April 20, 2009 and lasted until October 12, 2009, almost six months (five months, twenty-two days). CP 338, 346. On October 12, 2009, he regretfully announced, “I did not intend to come here today to do this, but after a discussion with my client and his family, it was kind of the proverbial straw that broke the camel’s back. I just don’t feel that, frankly, we can communicate to the point to adequately prepare for trial, nor do I feel that my client or his family, who – who guides his decisions, trusts my representations about facts and/or law. And, you know, frankly, my experiences with Mr. Montgomery and his family have led me to the point

where I do not feel I could be a zealous advocate as required.” RP 10/12/09 at 6. By now, trust issues the State suggests are chargeable directly to Montgomery have cost the case three attorneys and almost two years (one year, 11 months, seven days). One other attorney, Brian Berkenmeier, went the same way after two months even. CP 354, 357. So two years, one month, and seven days of the approximately three years this case was pending are directly chargeable to a defendant who frustrated the attempts of numerous experienced counsel to represent him adequately.

As noted supra, other blameless action of the defense also cannot be held against the state in determining “whether the government or the criminal defendant is more to blame for th[e] delay.” Doggett, 505 U.S. at 651. As noted supra, Josh Baldwin moved to the public defender’s office on November 5, 2007, after having been initially appointed on September 10, 2007. CP 318, 324, RP of 2/11/08 at 3. That accounts for one month and twenty-six days. The public defender also absorbed Ryan Jurvakainen after only ten days as Montgomery’s attorney in 2008. CP 330, 331, RP of 10/12/09 at 15. And Christopher Z. Wade went to work for the Cowlitz County Prosecutor’s Office after one month and seventeen days. CP 348, 352, RP of 2/21/09 at 2. That is approximately another three months and three weeks for which the State need not answer, bringing the total to almost two and a half years out of three years of delay.

The State submits there is no need for further mathematical analysis. This case would have moved at a sprightly pace had the defendant not systematically alienated his attorneys. The time left of the lengthy pendency of this case after accounting for blameworthy and non-blameworthy defense

action is less than six months from arraignment – and it is less still between arraignment and the initial trial that ended in mistrial. CP 252. Since the delay not attributable to the defense, added up, does not come close to even a year, the State submits that the initial inquiry – whether the delay should be “presumed prejudicial” pursuant to Iniguez, supra – has been answered in the negative and the court need seek no further.

But if this court decides to engage in the “more searching examination of the circumstances,” Iniguez, 197 Wn.2d at 292, which is required in the event of presumed prejudice, the State should prevail at the end of that analysis – as it did in Iniguez. The Iniguez court identified four factors to be addressed: “the length of and reasons for delay, whether the defendant asserted his speedy trial rights, and prejudice to the defendant.” Id.

10(a). **Length of Delay**

As the appellant rightly notes, the length of speedy trial delay herein was so close to three years that we may as well call it that. And the State very much shares counsel on appeal’s frustration at this lengthy pendency. But, as discussed supra, that delay is chargeable to the account of the appellant herein, as he caused it with his own behavior. In addition to the authorities cited supra, the State would here like to add authority related to other familiar concepts: invited error being the first – State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006), review denied, 169 Wn.2d 1002, 236 P.3d 205 (2010) (under invited error doctrine a party may not set up error at trial and then complain about the error on appeal). The second is the rule that the defendant cannot be allowed to disrupt proceedings and then benefit from his or her own misconduct – e.g., State v. Turner, 143 Wash.2d 715, 728, 23 P.3d

499 (2001). For all these reasons, the State suggests that while delay was lengthy, this factor should not weigh as heavily against the State as it would had the State directly caused the delay.

