Court of Appeals No. 39806-1-II
Clark County No. 09-1-00035-2

STATE OF WASHINGTON,

Respondent,

vs.

JERRY SIMS

Appellant.

BRIEF OF APPELLANT

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C. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Mr. Sims by Amended Information with Rape in the Second Degree, Rape in the Third Degree, and Rape of a Child in the Third Degree. CP 3-4. Mr. Sims was acquitted of Rape in the Second Degree and Rape in the Third Degree, but was convicted of Rape of a Child in the Third Degree. CP 23-25. Mr. Sims was given a standard range sentence of 60 months. CP 33. This timely appeal followed. CP 44

2. Speedy Trial Computation

On April 8th, 2009 Mr. Sims was brought before the Superior Court for the purpose of first appearance on a re-filed charge. RP (4-8-09), p. 3, Supp. CP 63. The new cause number was 09-1-00035-2. CP 1. The original cause number for this case was 08-1-00412-1. Appendix A, Supp. CP 63. The charge was dismissed on the State's motion without prejudice on August 29th, 2008. Appendix A. The reason given for the motion to dismiss was "In the interest of justice." Appendix A.

The charge was re-filed on January 9th, 2009.[1] CP 1. A summons was sent to Mr. Sims instructing him to appear on February 10, 2009, thirty-two days after the charge was re-filed. Supp. CP 64 (finding 10). He did not appear at that time. Supp. CP 64 (finding 11). The court issued a warrant for his arrest. Supp. CP 64 (finding 11). On April 8th, Mr. Sims

[1] The Findings of Fact and Conclusions of Law on the motion to dismiss for violation of speedy trial state, at finding number 9, that the date of re-filing was January 8th, 2009. However, the file stamp on the Information is dated January 9th, 2009. Appellant is treating January 9th, 2009 as the date of re-filing.

made his first appearance in Superior Court on the re-filed charge, at which time Neil Cane was appointed to represent him. RP I-A, p. 4. He was not arraigned at that time. RP I-B, p. 9. Two days later, Mr. Cane brought the case before the court informing it that it appeared the case was a three strikes case and he was not on the list of attorneys who handles such cases. RP (4-10-09), p. 17. The court then appointed Ed Dunkerly to represent Mr. Sims. Id. On April 15th, Mr. Sims was arraigned and the court set a trial date of June 8th, 2009. RP (4-15-09), p. 33. On April 23rd, 2009 Mr. Dunkerly filed an objection to the trial date and motion to have trial set by May 15th, 2009. Supp. CP 61-62. In this pleading, Mr. Dunkerly stated that he didn't believe trial could be set within speedy trial limits and that a motion to dismiss would be forthcoming. Supp. CP 61-62. At a hearing on April 28th, 2009 Mr. Dunkerly argued that speedy trial ran out thirty days after the charge was re-filed on January 9th, 2009. RP (4-28-09), p. 41. Alternatively, Dunkerly opined that speedy trial would expire thirty days after arraignment, or May 15th, 2009. RP (4-28-09), p. 42. The State opined that even if speedy trial ran out thirty days after re-filing (February 8th, 2009), it could invoke the "cure period" to fix the problem, and that the cure period would start running on the date of arraignment (April 15th) and run out on May 15th, 2009. RP (4-28-09), p. 43. The court set trial for May 11th, 2009, and ordered Mr. Dunkerly to

brief his motion and grounds for objection. RP (4-28-09), p. 43. On May 1st, Mr. Dunkerly filed a motion to dismiss and accompanying memorandum. Supp. CP 67-74. Dunkerly argued that the allowable time for trial ran out on February 9th, 2009, the next business day after the thirtieth day after the charge was re-filed. Supp. CP 68. Dunkerly argued that barring the court finding that the time for trial had expired on February 9th, 2009, it expired no later than May 8th, 2009 (thirty days after Mr. Sims' first appearance on the re-filed charge), or, barring that, no later than May 15th, 2009 (thirty days after the arraignment on the re-filed charge). Supp. CP 69.

The parties argued the motion at a hearing on May 8th, 2009. RP VI. Trial was originally set in this case (under the original cause number) for September 2nd, 2008, with 47 days elapsed on the time for trial clock.[2] Supp. CP 64, RP VI, p. 82. The State moved to dismiss the case, and the motion was granted, on August 29th, 2008. Supp. CP 64, Appendix A. At the time of that motion, the court file revealed that no subpoenas had been issued by the State. RP VI, p. 53.

At the motion hearing, Mr. Dunkerly argued that the case should be dismissed due to governmental mismanagement under CrR 8.3 (b),

[2] Throughout this hearing, the parties seem confused on how much time had elapsed on the 60 day trial clock during the original pendency of the charge. The State opined that only 43 days had elapsed, but the court indicated that the trial slip from that original trial setting indicated 47 days elapsed.

based on the State's failure to prepare for trial prior to its dismissal on August 29th, 2008. RP VI, p. 51-54. Mr. Dunkerly also argued, again, that the time for trial had elapsed thirty days after the charge was re-filed on January 9th, 2009. RP VI. P. 56-57.

The State argued, for the first time, that speedy trial did not begin running in this case, either during its original pendency or current pendency, until April 3rd, 2009 because Mr. Sims was supposedly in federal custody the entire time. RP VI, p. 80-82. Specifically, the State claimed that on April 22nd, 2008, the defendant was given a twelve-month federal sentence for a probation violation for having a dirty UA. RP VI, p. 80. The deputy prosecutor evidently acquired this information from a federal probation officer. RP VI, p. 80. The deputy prosecutor expressed a lack of full confidence in this information, and noted that they were trying to "get the paperwork on this." RP VI, p. 80. The parties agreed that Mr. Sims was in federal custody at the time the case was originally filed and that he filed a Notice of Imprisonment and Request for Speedy Trial on April 4th, 2008. CP 64, RP VI, p. 52-53. Mr. Dunkerly did not agree, however, that Mr. Sims was in federal custody at the time the charge was re-filed because that information, as noted above, was based on the bare assertion of the deputy prosecutor, who supposedly got that information from a federal probation officer. RP VI, p. 57. The State did

not put forth any documentation or testimony to support that assertion. Report of Proceedings, Vol. VI, Supp. CP 63-66. To date, no documentation or testimony has been proffered to support that assertion. Report of Proceedings, Clerk's Papers.

In addition to arguing that Mr. Sims' right to a speedy trial had already been violated, Mr. Dunkerly informed the court that he was not ready to try the case on the current trial date of May 11th, 2009, due largely to the fact that he had spent most of his time researching and briefing the speedy trial issue. RP VI, p. 71-77.

The prosecutor made two other arguments: First, that the defendant's failure to appear in court on February 10th, 2009 stopped the speedy trial clock and that it began running again, having been re-set to zero, on April 3rd, 2009 (the defendant's first appearance in court after the FTA); second, that the appointment of Mr. Dunkerly on April 10th, 2009 reset the clock to zero because Mr. Cane was "disqualified." RP VI, p. 82. The State urged the court, "in an abundance of caution," to adopt the April 3rd date as the commencement date. RP VI, p. 83. The State didn't address Mr. Dunkerly's assertion that the speedy trial clock began running again on January 9th, 2009 when the charge was re-filed. RP VI, p. 84.

The court denied the motion. Supp. CP 66. The court did not give a reason for its decision, except to say "I believe the change in the rule in

2003 was meant to give the Court more time to set speedy trial. And actually that was as a result of the Pierce County mess. Be that as it may." RP VI, p. 91. The court then concluded that the last day of the speedy trial period was June 1st, 2009, despite the State's assertion that day sixty (assuming a commencement date of April 3rd, 2009) was June 2nd, 2009. RP VI, p. 91. The court gave no reason for the one-day discrepancy. Id.

Mr. Dunkerly then advised the court that he had a scheduled vacation from which he would not return to work until June 3rd. RP VI, p. 91-93. The court asked him if he would return on June 1st, so that they could begin the trial on June 2nd, and Mr. Dunkerly said that he would rather not because his airline tickets were non-changeable and non-refundable. RP VI, p. 93. The court replied:

> Then...my choice is to appoint new counsel. And then we start speedy trial all over again, your having preserved your arguments on this, but if you're unable to try this case with anything other than [this coming] Monday—and I certainly can't put you in that position—So my choice, then, is to appoint new counsel.

