NO. 103561-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ERIC CHARLES BANFIELD,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Alysa S. Draper-Dehart, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly found that the trial court did not abuse its discretion in denying a motion for mistrial, that there was a failure to demonstrate ineffective assistance of counsel and the trial court did not violate Banfield's right to a speedy trial. Slip Op. at 2. The Respondent respectfully requests this Court deny the petition for review of the decision in *State of Washington v. Eric Charles Banfield,* Court of Appeals No. 58510-3-II and Supreme Court No. 1035616.

III. ISSUES PRESENTED FOR REVIEW

(1) Does the Court of Appeals' decision, holding that the trial court did not abuse its discretion in denying a motion for a mistrial following testimony, warrant reconsideration after

review of the record and when the correct standard of review was applied?

(2) Does the Court of Appeals' decision, holding that Banfield failed to show a deficient performance to warrant an ineffective assistance of counsel claim, warrant reconsideration after review of the record and when the correct standard of review was applied?

(3) Does the Court of Appeals' decision, holding that Banfield's right to a speedy trial was not violated, warrant reconsideration after review of the record and when the correct standard of review was applied?

IV. STATEMENT OF THE CASE

Banfield was first seen on August 17, 2020, for his first appearance. RP 4-5. At arraignment, he appeared out-of-custody on August 27, 2020. RP 7-8. Banfield remained out of custody throughout the duration of this case, excluding the period from May 26, 2021 through June 10, 2021, when he was held on new charges. RP 19-24. The Cowlitz County Superior Court entered

multiple orders for the cessation of trials before and during Banfield's case due to the 2020 Covid pandemic. CP 2020-0003-08: 15, 16, 21, 27, 43, 54, 55, 63, 64, 87, 94, 102; CP 2021-0003-08: 17, 46, 53, 54, 66; 2022-0003-08: 7, 10, 16.

Between Banfield's arraignment and the original trial setting of December 16, 2020, the Cowlitz County Superior Court halted trials for the safety of the community. RP 10-11; Clerk's Minutes, pgs 11-12; CP 94. Banfield objected yet also informed the trial court he was not ready because had motions for his attorney to file. RP 13. Additionally, defense counsel informed the court that Banfield would receive new counsel January 1, 2021, because he would be on paternity leave. RP 13. Reassignment of the trial was set for March 9, 2021, with readiness for March 2, 2021. RP 10.

On March 2, 2021, defense counsel requested new dates, and trial was reset to June 8, 2021, with a readiness hearing of June 1. Banfield did not object to his own request for continuance. RP 16. On June 1, 2021, the trial court held a joint

trial setting and readiness hearing, with his new criminal matter. The State requested a continuance based on the unavailability of two material witnesses. RP 19. One of the State's witnesses was undergoing an evaluation for cancer. RP 28. The court determined good cause existed for a continuance. RP 21.

On June 10, 2021, the trial court held a trial setting on both of Banfield's cases. RP 26-32. Trials in both matters were set for July 13, 2021. Clerk's Minutes 15-16. Between June 10, 2021, and July 1, 2021, defense counsel determined a conflict of interest existed and requested new counsel be assigned. RP 38-40; Clerk's Minutes, pg 20. Banfield appeared July 8, 2021, with new counsel. He was out of custody on Zoom. RP 42-45. Trials in both of his cases were set for September 14, 2021, and a new omnibus hearing on August 12, 2021.

On September 7, 2021, Banfield, through his attorney, requested new trial dates. Clerk's Minutes, pg 24. This was prompted by the Cowlitz County Superior Court's suspension of jury trials due to COVID-19 and for community safety. CP 2021-

0003-08: 53, 54, 66. Trial was reset for the week of November 30, 2021. RP 47-48. Good cause for that continuance was found and Banfield did not object.

On November 23, 2021, the Court set this case for trial to begin on December 2, 2021. Clerk's Minutes, pg 25. The defendant failed to appear on December 2, 2021. RP 52-3. The State was prepared to try Banfield, securing the presence of all witnesses. RP pg 53: 3-12. The trial court found good cause to strike trial and set for reassignment on December 9, 2021.

