

SUPREME COURT
STATE OF COLORADO

2 East 14th Ave.
Denver, CO 80203

Certiorari to the Colorado Court of Appeals,
15CA1925

Mesa County District Court,
13CR0339/13CR0027/13CR0342

THE PEOPLE OF THE STATE OF
COLORADO,

Petitioner,

v.

MICHAEL TRACY MCFADDEN,

Respondent.

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PEOPLE'S PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

	PAGE
CERTIFICATE OF COMPLIANCE	1
ISSUES PRESENTED FOR REVIEW	1
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE AND FACTS.....	2
REASONS FOR GRANTING CERTIORARI REVIEW	6
I. Appellate courts should afford great deference to a trial court’s decision to continue a trial past the statutory speedy trial deadline, where doing so is necessary to safeguard a defendant’s constitutional right to a fair and impartial jury.....	6
II. The Court of Appeals misconstrued, and therefore misapplied, the invited error doctrine.	10
CONCLUSION.....	14

TABLE OF AUTHORITIES

PAGE

CASES

Gray v. Mississippi, 481 U.S. 648 (1987)	10
Horton v. Suthers, 43 P.3d 611 (Colo. 2002)	10, 13
Irvin v. Dowd, 366 U.S. 717 (1961).....	13
Nagi v. People, 389 P.3d 875 (Colo. 2017)	6, 7, 8, 9
People v. Foster, 364 P.3d 1149 (Colo. App. 2013).....	10, 13
People v. Harlan, 8 P.3d 448 (Colo. 2000)	9
People v. Jefferson, 981 P.2d 613 (Colo. App. 1998)	8, 9
People v. Norman, 703 P.2d 1261 (Colo. 1985)	13
People v. Samuels, 228 P.3d 229 (Colo. App. 2009)	13
People v. Zapata, 779 P.2d 1307 (Colo. 1989)	10, 13
Tasset v. Yeager, 576 P.2d 558 (Colo. 1978)	13

STATUTES

§ 18-1-405, C.R.S. (2016).....	13
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 53(a). It contains 2,526 words.

/s/ *Jillian J. Price*

ISSUES PRESENTED FOR REVIEW

- I. Whether a trial court may, in its discretion, continue a trial past the statutory speedy trial deadline where doing so is necessary to safeguard the defendant's constitutional rights?
- II. Whether the Court of Appeals misconstrued, and therefore misapplied, the invited error doctrine?

OPINION BELOW

People v. McFadden, No. 15CA1925 (Colo. App. June 22, 2017)

(not selected for publication pursuant to CAR 35(f)) (attached as Appendix A).

STATEMENT OF JURISDICTION

This Court's certiorari jurisdiction is invoked under article VI, section 2 of the Colorado Constitution, section 13-4-108, C.R.S. (2017), and C.A.R. 49.

On June 22, 2017, a division of the Court of Appeals issued an unpublished opinion vacating the defendant's convictions. *People v. McFadden*, 15CA1925. The People filed a petition for rehearing which was denied on July 20, 2017. The People also filed a motion for extension of time through and including September 21, 2017, in which

to file a petition for writ of certiorari, which this Court granted on August 23, 2017. Accordingly, the People's Petition for Writ of Certiorari is timely filed. *See* C.A.R. 52(b)(3).

STATEMENT OF THE CASE AND FACTS

Michael Tracy McFadden was charged in three separate cases with nineteen child sexual offenses based on the allegations of six different children. The trial court joined the cases for trial over McFadden's objection. (CF, p. 291).

McFadden had previously been convicted of sexual assault on a child. (CF, p. 324). Although the trial court noted that the joinder of the three cases would result in the admission of "a lot of" CRE 404(b) evidence, it specifically ruled that if McFadden did not testify "or otherwise seek the admission of his prior statements in these pending cases, then the fact of his prior conviction would not be admissible." (Tr. 08-25-14, p. 53:14-16; R. CF, p. 324). The prior conviction would, of course, be admissible *if* McFadden were to testify at trial. (*id.*).