RP VI, p. 93-94. The court then encouraged Mr. Dunkerly to talk to Mr. Sims about whether he would consider waiving speedy trial, and Mr. Dunkerly took a brief recess to speak with Mr. Sims. RP VI, p. 94-95. When the hearing resumed, Mr. Dunkerly informed the court that Mr. Sims would not waive speedy trial and would therefore agree to new counsel. RP VI, p. 95. The court then appointed Suzan Clark. Id. At no

point in the hearing did Mr. Dunkerly state that he could not be ready to try the case on June 2nd, beyond the fact that he would not be physically present to do so because he would still be on vacation. RP VI, p. 91-95.

The court reconvened later that day with Ms. Clark present. RP VI, p. 97. Ms. Clark was somewhat confused about what was going on, and the trial court reiterated that because Mr. Sims wanted a speedy trial, she had removed Mr. Dunkerly as counsel and appointed new counsel for the sole purpose of circumventing the existing time-for-trial period and re-setting the clock to zero. RP VI, p. 98, 101. Ms. Clark indicated that in having briefly spoken with Mr. Dunkerly, it was clear to her that Mr. Sims wished to have a speedy trial and objected to the re-setting of the speedy trial period to zero. RP VI, p. 103. She asked for a review the following week so she could get up to speed. RP VI, p. 99, 103. Near the close of the hearing the State indicated that it had prepared findings of fact and conclusions on law on the motion to dismiss for violation of speedy trial (presumably during the recess between the hearing at which Mr. Dunkerly was removed and the hearing at which Ms. Clark first appeared). RP VI, 101. The deputy prosecutor stated that he had presented the findings and conclusions to Mr. Dunkerly and Mr. Dunkerly had signed them, noting an objection to finding number 3. RP VI, p. 102. Mr. Sims was not given an opportunity to review the findings and conclusions before they were

entered. RP VI, p. 103. The court entered the findings. RP VI, p. 103, Supp. CP 66.

The court entered the following findings of fact and conclusions of law on the motion to dismiss to which Mr. Sims assigns error:

Findings of Fact:

3. Defendant was in federal custody from February 4, 2008 through April 3, 2009, per federal probation officer Todd Wilson, Vancouver, Washington office, for probation violations relating to a federal conviction for Armed Robbery. These violations included a 12 month sentence given on April 22, 2008 for a "dirty UA." CP 63-64.

9. On January 8, 2009, the same charges were refiled in Clark County Superior Court and a new cause number was issued, 09-1-00035-2.[3] CP 9.

12. Thereafter [after the warrant was issued on February 10, 2009], the State learned defendant was still in Federal custody and attempts were made to return defendant to Clark County. CP 64.

13. Defendant was released from Federal custody on April 3, 2009. He went into custody in Oregon, on the hold from Clark County,

[3] Mr. Sims only objects to this finding because the file stamp on the Information clearly says "Jan 09 2009." Although it does not alter the basic arguments made in this brief, it is important to be accurate about the relevant dates where a defendant is alleging a violation of his right to a speedy trial.

and he was returned to Clark County, making a First Appearance on April 8, 2009. CP 64.

17. On April 24, 2009, defendant objects to the trial date being outside of speedy trial calculations.[4] CP 64-65.

Conclusions of Law:

1. The defendant was in the custody of the Federal prison system from before the time of the original filing of these charges in 2008, through April 3, 2009, and such time is an excluded period for speedy trial calculations. CrR 3.3 (e) (6). CP 65.

2. The substitution of counsel on April 10, 2009 reset the commencement date to that date, giving 60 days for trial setting. CrR 3.3 (c) (2) (vii). CP 65.

3. Following defense counsel Dunkerly's assertions that he is currently not ready for trial and that he will be on vacation from May 20th through June 2nd, 2009, and that he won't have enough time to prepare this trial even if it is set for June 2, new counsel is appointed. Following CrR (c) (2) (vii). CP 65.

4. The dismissal on August 28, 2008 was made by the State under CrR 8.3 (a) and the request was for dismissal without prejudice. Notice

[4] Again, the date in the findings (April 24, 2009) is demonstrably incorrect. The file stamp clearly says "2009 Apr 23." Because either date is still within the required ten-day period for objection, this error has no material affect on any issue before the Court.

was given to defendant and no objection was made. This court is not going to overrule the earlier court's decision.[5] CP 65.

Mr. Dunkerly interposed a handwritten objection to finding of fact number 3, stating: "Assum (sic) State will supplement record." CP 66. Mr. Dunkerly also objected to finding of fact number 8, which concerned the question of whether the dismissal was with or without prejudice and which is not at issue in this appeal. CP 66.

D. ARGUMENT

I. MR. SIMS' RIGHT TO A SPEEDY TRIAL WAS VIOLATED BECAUSE THE STATE HAD ONLY THIRTY DAYS IN WHICH TO BRING MR. SIMS TO TRIAL AFTER RE-FILING THE CHARGE.

A reviewing court reviews the application of the speedy trial rule de novo; it is a question of law. *State v. Nelson*, 131 Wn.App. 108, 113, 125 P.1008 (2006); *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). Former CrR 3.3 (g) (4) stated that an excluded period included "The time between the dismissal of a charge and the defendant's arraignment or rearraignment in superior court following the refiling of the same charge." The 2003 amendments specifically removed the language pertaining to arraignment or rearraignment and changed it, in CrR 3.3 (e) (4), to say that the excluded period is "The time between the dismissal of a

[5] Again, the date given in this conclusion is incorrect. The file stamp on the order of dismissal (found in Appendix A) clearly says "Aug 29 2008," and the date on which Judge Johnson signed it in open court was "29 day of August, 2008."

charge and the refilling of the same or related charge." See Appendix B, the Time for Trial Task Force Report (also found at www.courts.wa.gov/programs_orgs/pos_tft). By its plain language, the current rule says that when a charge is dismissed, as Mr. Sims' was on August 29, 2008, and refiled, as it was on January 9, 2009, speedy trial begins running on the date the charge is refiled, not on the date of rearraignment after the refiling.

The Time for Trial Task Force Report Discussion of Consensus Recommendations, attached as Appendix C, reveals very little about the decision to change this language. It states:

> B. *Proposed Section (e) (Excluded Periods).* The task force recommends numerous changes to section (e):
>
> Subsection (e)(4) specifies that the period between dismissal and refiling is excluded even with respect to a related charge.

The Task Force felt that the significant takeaway from the amendment was the addition of the language "or related charge." By its plain and unambiguous language, speedy trial begins running again on the date a charge is refiled, which in this case occurred on January 9th, 2009. With 47 days having elapsed on the original speedy trial period, there remained 13 days on the speedy trial clock when the charge was refiled. By operation of CrR 3.3 (b) (5), that 13 day period was automatically converted to a 30 day period. CrR 3.3 (b) (5) provides: "*Allowable Time*

After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial *shall not expire earlier than 30 days* after the end of that excluded period." (Emphasis added).[6] Appellant found no published authority addressing this question and bases his argument exclusively on the plain language of the rule. The Washington Practice Series discussion of CrR 3.3 (e) (4) simply states:

30. Excluded periods—Period between dismissal and refiling

Reserved. Watch this space for possible new cases decided under the 2003 version of CrR 3.3.

4A WAPRAC CrR 3.3

This issue is one of first impression. Statutes must be read so that each word is given effect and no portion of the statute is rendered meaningless or superfluous. *Spokane Valley v. Spokane County*, 145 Wn.App. 825, 833, 187 P.3d 340 (2008); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). If a statute is unambiguous, its meaning must be derived from the wording of the statute. *Spokane Valley* at 833, *State v. Lee*, 96 Wn.App.336, 341, 979

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[6] It is important to note that the rule operates to *convert* the 13 days into 30 days, and does not allow the State to *add* 13 days (the remaining days on the original clock) to the 30 day period outlined in CrR 3.3 (b) (5). The deputy prosecutor appeared to suggest, at one point during the May 28th hearing, that the court could add these two time periods together to come up with a 43 day time for trial period (assuming it adopted Mr. Sims' assertion that speedy trial began running on January 9th, 2009). This is incorrect.

