Speedy Trial

The constitutional approach to protecting your client's right to a speedy trial.

BY TOM CONOM & DEREK CONOM

By now, it should have sunk into the mental databases of the defense bar that the *Striker* rule on speedy trial appears to be dead. In 2003, the state prosecutors through a special task force were able to convince the Washington Supreme Court to jettison the provision engrafted onto the speedy trial rules to address the time between the filing of a charge and the bringing of a defendant before the court. This lacuna in the rules had been remedied by the *Striker* rule adopted by the supreme court in *State v. Striker* in 1976 and reaffirmed in *State v. Greenwood* in 1993.[1] Effective September 1, 2003, the supreme court amended a different rule, CrR 4.1, outside the speedy trial rule (CrR 3.3), which purports to totally eliminate the significance of any delay from the filing of the charge to the first appearance in court of the defendant — even if the defendant did not know of the charge, even if the defendant was not in any way at fault for the delay, even if the prosecutor was negligent in not acting diligently on known information to bring the defendant to court, and even if many years elapsed between the charge and the appearance.

We do not believe the *Striker* rule can be so easily dispensed with because there is a Sixth Amendment requirement that the government act with "reasonable diligence" on known information to bring a defendant before the court.[2] Because of this requirement, the *Striker* rule (or its functional equivalent) should be recognized as constitutionally mandated and any attempt by the Washington Supreme Court to amend the speedy trial rules to delete such a "reasonable diligence" requirement runs afoul of the Sixth Amendment. But even if the *Striker* rule is truly dead, the law of unintended consequences kicks in to provide a marvelous opportunity for defense counsel to raise the same issue under the Sixth Amendment and Art. I, sec. 22. This ironic result occurs because the rule relied on by the state to do nothing (CrR 4.1(a)(2)) and yet avoid dismissal under the new speedy trial rules insures that the state's lack of reasonable diligence ("official negligence") is established on the record for constitutional speedy trial purposes.

This strange state of affairs is highlighted by the first cases to address the new speedy trial rules, *State v. Castillo*, 129 Wn.App. 828, 120 P.3d 137 (2005); *State v. Olmos*, 129 Wn.App. 750, 120 P.3d 139 (2005). In these cases, and no doubt others unreported, defense counsel sputtered something along the lines of "But, you can't do this." ("Castillo complains that since September 1, 2003, the rule-based right has not contained 'any vestige of Good Faith and Due Diligence.'" *Castillo*, 120 P.3d at 139). But defense lawyers who simply complain about the obvious fact that the old *Striker* rule has been deleted without any updated analysis of their own are doomed to fail to vindicate their clients' speedy trial rights. As the court of appeals replied to Castillo's complaint: "While that is true, it is consistent with the right's basic purpose...." 120 P.3d at 139.

Now, as will be seen, the court of appeals' terse response is mistaken because the deletion of the state's duty of reasonable diligence is directly contrary to the purpose of the rules;[3] nevertheless the court is correct when it goes on to say:

> [I]t [deletion of *Striker*] does not affect a court's ability to consider the lack of good faith or due diligence, together with any other reasons for delay, as factors bearing on the federal and state constitutional rights to speedy trial." *id.*[4]

Unfortunately for Castillo, the constitutional implications of *Striker* were not raised.

The purpose of this article is to demonstrate that:

- the speedy trial rules still have some horsepower after being gelded;

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- the Washington Supreme Court does not have the authority to eliminate the due diligence requirement of the state to bring an accused to trial because it is a constitutional imperative and any speedy trial rule must be construed consistently with the Sixth Amendment; and
- the Sixth Amendment and Art. I, sec. 22 independently provide protection where the *Striker* rule does not apply for any reason.

We recently obtained dismissal with prejudice of a felony sex charge in Snohomish County based on constitutional analysis of the delay between the charge and the appearance in court of the defendant.[5] We set forth the analysis below.

Speedy Trial Rules Still Have Life

It is elementary to first look at the speedy trial rules for many reasons including, most importantly, that no prejudice need be shown to obtain dismissal once the relevant time period (subject to any "cures") has been exceeded. CrR 3.3(h).[6] It is beyond the scope of this article to address the myriad situations in which , even under the new rules, "it pays to give prosecutors every chance possible to screw up their cases." [7]

A recent example of prosecutorial ineptitude from King County should serve as a reminder to the defense bar that one should always be alert to speedy trial violations in whatever form they may appear. In *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006), the King County Prosecutor astonishingly was able to persuade the King County Superior Court to delay Mr. Nguyen's trial on the novel theory that the defendant's case *might* be linked to other cases and so "the State would be moving to keep this defendant and *track* with the others so that we know exactly what we're dealing with." (emph.ad.) Defense counsel properly objected to delay beyond the speedy trial limits solely on the prosecutor's assertion of a "tracking" theory. Division I noted the obvious: "the rule itself does not expressly authorize the delay that occurred here." 129 P.3d at 823. The court of appeals held that, since the delay was "based on mere speculation that there might eventually be joinder of other offenses or consolidation with other defendants," Mr. Nguyen was entitled to dismissal with prejudice under CrR 3.3(h). 129 P.23d at 824.[8]

Brief History of Striker Rule

While there are many variations of the violation of speedy trial theme, it would appear that the most common is the situation first addressed in *State v. Striker*: an inordinate delay between the prosecutor's filing of the charge with the court and the defendant's first court appearance to respond to the charge. Although there are no reliable data on this point, the 2002 task force was presented a survey from the Snohomish County Prosecutor's Office, the results of which were deemed "instructive" by the task force.[9]

> All the felony cases that were closed during the calendar year 2001 were reviewed to see how many of them were dismissed, declined, or reduced due to time-for-trial violations. Of the 17 cases that fell into this category, 13 cases (over 75%) involved violations of the *Striker/ Greenwood* standards.

