

28332-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID P. WEBSTER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in permitting defense counsel James Egan and Patrrick McBurney to withdraw based on the defendant's having filed a bar complaint against Mr. Egan.
2. The Court abused its discretion in failing to proceed with trial after determining that defense counsel had not violated the attorney-client privilege.
3. The court abused its discretion in permitting defense counsel Christopher Swaby to withdraw over defendant's objection.
4. The court abused its discretion ordering a mental health evaluation when the defendant was not represented by counsel.
5. The court abused its discretion in appointing counsel who could not begin preparing for trial for at least six months.
6. The court violated the defendant's constitutional right to a speedy trial.

B. ISSUES

1. After the court has appointed a second attorney to assist the defense, does the court abuse its discretion in permitting both attorneys to withdraw, over defendant's objection, based on the defendant having filed a bar complaint against one of the attorneys?
2. Trial had commenced when the court was asked to rule on the question of whether defense counsel has disclosed a client confidence during the course of pre-trial motions. The trial court took the matter under advisement and after one week ruled that the privilege had been waived. Did the court then abuse its discretion by failing to go forward with the trial and in continuing the date for over two months?
3. The defense attorney received copies of jail reports indicating that the defendant had alleged that the attorney was engaged in illegal and unprofessional conduct in the course of representing the defendant. On the advice of independent counsel, the defense attorney moved to withdraw. The attorney denied the allegations and told the court he would prefer to continue representing the defendant. The defendant denied that the attorney had

engaged in improper conduct and asked to have the attorney continue to represent him. Did the court abuse its discretion in granting the defense attorney's motion to withdraw?

4. For two months after permitting appointed counsel to withdraw, the court was unable to find new counsel to represent the defendant. Did the court err in then ordering a mental health evaluation and staying the proceedings?
5. Two-and a half years after the defendant was arraigned on rape charges, did the court abuse its discretion in appointing a new attorney after that attorney had advised the court that he would be able to begin preparing for trial for at least six months?
6. Defendant's trial began more than three-and-a-half years after arraignment on charges of rape allegedly committed in the county jail. Defendant had been remanded to prison on other charges, but at the request of various appointed counsel was held in the local jail during the majority of this time. The court made numerous discretionary rulings that caused much of the delay. Did the court violate the defendant's constitutional right to a speedy trial?

C. STATEMENT OF THE CASE

Richard Kassner filed a civil lawsuit claiming “\$7,350,000 in damages for the Superior Court’s imposition of community placement beyond what is authorized” and filed a petition for a writ of habeas corpus in federal court. (CP 900) “[O]n January 30, 2003, the Spokane County Superior Court ordered his immediate release from supervision. On September 23, 2003, [Mr. Kassner’s] federal complaint was dismissed without prejudice.” (CP 900)

In September 2003, David Webster was acquitted on a charge of rape and convicted on charges of assault and solicitation for murder. (CP 1544) During the months before and during trial on these charges, Mr. Webster had been housed in the Franklin County jail, and for the majority of that time he was placed in the isolation unit, also known as “George pod” or “the hole.” Following his conviction, he was removed from isolation and housed with the general population in “A Pod.” (RP 104)

On September 30, Mr. Kassner was transported from the Spokane County Jail to the Franklin County Jail, where he, too, was placed in “A Pod.” (RP 82-84) When the individual cells were locked for the night, at 11:00 pm, Mr. Kassner and Mr. Webster occupied the same cell. (RP 97)

When the cells were unlocked at 5:00 am and the staff prepared to serve breakfast, Mr. Kassner rushed from his cell and told corrections officer Sonya Symons that he had been raped. (RP 113-14, 752) He was placed in segregation and later moved to a cell. (RP 117, 496) Some time later he asked to speak to a nurse and his attorney. (RP 497) Thereafter an ambulance took Mr. Kassner to Lourdes Hospital where Dr. Gerard VanHoudt examined him and nurse Gerriane Pattreson prepared a rape kit, gathering evidence of possible rape including Mr. Kassner's clothing and samples of bodily fluids. (RP 250-58, 276-290, 451, 498)