10(b). **Reasons for Delay**

The reasons for the delay have been extensively dealt with supra. Also note that numerous motions were heard on various search and seizure issues, most of which are addressed in the appellant's brief. Eleven or more major defense motions, often duplicative, were filed in this case: including a motion to suppress on November 21, 2007 (CP 42), a motion to reconsider the court's ruling on that motion on January 22, 2008 (CP 66) which was amended on February 11, 2008 (CP 71); a motion for consolidation on January 22, 2008 (CP 69); a motion regarding the Franks hearing on May 8, 2008 (CP 76), a motion to identify the bear hunters on July 18, 2008 (CP 94) and a motion to reconsider the court's decision on March 18, 2009 (CP 105); yet another motion to suppress and yet another motion to compel the identities of the hunters on July 6, 2009 (CP 113); supplemental briefing on September 4, 2009 (CP 134); and a motion to compel discovery on October 6, 2009 (CP 137). So although the type of case we are dealing with here – a marijuana grow case charged as possession with intent to manufacture – is not one of the more inherently difficult cases (though it is not as simple as an assault or robbery), the search and seizure issues and the insistence of the defense on getting at least two decisions on every motion did create additional complexity for a case of its type that this court may find justifies delay. E.g., Iniguez, 167 Wn.2d at 292 (additional complexity of a conspiracy charge might excuse delay).

10(c). **Whether the defendant asserted his speedy trial rights:**

As noted supra, Montgomery requested a number of continuances and waived speedy trial nine times. The only time the state can think of offhand when he asserted his speedy trial rights was the one time the State requested a continuance (on March 12, 2009). RP 3/17/09. The rest of the time, Montgomery was happy to put off the case and remain free on bail.

Incidentally, the State takes issue with Montgomery's statement, AB 37, that the trial court never had a colloquy with him to determine the voluntariness of his waiver of speedy trial. This occurred at least twice, at RP of 11/24/08, 3-4; and RP of 11/23/09, at 5-6.

10(d). **Prejudice to the defendant:**

This has been dealt with supra. Note merely that even if this court has found "presumed prejudice," that does not meet the Ollivier standard of actual prejudice. Ollivier, supra. The defendant has asked this court to presume prejudice based on the length of delay, but has made no specific showing of prejudice, nor is there any to show. He was free on bail throughout this proceeding, unlike the defendants in all the major cases cited in this inquiry: Ollivier, Iniguez, Barker, Brillon, Dogget (all supra).

11. **Substitution of Counsel**

In preface to the meat of this argument, the State would like to point out this is the perfect appellate issue for the defense. If the trial court had denied a motion by counsel to be relieved from representing the defendant, that would have been the issue on appeal. Instead, now, Montgomery appeals because the motions were granted. An issue that constitutes grounds for appeal no matter how it turns out is a windfall for the appellate practitioner.

Interestingly, in five pages of argument, appellant never once addresses the standard of review with which this court must consider the trial court's decision to substitute counsel in a criminal case in the absence of objection by the defendant. Appellant does, however, misstate certain presumptions. For instance, at AB 39, we find State v. Bandura, 85 Wn.App. 87, 97-98, 931 P.2d 174 (1997), cited for the proposition that "absent exceptional circumstances, the court should deny a defendant's untimely and unwarranted request for new counsel and require counsel to remain on the case." Bandura is actually directly to the contrary, stating at the very pages cited by the appellant that the trial court may appoint new counsel at any stage of the proceeding and grant a continuance. Here is the language in its entirety:

A defendant has a right to counsel at every critical stage of the case, and sentencing is such a stage. A defendant can waive his right to counsel, but he must do so knowingly, voluntarily, and intelligently.

This is not to say that a trial court must delay a previously scheduled trial or hearing whenever a defendant demands new counsel. If a demand for new counsel is untimely, or otherwise unwarranted, the court has discretion (a) to require that present counsel remain and that the case proceed as scheduled or (b) to relieve present counsel and postpone further proceedings until new counsel can appear. When a critical stage of the proceeding is upcoming, however, the court cannot relieve present counsel and require a non-waiving defendant to proceed without counsel.

Here, Bandura's request for new counsel was certainly untimely and very possibly unwarranted. Thus, the trial court's options were (a) to require that [defense counsel] Foister remain in the case and that sentencing proceed as scheduled, or (b) to relieve

Foister and postpone sentencing until new counsel appeared.