Even discounting the self-serving nature of this "survey" and the absence of any objective validity, it does provide a rough estimate of the importance of the problem. (Unfortunately, the task force chose a solution which exacerbated the problem rather than solving it.) In any event, the case law reports on the subject demonstrate the magnitude of the question and the frequency with which it arises. *But see*: Snohomish County Prosecutor's self-serving proclamation 25 years earlier to the Supreme Court in *Striker* itself:

> We are assured by the prosecutor in this case that a delay such as that which occurred in this instance is so rare in his office that the occurrence can be termed almost unique…." 87 Wn.2d at 877.

The Washington Supreme Court first addressed the issue in 1976 in *State v. Striker*, three years after it had first adopted CrR 3.3. The supreme court belatedly recognized that where, contrary to the expectations expressed in its new speedy trial rules, there was a delay between the filing of an information and the initial appearance of the defendant before the court to answer the charge, no rule mechanism existed to enforce the right to speedy trial. The supreme court in *Striker* was confronted with the following question:

> Where, as here, the rules have not been followed and, through no fault or connivance of the defendant, a long period of delay has occurred between the filing of the information and the time the defendant is brought before the court, the question becomes: What is the applicable date from which to calculate the period in which he must be brought to trial? 87 Wn.2d at 872.

It is of more than historical interest to consider the *sources* employed by

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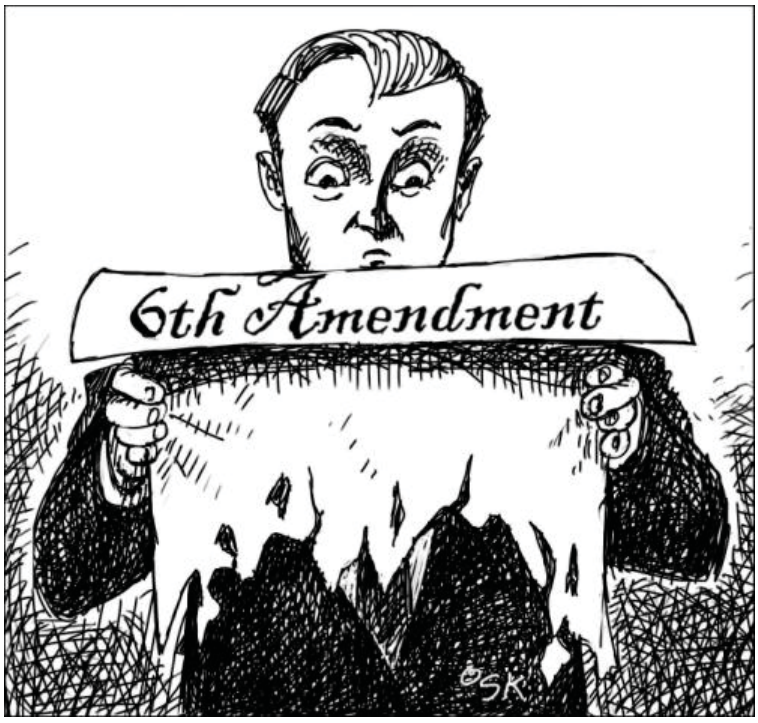
the supreme court in answering this question: they were primarily *constitutional*. The court first looked to the Sixth Amendment speedy trial right noting that under US Supreme Court precedent the right to speedy trial "attaches when an indictment or information is filed, or when the defendant is arrested and held to answer, whichever occurs earlier." *Striker*, 87 Wn.2d at 872.[10] Second, the court turned to the ABA Standards Relating to Speedy Trial, which in turn were based on Sixth Amendment principles providing "the time for trial should commence to run from the date the charge is filed unless the defendant has continuously been held to answer…." *Striker*, 87 Wn.2d at 872-73.[11] Third, the *Striker* court canvassed the law of other jurisdictions and noted "the time between the filing of the complaint and subsequent arrest is generally included in calculating the time for speedy trial purposes, either upon constitutional grounds or by statutory provision." 87 Wn.2d at 873, citing 85 ALR2d 980 (1962).

Accordingly, in answering the question before it, the *Striker* court began by acknowledging the constitutional underpinnings of its holding:

> [A] due regard for the protection of the petitioners' constitutional rights, as well as considerations of policy in the administration of justice, compel us to the conclusion that where, contrary to the expectation expressed in the rules, a delay has occurred between the filing of the information and the bringing of the accused before the court, CrR 3.3 must be deemed to operate from the time the information is filed.