Within four months, Mr. Kassner initiated a civil lawsuit against Franklin County, claiming damages in excess of \$1,000,000. (CP 859-60) The suit was eventually settled and the county paid Mr. Kassner damages of \$400,000. (CP 882-85) As a result of this lawsuit, the Franklin County Prosecutor's Officer determined that it had a conflict of interest and asked the State Attorney General to prosecute Mr. Webster on the county's behalf. (CP 1545)

On August 15, 2005, at the request of the Franklin County Prosecuting Attorney, the Washington State Attorney General's Office filed an information charging Mr. Webster with three counts of first degree rape based on Mr. Kassner's 2003 allegations. (CP 1565-67) Mr. Webster was arraigned on August 30, 2005, and trial was scheduled for

November 15, 2005. (CP 1911) The court appointed Patrick McBurney, who was not present, to represent him. (CP 1563) Two weeks later, Mr McBurney asked the court to permit Mr. Webster to be housed in the Franklin County Jail; the request was denied. (CP 1561, 1901, 1892-94)

Mr. McBurney had extremely limited felony trial experience and no experience defending against sex crime charges. (CP 1844-45) In October, he asked the court to appoint co-counsel to assist in Mr. Webster's defense. (CP 1562, 1842)

On October 24, 2005, the court appointed James Egan to represent Mr. Webster. (CP 1832-33) Mr. Egan appeared on November 1 and advised the court that the defense was not prepared to go to trial on November 15. (CP 1474) Mr. Webster addressed the court, complaining that he was being housed in "the hole" and strenuously objecting to any continuance. (CP 1474-75) At Mr. Webster's request, Mr. Egan objected to the court's decision continuing the trial to February 15, 2006. The court found the continuance was necessary, in the interests of justice, to ensure that Mr. Webster received effective assistance of counsel. (CP 1475; 11/1/2005 RP 18)

The State moved for an order prohibiting Mr. Webster from filing *pro se* pleadings while represented by counsel. (CP 1399-1401) The State quoted this court's assertion in *State v. Hegge*, 53 Wn. App. 345, 349,

766 P.2d 1127 (1989): “There can be but one captain of the ship and it is he alone who must assume responsibility for its passage, whether it safely reaches the destination charted or founders on a reef.” The court declined to do so.

On January 31, 2006, two weeks before trial was scheduled to begin, Mr. Egan moved to withdraw and asked the court to appoint new counsel. (CP 1795, 1801) Mr. Egan explained to the court that Mr. Webster had filed a bar complaint against him and he felt he was not able to adequately represent Mr. Webster due to a personality conflict. (CP 1811; SRP 139, 149-50) Mr. McBurney told the court he did not feel he could proceed to trial without co-counsel. (CP 1801) The State pointed out that unless Mr. McBurney were permitted to withdraw, and in light of Mr. Webster’s refusal to agree to a continuance or waive speedy trial, failure to proceed to trial could cause a speedy trial violation. (SRP 164-65) On February 10, 2006, the court granted the motion over the State’s objection, and appointed Christopher Swaby to represent Mr. Webster. (CP 1387, 1782) Because the State had cancelled arrangements to have Mr. Webster transported to the February 10 hearing, the court continued the matter to February 17, 2006. (CP 1782) Mr. Swaby objected to the apparent violation of Mr. Webster’s right to a speedy trial. (CP 1782-83; SRP 212, 217)

At the February 17 hearing, Mr. Webster addressed the court repeatedly, and at length, objecting to the conditions in which he was being held at the penitentiary, alleging that his speedy trial rights had been violated, and arguing that his right to be represented by counsel of his choice had been violated. (CP 1777; SRP 224-29, 233-34, 252-260) A new trial date was set for April 19, 2006. (CP 1779; SRP 276)

In March, Mr. Swaby told the court that Mr. Webster was being held in the isolation unit at the penitentiary and as a result he had encountered numerous difficulties in attempting to confer with his client. (CP 1766) He asked to have Mr. Webster moved to the Franklin County Jail. (CP 1766) On April 7, 2006, the court granted the defense motion to relocate Mr. Webster. (CP 1754, 1760) During most of the time Mr. Webster was housed in the Franklin County Jail, he was held in “the hole.” (CP 1743; 8/15/06 SRP 29) He repeatedly complained to the court about the conditions under which he was held, alleging that his food was insufficient, that he did not have access to a law library or reasonable opportunity to use the telephone. (CP 1738)