The month before the trial was to begin, McFadden prepared an initial jury questionnaire that “did not have information concerning the charges faced by Defendant[.]” (CF, p. 356). The trial court asked him to revise it because “[it] didn’t feel like we told them enough about the case for them to be able to say what it’s about.” (*id.* at 356, 100; R. Tr. 03-26-15, p. 2:22-25).

McFadden revised the questionnaire and provided copies to the court and the prosecution. At the pretrial conference, the prosecution told the court, “I have had a chance to review that. And . . . I don’t really have any objections[.]” (Tr. 03-26-15, p. 2:14-17). Upon hearing that the prosecution “did not have a problem with the questionnaire’s brief statement of the charges, the Court mistakenly failed to examine the statement of the charges [it]self.” (CF, p. 356; R. Tr. 04-13-15, p. 5:4-5).

It was not until after the questionnaires were distributed to the venire that the court and the prosecution realized that, “[o]n the first page of the jury questionnaire, the jury is informed that they may hear evidence during trial that Mr. McFadden committed child sexual

assault previously.” (Tr. 04-13-15, p. 2:14-21). McFadden admitted that he “did tender this exact [questionnaire] to the Court at the pretrial readiness conference.” (*id.* at 4:19-21). The court noted that “if [McFadden] does not testify, there’s not going to be any evidence that he’s been convicted of it before.” (*id.*). Additionally, the court was concerned that “[a] lot of the jurors picked up on that and talked about that he’s been convicted before or, or if he, if he’s done this before that they already have an opinion as to that he’s guilty.” (*id.* at 2:25-3:3).

McFadden declined the trial court’s invitation to move for a continuance. (Tr. 04-14-15, p. 2:15-19). The prosecution asserted that “the entire jury pool at this point is poisoned by that statement” and moved to continue the trial. (*id.* at 2:20-3:12). The trial court found that “it was invited error, that we did not catch at the appropriate time” and “everybody’s at fault.” (*id.* at 13:18-24). “[B]ut the Defense is also partly at fault, and therefore I’m finding that there’s a waiver of speedy trial[.]” (*id.*). McFadden “object[ed] to the Court’s finding that this is due to the Defense, and would just like the record to be clear that the case is being reset over Defense’s objection.” (R. Tr. 04-14-15, p. 14:4-8).

McFadden also filed a motion to dismiss for violation of his speedy trial rights. (CF, pp. 331-42). The trial court denied the motion to dismiss, finding that “despite this Court’s failure to examine carefully the submitted final questionnaire accepted by both parties, . . . the continuance and subsequent delay in trial were at the instance of the Defendant.” (CF, p. 356). More specifically, “Defendant’s counsel’s affirmative actions in preparing the questionnaire and going beyond the Court’s instructions by inserting the non-approved and problematic language caused and necessitated the ordered continuance and the resultant delay.” (*id.*). The trial was rescheduled for July 6-24, 2015, less than three months after the continuance was granted. (CF, pp. 354, 376).

McFadden was convicted and directly appealed his convictions on the basis that his right to a speedy trial had been violated. *People v. McFadden*, Colo. App. No. 15CA1925 (June 22, 2017) (not published pursuant to C.A.R. 35(e)). The Court of Appeal vacated the judgments of conviction. *Id.* Although the Court of Appeals “recognize[d] that ‘but for’ defense counsel’s addition of the language into the jury questionnaire,

the trial would have gone forward as originally scheduled,” it also determined that McFadden “cannot be charged with the trial delay” because he “did not agree to or otherwise occasion a necessary continuance[.]” *Id.* at 20-21.

REASONS FOR GRANTING CERTIORARI REVIEW

This case addresses the scope of a trial court’s discretion in safeguarding a criminal defendant’s constitutional right to a fair trial. Under *Nagi v. People*, 389 P.3d 875, 878 (Colo. 2017), trial courts have a “clear obligation” to protect such fundamental rights, and the Court of Appeals’ opinion improperly constrained that discretion. Accordingly, this Court should grant the petition for certiorari review.