Striker, 87 Wn.2d at 875. Add the twin qualifications that the defendant did not purposely cause the delay and that the state did not exercise good faith and due diligence in attempting to bring the defendant before the court, and — voila! — you have the *Striker* rule. See *State v. Greenwood* [*State v. Weyland*], 120 Wn.2d at 604-05. The *Striker* rule was unanimously reaffirmed by the Washington Supreme Court in *Greenwood* as to the 1980 (and subsequent) amendments to CrR 3.3. The *Striker* rule was held valid and applicable to a defendant's speedy trial claim as recently as October of 2005 in *State v. Hessler*, 155 Wn.2d 604, 121 P.3d 92 (2005).[12]



And so we arrive at the Washington Supreme Court's ill-considered and unceremonious overthrowing of its three-decade precedent of *Striker* and its progeny by its seemingly stealthy adoption of CrR 4.1(a)(2).

Striking Striker — CrR 4.1 and 2.2

The task force proposed drastic changes to the speedy trial rules as they existed prior to 2003. It also recommended rearranging the location of key provisions of the rules. Practically, any reader consulting the amended speedy trial rule in CrR 3.3 alone is likely to be misled. This is because the task force, in an effort to "simplify and clarify" the rules, has unnecessarily lifted large chunks of the existing 3.3 and placed them into CrR 4.1 and 2.2 respectively. Whereas in the past readers could glean everything about speedy trial in one place (CrR 3.3), now they must check at least three different rules and then consider their interplay.

More important than the location of the new rules is their content. Sadly, the substantive changes to the rules are also confusing, unnecessary, and unconstitutional.

CrR 4.1

It is hard to imagine the Washington Supreme Court adopting a provision more contrary to the historic goal of the speedy trial rules: to provide for fair and timely criminal trials. Yet, this is exactly what the court has done in adopting the ill-advised amendments to CrR 4.1.

Huge efforts were undertaken by the task force to strip-mine the *Striker* rule from the speedy trial rules. In fact, the task force's report appends surveys from the Washington Association of Prosecuting Attorneys (WAPA) and the Superior Court Judges Association (SCJA) to its report. The surveys list sixteen "priorities" of each organization in reviewing and revising the current speedy trial rules. The *number one* priority for both associations was "Removing *Striker/Greenwood* from rule."[13]

Buried within the new CrR 4.1(a)(2) lies the landmine that attempts to destroy *Striker* completely. CrR 4.1(a)(2)

reads in part (emph. ad.):

> *Any delay* in bringing the defendant before the court shall not affect the allowable time for arraignment, *regardless of the reason for that delay.*

The language is clear and unequivocal: any delay, even delay caused by the state's bad faith or negligence, in bringing the defendant before the court is immaterial for speedy trial purposes.

The task force explains authorizing "any delay ... regardless of the reason for that delay" under CrR 4.1(a)(2) by stating that "with this sentence, the task force is stating its intent that the *Striker/Greenwood* standards be replaced with the proposed due-diligence standards expressed in CrR 2.2."[14] As discussed next, the "due diligence standards" in the new CrR 2.2 are illusory and a mockery of the substance and purpose of the *Striker* rule.

A minority proposal for CrR 4.1 was made by four of the nineteen task force members.[15] The minority proposal would also have gutted the *Striker* rule. Neither the majority nor the minority recognized the fundamental constitutional problems with eliminating *Striker* altogether. Thus, both the majority proposal, which ultimately became the current CrR 4.1(a)(2), as well as the minority proposal, essentially allow the state to do absolutely nothing once the defendant for any reason misses the first court appearance.

CrR 2.2

The task force proposed two major changes to CrR 2.2 that were adopted along with the changes to CrR 4.1 discussed above.

In order to give the impression that it was really "simplifying" the due diligence requirement of *Striker*, as opposed to functionally annihilating it altogether, the task force proposed amending CrR 2.2 to add subsection (a)(3), entitled "Ascertaining Defendant's Current Address." Under this subsection, the state complies with the due diligence requirement when it runs the defendant's name through a total of three databases.[16] It does not matter if the state has other case-specific information that would allow it to exercise reasonable diligence to locate the defendant at any time between the filing of a pro-forma due diligence certification and the defendant's first appearance. Under the new CrR 2.2, due diligence requires no more than a simple database search at the very beginning of a case. And if no address of the defendant is located or if defendant fails to respond and delay ensues, CrR 4.1 says that there cannot be a speedy trial violation, no matter how long the delay, no matter how responsible the state was for the delay (and how blameless the defendant) and no matter how much other information the state had in its possession regarding the whereabouts of the defendant. Indeed, the state no longer has any obligation at all to use the information at its disposal to bring in the defendant once it complies with CrR 2.2(a)(3).

Ironically, the task force acknowledges that due diligence is in fact a case-specific inquiry where "due-diligence requirements that make sense in one case might not make sense in another."[17] This sentiment echoes that of the Washington Supreme Court in *Greenwood*, where it stated:

> The good faith and due diligence standard is consistent with the purpose behind *Striker*, CrR 3.3 and the criminal rules as a whole. ... Whether the prosecution acted in good faith and with due diligence necessarily turns on the facts of each individual case.[18]

Despite the above statements, the task force inexplicably created instead a rigid formulaic framework in CrR 2.2(a)(3) to satisfy the state's duty of due diligence. The task force defends the new CrR 2.2(a)(3) by stating that the new approach "would take the guesswork out of the process, while still ensuring that due-diligence is performed...."[19] The approach of the task force was to craft a standard so easy to satisfy that one could hardly term it "diligence" at all and so inadequate that it will not address the delays *Striker* was created to remedy. Due diligence in name only is sophistry.