P.2d 458 (1999). Here, former CrR 3.3 (g) (4) specified that the clock-triggering date in situations where a case is dismissed without prejudice and then re-filed was the date the defendant was arraigned on the re-filed charge. Those who authored the amendments to CrR 3.3 were aware of that language because it was plain to be seen, and they specifically removed it and changed the clock-triggering date to the day the charge is re-filed. In Mr. Sims' case, speedy trial began running on January 9th, 2009, and the State was required to bring him to trial no later than Monday February 9th, 2009 (the next business day after the thirtieth day, which was Sunday February 8th).

The State dodged responding to Mr. Dunkerly's assertion that speedy had trial had run thirty days after it re-filed the charge by asserting that Mr. Sims was in federal custody at the time. The State made this assertion based on hearsay information it purportedly received from a federal probation officer. The State further asserted that it learned that Mr. Sims was in federal custody at some point after the warrant was issued on February 10th, 2009 and made attempts to have him returned to Clark County (see finding of fact number 12). However, neither of these assertions is supported by the record. At no point in any of the hearings did the prosecutor claim that the State learned that Mr. Sims was in federal custody and that they tried to have him brought back to Clark County.

This assertion appears for the first time in the Findings of Fact and Conclusions of Law, which were entered without benefit of counsel to Mr. Sims (Mr. Dunkerly, who signed the Findings and Conclusions, was *not* Mr. Sims' attorney). At the May 8th hearing, the prosecutor merely indicated that he had been told by the federal probation officer that Mr. Sims was released from federal custody on April 3rd, 2009. See Report of Proceedings, Vol. VI, p. 80.

The record reflects that While Mr. Sims agrees that he was in federal custody during the original filing of the case in 2008 (indeed, he filed a Notice of Imprisonment and Request for Speedy Trial on April 4th, 2008 and was subsequently brought to Clark County on July 3rd, 2008), the State proffered no evidence that he was in federal custody at the time the charge was re-filed on January 9th, 2009. The State acknowledged, twice, that it would need to present documentation showing Mr. Sims was in federal custody during the dates it alleged, but never did so. Once the findings of fact and conclusions of law were entered, the State appears to have considered the matter closed. Further, since Mr. Dunkerly had been removed from the case (and, as such, should *not* have been a party to the findings of fact and conclusions of law, argued in Part IV, below), he did not follow up on the State's failure to produce any proof of this assertion.

The trial court erred in finding that Mr. Sims was in federal custody at the time the charge was refiled because there was no evidence to support such a finding. Challenged findings of fact are reviewed for substantial evidence. *State v. Allen*, 138 Wn.App. 463, 468, 157 P.3d 893 (2007); *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence is evidence that would persuade a fair-minded rational person of the truth of the finding. *Id.* A trial court's conclusions of law are reviewed de novo. *Vickers* at 468; *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

Here, the prosecutor's bare assertions that Mr. Sims had been in federal custody at the time the case was re-filed, that he himself acknowledged, on at least two occasions, were insufficient without documentary or testamentary proof, did not provide substantial evidence that Mr. Sims was in federal custody between January 9th, 2009 and April 3rd, 2009. The court erred in finding this as fact, and making any conclusion of law based on this unsubstantiated fact.

Mr. Sims was not in federal custody, based on the existing record before this Court, between January 9th, 2009 and April 3rd, 2009, and his time for trial period expired on February 9th, 2009, before he was even instructed to appear on the summons. His conviction should be reversed and dismissed with prejudice.

II. UNDER THE COURT'S CONCLUSION OF LAW NUMBER 1, IF THIS COURT ACCEPTS IT AS SUPPORTED BY THE EVIDENCE, APRIL 3RD, 2009 MARKED THE END OF AN EXCLUDED PERIOD, NOT A NEW COMMENCEMENT PERIOD, AND THE TIME FOR TRIAL EXPIRED THIRTY DAYS LATER (ON MAY 4TH, THE NEXT BUSINESS DAY AFTER THE THIRTIETH DAY, WHICH WAS SUNDAY, MAY 3RD).

The court, at the urging of the State, adopted April 3rd, 2009 (the day Mr. Sims was supposedly released from federal custody), as the re-starting of the speedy trial clock. However, the court treated this date as a *commencement* date, rather than the re-starting of the clock after an excluded period, which was error. CrR 3.3 (e) (6) provides that the period of time that a defendant is detained in a federal jail or prison is *excluded* from the time for trial period. When any period of time is excluded from the time for trial period, the time for trial period shall not expire sooner than thirty days after the clock starts running again. See CrR 3.3 (b) (5), supra. As such, the State had thirty days, not sixty, as the court and State assumed, to bring Mr. Sims to trial and the court erred, as a matter of law, in entering conclusion of law number 3 in which it held that based on conclusion of law number 1 (in which it treated April 3rd, 2009 as the end of an *excluded* period), the time for trial period expired on June 2nd, 2009. Thus, Mr. Sims right to a speedy trial, even adopting the court's calculation, was violated because Mr. Sims had to be brought to trial no

later than May 4th, 2009. Mr. Sims' conviction should be reversed and dismissed with prejudice.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND THEREBY VIOLATED MR. SIMS' RIGHT TO A SPEEDY TRIAL WHEN IT REMOVED MR. DUNKERLY AS COUNSEL FOR THE SOLE PURPOSE OF MANIPULATING AND CIRCUMVENTING THE SPEEDY TRIAL RULE.

An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds. *In re Guardianship of Lamb*, 154 Wn.App. 536, 544, 228 P.3d 32 (2009); *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay,* 55 Wash.2d 344, 347 P.2d 1062 (1959)). The court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis. *Lamb* at 544, *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). But if pure questions of law are presented, a de novo standard of review should be applied to those questions. *Lamb* at 544; *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (2005). Issues of statutory construction are also reviewed de novo. *Lamb* at 544.

As noted in Part I, supra, Mr. Sims maintains that the State did not put forth any evidence that Mr. Sims was in federal custody at the time the case was refiled on January 9th and the court erred in finding as such. But

if this Court should find that he was in federal custody, and that speedy trial never began running in the first place, then Mr. Sims speedy trial period should be deemed to have commenced either: (a) On April 8th, 2009, when Mr. Sims first appeared in Superior Court after the issuance of the warrant on February 10th, 2009 (with the last allowable date for trial being June 8th, 2009, the first business day after the thirtieth day); (b) On April 10th, when Mr. Cane was removed as counsel and Mr. Dunkerly was appointed (the last allowable date for trial being June 9th, 2009); or (c) On April 15th, when Mr. Sims was arraigned (the last allowable date for trial being June 15th, the first business day after the thirtieth day). Under any of these three dates, the court could have re-set trial within speedy trial in spite of Mr. Dunkerly's scheduled vacation ending on June 2nd, 2009.

It must be emphasized that the sole reason for Mr. Dunkerly's inability to try this case by June 2nd, 2009 was because he was scheduled to be out of town on vacation, *not* because he could not have been otherwise prepared. Mr. Dunkerly never stated he could not be prepared for trial by June 2nd and it is baffling that the State inserted this fact into the Findings of Fact and Conclusions of Law. (See Conclusion of Law number 4, Supp. CP 65). When Mr. Dunkerly made an extensive record of his unpreparedness (see RP VI, p. 71-77), he was plainly referring to his inability to try the case *that coming Monday*, May 11th, 2009 (the trial date

that was set at the April 28th hearing). Dunkerly was not referring to the new proposed trial date of June 1st. It was error for the trial court to enter this conclusion of law not only because it is wholly unsupported by the record, but because it is not even supported by the findings of fact. The only finding of fact that refers to Mr. Dunkerly's unpreparedness for trial is Finding of Fact number 19, and it is clearly referring to the May 11th trial date because it makes reference to Mr. Dunkerly having just finished reviewing the discovery, which Mr. Dunkerly brought up at the May 8th hearing in reference to his unpreparedness for the May 11th trial date. See Supp. CP 65, RP VI, p. 71-77.