On December 9, 2021, Banfield appeared with counsel. He was arraigned on an amended information in both of his cases. RP 56-61; CP 24. Banfield's new trial dates were set for February 8, 2022. Defense agreed to that date. RP 58-59. Banfield was ordered to appear.

On January 27, 2022, the Superior Court again suspended trials over concerns from COVID and for community safety. CP 2022-0003-08: 7, 10. Banfield's case was heard on February 1, 2022, good cause was found for a continuance of the case.

Banfield did not object. Clerk's Minutes, pg 35. The readiness hearing was set for April 12, 2022. On that date, trial was confirmed and set to begin on April 17, 2022. RP 63.

On April 19, 2022, Banfield appeared out of custody with his counsel for trial. The court found good cause to continue the trial as it was a trailing case to an in-custody trial. RP 66-7. Banfield did not object to the continuance. In fact, it was his counsel who asked for good cause to be found. RP 67: 5-6. On April 21, 2022, the court set trial to begin May 10, 2022, within the 30-day period. Readiness was set for May 3, 2022. RP 69-70. Banfield failed to appear at the May 3, 2022, hearing. RP 72-3; Clerks papers, pg 42.

Banfield was next seen in front of the court on May 12, 2022. RP 75-9. Banfield's new trial date was set for June 28, 2022. RP 77. On June 28, 2022, the State requested a continuance because the independent witness and her child were COVID positive. RP 92: 9-25. The court and defense felt that justified a

good cause continuance. RP 93: 6-14. Trial was set for July 26, 2022. RP 94: 12-25.

Trial began on July 26, 2022. On the first day, the trial court heard motions in limine. RP 196-205. The trial notably ruled that law enforcement officers could discuss prior contacts at the victim's residence and their knowledge of active protective orders. RP 204. No motions to curtail the victim's comments on prior contact were made or ruled upon. The court then admitted exhibits 1-9, including an active protective order, exhibit 1, and the clerk's minutes for the hearing when that order was entered with Kelso Municipal Court, exhibit 9. RP 205.

Several witnesses testified, including the victim. During direct examination, Kimberly Curits was asked questions by the prosecutor and responded:

> Q. Did you express pain to them?
> A. Yes.
> Q. What did you say to law enforcement?
> A. I said my head hurt.
> Q. Did you say why your head hurt?
> A. I don't recall.
> Q. Do you know why your head hurt?

A. I'm sure it was from Eric.
Q. Why are you sure that was from Eric?
A. Because it happened quite often.
Q. But in this instance, did it happen then?
A. Yes.
Q. Do you know how Eric hurt your head?
A. I don't remember.
Q. Do you remember law enforcement taking a photograph of you?
A. Kind of.

RP 224-225.

At which point defense asked to be heard outside the presence of the jury. RP 225. The court heard an argument from defense that "Ms. Curtis just volunteered that there had been previous physical assaults." RP 226. Defense and the State addressed the issue, 404(b) and the remedy of a mistrial or curative instruction. RP 226-227. The court concluded that the jury was aware of a no contact order, the issue did not rise to a mistrial and that should defense want, a curative instruction could be provided. RP 229. Defense counsel did not seek the curative instruction, and the trial continued. RP 229. At the end of the trial Banfield was convicted of all charged counts.

In a unanimous decision, the Court of Appeals affirmed Banfield's convictions. Slip Opinion at 23. On the motion for mistrial based on Curtis's testimony, the court held that it was not clear "whether the trial court's ruling on Banfield's motion in limine actually precluded Curtis's testimony." Slip Opinion 12. But even if it "violated the trial court's pretrial rulings, that irregularity was not serious and had no prejudicial effect given the weight of the evidence." *Id.* Third, the court noted that the "irregularity could have been cured with an instruction." Slip Opinion at 13.