The new rule encourages prosecutors and police to remain inactive after conducting their perfunctory computer search.

By setting forth the most superficial definition of due diligence in the new CrR 2.2, the task force eviscerates the actual purpose of the speedy trial rules — to ensure the presence of the defendant in a timely fashion — by absolving the state of any failure to act through the recitation of a simple mantra: "We typed defendant's name into a computer!" This artificial construct is not designed to accomplish the end of securing the defendant's presence and does nothing to solve problems of delay. The new rule encourages prosecutors and police to remain inactive after conducting their perfunctory computer search, even when other avenues for finding the defendant are known to the state.[20]

In sum, the combination of CrR 2.2(a)(3)'s termination of the state's duty of due diligence at the commencement of a case, along with CrR 4.1(a)(2)'s elimination of "any delay" from speedy trial consideration, results in the total elimination of *Striker* and of the duty of good faith and due diligence from the rules. Neither CrR 4.1 nor CrR 2.2 serves the purposes of the

speedy trial provisions contained in the Sixth Amendment and Art. I, sec. 22 but instead serves only to ensure denial of speedy trials.

The Unconstitutionality of CrR 4.1(a)(2)

It is well-settled that the speedy trial rules established by the Washington Supreme Court emanate from state and federal speedy trial guarantees.[21] Speedy trial rules adopted by the Washington Supreme Court cannot conflict with the speedy trial provisions of the Sixth Amendment and Art. I, sec. 22. *Barker v. Wingo*, 407 U.S. 514, 523 (1972).

In the case of CrR 4.1(a)(2), the Sixth Amendment requires that the state act with "reasonable diligence"[22] in bringing a defendant before the court in a timely fashion. Thus, while the task force made quite explicit its intent to rid the speedy trial rules of the duty of the state to bring a charged defendant before the court promptly,[23] the failure to comprehend the constitutional basis of the duty is the most glaring error of both the majority and minority views expounded. If the task force (and ultimately, the Washington Supreme Court) had properly recognized the constitutional grounding of the requirement that the state act with reasonable diligence as a matter of constitutional necessity, then it would have been impossible to recommend or adopt CrR 4.1(a)(2) — a rule that reads unreasonable delay, the essential prohibition of the constitutional provision — right out of the speedy trial rules. Additionally, by sanctioning any and all delay between charging and appearance, CrR 4.1 reads the state's constitutional duty of reasonable diligence right out of the rules. For these reasons, CrR 4.1(a)(2) is unconstitutional.

The constitutional requirement that the state act with reasonable diligence has been firmly in place in the law for at least thirty years. In the seminal speedy trial case of *Barker v. Wingo*, the US Supreme Court held: "A defendant has no duty to bring himself to trial; the State has that duty...."[24] Explaining why a duty of reasonable diligence exists, the Court stated: "the rule we announce today, *which comports with constitutional principles*, places the primary burden on the courts and the prosecutors to *assure that cases are brought to trial*."[25] The *Barker* Court makes it clear that reasonable diligence is not simply a goal to be sought for judicial economy's sake; it is constitutionally mandated to give effect to the constitutional guarantee. Describing how much time the government should have in bringing the defendant before the court, the Court declared that "the States... are free to prescribe a *reasonable period* [defining the speedy trial right] *consistent with constitutional standards*...."[26] Contrary to the dictates of *Barker*, however, Washington's new CrR 4.1(a)(2) allows delay of unreasonable and potentially unlimited length.

The US Supreme Court expanded and elaborated on the requirement of reasonable diligence in the watershed speedy trial case, *Doggett v. US*, 505 U.S. 647 (1992).[27] There, the Court held that the government had failed to exercise reasonable diligence in pursuing Doggett, where his indictment and his eventual arrest were separated by eight and a half years. The Court recognized that "between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground."[28] Reasonable diligence is inextricably connected with the reason for the delay. Allowing lengthy delays, the *Doggett* Court stated, "would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority."[29] *Barker* and *Doggett* demonstrate not only that reasonable diligence is constitutionally mandated, but also explain that *delay* is the primary evil the speedy trial provisions remedy. With this goal in mind, the new CrR 4.1 stands in stark opposition, allowing and even encouraging delay. CrR 4.1(a)(2) is the product of pure expediency, politically motivated, contrary to the letter and purpose of the speedy trial constitutional provisions and utterly heedless of the rights of criminal defendants and the interests of society in efficient justice. Indicative of the patent unconstitutionality of CrR 4.1 is the fact that the rule adopted by the Washington Supreme Court would result in no speedy trial violation in circumstances like *Doggett*, an eight and a half year delay completely rebuked by the US Supreme Court.