Because Mr. Dunkerly was prepared to go to trial on June 3rd, 2009, the trial court should have set the trial for any one of the above mentioned dates and Mr. Sims could have had a speedy trial (again, assuming the trial court was correct in finding that he was in federal custody during the entire pendency of the case up to April 3rd, 2009).

Instead, the trial court removed Mr. Dunkerly as counsel and appointed new counsel for the admitted and sole purpose of circumventing the speedy trial rule and having the clock re-set to zero under CrR 3.3 (c) (2) (vii). This was outrageous and a flagrant abuse of discretion. The Time for Trial Task Force included this provision to ensure that when new counsel is needed on a case he or she will have adequate time to prepare

and needn't worry about whether the client will put him or her in a box by not waiving speedy trial. The Task Force surely did not intend for judges to use this provision to circumvent not only the words but the spirit of the rule, disregarding any notion of fair play and making a mockery of the rule itself. On what basis was Mr. Dunkerly unqualified to handle this case, such that his disqualification by the court became necessary? Black's Law Dictionary, Eighth Edition, defines "disqualification" as follows:

> Something that makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party.

What bias or conflict of interest did Mr. Dunkerly have? Having a pre-scheduled vacation is not evidence of bias. And it certainly does not rise to the level of a conflict of interest. Black's Law Dictionary, Eighth Edition, defines "conflict of interest" as follows:

> 1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. 2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

Where was Mr. Dunkerly's conflict of interest? There was no conflict of interest. Mr. Dunkerly was not "disqualified," within the meaning of CrR 3.3 (c) (2) (vii). He was removed as counsel, without any legitimate basis, because the trial court wanted to re-set the speedy trial

clock to zero. Should the State suggest that Mr. Sims consented to this perversion of the rule, the record clearly demonstrates that Mr. Sims was nothing short of duped into agreeing to the substitution of counsel. A review of the record demonstrates that when Mr. Sims "agreed" to Mr. Dunkerly's removal as counsel, he did it because he believed that by doing so, he would be getting the speedy trial he so vehemently sought. Ms. Clark confirmed this when she advised the court that Mr. Sims objected to the resetting of the speedy trial clock to zero as a consequence of the appointment of new counsel. Had Mr. Sims been advised that the new appointment of counsel would re-set the clock to zero, and that, indeed, that was the court's *sole purpose* in removing Mr. Dunkerly, he clearly would have objected. This is evidenced by the fact that he did object after being fully informed (by Ms. Clark, not Mr. Dunkerly) about what was happening.

The trial court misconstrued, and incorrectly applied, CrR 3.3 when it treated April 3rd as a new commencement date. Assuming that speedy trial did not run out on February 9th, 2009 (Mr. Sims' primary contention), then either April 3rd was the end of an excluded period, giving the State thirty days in which to bring Mr. Sims to trial, or speedy trial commenced on either April 8th, 10th, or 15th, any one of which would have given Mr. Dunkerly plenty of time to try this case within speedy trial

because he would return from his vacation on June 3rd, 2009. The trial court abused its discretion by failing to simply set trial by either June 8th, 9th or 15th. The court further abused its discretion by trampling on the time for trial rule and abusing CrR 3.3 (c) (2) (vii) by removing Mr. Dunkerly as counsel not because he was disqualified to try Mr. Sims'case, but for the sole purpose of resetting the time for trial clock to zero in the face of Mr. Sims' recalcitrant and inconvenient exercise of his right to a speedy trial. Mr. Sims' right a speedy trial was violated by the court's action and his case should be reversed and dismissed with prejudice.

IV. MR. SIMS WAS DENIED HIS RIGHT TO COUNSEL AND DUE PROCESS WHEN THE TRIAL COURT ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY MR. DUNKERLY AFTER HE HAD BEEN REMOVED AS COUNSEL OF RECORD.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). The State's purpose in proposing, and the trial court's purpose in signing, the Findings of Fact and Conclusions of Law was to memorialize the facts the court found, and the legal conclusions it made, in denying Mr. Sims' motion to dismiss the case with prejudice for the violation of his right to a speedy trial. This document, as the State and the trial court well knew, would be the primary

portion of the record that a reviewing court would use to analyze Mr. Sims' claim that his right to a speedy trial was violated. Mr. Sims was represented by a lawyer at the time these findings and conclusions were prepared, but that lawyer (Ms. Clark) was not consulted on them. Instead, the State inexplicably sought the signature of a lawyer who was not involved in the case and not a current party to the proceedings (Mr. Dunkerly). Having obtained Mr. Dunkerly's signature in violation of Mr. Sims right to counsel (and, according to Ms. Clark, without his knowledge and input), the State essentially proposed this document ex parte, and the trial court signed it ex parte.

In *State v. Watson,* 155 Wn.2d 574, 578-79, 122 P.3d 903 (2005), the Supreme Court acknowledged that the term "ex parte communication" had not been clearly defined under Washington law. The Court therefore adopted the Black's Law Dictionary definition and stated:

> *Black's Law Dictionary* defines "ex parte communication" as "[a] communication between counsel and the court when opposing counsel is not present." BLACK'S LAW DICTIONARY 296 (8th ed.2004). That definition assumes that there is a proceeding involving the court, with counsel and opposing counsel, and that the communication regards the proceeding at hand. *Black's* further defines "ex parte" as something being made by one party: "Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other." *Id.* at 616, 80 P.3d 605; *see also State v. Moen,* 129 Wash.2d 535, 541 n. 3, 919 P.2d 69 (1996) ("By definition, an ex parte order is done on the application of one party ...."). *Black's*

> multiple definitions of "party" also assume that a cause of action exists in which the party is a participant. *See* BLACK'S, *supra,* at 1154.

Watson at 579. Ex-parte communications which affect the rights of a party are improper and may constitute a violation of due process. See *In re Pers. Restraint of Boone,* 103 Wash.2d 224, 234-35, 691 P.2d 964 (1984) (holding petitioner was denied due process in his probation revocation proceeding when his probation officer submitted a secret report to the trial court).

Here, it cannot be disputed that the Findings of Fact and Conclusions of Law affected the rights of Mr. Sims or constituted a critical stage of the proceeding. A trial court's findings and conclusions are ground-zero for appellate review of a defendant's assignment of error based on an erroneous denial of a pre-trial motion. It is the single most important part of the record on appeal in cases such as this. Mr. Sims had a right to have his counsel of record review the document and consult with him before it was signed and entered by the trial court. Mr. Sims was denied his right to due process and counsel when the trial court accepted and signed the Findings of Fact and Conclusions of Law knowing that they had not been served upon, or reviewed by his attorney of record, Suzan Clark, and that they bore the signature of a an attorney who was no longer a party to the proceedings. Assuming this Court does not agree,

based on the existing record, that Mr. Sims' right to a speedy trial was violated such that his conviction should be reversed and dismissed with prejudice, his case should be remanded for a new hearing on the entry of findings of fact and conclusions of law where Mr. Sims can be represented by his trial counsel of record, and Mr. Sims should be permitted to submit supplemental briefing based upon new findings of fact and conclusions of law.

E. CONCLUSION

Mr. Sims' right to a speedy trial was violated and his case should be reversed and dismissed. Alternatively, he should be granted a new hearing on the findings of fact and conclusions of law, with representation of counsel.

RESPECTFULLY SUBMITTED this 7th day of June, 2010.

ANNE M. CRUSER, WSBA No. 27944
Attorney for Mr. Sims

APPENDIX A

ANTOINE TISSOT

FILED
AUG 29 2008
Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. JERRY SIMS, Defendant	No. 08-1-00412-1 MOTION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW, Tonya R. Riddell, Deputy Prosecuting Attorney, and moves the above Court to dismiss the Information filed March 13, 2008 in the above-entitled case for the reason that: In the interest of justice.

DATED this 29 day of August, 2008.

Tonya R. Riddell, WSBA #31465
Deputy Prosecuting Attorney

ORDER

THIS MATTER having come before the Court upon the Motion and the Court now being fully advised in the premises and on consideration whereof finds in the interests of justice said Motion should be sustained;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said case is hereby dismissed without prejudice.