Next Banfield argued that he received ineffective assistance of counsel, because his counsel did not move to suppress evidence. The Court of Appeals conducted the following analysis:

> To prevail on a claim of ineffective assistance of counsel, Banfield must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, I 04 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is deficient if it falls below an objective standard of reasonableness. *State v. Bertrand*, 3 Wn. 3d I 16,128,546 P.3d 1020

> (2024). We strongly presume that counsel's performance was effective. *Id.* at 130. To rebut this presumption, a defendant bears the burden of showing there was no possible legitimate trial tactic that would explain counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Slip opinion at 14. After reviewing the record, the court held that Banfield was unable to prevail on a claim of ineffective assistance of counsel. Slip Opinion at 16.

Finally, Banfield argued that the trial court violated his right to a speedy trial because of the 23-month delay. *Id.* The court reviewed the procedural record and noted that "courts and prosecutors have "the primary burden" to ensure that cases are brought to trial." *Barker v. Wingo*, 407 U.S. 514,529, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Slip Opinion at 17.

Under the *Barker* balancing test the court found that the length of delay did require analysis, "Banfield's conduct was the more significant cause of the delay." The "prejudice from delay factor weighs heavily against Banfield." *Id* at 18 and 21. In balancing all the factors the court concluded "that the balancing

analysis weighs in favor of the State... the trial court did not violate Banfield's right to a speedy trial." *Id* at 22.

Banfield now petitions this Court for review.

V. THIS COURT SHOULD DENY REVIEW BECAUSE THE PETITION FAILS TO RAISE GROUNDS UNDER RAP 13.4(B).

Because Banfield's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Banfield claims the Court of Appeals' decisions are in conflict with decisions made by the Supreme Court, that there is a

significant question of law under the Washinton or United States Constitution and it involves a substantial public interest that should be reviewed by the Supreme Court. RAP 13.4(b)(1), (3) and (4). He does not claim grounds for review under RAP 13.4(b)(2).

The Court of Appeals' decision is not in conflict a Supreme Court decision, there is not a significant question of law under the Washington State or United States Constitution and there is not a substantial public interest to be determined by the Supreme Court. Because Banfield fails to raise grounds for review under RAP 13.4(b), review should not be granted.

VI. THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL.

The Court of Appeals correctly held that Banfield was not prejudiced as the statement "was not serious and had no prejudicial effect given the weight of the evidence." The trial

court was correct that a curative instruction could have been issued but a mistrial was not. Slip Opinion 12. A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. *Id.* A denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict. *Id.*

When a trial irregularity occurs, the reviewing court must decide its prejudicial effect. *Id.* That court will examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Id.* Ultimately, the question the court must answer is whether, in light of all the evidence, the improper testimony was so prejudicial that the defendant did not get a fair trial. *Id.* at 177,

225 P.3d 973 (*citing State v. Thompson*, 90 Wn.App. 41, 47, 950 P.2d 977 (1998)).

In *Gamble*, the Supreme Court held the investigating officer's testimony was not serious or cumulative enough to justify a mistrial even though he twice testified in violation of a pretrial order by mentioning the defendant's booking file and booking process. 168 Wn.2d at 178-79. There the witness was a professional witness, which increased the seriousness of the irregularity. However, the court found that mentioning the booking file and the booking process did not identify any specific prior criminal conduct. *Id.* at 178. Ultimately, because of the strength of the State's case, including observations of the defendant from an independent witness, the court found there was not an abuse of discretion. Id. at 179-80.

In this case, law enforcement officers were not precluded from testifying about their knowledge of an active protective order and their prior responses. RP 204: 2-10. Curtis herself was not prohibited from discussing those incidents. In fact, no motion

was made to curtail her testimony. Her answer was non-responsive to the question asked. Non-responsive answers to questions do not justify mistrials. *See Thompson*, 90 Wn.App. at 46-47, 950 P.2d 977 (1998); *see also State v. Peters*, 10 Wn.App.2d 1028, *Not Reported* (2019)(unsolicited and non-responsive testimony from the victim was not so serious as to justify mistrial).