At the April 7 hearing, Mr. Swaby told the court that he could not be prepared for trial on April 19. (CP 1758) Mr. Webster declined to waive his right to a speedy trial. (CP 1769) Over Mr. Webster’s objection, the court continued the trial date to July 26, 2006. (CP 1758)

On June 20, 2006, with Mr. Webster's written consent, the court granted Mr. Swaby's motion for a further continuance and trial was reset for August 30. (CP 1746-47) On August 15, the trial date was continued to February 14, 2007, over Mr. Webster objection. (CP 1743; SRP 20) In January 2007, Mr. Swaby again moved for a continuance, suggesting a trial date in late March or early April. (CP 1737) Mr. Webster again complained to the court about the conditions of his housing in the jail, but he did finally sign a waiver of his speedy trial right until April 4, 2007. (CP 1736, 1738-39; SRP 406-414) Trial was continued to April 4, 2007. (CP 1740)

In March 2007 the State sought an order requiring Mr. Webster to submit a DNA sample for comparison to DNA found in Mr. Kassner's examination. (CP 160) The State filed its pre-trial motions on March 29, 2007, and proposed jury instructions on April 4. (CP 1251-95) On April 4, however, after the court had heard and ruled on numerous pretrial motions, Mr. Webster made a *pro se* motion to continue his trial because he believed Mr. Swaby had violated the attorney-client privilege in the course of the morning's motion argument. (CP 1207) He declined to waive the conflict but asserted that he wished to be represented by Mr. Swaby. (CP 1214) The court ruled that it would take the matter under advisement and issue a written decision on the issues presented. (CP 1237)

On April 11, the court issued a written decision that Mr. Webster had waived the attorney-client privilege with respect to the alleged disclosure and concluded there was no basis for disqualifying Mr. Swaby. (CP 1250) On April 18, 2007, the parties agreed to a trial date of June 20, 2007. (CP 1732)

In May 2007, the State moved for a one-week continuance to June 27 because of an alleged scheduling conflict. (CP 1729-30) The court granted the motion. (CP 1724-1726)

At a hearing on June 15, 2007, Mr. Swaby told the court he and the State's attorney had interviewed Mr. Kassner in the summer of 2006. (RP 525) During that interview, Mr. Kassner had specifically told them that he had not filed any lawsuits prior to the action against Franklin County based on Mr. Webster's alleged assault. (RP 525) But on the previous Saturday the State's attorney had provided him with recently discovered evidence showing that Mr. Kassner had, in fact, filed prior lawsuits in Federal Court and possibly State court. (RP 526) Mr. Swaby moved to continue trial so the defense could investigate this new evidence as well as alleged improprieties in the State's forensic testing procedures. (CP 1652-1723) Trial was continued to October 24, 2007. (CP 1650-52)

On September 12, 2007, Mr. Swaby filed a motion to withdraw as counsel for Mr. Webster. (CP 968-69). Mr. Swaby provided the court

with correspondence and reports prepared by jail personnel alleging that Mr. Webster claimed that Mr. Swaby was purchasing drugs for his client and engaging in other unlawful conduct. (CP 971-1105)

Mr. Swaby appeared in court represented by his own attorney, Dan Arnold. Mr. Arnold assured the court that Mr. Swaby denied any such misconduct but told the court that the making of these accusations created an insurmountable conflict of interest between Mr. Swaby and Mr. Webster. (CP 1647-49) According to Mr. Arnold, Mr. Swaby did not, in fact, wish to withdraw, but Mr. Arnold had advised him to do so. (SRP 555)

Mr. Swaby's attorney told the court that Mr. Webster had assured him such accusations were untrue, and that Mr. Webster was possibly denying ever having made the alleged statements. (RP 555) Although Mr. Webster admitted having made some of the alleged "accusations," he tried to explain to the court that he had made those statements in jest.