IT IS FURTHER ORDERED that bail and release conditions previously imposed are hereby exonerated and the Clerk shall disburse it to the appropriate person.

DONE IN OPEN COURT this 29 day of August, 2008.

THE HONORABLE BARBARA D. JOHNSON
JUDGE OF THE SUPERIOR COURT

Presented by:

Tonya R. Riddell, WSBA #31465
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
CHILDREN'S JUSTICE CENTER
PO BOX 61992
VANCOUVER, WASHINGTON 98666
(360) 397-6002 (OFFICE)

APPENDIX B

Time-for-Trial Final Report

B. Discussion of Consensus Recommendations.

- **Terminology**
- **The Dilemma - Flexible Rule Versus Strict Rule**
- **Proposed Subsection (a)(1) (Responsibility of Court)**
- **Proposed Subsection (a)(2) (Precedence of Criminal Trials)**
- **Proposed Subsection (a)(3) (Definitions) (new provision)**
- **Proposed Subsection (a)(4) (Construction of Rule) (new provision)**
- **Proposed Subsection (a)(5) (Related Charges) (new provision)**
- **Proposed Subsection (a)(6) (Reporting of Dismissals and Untimely Trials) (new provision)**
- **Proposed Subsections (b)(1) through (b)(4) (Time Periods for Bringing Cases to Trial)**
- **Proposed Subsection (b)(5) (Allowable Time After Excluded Period) (new provision)**
- **Proposed Section (c) ("Commencement Date") (new provision)**
- **Proposed Section (d) (Trial Settings and Notice-Objections-Loss of Right to Object)**
- **Proposed Section (e) (Excluded Periods)**
- **Proposed Subsection (f)(1) (Continuance-Written Agreement)**
- **Proposed Subsection (f)(2) (Continuance-Motion By the Court or a Party)**
- **Proposed Section (g) (Continuance-Cure Period) (new provision)**
- **Proposed Section (h) (Dismissal with Prejudice)**
- **Other Proposed Changes for CrR 3.3.**
- **Changes Proposed for CrR 4.1**

Terminology. For ease of discussion, this report will discuss the time-for-trial rules by referring to the superior court rule, **CrR 3.3**. The task force's recommendations for **CrRLJ 3.3** and **JuCR 7.8** are essentially the same as for CrR 3.3.[1]

The Dilemma - Flexible Rule Versus Strict Rule. Throughout our deliberations, the task force had to balance two competing issues underlying our time-for-trial rules. The rules need to be flexible enough for the judicial system to be able to handle a heavy load of criminal cases and to reach just results, yet the rules need to be strict enough to continue to serve as the "hammer" ensuring that the judicial system will promptly resolve criminal cases.

Full recognition of these competing interests is necessary to any meaningful dialogue over proposals for change. Readers will note the interplay of these two competing issues throughout the following discussion.

Proposed Subsection (a)(1) (Responsibility of Court). The task force began its consideration of CrR 3.3 by re-affirming the policy contained in subsection (a)(1). The responsibility for ensuring the timeliness of criminal trials is best placed on the courts. This provision has been in place since the adoption of the original rule in 1973, and the

task force recommends that it not be changed.

Proposed Subsection (a)(2) (Precedence of Criminal Trials). The task force also re-affirmed the policy that criminal trials take precedence over civil trials. The task force did consider proposals to provide greater specificity on this point. For example, members discussed whether the rule should specify that courts do not need to interrupt an on-going civil trial in order to begin a criminal trial. The task force ultimately decided, however, that this provision of the rule should be retained in its current form, leaving the resolution of more specific issues to the discretion of the courts.

Proposed Subsection (a)(3) (Definitions) (new provision). The task force recommends adding definitions of particular key terms for greater clarity and certainty in the rule's application. The definition of "appearance" in subsection (iii) is proposed in order to specify when a defendant's presence in court on another charge may be counted as an appearance for purposes of the current charge. The definition of "detained in jail" in subsection (v) expressly excludes electronic home monitoring. Although case law holds that a defendant on electronic home monitoring is "in custody" for other purposes of the criminal law, including the calculation of credit for time served, the task force believes that for the purpose of time-for-trial calculations such a defendant is more properly treated as a defendant not detained in jail. Other definitions will be discussed later in this discussion along with the substantive provision to which they relate.

Proposed Subsection (a)(4) (Construction of Rule) (new provision). Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be read in. Criminal cases should be dismissed under the time-for-trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions.

Proposed Subsection (a)(5) (Related Charges) (new provision). The task force recommends adding a new provision stating directly that the computation of the time-for-trial period applies equally to related charges. The proposed definition for "related charge" is limited to a charge that is based on the same conduct as the pending charge and that is ultimately filed in superior court (see subsection (a)(3)(ii)).

Proposed Subsection (a)(6) (Reporting of Dismissals and Untimely Trials) (new provision). The task force recommends that the trial courts be required to report particular time-for-trial problems to the Administrative Office of the Courts. Under the proposal, courts would need to report each case that is dismissed under the time-for-trial rule and any case for which the cure period is invoked.

These reports will serve several functions. First, the reports will provide an additional incentive to the trial courts to hear their criminal cases in a timely manner. The task force considers this to be an important function, given the greater flexibility that the task force is recommending for the rule. Requiring these reports will also provide a centralized collection of statistics to guide future decisions about time-for-trial policies and resource allocations. Currently, statistics on how often cases are dismissed under CrR 3.3 are not collected anywhere around the state. The task force sent state-wide queries to court administrators, judges, defense counsel, prosecuting attorneys, and the Administrative Office of the Courts, and found only anecdotal information. Responding to the lack of statistical data, the Snohomish County Prosecutor's Office undertook a survey of their adult felony cases that were closed in 2001. Their survey revealed that 17 of these cases had been reduced, dismissed, or declined on time-for-trial grounds. Thirteen of these

cases involved *Striker/Greenwood* issues. We include the results of this survey in **Appendix D.**

Proposed Subsections (b)(1) through (b)(4) (Time Periods for Bringing Cases to Trial). These proposed subsections consolidate and simplify the existing provisions of CrR 3.3 establishing the 60-day and 90-day time periods for bringing defendants to trial.

The task force decided not to recommend changing the underlying time-for-trial time periods: 60 days for defendants detained in jail and 90 days otherwise. Members discussed the possibility of extending these deadlines, noting that most other states have time periods longer than ours, especially in those states that require dismissal with prejudice for rule violations[2]. The task force examined the average length of time that superior courts currently need to get criminal cases to trial, and found that the state-wide averages significantly exceed 60 or 90 days, given the application of various exclusions of time, extensions of time, waivers, and continuances.[3]

The task force concluded, however, that lengthening the time periods would serve little purpose. Although such a change could give more time for cases to be readied for trial, the timing of most cases going to trial is driven in large part not by the 60/90 day deadlines, but by the various exclusions, extensions, waivers, and continuances. As a result, changing the underlying time period would not necessarily result in any significant change in how long cases take before they get to trial. Further, lengthening the time periods runs counter to society's and victims' interests in having criminal trials be timely held and it does nothing to ease court congestion (the same number of cases would still have to be heard regardless of the length of the time periods).

The task force proposes rephrasing this part of the rule to more clearly distinguish between defendants who are subject to the 60-day period and those who are subject to the 90-day period. We recommend sharpening this distinction by providing a definition for the key phrase "detained in jail." See proposed CrR 3.3(a)(3)(v). We also propose specifying the time-for-trial time period for those defendants who begin serving time in custody but are released before trial, as well as for defendants who are initially released but later placed in pre-trial custody.

Proposed Subsection (b)(5) (Allowable Time After Excluded Period) (new provision). This subsection proposes a significant change from the current rule - a 30-day buffer period to follow any excluded period of time. The current rule does not provide adequate time for preparing and trying cases in which an excluded period of time runs out shortly before the expiration of a defendant's 60/90-day time period.