- I. Appellate courts should afford great deference to a trial court’s decision to continue a trial past the statutory speedy trial deadline, where doing so is necessary to safeguard a defendant’s constitutional right to a fair and impartial jury.**

Trial courts have a “clear obligation” to not only protect a criminal defendant’s fundamental constitutional rights, but also to “ensure the integrity of judicial proceedings and ensure that their judgments remain intact on appeal[.]” *Nagi v. People*, 389 P.3d 875, 878 (Colo.

2017). In light of that “clear obligation,” “it is not surprising that trial courts would be permitted, if not actually encouraged, to exercise their discretion in furtherance of these goals, even where the suspension of proceedings . . . may not be mandated.” *Id.*

Here, McFadden’s sole contention was that his *statutory* speedy trial right was violated. Although cognizant of that right, the trial court was also concerned that McFadden’s constitutional right to a fair and impartial jury had been – perhaps irreparably – jeopardized. Indeed, even though it was unknown whether evidence of McFadden’s prior conviction would be admitted at trial, the entire venire was notified that he had committed sexual assault on a child in the past. Thus, McFadden’s statutory speedy trial right was at odds with his constitutional right to a fair and impartial jury.

The Court of Appeals resolved the tension between McFadden’s rights in favor of the statutory right to a speedy trial, and in so doing effectively eliminated the trial court’s discretion in the matter. This was error. *See Nagi*, 389 P.3d at 878-80 (trial courts should be “actually encouraged” to exercise their discretion in furtherance of protecting a

defendant's fundamental rights); *People v. Jefferson*, 981 P.2d 613, 614 (Colo. App. 1998) (noting that "under certain circumstances, the six-month speedy trial time frame will be extended where a reasonable delay is necessary to protect other fundamental constitutional rights of the defendant.").

The trial court's concern stemmed from the fact that evidence of McFadden's prior conviction might not be introduced at trial. Under those uncertain circumstances, the introduction of such information at the outset of voir dire could not be cured and may have deprived McFadden of a fair trial. The trial court exercised its discretion and determined that it needed to protect McFadden's constitutional right over his statutory speedy trial right, and that decision ought to have been given significant weight. *Nagi*, 389 P.3d at 878-80.

The Court of Appeals nevertheless suggests that the trial court should have questioned the venire to determine if they could be fair regardless of the fact that McFadden had committed sexual assault on a child in the past. *McFadden*, slip op. at 19-20. But this suggestion ignores the trial court's concern, namely, that the defendant's

fundamental right to a fair and impartial jury was violated before the actual trial began. It is difficult to imagine how the court (or the parties) could determine during voir dire whether the jurors could disregard a prior child sexual assault without emphasizing the fact that one had, in fact, occurred.

The People acknowledge that appellate courts presume that jurors follow a court's instructions to disregard an erroneously admitted piece of evidence. *See, e.g., People v. Harlan*, 8 P.3d 448, 473 (Colo. 2000) ("Absent evidence to the contrary, the appellate court presumes that a jury follows the trial court's instructions."). However, trial courts should not be prohibited from considering the impact of prejudicial disclosures and taking preemptive action to protect a criminal defendant's right to a fair trial. Stated differently, erring on the side of caution does not, in this case, constitute an abuse of discretion.

The trial court's decision should have been given great deference, and McFadden's constitutional right to a fair and impartial jury should have been given precedence over the statutory right to a speedy trial. *Nagi*, 389 P.3d at 878-80; *Jefferson*, 981 P.2d at 614. In our legal

hierarchy, constitutional rights generally rank higher than statutory and common-law rights, and in the event of a conflict, the federal constitutional right should prevail over the state statutory right. *See Nagi*, 389 P.3d at 878-80; *Jefferson*, 981 P.2d at 614-15; *see also Gray v. Mississippi*, 481 U.S. 648, 663 (1987) (“In a situation such as this where a constitutional right comes into conflict with a statutory right, the former prevails.”). The Court of Appeals’ opinion flouts that hierarchy, and the petition for certiorari should be granted in order to provide guidance on this matter to the lower courts.