The documents provided by Mr. Swaby consisted, with one exception, of reports prepared by staff at the Franklin County Jail. (CP 974-1105) The sole exception was a handwritten letter from Mr. Webster, addressed to the Franklin County Prosecuting Attorney, offering to fire Mr. Swaby and settle with the county for three million dollars, and alleging misconduct by unspecified government officials. (CP 971-73)

Copies of these documents were first provided to Mr. Webster in October 2007. (CP 966)

The court granted Mr. Swaby's motion to withdraw over Mr. Webster's vehement objection. (CP 1649; SRP 570)

On September 25, Ray Gonzales appeared on behalf of Franklin County's public defense panel and described to the court his efforts to obtain new counsel for Mr. Webster. (CP 1635) Mr. Gonzales presented attorney Gregory Scott to the court on October as a possible attorney for Mr. Webster, but after observing the proceedings and meeting with Mr. Webster, Mr. Scott declined to accept an appointment to represent Mr. Webster. (SRP 675)

On October 30, 2007, Mr. Gonzales presented William McCool to the court as a possible attorney for Mr. Webster, contingent on Mr. McCool's reaching a satisfactory financial arrangement with the county. (SRP 725) On November 13, Mr. Gonzales advised the court that Mr. McCool had declined to accept an appointment to represent Mr. Webster. (CP 1627)

At the October 30 hearing, the State suggested the court should consider ordering a competency hearing. (SRP 754-55) Mr. Webster vehemently assured the court that he was competent and opposed an evaluation. (SRP 755-59) The State raised the issue again on November

13, suggesting that the court's inability to provide Mr. Webster with counsel was caused by Mr. Webster's behavior. (CP 1627) The court concurred, noting that an evaluation might be helpful in finding counsel for the defendant. (CP 1628) The court entered an order requiring Mr. Webster's examination by the staff of Eastern State Hospital. (CP 961-64)

At the December 4, 2007 hearing, the State told the court that Mr. Webster's evaluation was scheduled to take place at the jail on December 5. (CP 1624) Mr. Webster renewed his objection to the evaluation. (CP 1624-26)

At a status hearing on December 27, 2007, Mr. Gonzales advised the court that he had found three attorneys who were potentially willing to represent Mr. Webster. (CP 1622) Mr. Webster addressed the court, again objecting to the proposed mental health evaluation and urging the court to appoint counsel to represent him. (CP 1622-23) The following day, he refused to participate in the proposed evaluation in the absence of appointed counsel. (CP 912) From September 12, 2007 until January 15, 2008, Mr. Webster was not represented by counsel. He remained housed in "G Pod" in the Franklin County jail.

On January 15, 2008, the court appointed Michael Lynch to represent Mr. Webster. (CP 925-27) At the time of his appointment, Mr. Lynch advised the court that he would be unable to prepare for trial until

after completing two pending complex cases, which he estimated would be no sooner than the end of May or early July. (CP 1608-09)

Following a mental health examination at the Franklin County Jail on February 14, 2008, Mr. Webster was found competent to understand the proceedings against him and to assist in his own defense. (CP 911-12) Mr. Lynch was present during the examination. (CP 912)

On April 18, 2008, the court found Mr. Webster competent and the matter was set for trial on October 1, 2008. (CP 1619) On October 1, the court granted a defense motion for continuance and the trial was scheduled for April 1, 2009. (CP 1605)

On December 15, 2008, the court heard arguments regarding Mr. Webster's desire to represent himself. (CP 696-762) The court ordered a second competency evaluation for the specific purpose of determining Mr. Webster's ability to represent himself. (CP 657-60) Following the evaluation, a forensic psychologist declared that Mr. Webster was indeed competent to represent himself, and on March 4, 2009, the court granted Mr. Lynch's motion to withdraw as counsel. (CP 630-635)

The defense theory of the case was that "if sex occurred between the defendant and [Mr. Kassner] it was consensual; that [Mr. Kassner] engaged in sex or willingly submitted, in order to establish the basis for a large civil claim against the County." (CP 893)

Trial commenced, as scheduled, on April 1, 2009. (CP 403) Mr. Webster told the jury that Mr. Kassner had initially asked him to assault him so that Mr. Kassner could sue the county. (RP 1625) Mr. Webster declined, but in the course of the night they agreed to have sex. (RP 1630-38) Mr. Webster's claim was partially corroborated by the testimony of Rodriguez, who told the jury that Mr. Kassner had spoken with him on the evening of September 30 and suggested the possibility of engaging in an assault or sexual activity in order to sue the county. (RP 1768-70)

The jury found Mr. Webster not guilty on all three counts of first degree rape and returned a verdict of guilty on one count of second degree rape. (CP 288-93) The court imposed a minimum sentence of 284 months, the top of the standard range, and the maximum sentence of life, as mandated by RCW 9.94A.712. (CP 56, 60) Mr. Webster appealed his conviction. (CP 15)

D. ARGUMENT

1. MORE THAN THREE YEARS OF UNNECESSARY DELAY VIOLATED MR. WEBSTERS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The United States and Washington Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Wash. Const. Art. I, §22; *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) The State and Federal rights are coextensive. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). When an appellant alleges violation of this right, the issue is reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d at 280.