Bandura, supra, 85 Wn.App. at 97-98 (citations omitted).

As the court can see, there is nothing here creating a preference for denying substitution of counsel. Rather, the Bandura court leaves substitution – and continuance to give new counsel time to prepare – to the trial court’s good discretion. This is the same standard to which a defense attorney’s request for substitution of counsel is held in State v. Stenson, 132 Wash.2d 668, 743, 940 P.2d 1239 (1997).

A similar disconnect exists between the reality and Montgomery’s version of CrR 3.1(e). That court rule provides as follows: “Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.” What Montgomery says it provides is that “Once a trial date is set, the court must inquire into the factors weighing for and against substitution.” AB 39 (emphasis in original). Only the version written by the appellant contains a mandatory on-the-record review. Nor does Montgomery cite any authority for the position that the court, if satisfied good cause for withdrawal exists, must engage in further colloquy that the court would perforce consider useless. (Note also that further inquiry into the client-attorney dynamic places the outgoing counsel in a difficult position vis-à-vis the attorney-client privilege.)

Montgomery does not allege or argue that written consent was not given by the court pursuant to CrR 3.1(e). Nor does Montgomery allege that the reasons the lawyers withdrew do not constitute good cause. Montgomery’s only argument is that the court should have inquired further before granting

recusal to his lawyers. AB 38-40.

It is for this court to determine whether the record shows an abuse of discretion in the trial court's granting substitution of counsel. And there is no instance in which an abuse of discretion can be shown. Imagine the appeal Montgomery would have had if any of the four attorneys who said he had alienated them had been required to stay on the case – the brief writes itself (though the State believes such claims would eventually fail). Nor is there any authority for the proposition that it is an abuse of discretion for a trial court to allow a lawyer to exit a case to take a new job. This court may have made different decisions about whether and when to retain counsel, but it cannot find that the trial court made its decisions based “on untenable grounds or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

12. **Second Speedy Trial Argument**

Montgomery takes a second run at the speedy trial issue in the portion of his brief commencing at page 40, apparently arguing that when an attorney is substituted out of a criminal matter, he or she is not “disqualified” pursuant to CrR 3.3(c)(2)(vii). To the contrary of this position is State v. Bobenhouse, 143 Wash.App. 315, 329, 177 P.3d 209 (2008), holding that court rule applies and resets speedy trial when a defense counsel withdraws and is substituted because of an attorney-client relationship breakdown (in that case, defendant filed a bar complaint against defense counsel, who subsequently withdrew). Bobenhouse, id.

The question whether taking a new full-time job elsewhere constitutes “disqualification” appears to be one of first impression in Washington, but

since to be “qualified” means to be fit for a given purpose (see, e.g., Merriam-Webster.com’s definition, retrieved 4/29/11 at <http://www.merriam-webster.com/dictionary/qualified>) and it is hard to argue that a person who works full time in one county is fit to simultaneously represent someone else in another county. Besides, the interpretation of the rule that the defense seems to urge would create two speedy trial rules – one for situations in which attorneys are “disqualified” in the defense’s narrow definition of the term, and one for other substitutions of counsel. Under this counterintuitive system, only when attorneys are “disqualified” is speedy trial reset so that newly appointed counsel has time to get up to speed, while if attorneys leave for reasons not constituting “disqualification,” the attorney who substitutes will not have the same opportunity to prepare for trial. This operates only to the prejudice of the defendant, whose attorney would be ill-prepared. E.g., Ollivier, supra.

In any event, since the standard of review for speedy trial determinations is abuse of discretion – e.g., Bandura, supra; Stenson, supra – and given the lack of contrary authority on the matter, it is the State’s contention that this court should hold that the trial court did not exercise its discretion on “on untenable grounds or for untenable reasons” (Junker, supra) when it permitted an attorney to disqualify himself to take a new job. And the purpose of the rule is served by this interpretation, for it permitted Montgomery a chance to be served by attorneys who had time to acquaint themselves with the burgeoning complexities of his case.