Banfield argues *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) controls this case. However, unlike in *Escalona*, the jurors were not informed that Banfield had prior assault convictions against another person, or even Curtis herself; they did not hear he was violent generally. In *Escalona*, when cross examined by defense counsel, the victim informed the jury of the defendant's prior convictions for assault with a deadly weapon, a knife, like the offense against him, stating: "[defendant] already has a record and had stabbed someone." 49 Wn.App. at 253-55. Because the State's case in *Escalona* was weak, the statements

regarding his violent behavior could not be defused by any admonition from the court. *Id.* at 256.

Unlike *Escalona*, here, the evidence was irrefutable. An independent witness observed Banfield commit the assault. The protection order was entered into evidence before testimony. And Banfield was found hiding within a locked closet in an apartment he was prohibited from entering, suggesting consciousness of guilt.

As the trial court opined, Curtis's statement was minimal compared with the evidence already entered. The statement was non-responsive. The statement did not materially affect Banfield's trial. Moreover, the statement was not made in violation of any motion in limine. Consequently, the trial court did not abuse its discretion when it denied defense counsel's motion for mistrial. The Court of Appeals ruling should be left to stand.

The Court of Appeals was correct to first address whether there was an abuse of discretion. Slip Opinion at 10. After

determining there was not, the Court of Appeals next assessed if the testimony warranted a mistrial, which it did not. *Id* at 11-13. After review of the record, the trial court decision, the Court of Appeals' decision was in line with decisions made by the Supreme Court, the Washington and United States Constitution and there was no substantial public interest other than following the laws already set forth by the courts. The petition for review should be denied with regards to issue one as it fails to provide grounds for review under RAP 13.4(b).

VII. THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE THE APPELLATE COURT DID NOT ERR REGARDING THE EFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND THERE WAS NOT A CONFLICT UNDER THE WASHINGTON OR UNITED STATES CONSTITUTION OR A SUBSTANTIAL PUBLIC INTEREST.

To demonstrate ineffective assistance of counsel, Banfield must make two showings: (1) his counsel's representation was deficient or fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) his

counsel's deficient representation prejudiced him, or there is a reasonable probability that, except for his counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the 2–prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

There is a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight*, 89 Wash.2d

38, 45–46, 569 P.2d 1129 (1977). It is Banfield's burden to show deficient representation based on the record. At which he fails.

Banfield argues this case falls within the narrow exception set in *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *Cronic* recognized a limited set of circumstances that were so likely to prejudice a defendant that litigation was unjustified. 466 U.S. at 658, 104 S.Ct. 2039. Only when one of three circumstances applies will prejudice be presumed and the defendant relieved of his burden under *Strickland*. *Id.* The first is when the defendant has been completely denied counsel at a critical stage of the proceedings. 466 U.S. at 659-60, 104 S.Ct. 2039. The second is when the circumstances are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is minimal. *Id.* The final situation, and the circumstance Banfield argues applies in his case, arises when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Id.*, 466 U.S. at 659, 104 S.Ct. 2039.

In *Bell v. Cone*, 535 U.S. 685, 696, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), the Supreme Court defined what it means when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. The attorney's failure must be complete. 535 U.S. at 697, 122 S.Ct. 1843. The exception is so narrow it should only be applied to those cases in which defense counsel was so uninvolved that the attorney may as well have not been present in court at all. *State v. McCabe*, 25 Wn.App.2d 456, 463, 523 P.3d 271 (2023).

The Washington State Supreme Court has discussed *Cronic* only once and in that case it preferred to evaluate the 15 claims of ineffectiveness under *Strickland. In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). The appellate court in *McCabe*, applied *Cronic* only because appellant affirmatively declined the application of *Strickland*. 25 Wn.App.2d at 466, 523 P.3d 271. There, McCabe claimed he was constructively denied assistance of counsel when his attorney did not make an opening statement, failed to alert the court he was falling asleep, did not

object to inadmissible evidence, did not cross-examine many of the State's witnesses, among other issues outside of trial. *Id.* at 466. Even these failures did not meet a *Cronic* claim, which requires defense counsel to be "absent or completely non-participatory." *Id.*

Banfield's counsel actively participated throughout the entire process of trial. He made relevant motions, argued for mistrial, cross-examined the only witness who had no first-hand observations of his client inside an apartment from which his client was prohibited to enter, and made reasonable arguments.