Where a court rule exceeds the Washington Supreme Court's rulemaking authority, it must be held invalid.[30] If a rule exceeds or violates constitutional authority, then it is not a proper exercise of judicial rulemaking power. Here, the new CrR 4.1 is just such a rule, as it purports to eliminate the state's constitutionally mandated burden of exercising reasonable diligence.

For those cases arising under the new rules which would otherwise violate the *Striker* rule but where the delay is not great enough to establish a presumption of prejudice or where defendant cannot show actual prejudice, the only avenue open to defense counsel is to attack the constitutionality of CrR 4.1(a)(2) under the preceding analysis.

Constitutional Criteria

In *Barker v. Wingo*, *supra*, the Court set down four criteria for evaluation of denial of speedy trial claims: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530. None of these factors individually is dispositive ("We regard none of the four factors ... as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." 407 U.S. at 533).

Instead, the court is to conduct a "balancing test." 407 U.S. at 530.

This four-part equation was modified and amplified in some critical respects in *Doggett v. US*, the first Supreme Court case to dismiss for violation of speedy trial under the Sixth Amendment applying the *Barker* factors. As to length of delay, the *Doggett* Court explicitly states:

1. that at least by one-year delay, there is a presumption of prejudice which triggers the constitutional protection, 505 U.S. at 652, n.1,[31] and

2. that in some cases, the presumption of prejudice alone will suffice to satisfy the prejudice prong as well as the length of delay prong, 505 U.S. at 658.[32]

In other words, under *Doggett* there is a front-end consideration of prejudice as well as at the back-end and the stronger the presumption on the front-end the less likely there will be a required showing of actual prejudice on the back-end.

Moreover, as to reason for delay, the *Doggett* Court expressly imposes a duty of reasonable diligence on the government to employ its resources to bring a charged defendant before the court. And, within the duty to exercise reasonable diligence, the government must resort to information in its possession such as contacting the defendant's attorney, when known. *Doggett*, 505 U.S. at 652-53; *US v. Beamon*, 992 F.2d 1009, 1013 (9th Cir. 1993) ("The police should have found Beamon since they knew where he lived and knew his attorney….")

In light of the four factors of *Barker* and *Doggett*, the following framework for constitutional analysis of speedy trial emerges:

1. Length of Delay. The most significant difference between the time limits of the speedy trial rules (colloquially referred to often as the 60-90 day rule) and the Sixth Amendment is that under the rules there is a fixed time period of 90 days from arraignment for out-of-custody defendants (and 60 days for in-custody) but there is no fixed period under the Constitution. The courts, therefore, have fashioned a "presumption of prejudice" time period to invoke Sixth Amendment protection and trigger constitutional analysis. The US Supreme Court has not definitively declared at what point the presumption of prejudice begins but in *Doggett* strongly indicated the point would be reached "at least as it approaches one year." 505 U.S. at 652, n.1. The lower courts, including Washington, have now reached a consensus that the presumption of prejudice period begins at eight months. *State v. Corrado*, 94 Wn.App. 228, 233, 972 P.2d 515 (1999), citing *US v. Beamon*, 992 F.2d 1009, 1012-13 (9th Cir. 1993) which "not[ed] that the second circuit in *US v. Vassell*, 970 F.2d 1162, 1164 (2d Cir.1992), found a general consensus that eight months delay is presumptively prejudicial."

The Washington Court of Appeals held in *Corrado* that an eleven-month delay met the threshold and thus "the delay was presumptively prejudicial." 94 Wn.App. at 234. On the ultimate question of whether the length of delay tips the balance in favor of a finding of speedy trial violation, the cases generally require more than just the minimum presumptive period. For example, in *Doggett*, the total delay was eight and a half years between indictment and arrest, of which six years was attributable to government negligence. In *US v. Shell*, 974 F.2d 1035 (9th Cir.1992), the Ninth Circuit originally held that a six-year delay between indictment and arrest, of which five years was attributable to government negligence in misplacing the file, was not sufficient to establish a speedy trial violation without a showing of actual prejudice. Following *Doggett*, however, the Ninth Circuit reconsidered and upheld the district court's dismissal.

The most important Washington case on this factor is also the most unusual. *State v. Ellis*, 76 Wn. 391, 884 P.2d 1360 (1994). *Ellis* was not a "true" speedy trial case; rather it was a speedy sentencing case. Consequently, the court of appeals first had to address the issue of whether the right to speedy sentencing is subsumed within the right to speedy trial. The court held it is and proceeded to apply the *Barker* factors to the sentencing delay. The length of delay of sentencing was 23 months. The court of appeals held this delay "was presumptively prejudicial and the State failed to rebut the presumption." 76 Wn.App. at 395. The court refused the state's request to impose a remedy other than dismissal and dismissed the conviction itself on the basis of the 23-month delay caused by the negligence of the state (and the court). *Ellis* therefore stands for the proposition that a delay of 23 months resulting from the state's lack of reasonable diligence in bringing the defendant before the court is not only presumptively prejudicial but conclusively prejudicial as well in the absence of a showing by the state.

2. Reason for Delay. For constitutional purposes, the cause of the delay must result from the action or inaction of the prosecuting agency including its investigative arms.

Where a court rule exceeds the Washington Supreme Court's rule-making authority, it must be held invalid.