Montgomery also takes the opportunity presented by this second attempt to challenge speedy trial to again put forth the idea that the trial court

abused its discretion by disqualifying the attorneys Montgomery alienated. The State refers this court to facts and argument supra showing adequate grounds for recusal, and would like to add this further word regarding invited error.

The invited error doctrine does operate to bar claims that impact a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). See also United States v. Reyes-Alvarado, 963 F.2d 1184, 1187 (9th Cir.) (nontestifying codefendant's statements elicited by defendant cannot be basis for claim on appeal), cert. denied, 506 U.S. 890, 113 S.Ct. 258, 121 L.Ed.2d 189 (2002). Invited error bars review because a party cannot set up an error at trial and then complain on appeal. Korum, supra, 157 Wn.2d at 646. Washington's appellate courts have "held that the invited error doctrine was a 'strict rule' to be applied in every situation where the defendant's actions at least in part cause the error." State v. Summers, 107 Wn.App. 373, 381-82, 28 P.3d 780 (2001) (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

Montgomery's appellate brief put forth the notion that Montgomery is not to blame for the various recusals herein; that the various attorneys who withdrew were spineless or unreasonable and withdrew willy-nilly for no good reason (e.g., AB 40). Making such allegations is the only way the appellant can avoid the invited error doctrine. But the State suggests that here more than in many cases, this court has ample evidence the appellant had a hand in at least four of the recusals herein. True, the conflicts between attorney and client appeared to have happened behind closed doors rather than on the record, but how many other cases has the court seen this year in which one

defendant has gone through four attorneys for cause? ¹ If there is any basis for the expression “Where there’s smoke, there’s fire,” then that phrase applies here.

The defense itself was forced to admit at sentencing that of the many attorneys disqualified over the years before trial counsel came aboard, only with “some of those prior attorneys, it wasn’t an issue with Mr. Montgomery. It was other issues with the – with regard to the counsel themselves that they chose to leave the case and that may have been a reason that this case, and actually it was a reason that the case was extended, at least in some part.” VRSP 7. In other words, even Mr. Montgomery’s own counsel had to admit that only “some” of the delay WASN’T his client’s fault. The trial court agreed: “While there was a substantial amount of delay...most of it was occasioned by the fact that the defendant had a difficult time retaining - or continuing to have the same attorney and there was a need to replace the attorney multiple times.” VRSP 16.

Whether Montgomery phrases his objections as speedy trial objections or objections to defense counsels’ recusals, the answer is the same: he brought the great delays of trial upon himself and cannot now benefit from the irregularities he himself caused.

13. **Prosecutorial Vindictiveness?**

On the day of the initial mistrial in this case, June 1, 2010, the defense attorney who actually managed to take Mr. Montgomery’s case to trial, Donald Blair, wanted to put something on the record before the venire entered. RP of

¹ (And the one who actually took this case to trial is now suffering through an unwarranted bar complaint by Montgomery. He probably wishes he had withdrawn as well.)

6/1/10, 14. He described the plea bargain offer that Montgomery had rejected on “four prior occasions” despite Blair’s recommendation. Id. at 15. The offer was so generous it cannot even properly be considered a plea bargain offer, as Montgomery would not have to plead guilty to anything. Id. Instead, two counts would be dropped, the State would not pursue the school bus stop zone enhancement, Montgomery would go to trial on the remaining counts on stipulated facts, and this would preserve his right to appeal. Id., 15-16. The State would even have agreed to a stay of judgment pending appeal. Id. Blair went over the offer in “excruciating detail” with Montgomery and recommended it. Id. But Montgomery gambled on a motion decision of the trial court and rejected the offer. RP 17. (Having lost the gamble, he then announced his willingness to take the deal that he now complains is unfair. Id.)

Montgomery now references this plea-bargain offer from the State that would have kept him out of prison as proof of prosecutorial vindictiveness. And Montgomery cites to Korum supra, a case that holds that if the defendant rejects a plea-bargain offer for a ten year sentence, the State can, as promised, charge (and convict) a defendant and secure a hundred-year sentence against him – as authority for the proposition that the plea bargain offer in this case was unfair.