Whether a criminal defendant's constitutional right to a speedy trial has been violated begins with a determination whether the delay, under the circumstances of the case, is presumptively prejudicial. *Iniguez* at 283-84. The length of the delay, the complexity of the case, and the nature of the evidence are relevant factors in this determination. 167 Wn.2d at 292.

The delay in this case, more than three-and-a-half years from the filing of the information in August 2005, to the commencement of trial in April 2009, is considerable.

And despite the wide-ranging and time consuming discovery conducted by successive attorneys, the issue was not complex. The issues for the jury were whether sexual intercourse took place and whether, as

Mr. Kassner asserted, Mr. Webster forcibly raped him or whether, as Mr. Webster testified, the sexual encounter was consensual.

Because there were no eye-witnesses to the crime itself, the evidence consisted in large part of the accounts of numerous individuals who encountered the participants shortly before or after the alleged events. Such evidence is necessarily ephemeral.

Under these circumstances, the delay was presumptively prejudicial.

Once delay is found to be presumptively prejudicial, an analysis of whether the delay was unconstitutional involves an analysis based on four factors set out in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): “This involves 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.” 167 Wn. 2d at 292.

a. The Extraordinary Delay Was Unreasonable.

The first constitutional analysis factor is the length of the delay: whether it “stretches beyond the bare minimum needed to trigger” the inquiry. *Iniguez* at 293, quoting *Doggett v. U.S.*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Certainly a delay of years,

rather than months, especially for a simple rape case, must be considered extraordinary.

The court should next consider the reasons for each delay and the respective parties' responsibility. *Iniguez* at 294. The passage of a lengthy period of time to trial, requires the reviewing court to appraise the circumstances with extreme care. *Iniguez* at 294.

Defense counsel requested the vast majority of the delays, alleging the need for additional time to conduct discovery and prepare for trial, as well as to conduct other unrelated business. Ordinarily, the court's granting of a continuance is reviewed for abuse of discretion, but when the constitutional right to a speedy trial is at issue, the review is *de novo*. *Iniguez*, at 280-81.

The first defense request for a continuance, made less than three months after Mr. Webster's arraignment, became necessary because the attorney who had been appointed did not consider himself qualified to represent a defendant who was charged with a serious felony. Appointed counsel nevertheless waited more than a month before advising the court that he would need the assistance of co-counsel. By the time co-counsel had been appointed, the speedy trial date was less than a month away, and a continuance was necessary to permit the new attorney to prepare for

trial. Mr. Webster vehemently asserted his right to a speedy trial at this hearing.

Ordinarily, such a sequence of events would not implicate the right to a speedy trial, but this court should bear in mind that nearly two years had passed before Mr. Webster was even arraigned on these charges, even though the State was in possession of abundant evidence to establish probable cause to charge him and knew that he was housed only a few miles away in the penitentiary. While the State is under no obligation to file charges immediately, in light of the purpose of the right to speedy trial, especially the importance of preventing witnesses' memories from fading, following a lengthy delay in charging, the trial court should be expected to ensure that the attorney appointed to represent the defendant is competent to perform that function, and appointed counsel should be alert to the necessity of promptly advising the court of his shortcomings.

Two-and-a-half months after his appointment, and a mere two weeks before the date set for trial, co-counsel told the court he wished to withdraw because Mr. Webster had filed a bar complaint against him and he felt that they had an insurmountable personality conflict. Mr. Webster objected to any continuance.

The conflict of interest necessary to require reversal must be readily apparent and will not be inferred. *State v. Martinez*, 53 Wn. App.