For example, consider a defendant whose competency to stand trial needs to be evaluated on the 58th day of a 60-day time-for-trial period. Under the existing rule's provisions, the time-for-trial "clock" would stop on Day 58 pending the final determination of competency. Once competency is determined, however, the clock restarts at Day 58, leaving only two days with which to begin the defendant's trial. The attorneys are left with insufficient time to complete their final trial preparations, including subpoenaing their witnesses, and the courts have problems with scheduling the case for trial on short notice.

Accordingly, the task force proposes a new subsection (b)(5) ensuring that there will always be at least 30 days, following the conclusion of any excluded period of time, within which a trial may be started. This new provision will not necessarily change the expiration of the defendant's 60/90-day time period. The additional 30 days come into play only if there are fewer than 30 days remaining in the defendant's 60/90-day time period. In other words, if there are 10 days remaining in the time-for-trial period, then the new

provision would extend the time-for-trial period by only 20 days.

The task force recognizes that in most instances the courts will not need all, or even most, of the 30-day period to get the case set for trial. Indeed, as is recognized elsewhere in the rule, the courts may direct the parties, when appropriate, to remain in attendance or be on-call for trial assignment in order for the trial to be held within a relatively short period of time.

Proposed Section (c) ("Commencement Date") (new provision). The task force has created a separate subsection (c) devoted solely to specifying the starting date for the 60/90-day time period under different circumstances.

Under proposed subsection (c)(1), the time-for-trial period commences on the date of the defendant's arraignment, as determined under CrR 4.1. By using this date, the proposal departs from the existing rule with regard to cases that are initially filed in juvenile court or district court. Under the existing rule, when a case is moved from juvenile court or district court to superior court, time that the case spent in juvenile court or district court is counted toward the superior court time-for-trial deadline, shortening the time in superior court for getting the case ready to be heard. See existing CrR 3.3(c)(2) through (c)(6). Under the task force's proposal, these complicated provisions from the existing rule are deleted. Doing so ensures that cases will have adequate time to be prepared for trial in superior court and reduces the possibility of coordination problems between different court levels.

Subsection (c)(2) specifies the circumstances under which the time-for-trial clock is reset to zero and establishes the corresponding "restart" date. Many of the circumstances spelled out in subsection (c)(2) were moved here from the current rule's section on extensions of time, the task force concluding that these circumstances are better handled by restarting the clock.

Two aspects of subsection (c)(2) should be mentioned. New to CrR 3.3 is subsection (c)(2)(v), which restarts the time-for-trial clock when a new trial is granted as the result of a collateral proceeding. The task force intends the term "collateral proceeding" to include not only the hearing on the collateral matter but also any additional appellate review of the initial decision. Also, in subsection (c)(2)(vii), the task force has added language relating to the disqualification of defense attorneys (the corresponding provision in existing law refers only to the disqualification of judges and prosecuting attorneys). The task force believes that the same standards for restarting the clock should apply whether the disqualification is of a defense attorney, a prosecuting attorney, or a judge. In this regard, the task force has intentionally retained the existing "disqualification" terminology - the task force does not intend this provision to apply more broadly to all "substitutions" of defense counsel.

Proposed Section (d) (Trial Settings and Notice-Objections-Loss of Right to Object). The changes being proposed to section (d) are largely for the purposes of clarification. Subsection (d)(4) is a new provision specifying the effect on the time-for-trial period when a defendant loses the right to object to a trial date.

Proposed Section (e) (Excluded Periods). The task force recommends numerous changes to section (e):

- Subsection (e)(1) clarifies excluded period for competency proceedings. The competency proceeding must be for the pending charge, which is defined earlier in the rule to mean the charge for which the time-for-trial period is being computed. The proposal also clarifies the beginning date for this excluded period.

- Subsection (e)(2) (addressing an excluded period for proceedings on unrelated charges) has been rewritten in several regards. First, the task force proposes specifying that the provision applies to arraignment, pre-trial proceedings, trials, and sentencing on unrelated charges, replacing less specific language from the existing rule. The biggest change here is the addition of language on sentencing matters. The task force believes that the underlying policy considerations are the same with regard to sentencing as with regard to the other listed proceedings: the time-for-trial clock should stop when a defendant and the defendant's counsel are occupied with addressing charges that are unrelated to the case at hand. With regard to "pre-trial proceedings," the task force intends the term to apply to proceedings on substantive motions that need a judge's time to resolve, such as motions under CrR 3.5 or 3.6, but not to apply to simple motions such as the exclusion of witnesses. Finally, the proposal uses (and defines) the term "unrelated charge" rather than "another charge" in order to distinguish the issues from those set forth in (e)(5) ("Disposition of Related Charge").

- Subsection (e)(4) specifies that the period between dismissal and refiling is excluded even with respect to a related charge.

- Subsection (e)(5) is new, creating an excluded period that applies when a defendant is being tried on related charges. This provision addresses appellate opinions that have incorporated a strict version of mandatory joinder analysis into CrR 3.3. The task force proposes that this mandatory joinder analysis not be included in the time-for-trial rules.

  Another aspect of section (e) merits special attention. Subsection (e)(8), creating a new excluded time period for unavoidable or unforeseen circumstances, incorporates language and concepts from the existing rule's provision on five-day extensions. The new provision differs from the current rule in that the new exclusion is not necessarily limited to five days in length. Additionally, the new exclusion does not apply after the expiration of the time-for-trial period, although the proposed cure period can apply in this manner. See the discussion of the proposed cure period below.

  By phrasing subsection (e)(8) in terms of existing language from another part of the current rule, the task force intends that appellate interpretations of that language continue to apply. The term "unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or the parties" should continue to include, for example, unexpected illnesses of defendants, attorneys, and judges, as well as natural disasters and other events requiring evacuation or closing of the courthouse. Routine instances of court congestion would not be covered by this provision, but could instead be addressed with the proposed cure period.

Proposed Subsection (f)(1) (Continuance-Written Agreement). This subsection slightly modifies the current rule to require that the continuance be to a date-certain. The task force also discussed the current (and recently adopted) provision's requirement that the agreement must be signed by the defendant, and not just the defendant's attorney. Members noted in their discussion that under some circumstances, such as when a defendant's medical condition prevents him or her from attending a hearing, the defendant's signature might not be available even though good reason exists to grant a continuance. The task force decided, however, that under these circumstances a continuance could instead be addressed under a separate provision - subsection (f)(2), which authorizes continuances on the motion of the court. In light of the importance of securing the defendant's signature to these agreements, the task force proposes that the current signature requirement be retained. This same rationale applies equally to the

provision earlier in the rule requiring defendants to personally sign waivers.

Proposed Subsection (f)(2) (Continuance-Motion By the Court or a Party). This subsection is adapted from the existing provision authorizing continuances when required in the administration of justice and when the defendant will not be prejudiced. Two changes to the existing language are being proposed. The continuance should be to a date-certain, and the provision should be phrased in terms of whether the defendant is prejudiced, rather than "substantially prejudiced," by the continuance.

Proposed Section (g) (Continuance-Cure Period) (new provision). The task force recommends creating a cure period that is designed to operate as a final "safety net." The cure period would provide one final opportunity (a period of up to 14 days for defendants detained in jail, and up to 28 days for other defendants) to bring the case to trial.

Importantly, this cure period may be invoked even after the regular time-for-trial period has already expired, although the motion must be made no later than five days after this time has expired. For example, if a motion to cure is made four days after the defendant's 90-day time-for-trial period has expired, the defendant would be entitled to dismissal with prejudice only under the following scenario: (1) the court would hold a hearing, at which the judge would have discretion whether to impose the cure period; (2) if the judge determines that a cure period is not appropriate, then the case would be dismissed with prejudice at that point, but if the cure period is invoked, then the court would grant a continuance for up to 14 or 28 days; (3) the cure period could be lengthened for unavoidable or unforeseen circumstances under proposed subsection (e)(8); and (4) if the cure period expires before the defendant is brought to trial, then the defendant would be entitled to dismissal with prejudice.

The proposed cure period is broadly drafted. It is not limited to particular fact patterns or categories of cases. The task force considered alternative proposals for a cure period, including proposals that would have limited the cure period to instances of court congestion. Ultimately, however, the members concluded that a broad cure period best satisfied the needs for a safety net, with judges being granted discretion to apply it as they deem appropriate.