The government must not act in bad faith or negligently but must act with reasonable diligence to arrest or otherwise bring the defendant to court to answer to the charges. Where the government does nothing, or fails to act with reasonable diligence upon information in its possession, it cannot satisfy this *Barker/Doggett* factor. In *Shell*, the "government lost Shell's file in 1984 and did not resume its search for him until late 1989," when it routinely located him. 974 F.2d at 1036. In *Beamon*, the "government did not act with appropriate diligence in pursuing either Beamon or McMillin" where the "police should have found Beamon since they knew where he lived and knew his attorney ... [and] [t]here is no evidence that McMillin tried to hide from the police." 992 F2d at 1013. In *Doggett*, the government simply assumed that Doggett was unavailable and so for "six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and, had they done so, *they could have found him within minutes*. 505 U.S. at 652-653 (emph. ad.)

In *Doggett*, the government simply assumed that Doggett was unavailable.

3. Demand for Speedy Trial. This is the easiest factor for a defendant to satisfy and should be the least controversial part of the balancing test. All that is required is that the defendant timely submit his or her demand for speedy trial at or near the first court appearance. Where a defendant is unaware of the pending charges, which is the usual case, *Doggett* holds that the defendant "is not to be taxed for invoking his speedy trial right only after his arrest." 505 U.S. at 654.

4. Prejudice. In cases of "extraordinary" delay such as *Doggett*[33] (six years charged to government), *Shell*[34] (five years charged to government), and *Barker*[35] (four years charged to government), the presumed prejudice flowing from the length of delay should suffice to establish (or to excuse absence of affirmative proof of) actual prejudice. Ordinarily, then, in cases of such great delay, the weight of the first factor in favor of the defendant also serves to weigh in favor of the fourth factor.

On the other hand, where the length of delay is much closer to the threshold presumption of eight months, the courts are less likely to excuse the lack of showing of actual prejudice. E.g., *State v. Corrado* ("Corrado's defense was not impaired" by 11-month delay, 94 Wn.App. at 235).

Under the Sixth Amendment, certainly when the length of delay at least doubles the presumptive prejudice period to 16 months, actual prejudice should not be required and when the delay extends to three times the presumptive period (24 months), the presumption of prejudice should be conclusive. See *State v. Ellis* (23 months delay establishes conclusive presumption of prejudice absent contrary showing, under Sixth Amendment and Art. I, sec. 22).

But for delays between eight months and four years at least one federal appellate court has demanded proof of actual prejudice. *US v. Beamon*, 992 F.2d at 1015. Apparently using a one-year presumptive period, the Ninth Circuit in *Beamon* held that delays of 17 months (Beamon) and 20 months (McMillin) were less than double the more generous to the government one-year standard and even though the Beamon defendants satisfied the first three *Barker/Doggett* factors they were not excused from showing actual prejudice under the fourth factor which in the end tipped the balance against them ("the delay of 17 to 20 months is not sufficient to excuse the defendants altogether from any showing of actual prejudice," 992 F.2d at 1015). Had the Ninth Circuit in *Beamon* followed and applied the consensus eight-month presumption of prejudice period, the analysis would have changed to one where both defendants could show delay *more* than twice the presumptive period. Given that the *Beamon* defendants clearly prevailed on the first three factors, a less deferential balancing process would have resulted in a holding that the speedy trial rights of the *Beamon* defendants were denied.

The Shumway Case

In early 2003, 18-year old Scott Shumway was investigated for alleged sexual assault involving a minor by the Snohomish County Sheriff. The Shumway family retained our office during the investigation. We contacted the detective on the case and advised of our representation, requested that he not contact our client, requested that he not arrest our client, and, if charges were filed, advised we would assure the presence of the client in court. Per our standard procedure, we specifically requested that the detective include information on our representation in any materials forwarded to the Snohomish County Prosecutor for review.

During the next two and a half years, Mr. Shumway continued to reside at the family residence, registered to vote, registered with the Selective Service, worked, went to school, etc. and maintained periodic contact with our office. Unbeknown to our client and to us, after several months of investigation and review, the Snohomish County Prosecutor filed an information on August 22, 2003. It was allegedly mailed to the Shumway residence but

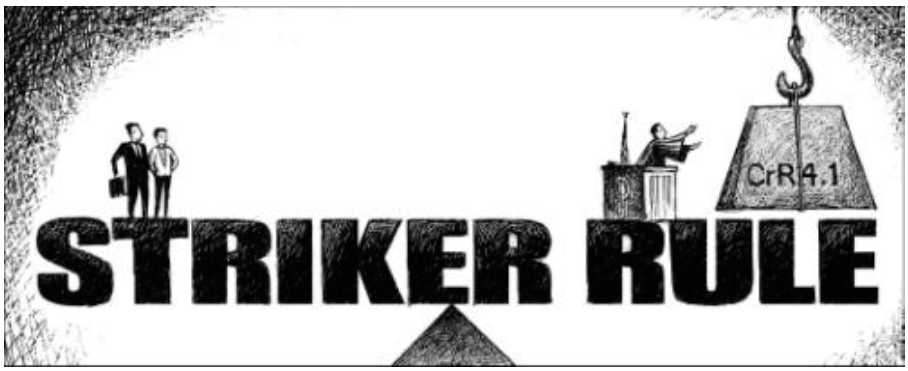
was never received or seen by any of the family members including our client. The prosecutor did not bother to notify our office although all our contacts with the detective were documented in the discovery and readily available to the prosecutor.