709, 715, 770 P.2d 646 (1989); *State v. James*, 48 Wn. App. 353, 365-66, 739 P.2d 1161 (1987). Rather, “[a] conflict will not be found unless the appellant can point to specific instances in the record to suggest an actual conflict or impairment of his interest.” *State v. Martinez*, 53 Wn. App. at 715. Our Rules of Professional Conduct define a conflict of interest as “aris[ing] from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.” RPC 1.7 cmt. 1. The mere filing of a bar complaint does not create a conflict of interest and, without more, is not sufficient to require appointed counsel to withdraw.

Moreover, there was no basis for permitting Mr. Burney to withdraw. There was no evidence of any conflict between him and Mr. Webster. The record indicates Mr. McBurney was permitted to withdraw because the State suggested that otherwise, in the absence of Mr. Webster’s agreement to waive speedy trial, the speedy trial rule, CrR 3.3, might compel Mr. McBurney to go to trial, which he did not want to do. Regardless of whether the rule would indeed require such a result, it is evident the court exercised its discretion in order to circumvent the court rule rather than to ensure that Mr. Webster received the speedy trial guaranteed by the Sixth Amendment and Const. Art. 1, § 22.

In the course of the next 12 months, Mr. Webster's new counsel asked the court to continue the trial date four times, on the grounds that he needed more time to prepare for trial. On the date set for trial, Mr. Webster claimed breach of the attorney-client privilege, causing a delay of about two weeks while the court prepared a written decision rejecting the claim. But thereafter, defense counsel requested additional continuances for further trial preparation.

The defense theory of the case included the claim that Mr. Kassner had planned to create evidence that he was assaulted in the jail to support a claim for damages against Franklin County. The fact that he ultimately filed such a claim was known from the outset, since the claim had been settled before charges were even filed against Mr. Webster. The defense never suggested any theory of the case that justified two years of continuing trial preparation.

Mr. Webster personally claimed his right to a speedy trial, either expressly objecting, refusing to agree to continuances or agreeing only after counsel pressed him to do so. Nearly four years after the commission of the alleged offense, the court's continued acquiescence in counsel's repeated requests for additional time infringed Mr. Webster's constitutional speedy trial right.

Nevertheless, in September 2007, the court granted defense counsel's motion to withdraw based on allegations that Mr. Webster had, in effect, slandered his lawyer. Mr. Swaby indicated that he wanted to continue to represent Mr. Webster and that he had moved to withdraw because he believed he had an ethical obligation to do so.

Mr. Webster had not been provided with copies of the jail staff statements at the time the court heard the motion to withdraw. The court did not purport to make any determination as to the truth or accuracy of any of the evidence presented in support of the motion, nor did the court ever identify the nature of the conflict that necessitated permitting counsel to withdraw.

To the extent that Mr. Webster intentionally sought to harm his lawyer by making scurrilous accusations, his actions were akin to physically assaulting his lawyer. Such conduct does not necessarily create a conflict of interest. *See State v. Fualaau*, 155 Wn. App. 347, 360, 228 P.3d 771 (2010). Unless the conduct will adversely affect counsel's performance, substitution of counsel is not required. *Id.*, citing *State v. Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003).

The distress of both the defendant and Mr. Swaby at the prospect of Mr. Swaby's withdrawal should have demonstrated to the court that the alleged misconduct would not adversely affect his ability to represent Mr.

Webster. In light of the delay up to that point, the court's decision to permit Mr. Swaby to withdraw clearly violated Mr. Webster's right to a speedy trial.

Having permitted Mr. Swaby to withdraw, the court was confronted with the difficult task of finding another attorney to represent Mr. Webster. Two attorneys who had tentatively agreed to represent him declined appointment after having had an opportunity to observe Mr. Webster's conduct in the courtroom. Mr. Webster regularly interrupted the court and the attorneys to offer extended comments that were generally irrelevant and disruptive. Since he had conducted himself in this manner for two years, there is no reason to believe this conduct was designed to discourage potential appointed counsel.

It was during this time that the State suggested that difficulty in obtaining counsel to represent him justified ordering Mr. Webster to submit to a mental health evaluation, and the court entered such an order. Had the examination been carried out in the absence of counsel, it would have violated Mr. Webster's right to counsel at a critical stage of the prosecution. *See State v. Cochran*, 102 Wn. App. 480, 484, 8 P.3d 313 (2000); *State v. Nuss*, 52 Wn. App. 735, 741, 763 P.2d 1249 (1988). Because it was conducted after an attorney had been appointed, it failed to serve its alleged purpose and merely served to extend the delay for two

months after counsel had been appointed. Thus the mental health evaluation order further violated Mr. Webster's right to a speedy trial.