Montgomery argues that since he had a right to seek an appellate bond, the prosecutor was being vindictive by promising to argue against such a bond if Montgomery was convicted at trial. AB 44-45.

There is no constitutional right to release after conviction pending appeal. State v. Cole, 90 Wn.App. 445, 949 P.2d 841 (1998), citing State v.

Blilie, 132 Wash.2d 484, 493, 939 P.2d 691 (1997), and State v. Smith, 84 Wash.2d 498, 499, 527 P.2d 674 (1974). So the right Montgomery believes the prosecutor was vindictive for interfering with is not a constitutional one. Nor, is the right absolute. RCW 9.95.062 sets out exceptions – conditions under which a convicted defendant is ineligible for appeal bond. The State has every right to argue that one of these exceptions applies. So, while the right to go to jury trial is Constitutional and absolute, the right to an appeal bond is statutory and limited.

The reason this is interesting is that the argument Montgomery makes has already failed when applied to constitutional rights. The dissent in Korum itself, the centerpiece of Montgomery’s argument, observes that Korum had the constitutional right to withdraw his guilty plea, after which the State kept its promise and added charges. The argument that the plea bargain process infringed on Korum’s constitutional rights failed, which is how it found itself in the dissent rather than the majority opinion. Korum, 157 Wn.2d at 668 (Madsen, J., dissenting). Furthermore, if that argument worked at all on any level, plea-bargaining itself would automatically result in reversal, as it could always be argued that not following through with the plea bargain after trial penalizes the defendant for going to trial in the first place. If this argument does not work – and the Korum case shows it does not – for rights that are constitutional in origin, how much less effective must this argument be here?

See also State v. Moen, 150 Wn 2d 221, 230-231, 76 p.3d 721 (2003).

“Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea

agreements.” State v. Lee, 132 Wash.2d 498, 506, 939 P.2d 1223 (1997); see State v. Perkins, 108 Wash.2d 212, 737 P.2d 250 (1987). The theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights. Perkins, 108 Wash.2d at 217, 737 P.2d 250.”

The fact is, Montgomery received a plea bargain offer that was more than fair, and it included the State offering to waive its right to argue against an appeal bond. He rejected the offer, so the State was free to argue against an appeal bond after he was convicted. This is precisely how the system is supposed to work, and work it did.

14. **School Bus Enhancement**

14(a). Montgomery’s Argument on the Evidence

Montgomery does not claim that the designated school bus stop at issue in this case – the one the location of which triggers the sentencing enhancement of RCW 69.50.435(1)(c)– is more than a thousand feet from his indoor marijuana grow. Montgomery simply claims that the extent of the state’s evidence was that the school bus stop was established in October of 2007 and his crimes had been committed before then. AB 46. But this claim overlooks much of the evidence elicited by the state. Both the school official responsible for using GPS to locate the bus stops and the school bus driver who ran the route testified that the same bus stop had existed for years before 2007. School bus driver George Bates said he had been stopping there since about 1999. RP 54. Supervisor Cal Grassetth could only say it had been there “several years.” RP 22. And Bates added that stops hold over from year to

year: that stops are “already determined basically unless a new one comes up.”
RP 58.

Thus, a full reading of the record shows that the school bus stop at issue here had been “determined” in its present state since 1999. Appearances to the contrary come solely from selective reference to the record.

Aside from being a bad factual argument, it is worth noting that Montgomery’s argument, though citing no authority whatsoever, would lead to confusing and unfair precedent. The argument seems to be that during the first few weeks of school, while supervisors like Cal Grassetth are updating the year’s bus stops, no bus stops are “established.” If so, then there are a few weeks every year when the school bus stop sentencing enhancement ceases to function. A person can commit a crime in a place that has been a school bus stop since 1999, and in September that crime would carry no additional sentencing enhancement but in October it would. This violates common sense and at least two canons of statutory construction: first, the rule that no statute is to be interpreted in such a way as to lead to an absurd result, State v. J.P., 149 Wash.2d 444, 69 P.3d 318 (2007); and second, because such fluctuation would seem to be susceptible to criticisms of arbitrariness and equal protection violation, the rule that statutes are to be interpreted to be constitutional, State v. Enloe, 47 Wash.App. 165, 734 P.2d 520 (1987).