The Court of Appeals first addressed Banfield's claim by reviewing the *Strickland* test. Slip Opinion at 14. After review of the record, counsel's performance, and the evidence produced in trial, the Court of Appeals held that Banfield could not show that there would have been a change in the outcome of the trial, and that the claim failed on the second prong of the *Strickland* test even if the first had been overcome. Finally, as Banfield's counsel "clearly participated in the trial... counsel's performance

did not deprive Banfield entirely of a defense," under *Cronic.* Slip Opinion at 16.

There are no significant constitutional questions that have not already been addressed and carefully analyzed in this case. Case law clearly provides what conduct can rise to the level of ineffective assistance of counsel for there to be a constitutional question. That case law was applied, the Court of Appeals provided the analysis of the case and the law to the facts presented. Additionally, there is not an issue of substantial public interest that is not already addressed by case law. Banfield fails to show grounds for review under RAP 13.4(b). The petition for review should be denied with regards to issue two.

VIII. THE TRIAL COURT DID NOT VIOLATE SPEEDY TRIAL REVIEW SHOULD BE DENIED.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution both protect a criminal defendant's right to a speedy trial. The analysis of the rights they provide is substantially the same. *State*

v. Ollivier, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). The right to a speedy trial attaches when a charge is filed or an arrest is made, whichever occurs first. *State v. Lee*, 188 Wn.2d 473, 498, 396 P.3d 316 (2017); *State v. Shemesh*, 187 Wn. App. 136, 144, 347 P.3d 1096 (2015). If a defendant's constitutional right to a speedy trial is violated, the remedy is dismissal of the charges with prejudice. *State v. Iniguez*, 167 Wn.2d 273, 282, 217 P.3d 768 (2009).

Like the Sixth Amendment speedy trial right, the State right is consistent with delays and subject to the circumstances. *Ollivier*, 178 Wn.2d at 826 (*citing Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). We use the balancing test set out by the United States Supreme Court in *Barker* to determine whether a constitutional violation has occurred. *Id.* at 827. That test makes four separate inquiries: first, whether the delay before trial was uncommonly long; next, whether the government or the criminal defendant is more to blame for that delay; then, whether, in due course, the defendant

asserted the right to a speedy trial; and, finally, whether the defendant suffered prejudice as the delay's result. *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (citing *Barker*, 407 U.S. at 530). The delay between Banfield's first appearance and the final trial was long, it took 23 months to bring the case to trial. However, many of the continuances were at Banfield's request or for his benefit.

The second factor asks the Court to examine each party's level of responsibility or reason for that delay, and to assign weight to the reasons. *State v. Iniguez*, 167 Wn.2d 273, 294, 217 P.3d 768 (2009). Where the defendant requests or agrees to the delay and therefore "is deemed to have waived his speedy trial rights as long as the waiver is knowing and voluntary." *Iniguez*, 167 Wn.2d at 284 (*citing Barker*, 407 U.S. at 529). If the government deliberately delays the trial to frustrate the defense, this conduct will be weighted heavily against the State. *Barker*, 407 U.S. at 531. But if the government has a valid reason for the

delay, such as a missing witness, then the valid reason may justify a reasonable delay. *Id.*

The State did not create the COVID pandemic and cannot be held responsible for the superior court's approach for the safety of the broader public. *See* CrR 3.3(e)(8). There are only two delays that can be attributed to the State. The first occurred after learning of a material witness's medical procedure, and good cause was found for that continuance. The second occurred when the State's independent witness and her child contracted COVID and was unavailable to testify. The unavailability of a key witness is a valid reason for a continuance. *Iniguez*, 167 Wn.2d at 294, *citing Barker*, 407 U.S. at 531, 92 S.Ct. 2182. The trial court found good cause existed to continue the trial because of their absences.