The cure period need not delay the trial for the full duration of the 14- or 28-day period. In an appropriate case, the court may order a shorter cure period or may order the full cure period but set a trial date before the ending date. The court may even direct the parties to remain in attendance or on-call in a case that is ready for trial on short notice.

Finally, courts may use the cure period to ease the very real problem of court congestion. The cure period will give courts greater flexibility to handle their peak periods of case activity without greatly impinging on defendants' rights to a timely trial. The task force crafted the cure period with an eye toward retaining a sufficient "hammer" - the ultimate remedy of dismissal with prejudice - to ensure that criminal cases are promptly readied for trial and heard.

The cure period, however, is not intended for everyday use. It should be used more as a measure of last resort, such as for addressing urgent periods of peak activity on criminal calendars. Over-use of the cure period should serve as a warning signal that the system is not working as intended, and that changes need to be made. Accordingly, the task force recommends that the trial courts be required to file a public report each time that a cure period is invoked as well as each time that a case is dismissed under the time-for-trial rule. See Proposed CrR 3.3(a)(6). This will ensure that the cure periods are closely monitored and will deter courts from using them too frequently.

Proposed Section (h) (Dismissal with Prejudice). In light of the recommendation that CrR 3.3 be made more flexible in several regards, the task force proposes retaining the "hammer" of dismissal with prejudice. This strict remedy, coupled with the proposed creation of a reporting requirement, is needed to ensure that criminal cases will be promptly prepared for trial and heard. The proposal also directs the State to provide notice of dismissal to the victim and provides an opportunity, at the court's discretion, for the victim to address the court regarding the impact of the crime.

Other Proposed Changes for CrR 3.3. In addition to the changes described above for new or amended provisions in CrR 3.3, the task force proposes deleting some of the rule's existing provisions. Because these changes involve deletions from the existing rule, they are more evident in the "legislative bill" format version of our proposals in Part III rather than in the "clean" version presented in **Appendix G**.

The task force proposes moving arraignment provisions from current CrR 3.3 to the court rule that already addresses arraignment issues, CrR 4.1. This approach clarifies the distinction between time-for-trial issues and time-for-arraignment issues.

Additionally, the task force recommends eliminating from CrR 3.3 the concept of "extensions" of time. See existing CrR 3.3(d). These provisions are more simply included elsewhere in the rule. Some have been redrafted as excluded time periods, under proposed CrR 3.3(e), and others as grounds for starting the time-for-trial clock anew, under proposed CrR 3.3(c)(2).

In sum, the task force believes that its proposal for revising CrR 3.3 strikes an appropriate balance between the need for a flexible rule that allows for the sensible administration of justice and the need for a strict rule that compels the timely hearing of criminal cases (to the benefit of all).

Changes Proposed for CrR 4.1. The task force members agree that the time-for-arraignment provisions currently existing in CrR 3.3 should be moved to the rule that already specifically addresses arraignments, CrR 4.1.[4] Other aspects of the proposed revisions for CrR 4.1, however, are not consensus recommendations, but are discussed below with regard to the *Striker/Greenwood* recommendations.

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[1] The substantive differences for these two other rules are few. The draft of CrRLJ 3.3 includes an additional basis for restarting the time-for-trial clock - deferred prosecutions. See **proposed CrRLJ 3.3**(c)(2)(viii). The draft of JuCR 7.8 employs different lengths of time for the buffer period as well as for one aspect of the cure period, and it includes motions for revision of a court commissioner's ruling as a basis for an excluded period of time. See **proposed JuCR 7.8**(b)(5) and (e)(8). Other changes include terminology that is specific to the particular level of court (for example, JuCR 7.8 uses the terms "adjudicatory hearing" rather than "trial").

[2] See **Appendix F** for a chart prepared by the Washington Association of Prosecuting Attorneys summarizing the time-for-trial statutes and court rules used in all 50 states and in the federal court system.

[3] See **Appendix E** for a summary of these statistics.

[4] A similar recommendation is made for the corresponding provisions of the limited jurisdiction court rules, **CrRLJ 3.3** and **CrRLJ 4.1**. The task force decided that a similar recommendation was not necessary for the juvenile court rule, **JuCR 7.6**, given the cross-reference in that rule to the superior court rule, CrR 4.1.

APPENDIX C

D. Text of Proposed Amendment for CrRLJ 3.3 (in legislative bill format).

CrRLJ RULE 3.3
TIME FOR TRIAL

(a) General Provisions.

(1) *Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with ((~~having committed~~)) a crime.

((~~(b)~~)) (2) *Precedence Over Civil Cases.* Criminal trials shall take precedence over civil trials.

(3) *Definitions.* For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in the trial court.

(iii) "Appearance" means the defendant's physical presence in the trial court. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously placed on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrRLJ 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(vi) "Trial court" means the court where the pending charge was filed.

(4) *Construction.* The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under this language of this rule but was delayed by circumstances not addressed in this rule or CrRLJ 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) *Related Charges.* The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) *Reporting of Untimely Trials.* The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time allowed by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) *Defendant Detained in Jail.* A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(2) *Defendant Not Detained in Jail.* A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) *Release of Defendant.* If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) *Return to Custody following Release.* If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) *Allowable Time after Excluded Period.* If any period of time is excluded pursuant to section (f), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

~~(((c) Time for Arraignment and Trial.~~

~~(1) *Cases Filed in Court.* If the defendant is detained in jail, or subject to conditions of release, the defendant shall be arraigned not later than 15 days after the date the complaint is filed in court. If the defendant is not detained in jail or subjected to conditions of release, the defendant shall be arraigned not later than 15 days after that appearance in court which next follows the filing of the complaint or citation and notice. A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. A defendant released from jail whether or not subjected to conditions of release pending trial shall be brought to trial not later than 90 days after the date of arraignment.~~

~~(2) [Reserved.]~~

(3) *Cases Filed Initially in Juvenile Court.* If a complaint or citation and notice is filed with the court after a juvenile court has declined jurisdiction, and if at the time the complaint or citation and notice is filed the defendant is detained in jail or subjected to conditions of release, the defendant shall be arraigned not later than 15 days after the date the complaint or citation and notice is filed. If a complaint or citation and notice is filed with the court after a juvenile court has declined jurisdiction, and if at the time the complaint or citation and notice is filed the defendant is not detained in jail or subjected to conditions of release, the defendant shall be arraigned not later than 15 days after the appearance in court which next follows the filing of the complaint or citation and notice. A defendant not released from jail pending trial in court shall be brought to trial not later than 60 days after the date of arraignment. A defendant released from jail whether or not subjected to conditions of release shall be brought to trial not later than 90 days after the date of arraignment.

(4) *Untimely Arraignment.* If a defendant is not arraigned within the time limits of this rule and an objection to the date of arraignment has been made as required by section (e) of this rule, the time for trial established in this section shall commence on the last day the defendant could properly have been arraigned.

(5) *Rearraignment.* If a defendant is required to be rearraigned on a charge that arises out of the same occurrence and has the same elements of proof as those upon which the defendant was previously arraigned, the time for trial established in this section shall commence on the date of the previous arraignment.

(6) *Arraignment Defined.* As used in this rule, "arraignment" shall be defined as in rule 4.1.

(d) Extensions of Time for Trial. The following extensions of time limits apply notwithstanding the provisions of section (c):

(1) *Revocation of Release.* A defendant who has been released from jail pending trial, pursuant to an order imposing conditions of release, but whose release is then revoked by order of the court, shall be brought to trial within such a time period that the defendant spends no more than a total of 60 days in jail following the date of arraignment, and in any event within such a time period that the defendant is tried not later than a total of 90 days after the date of arraignment unless the time period is otherwise extended by this rule.

(2) *Failure To Appear.* When a defendant who has already been arraigned fails to appear for any trial or pretrial proceeding at which the defendant's presence is required, the defendant shall be brought to trial not later than 60 days after the date upon which the defendant is present in the county where the criminal charge is pending and the defendant's presence has been made known to the court on the record, if the defendant is thereafter detained in jail or not later than 90 days after such date if the defendant is not detained in jail whether or not the defendant is thereafter subjected to conditions of release.