The purpose of the school bus stop zone enhancement is to discourage drug activity in areas where there are children. State v. Coria, 120 Wn.2d 156, 172-3, 839 p.2d 890 (1992). The significance of school bus stops is that they are “readily specifiable places that may be used to define those areas.” Id. That significance does not disappear during a period of a few weeks at the

beginning of the school year. So interpreting the school bus enhancement zone statute the way Montgomery urges would not comport with the purpose of the law. State v. Danner, 79 Wn. App. 144, 149, 900 P.2d 1126 (1995).

14(b). Montgomery's Argument re: Constitutionality

To avoid application of the sentencing enhancement herein, Montgomery interposes a 1990 federal case from New York: U.S. v. Coates, 739 F.Supp. 146 (SDNY, 1990). Montgomery cites Coates for the proposition that if a court decides a statute is "overreaching," the court can overrule the statute in the individual case in which such "overreaching" occurs. AB 47. But the Coates court makes no such sweeping claim.

In Coates, the defendants were in Penn Station with drugs, on their way to distribute them somewhere else. (Penn Station is within a thousand feet of a business school.) The court opined as follows:

There is no evidence that [defendants] were in Penn Station to distribute cocaine within 1,000 feet of a school, or, for that matter, to distribute cocaine within New York State at all. Indeed, Coates testified on cross-examination that he and [co-defendant] Dillard were transporting the cocaine to Maryland.

To charge a schoolyard count in these circumstances stretches the scope of the statute beyond logical and acceptable bounds. The statute cannot be meant to reach the circumstance of Coates' and Dillard's presence, undoubtedly unknowing, within a 1,000 feet of a school while ensconced in a railway car.

United States v. Coates, 739 F. Supp. 146, 153 (S.D.N.Y. 1990)

Leaving aside all questions of whether this decision is binding on our court, which of course it is not, Coates is distinguishable on its facts. A

person traveling from one place to another with drugs may pass in and out of any number of sentencing enhancement zones while in transit. Perhaps the Coates court is correct in thinking the element of fortuity in the location such a person may happen to be stopped, and what zone that location may or may not happen to be in, creates an unacceptable level of randomness in such a person's eventual sentencing range. (The State would argue to the contrary and point out that the defendant assumed such risk when he or she decided to distribute drugs.) But the Coates court would not have objected to a sentencing enhancement in this case. Mr. Montgomery set up his marijuana growing operation in a stationary location near a bus stop. He did not just happen to be passing through it: he lived there.

Montgomery says that only his own children's bus stop was within a thousand feet of his grow. "Only that family's children use the stop." AB 47. But this claim is made without citation to the record. The record establishes that Montgomery's children used the bus stop, but that only Montgomery's children used the bus stop is more than we know – more than the record tells us. Montgomery is attempting to supplement the record with an unsworn assertion, contrary to RAP 10.3(a)(5); therefore this assertion should be disregarded. Thus, the court need not even reach the question, easy though it might be to answer, whether to make an exception to the school bus stop enhancement that would permit a criminal parent to avoid punishment as long as he or she is only endangering his or her own children. And, in any event, when the school bus stops at that stop, any children on that bus would have been within a thousand feet of Montgomery's grow.

15. **“Abiding Belief” Prosecutorial Argument:**

If the defendant objects to prosecutorial arguments, then this is the standard of review:

We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wash.2d 559, 578, 79 P.3d 432 (2003).

State v. Johnson, 158 Wash. App. 677, 683, 243 P.3d 936, 939 (2010).