Conversely, several delays were the direct result of Banfield's behavior. Banfield failed to appear at his trial on December 2, 2021. Failed to appear for his readiness hearing on May 3, 2022. His speedy trial period restarted in both instances.

State v. Branstetter, 85 Wn.App. 123, 129, 935 P.2d 620 (1997)(under CrR 3.3(d)(2) and CrR 3.4, speedy trial period restarts when an arraigned defendant is absent from a hearing he was ordered to attend). Before those absences, he required new counsel after obtaining new charges. CrR 3.3(c)(2)(vii). Additionally, Banfield himself requested continuances. CrR 3.3(e)(3) and CrR 3.3(f).

The third factor considers whether Banfield asserted his right for speedy trial. Banfield did assert his right for speedy trial, however, those assertions must be objectively examined in light of his other conduct. *Iniguez*, 167 Wn.2d at 284. Banfield sporadically asserted his right to a speedy trial, however he also made his own requests to continue trial as well as missed both his date for trial and his date for readiness or trial setting.

The fourth factor determines whether there was any prejudice to the defendant as a result of the delay. *Id.* Banfield must show actual prejudice to establish a constitutional violation of his speedy trial rights. *State v. Ross*, 8 Wn.App.928, 955, 441

P.3d 1254 (2019). A showing of actual prejudice "may consist of (1) oppressive pretrial incarceration, (2) the defendant's anxiety and concern, and (3) the possibility that dimming memories and loss of exculpatory evidence will impair the defense." *Id.* at 955. The last interest is the most serious, because a defendant's inability to adequately prepare their case " 'skews the fairness of the entire system.' " *Id.*

There is no prejudice because none of the possibilities were alleged by Banfield at the time of his assertions. He was not in custody on this matter, spending only a brief time in jail after he obtained new charges. There is no evidence on the record that Banfield suffered constitutionally significant anxiety. Any claim Banfield may make of undue anxiety is generally immaterial unless a defendant can demonstrate a "special harm which distinguishes his case from that of any other arrestee awaiting trial." *United Staes v. Dirden*, 38 F.3d 1131, 1138 (10th Cir. 1994).

The Court of Appeals reviewed the case along with the procedural history and applied the *Barker* balancing test. The Court of Appeals found that the length of delay did require analysis, "Banfield's conduct was the more significant cause of the delay," that Banfield did assert his right to a speedy trial, however, the "prejudice from delay factor weighs heavily against Banfield." Slip Opinion at 18 and 21. In balancing all the factors the court concluded "that the balancing analysis weighs in favor of the State... the trial court did not violate Banfield's right to a speedy trial." *Id* at 22. After review of the record, application of the *Barker* test and analysis the Court of Appeals' decision should be left to stand. The Court of Appeals' decision was in line with decisions made by the Supreme Court, the Washington and United States Constitution and there was no substantial public interest other than following the laws already set forth by the courts. The petition for review should be denied with regards to issue three. Banfield fails to show grounds for review under RAP 13.4(b)(3) and (4).

IX. CONCLUSION

The Court of Appeals reviewed the issues presented with the correct standard of review. The petition for review should be denied.

CERTIFICATE OF COMPLIANCE

I certify under RAP 18.17(b) that excluding appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, the word count of this document is 4,878 words, as calculated by the word processing software used. Font is 14 pt.

Respectfully submitted this 10th day of March, 2025.

Alysa S. Draper-Dehart, WSBA #61031
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Jacqueline Renny, do hereby certify that the RESPONSE TO PETITION FOR REVIEW was filed electronically through the Supreme Court Portal to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 10, 2025.

Jacqueline Renny

COWLITZ COUNTY PROSECUTORS OFFICE

March 10, 2025 - 9:24 AM

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