II. The Court of Appeals misconstrued, and therefore misapplied, the invited error doctrine.

The invited error doctrine is a “cardinal rule” of appellate review that was crafted to prevent the injustice of a party benefitting from an error that he caused. *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002); *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989); *People v. Foster*, 364 P.3d 1149, 1156 (Colo. App. 2013).

The unique facts of this case present no reason for this Court to depart from the invited error rule; to the contrary, the circumstances of

this case compel the application of that rule. Applying the invited error rule makes particular sense here because – as the Court of Appeals acknowledged – the error in the jury questionnaire was injected into this case by McFadden’s affirmative actions. *See McFadden*, slip op. at 20 (“We recognize that ‘but for’ defense counsel’s addition of the language into the jury questionnaire, the trial would have gone forward as originally scheduled.”). That error, in turn, directly implicated McFadden’s fundamental constitutional right to a fair and impartial jury.

By alerting the venire to the fact that McFadden had previously committed sexual assault on a child (the same charge for which he stood trial in the instant case), defense counsel created a biased and unfair jury pool.¹ More specifically, this information was provided to the venire

¹ McFadden did not need to inform the venire that he had previously committed sexual assault on a child. Instead, he could have asked the jurors how a prior conviction might impact their evaluation of credibility, or whether they could look past that sort of information and focus on the charges at hand. That sort of question would have exposed any biases in the jurors and allowed McFadden to shape the jury without improperly exposing the entire venire to prejudicial information.

out of context and with no contemporaneous limiting instruction (which juries generally receive when prior act evidence is admitted at trial). Moreover, it was unknown whether McFadden’ would, or would not, testify – thus, it was also unknown whether the fact of his prior conviction would be admitted in evidence.

There is a strong, and reasonable, possibility that each of the potential jurors would have been induced to pre-judge the question of McFadden’s guilt or innocence upon reading in the official jury questionnaire that he had committed child sexual assault previously. Accordingly, neither the record nor the law supports the Court of Appeals’ holding that “the circumstances of this case do not compel a conclusion that defendant could not receive a fair trial in light of the language contained in the jury questionnaire.” *McFadden*, slip op. at 20.

Defense counsel affirmatively placed the challenged language in the jury questionnaire. That action tainted the entire venire and compromised McFadden’s constitutional right to “a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722

(1961). Defense counsel cannot by his erroneous actions simply waive a defendant's constitutional right to a fair and impartial jury. *See, e.g., People v. Norman*, 703 P.2d 1261, 1271 (Colo. 1985) (noting that the right to a trial by jury is a fundamental right that is personal to the defendant); *People v. Samuels*, 228 P.3d 229, 242 (Colo. App. 2009) (all criminal defendants have a fundamental constitutional right to a fair and impartial jury).

The trial court, therefore, was left with a Sophie's choice: it could either (1) proceed to trial on schedule and select a jury from a tainted pool; or (2) continue the trial and select a jury from a fair and unbiased pool. Because this choice was the direct result of McFadden's affirmative conduct, the invited error doctrine applies and appellate review is precluded. *See Horton*, 43 P.3d at 618; *Zapata*, 779 P.2d at 1309; *Foster*, 364 P.3d at 1156. For the same reason, the trial delay was properly charged to McFadden. *See* § 18-1-405(6)(f), C.R.S. (2017) ("The period of any delay caused at the instance of the defendant" shall be excluded from the time computation); *Tasset v. Yeager*, 576 P.2d 558, 559-60 (Colo. 1978) ("In computing the time within which a defendant

must be brought to trial, in order for the delay to be charged to the defendant, it must be attributable to affirmative action on [his or] her part[.]”). The Court of Appeals misconstrued, and misapplied the invited error doctrine in this case, and reversal is warranted.

CONCLUSION

Because the unpublished opinion in this case addresses an important issue that impacts a criminal defendant’s fundamental constitutional rights, this Court should grant this petition for writ of certiorari.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PETITION FOR WRIT OF CERTIORARI** upon **KIMBERLY PENIX**, and all parties herein via Integrated Colorado Courts E-filing System (ICCES) on September 19, 2017.

/s/ Jillian J. Price