The Johnson inquiry must come second in the event, as here – RP 467 et. seq. – that the defendant made no objection to the argument at the trial level:

If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” State v. Stenson, 132 Wash.2d 668, 719, 940 P.2d 1239 (1997) (citing State v. Gentry, 125 Wash.2d 570, 596, 888 P.2d 1105 (1995)).

State v. Weber, 159 Wash. 2d 252, 270, 149 P.3d 646, 655 (2006).

The Johnson case, cited by Montgomery for the proposition that a court may reverse when a prosecutor misleads the jury as to the meaning of “reasonable doubt,” concerns a case in which the State made the discredited “fill in the blank” argument, in which the prosecutor follows up on the phrase in jury instructions stating that reasonable doubt is “doubt for which a reason exists” by pressing for a specific reason. Such an argument urges that if the

jury cannot say, “My reasonable doubt is...” and then fill in the blank at the end of the sentence, then there is no reason for the doubt; the doubt is therefore not reasonable; and the jury must convict. Johnson follows a line of cases cited by the court in its opinion stating that this argument is improper. In other words, the Johnson case stands for the proposition that the jury’s reasons for its verdict may be inchoate.

The reason this is interesting is that Montgomery takes his prosecutor to task for saying that the jury’s reasons for its verdict may be inchoate. The prosecutor is quoted as saying, “If you feel in your gut that Mr. Montgomery is guilty of the charge, the State would submit that’s the abiding belief standard.” RP 468. The defense made no objection at the time. The defense cites no authority for the proposition that this is not an accurate statement of the law. The defense would no doubt protest to the skies if a similar argument were made to prohibit the defense from saying, “If you feel in your gut that Mr. Montgomery is innocent of the charge, you should acquit” – and, in fact, that proposition is what the Johnson court actually supports.

Succinctly put, Montgomery has not established that the State misstated the law at all, and has not even argued that any misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Stenson, supra. After all, no exception was taken to the reasonable-doubt jury instruction herein, and jurors are presumed to follow instructions. “We presume that juries follow all instructions given.” State v. Stein, 144 Wash.

2d 236, 247, 27 P.3d 184, 189 (2001). It would be difficult enough to establish prejudice without this presumption against it.

16. Cumulative Error

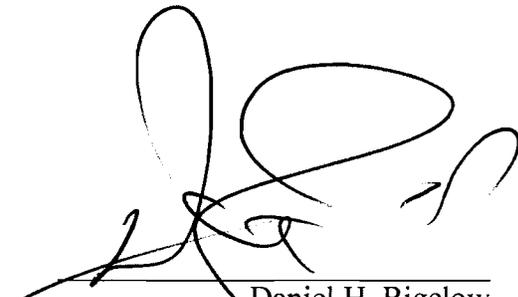
There having been no error, the doctrine of cumulative error does not apply.

IV. CONCLUSION

Based upon the arguments above related, the State respectfully requests this court uphold the warrant herein and affirm Montgomery's conviction. Nobody likes to see a case take three years to come to a verdict, but it will happen more often rather than less if this case is overturned, because defendants will have precedent to the effect that if they prolong their cases long enough, they will be freed in the end.

Respectfully submitted this 31st day of May,

2011.



Daniel H. Bigelow
Prosecuting Attorney
Attorney for Respondent
WSBA No. 21227

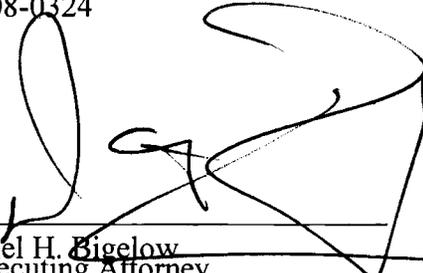
CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to
the following addresses, postage prepaid, on May 31, 2011.

David C. Ponzoha,
Washington State Court of Appeals-Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

11 JUN -2 AM 11:26
STATE OF WASHINGTON
BY _____
DEPUTY

Jordan B. McCabe
Attorney for Appellant
P.O. Box 6324
Bellevue, WA 98008-0324



Daniel H. Bigelow
Prosecuting Attorney
Attorney for Appellant
WSBA No. 21227