At the time of his appointment, Mr. Lynch advised the court that this would result in a minimum delay of five to six months. And once counsel had been appointed, delay actually continued for another year, during which the court granted two more continuances to accommodate preparation of the defense for trial.

The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." *Barker v. Wingo*, 407 U.S. at 516 n. 2. The State did not cause these delays. The majority of the delays were, however, caused by Mr Webster's various lawyers rather than the defendant himself, and were granted over defendant's repeated objections. The delays were the result of numerous decisions that were within the court's discretion. In exercising that discretion the court failed to give sufficient weight to Mr. Webster's constitutional right to a speedy trial.

- b. Delay occurred over the defendants repeated objections.

Although some of the delay may have been attributable to Mr. Webster's misconduct, nothing in the record demonstrates that he intended the misconduct to cause delay. When given the opportunity to

control the timing of his case, Mr. Webster proceeded to trial at the earliest opportunity.

With few exceptions, and then only when importuned by counsel, Mr. Webster declined to waive his right to speedy trial and objected to nearly every continuance. By December 2008, based on the court's prior rulings and the conduct of prior counsel, Mr. Webster had no reason to believe his case would actually go to trial on April 1, 2009. Despite the delay necessitated by the court's ordering an additional competency hearing before finally granting Mr. Webster's motion to represent himself on March 4, 2009, Mr. Webster proceeded to trial on April 1.

c. The Extraordinary Delay Was Prejudicial.

The United States Supreme Court addressed prejudice in *Barker*:

Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Barker, 407 U.S. at 532 (citations omitted).

Mr. Webster was incarcerated throughout the time he was awaiting trial. And while he would have been incarcerated in any event because of his prior conviction, he would have been housed in a prison setting. Instead, most of the time he was housed in a jail where, as he frequently

complained to the court, his movements were significantly restricted, he had limited access to shower facilities, a telephone or law library, and his visits from family were restricted. Defense counsel had requested Mr. Webster's placement at the local jail, but this was primarily for the lawyers' convenience. Mr. Webster remained in the jail even when counsel did not represent him. This housing brought him in frequent contact with jail staff that would be, or might be, witnesses against him at trial. Such pretrial incarceration was oppressive.

“Even though impairment to the defense by the passage of time is the most serious form of prejudice, no showing of actual impairment is required to demonstrate a constitutional speedy trial violation.” *Iniguez* at 296, *citing Barker*, 407 U.S. at 532. This is because what has been forgotten or lost can rarely be shown. 407 U.S. at 432. Accordingly, prejudice to the accused is presumed to intensify over time. *See Doggett*, 505 U.S. at 655.

The “dangers and disadvantages of self-representation” are well-known. *See Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975). “When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.” *Id.*

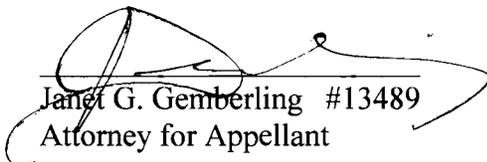
Although Mr. Webster always expressed a desire to proceed to trial promptly, he did agree to several continuances during the time that he was represented by Mr. Swaby. The court's history of granting continuances to Mr. Swaby, the determination that Mr. Swaby had a conflict despite Mr. Swaby's reluctance and Mr. Webster's objection, and rulings granting more than a year's continuances to subsequent counsel over Mr. Webster's objections, likely precipitated Mr. Webster's ultimate insistence in proceeding to trial without counsel. Even a cursory review of the record shows that this was exceedingly detrimental to his defense.

E. CONCLUSION

Mr. Webster did not receive the speedy trial guaranteed by the constitution. His conviction should be dismissed with prejudice.

Dated this 5th day of May, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 28332-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
DAVID P. WEBSTER,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 5, 2011, I mailed copies of Appellant's Brief in this matter to:

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and

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Signed at Spokane, Washington on May 5, 2011.


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Appellate Counsel