In December, 2005, our client was detained by U.S. Customs on his return to the country from a short cruise with his family. Then, for the first time, we were contacted by the Snohomish County Prosecutor and arranged to have Mr. Shumway arraigned on January 5, 2006, more than two years and four months (28 months) after the information was filed.

We immediately filed a notice of objection to the arraignment date, a notice of objection to the trial date (March 24, 2006 — 31 months after the charge), a demand for speedy trial, and motions to dismiss on CrR 3.3, federal and state constitutions. Because the information was filed before the effective date of the new speedy trial rules, we initially asked the court pursuant to CrR 1.3(b) to dismiss under the CrR 3.3 version in effect at the time of the filing of the charge.

After the court declined to do so, reserving the constitutional issues, we proceeded with the constitutional arguments. On May 25, 2006, Judge Larry McKeeman, former Chief Criminal Deputy Prosecutor for Snohomish County, dismissed with prejudice under the Sixth Amendment and Art I, sec. 22 of the Washington Constitution.

The trial court followed the constitutional analysis described above. As to length of delay, the court found 28 months to be an "extremely long period of time" which created a presumption of prejudice as a matter of law. Conclusions of Law 1, 2. As to the reasons for delay, the court found "under the Sixth Amendment and Art. I, sec. 22 the State must act with reasonable diligence to bring a defendant before the court." CL 4. The court found the "State did not act with reasonable diligence in this case because the State made no effort to personally serve Defendant" at his known address "where he was amenable to legal process or to contact Defendant Shumway's attorney" despite the state's awareness of defendant's legal representation "throughout the time the case was pending." CL 3, 4. On this reason for delay *Barker/Doggett* factor, the reader must appreciate the symmetry of the prosecutor's Catch-22 posture: the same written argument submitted to establish "due diligence" under CrR 4.1(a)(2) and 2.2(a)(3), that is, doing nothing in the two and half years since the due diligence certificate was filed at the beginning of the case satisfied the new rules, was used by the defense to establish the irrefutable proposition that by admittedly doing nothing the state had engaged in official negligence proscribed by the Sixth Amendment.



> The State was negligent in not reasonably pursuing these available options. The State's negligence, therefore, is the primary basis and reason for the lengthy delay. CL 4

As to prejudice, the court found that 28 months is more than three times the presumption of prejudice period. CL 6. The court went beyond the presumptive period to look at the facts of the case as contained in the certification of probable cause and held due to the nature of the charges, the defendant alternatively could establish actual prejudice to his defense. The court therefore ruled:[36]

> Based on the extraordinary delay, negligence of the State in failing to act with reasonable diligence, timely demand by Defendant for a speedy trial and presumptive and actual prejudice shown above, Defendant Scott Shumway's Sixth Amendment [and Art I, sec. 22] right to a speedy trial has been violated. CL 9, 10.

Shumway was a case where, as in *Doggett*, "the Government, indeed can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bring an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." 505 U.S. at 657.

Art I, Section 22

We also raised an independent speedy trial argument under the Washington Constitution.[37] We took the position that Art. I, sec. 22 must be construed to bar any criminal trial more than eight months beyond the charging date. That is, we urged that the presumptive prejudice period under the Sixth Amendment should be deemed the conclusive prejudice period under the state constitution noting that eight months is four times the fixed period under the rules and former statute. Although the trial judge granted dismissal based on Art I, sec. 22 in addition to the Sixth Amendment, he did not reach the *Gunwall* argument.