~~(3) *Mistrial and New Trial.* If before verdict the court orders a mistrial, the defendant shall be brought to trial not later than 60 days after the oral or written order of the court, whichever first occurs, if the defendant is thereafter detained in jail or not later than 90 days after the order if the defendant is not detained in jail and whether or not the defendant is subjected to conditions of release. If after verdict the court orders a new trial, the defendant shall be brought to trial not later than 60 days after entry of the oral or written order of the court if the defendant is thereafter detained in jail, or not later than 90 days after entry of such order if the defendant is not detained in jail whether or not the defendant is thereafter subjected to conditions of release.~~

~~(4) *Trial After Appellate Review or Stay.* If a cause is remanded for trial after an appellate court accepts review or stays proceedings, the defendant shall be brought to trial not later than 60 days after that appearance by or on behalf of the defendant in court, with notice to both parties of any such appearance, which next follows receipt by the clerk of the court of the mandate or other written order, if after such appearance the defendant is detained in jail, or not later than 90 days after such appearance if the defendant is thereafter released whether or not subject to conditions of release.~~

~~(5) *Change of Venue.* If a change of venue has been granted, the case shall be transferred to the receiving court as soon as practicable but within 7 days and the defendant shall be brought to trial as prescribed by this rule or not later than 30 days following the date upon which the court to which the case is being transferred for trial receives the filing of the case, whichever is later. If, however, after a change of venue is attempted, the criminal calendar of the receiving county will prevent compliance with the time limits within this section, the trial shall commence on the earliest available date permitted.~~

~~(6) *Disqualification.* If the prosecuting authority or judge becomes disqualified from participating in the case, the defendant shall be brought to trial as prescribed by this rule or not later than 30 days following the disqualification, whichever is later.~~

~~(7) *Withdrawal of Guilty Plea.* If a defendant has been permitted to withdraw a plea of guilty, the defendant shall be brought to trial not later than 60 days after the date of the written order allowing withdrawal of the guilty plea if the defendant is thereafter detained in jail or not later than 90 days if the defendant is thereafter released from jail, whether or not subjected to conditions of release.~~

~~(8) *Five-Day Extensions.* When a trial is not begun on the date set because of unavoidable or unforeseen circumstances beyond the control of the court or the parties, the court, even if the time for trial has expired, may extend the time within which trial must be held for no more than 5 days unless the defendant will be substantially prejudiced in his or her defense. The court must state on the record or in writing the reasons for the extension. If the nature of the unforeseen or unavoidable circumstance continues, the court may extend the time for trial in increments of not to exceed 5 days unless the defendant will be substantially prejudiced in his or her defense. The court must state on the record or in writing the reasons for the extension.))~~

(c) Commencement date.

(1) *Initial Commencement Date.* The initial commencement date shall be the date of arraignment as determined under CrRLJ 4.1.

(2) *Resetting of commencement date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) *Waiver.* The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) *Failure to Appear.* The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) *New Trial.* The entry of an order granting a mistrial or a new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) *Appellate Review or Stay.* The acceptance of review or grant of a stay by an appellate court, or the issuance of a writ of certiorari, mandamus, or prohibition. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the trial court of the mandate or written order terminating review or stay.

(v) *Collateral Proceeding.* The entry of an order granting a new trial pursuant to a personal restraint proceeding, a habeas corpus proceedings, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the trial court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) *Change of venue.* The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) *Disqualification.* The disqualification of the judge, defense attorney, or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(viii) *Deferred Prosecution.* The filing of a motion for deferred prosecution. The new commencement date shall be the date that an order is entered denying the motion or revoking deferred prosecution.

((~~(c) Objection to Arraignment Date—Waiver of Objection~~))

((~~A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment pursuant to section (c) of this rule, and the time for trial set out in section (c) shall be deemed to have commenced on that date. Failure of a party to object as required shall be a waiver of the objection, and the date of arraignment shall be conclusively established as the date upon which the defendant was actually arraigned.~~))

(((~~(f) Setting of Trial Date--Notice to Parties--Objection to Trial Date--Waiver of Objection~~)) **(d) Trial Settings and Notice—Objections—Loss of Right to Object.**

(1) *Initial Setting of Trial Date.* The court shall, within 15 days of the defendant's actual arraignment in the trial court((~~,~~)) or at the ((~~pretrial~~)) omnibus hearing, set a date for trial which is within the time limits prescribed by this rule((~~,~~)) and notify ((~~the lawyer~~)) counsel for each party of the date set. If a ((~~party~~)) defendant is not represented by ((~~a lawyer~~)) counsel, the notice ((~~of the trial date~~)) shall be given to the ((~~party~~)) defendant((~~,~~)) and may be mailed to the ((~~party's~~)) defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment ((~~as established at the time of arraignment,~~)) and the date set for trial. ((~~A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. Failure of a party, for any reason, to make such a motion shall be a waiver of the objection that a trial commenced on such a date, or on an extension of such date properly granted pursuant to this rule, is not within the time limits prescribed by this rule.~~))

(2) *Resetting of Trial Date.* When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a ((~~period of extension~~)) new commencement date pursuant to ((~~section (d)~~)) subsection (c)(2) or a period of exclusion pursuant to section (((~~(g)~~))) (e), the court shall set a new date for trial which is within the time limits prescribed and notify each ((~~lawyer or~~)) party of the date set ((~~in subsection (f)(1)~~)).

(3) *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. ((~~Failure of a party, for any reason, to make such a motion shall be a waiver of the objection~~)) A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date((~~, or on any extension of such date granted pursuant to subsection (d)(8),~~)) is not within the time limits prescribed by this rule.

(4) *Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial. A later trial date shall be timely only if the

commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

((~~(g)~~)) (e) **Excluded Periods.** The following periods shall be excluded in computing ((~~the time for arraignment and~~)) the time for trial:

(1) *Competency Proceedings.* All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters ((~~an~~)) a written order finding the defendant to be competent((~~;~~)).

(2) *Proceedings on Unrelated Charges.* Arraignment, ((~~Preliminary~~)) pre-trial proceedings, ((~~and~~)) trial, and sentencing on ((~~another~~)) an unrelated charge ((~~except as otherwise provided by subsection (e)(5);~~)).

(3) *Continuances.* Delay granted by the court pursuant to section ((~~(h);~~)) (f).

(4) *Period between Dismissal and Filing.* The time between the dismissal of a charge and the ((~~defendant's arraignment or rearraignment in court following the~~)) refiling of the same or related charge((~~;~~)).

(5) *Disposition of Related Charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in the trial court on a related charge.

((~~(5)~~)) (6) *Defendant Subject to Foreign or Federal Custody or Conditions.* The time during which a defendant is detained in jail or prison outside the county in which the defendant is charged or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington((~~;~~)).

((~~(6)~~)) (7) *Juvenile Proceedings.* All proceedings in juvenile court.

(8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

((~~(h)~~)) (f) **Continuances**. Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial to a specified date. ((~~The agreement shall be effective when approved by the court on the record or in writing.~~))

(2) *Motion by the Court or a Party.* On motion of the ((~~State, the~~)) court or a party, the court may continue the ((~~case when~~)) trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be ((~~substantially~~)) prejudiced in the presentation of his or her defense. The motion must be filed ((~~on or~~)) before the ((~~date set~~

~~for trial or the last day of any continuance or extension granted pursuant to this rule~~)) time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

((~~(i)~~)) **(h) Dismissal With Prejudice**. A ((~~criminal~~)) charge not brought to trial within the time ((~~period provided by~~)) limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

((~~(j) **Waiver.** A defendant may waive his or her time for trial rights. A waiver shall be in writing and shall be signed by the defendant. The waiver shall be to a date certain beyond the current expiration date as calculated pursuant to this rule or for a period of days beyond the current expiration date.~~))

CERTIFICATE OF MAILING

I certify that on 06/7/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Arthur Curtis, P.O. Box 5000, Vancouver, WA 98666; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Mr. Jerry Sims, DOC #311008, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584