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Notes

1. *State v. Striker*, 87 Wn.2d 870, 557 P.2d 847 (1976); State v. Greenwood, 120 Wn.2d 585, 845 P.2d 971 (1993). The task force referred to the rule as the *Striker/Greenwood* standards but for brevity's sake we refer to it as the *Striker* rule. Interestingly, the Washington Supreme Court never formally incorporated the *Striker* rule into its various amendments of CrR 3.3. But as a practical matter, the "court's decision in *Striker* ... operates as if it were originally written into the 1976 version of CrR 3.3." *Greenwood*, supra, 120 Wn.2d at 592.
2. *Doggett v. U.S.*, 505 U.S. 647, 656 (1992). Alternatively, this is stated as the absence of "official negligence." Id.
3. "The purpose behind CrR 3.3 is to provide 'a prompt trial for the defendant once prosecution is initiated.' *State v. Edwards*, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).... Striker thus continues to apply to CrR 3.3 to foster the rule's purpose of providing for prompt trials once a prosecution is initiated." *State v. Greenwood*, 120 Wn.2d at 593-94.
4. See also, CrR 3.3(h) ("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." For the first time, the speedy trial rules explicitly acknowledge that constitutional concerns can trump the rules.
5. *State v. Shumway*, Snohomish Co. No. 03-1-01860-5. A copy of our Memorandum in Support of Motions to Dismiss for Violation of Right to Speedy Trial under Sixth Amendment and Art. I, sec. 22 and a copy of Judge Larry McKeeman's Findings of Fact and Conclusions of Law are available from the WACDL Brief Bank (MO714).
6. In its history, the dismissal with prejudice portion of the speedy trial rules began as section (f) in 1973, advanced for many years to (i) and now has retreated to CrR 3.3(h) as recodified in the 2003 amendments. However denominated, "[i]f the court determines that the time for trial deadline has passed and the defendant's objection was properly raised, the court has no discretion in deciding whether to dismiss the charges. The charges 'shall' be dismissed with prejudice." *State v. Swenson*, 150 Wn.2d 181, 187, 75 P.3d 513 (2003).
7. Corbin Volluz, "Speedy Trial — Some Teeth Remain in the New Time-for-Trial Rule," *Defense*, November, 2004, 21, 24.
8. For other examples of post-2003 rule amendments dismissals, see cases discussed in November 2004 *Defense* at pp. 21-24.
9. 4A Tegland, Wash. Prac. (6th ed) (2006 pocket part, author's comments following CrR 2.2 containing excerpt of Report; *http://www.courts.wa.gov/programs_orgs/pos_tft/, Appendix D.*)
10. Citing *Klopfer v. North Carolina*, 386 U.S. 213 (1967) and *US v. Marion*, 404 U.S. 307 (1971).
11. The *Striker* court quoted extensively from *ABA Standards Relating to Speedy Trial* sec. 2.2 (Approved Draft, 1968). Relevant here is the Court's approval of the standard providing, "In all other cases the time begins running as of the date the charge is filed." *Striker* at 872, n. 2.
12. Curiously, there is no acknowledgment or evident awareness even by footnote in the *Hessler* per curiam opinion that the court ostensibly had obliterated the Striker rule two years earlier by adoption of the 2003 amendments.
13. Time for Trial Task Force Final Report, Appendix C, located at *http://www.courts.wa.gov/programs_orgs/pos_tft/, (hereinafter Final Report)*.
14. *Final Report*, Part II, Section C.
15. *Final Report*, Appendix H.
16. CrR 2.2(a)(3)(i) reads: "The court shall not issue a warrant unless it determines that the complainant has attempted to ascertain the defendant's current address by searching the following: (A) the District Court Information System database (DISCIS), (B) the driver's license and identicard database maintained by the Department of Licenses; and (C) the database maintained by the Department of Corrections listing persons incarcerated and under supervision. The court in its discretion may require that other databases be searched."
17. Final Report, Part II, Section C.
18. 120 Wn.2d 585, 601 (1993) (citing with approval, State v. Miffitt, 56 Wn.App. 786, 793, 785 P.2d 850 (1990), review denied, 114 Wn.2d 1026 (1990)).
19. *Final Report*, Part II, Section C.
20. Just to ensure the government knew the task force meant business with CrR 2.2(a)(3)'s due diligence "requirements", the task force also proposed CrR 2.2(g), entitled "Failure to Issue Warrant - Dismissal." A front-runner for "most toothless provision" of the new rules, CrR 2.2(g) punishes the state with a dismissal (without prejudice, of course) if 90 days have elapsed since the information was filed and no arrest warrant has been issued against the defendant at the time of the dismissal. What competent prosecutor will file their certification of due diligence as required by CrR 2.2(a)(3) but subsequently fail to secure an arrest warrant and risk dismissal?
21. *State v. Striker*, 87 Wn.2d 870, 875; *State v. Adamski*, 111 Wn.2d 574, 582, 761 P.2d 621 (1988); Cf. *State v. McPherson*, 64 Wn.App. 705, 707, 829 P.2d 179 (1992).
22. Federal courts have used the term "reasonable diligence" to describe the government's burden in bringing a defendant before the court. Washington cases typically use the term "due diligence." The two terms are equivalent and are used interchangeably, as illustrated in *US v. Beamon*, 992 F.2d 1009, 1014 (9th Cir. 1993) ("the government did not pursue Beamon....with due diligence....")
23. "The Task Force's proposed CrR 2.2 and CrR 4.1, for example, eliminates the *Striker/Greenwood* requirements...." *Final Report*, Part II, Section C.
24. *Barker*, 407 U.S. at 527.
25. Id. at 529. (emph. ad.).
26. Id. at 523. (emph. ad.).
27. *Doggett*, with its requirement of reasonable diligence, is the case the task force attempts to overrule with the proposed CrR 4.1(a)(2). Whether deliberately or inadvertently, the task force does not cite or otherwise mention *Doggett* or acknowledge the constitutional nature of the reasonable diligence obligation in its *Final Report*.
28. *Doggett*, 505 U.S. at 656-57.
29. *Doggett*, 505 U.S. at 657.
30. *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002).
31. "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 652.
32. "... when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, ... nor persuasively rebutted, the defendant is entitled to relief."
33. *Doggett*, 505 U.S. at 658.
34. 505 U.S. at 658.
35. 974 F.2d at 1036.
36. 407 U.S. at 533-34.
37. The state did not file an appeal of Judge McKeeman's decision.
38. The *Gunwall* argument under Art I, sec. 22 is found at pages 12-17 of our Memorandum on file with WACDL Brief Bank (MO714).