No. _____

In The
Supreme Court of the United States

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SHANE M. GATES,

Petitioner,

v.

WALTER P. REED, RODNEY J. STRAIN, JR., et al.,

Respondents,

_____ ∆ _____

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

_____ ∆ _____

PETITION FOR WRIT OF CERTIORARI

_____ ∆ _____

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QUESTIONS PRESENTED:

1. . Whether the Court of Appeals erred by failing to recognize that a District Attorney, who in his private law practice represented, and received hundreds of thousands of dollars in legal fees from, the liability insurer for the Parish (county) served by that District Attorney, both violated the Hobbs Act (18 U.S.C. § 1951, et seq.) and denied a criminal defendant substantive due process when that District Attorney used the authority of his public office to institute and maintain a misdemeanor criminal prosecution at the behest of that insurer and for the purpose of bolstering that insurer's defense of a civil lawsuit for the tort of excessive force that was filed as a civil rights action by the misdemeanor defendant against the Sheriff of that Parish and others.

2. Whether the Court of Appeals erred in upholding the District Court's dismissal of two civil rights suits against a District Attorney and a Sheriff, on the alleged ground that the plaintiff had failed to prosecute his civil suit when, in fact, that District Court had stayed the plaintiff's suit on the defendants' motion.

3. . Whether the Court of Appeals erred as a matter of law when it denied a misdemeanor defendant an injunction against DUI and resisting arrest prosecutions against him, where those misdemeanor cases' continued prosecution denied him important substantive and procedural due process rights, including among others denial of a speedy trial in violation of both state statute and the Sixth Amendment, improper reuse of evidence previously rejected by a felony trial jury

so as to subject him to double jeopardy, spoliation of evidence, forgery of both prosecution documents and of portions of the state court criminal case record, and irremediable conflicts of interest on the part of the prosecutors.

List of all Parties to Proceeding

Undersigned counsel of record hereby certifies in accordance with Rule 14.1(B) that the following persons have an interest in the outcome of this case:

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shane M. Gates respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case, refusing to reverse the decision of the United States District Court for the Eastern District of Louisiana which had dismissed Mr. Gates' civil rights suits and denied his Rule 60 motion for reconsideration of that dismissal.

OPINIONS BELOW

The Judgments and Opinions of the United States District Court for the East-ern District of Louisiana and of the United States Court of Appeals for the Fifth Circuit are included in Appendices "A", "B", "C", "D", and "E" hereof.

JURISDICTION

This Court has jurisdiction to consider this case by way of Writ of Certiorari pursuant to 28 U.S.C. §1254. The decision of the Court of Appeals for the Fifth Circuit was entered on March 22, 2018 (Appendix "D"). Rehearing and rehearing en banc was denied on May 30, 2018 (Appendix "E")..

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VI:
In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; …

U.S. Const., Amend.
: … No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hobbs Act, 18 U.S.C. §1951
(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
(b) As used in this section--
(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 , sections 52 , 101 - 115 , 151 - 166 of Title 29 or sections 151 - 188 of Title 45 .

42 U.S.C. §1983.
§1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

Louisiana Code of Criminal **Procedure, Article 701**

A. The state and the defendant have the right to a speedy trial.

B. The time period for filing a bill of information or indictment after arrest shall be as follows:

(1)(a) When the defendant is continued in custody subsequent to an arrest, an indictment or information shall be filed within forty-five days of the arrest if the defendant is being held for a misdemeanor and within sixty days of the arrest if the defendant is being held for a felony.

(b) When the defendant is continued in custody subsequent to an arrest, an indictment shall be filed within one hundred twenty days of the arrest if the defendant is being held for a felony for which the punishment may be death or life imprisonment.

(2) When the defendant is not continued in custody subsequent to arrest, an indictment or information shall be filed within ninety days of the arrest if the defendant is booked with a misdemeanor and one hundred fifty days of the arrest if the defendant is booked with a felony. Failure to institute prosecution as provided in Subparagraph (1) shall result in release of the defendant if, after contradictory hearing with the district attorney, just cause for the failure is not shown. If just cause is shown, the court shall reconsider bail for the defendant. Failure to institute prosecution as provided in Subparagraph (2) shall result in the release of the bail obligation if, after contradictory hearing with the district attorney, just cause for the delay is not shown.

C. Upon filing of a bill of information or indictment, the district attorney shall set the matter for arraignment within thirty days unless just cause for a longer delay is shown.

D.(1) A motion by the defendant for a speedy trial, in order to be valid, must be accompanied by an affidavit by defendant's

counsel certifying that the defendant and his counsel are prepared to proceed to trial within the delays set forth in this Article. After the filing of a motion for a speedy trial by the defendant and his counsel the time period for commencement of trial shall be as follows:

(a) The trial of a defendant charged with a felony shall commence within one hundred twenty days if he is continued in custody and within one hundred eighty days if he is not continued in custody.

(b) The trial of a defendant charged with a misdemeanor shall commence within thirty days if he is continued in custody and within sixty days if he is not continued in custody.

(2) Failure to commence trial within the time periods provided above shall result in the release of the defendant without bail or in the discharge of the bail obligation, if after contradictory hearing with the district attorney, just cause for the delay is not shown.

E. "Just cause" as used in this Article shall include any grounds beyond the control of the State or the Court.

F. A motion for a speedy trial filed by the defendant, but not verified by the affidavit of his counsel, shall be set for contradictory hearing within thirty days.

CONCISE STATEMENT OF MATERIAL FACTS

At about 8:40 PM on November 16, 2006, Shane Gates left the Brian Harris Auto Dealership in Slidell, Louisiana, driving the car he had spent the afternoon purchasing there. He was heading for his home which about 20 miles away. On Interstate Highway 12, Mr. Gates's automobile was mistakenly identified by an off-duty St. Tammany Sheriff's Deputy, Nathan Miller, as a wanted vehicle and about 9:05 PM Deputy Miller stopped Mr. Gates on Louisiana 434 at the Bayou Lacombe Bridge, a location that was later measured to be 6/10th of a mile from the spot where Deputy Miller, sitting on I-

12 under the Lacombe overpass, had first called his dispatcher to inform his department that he was stopping Mr. Gates' car.

Deputy Miller stopped Mr. Gates, removed him from Mr. Gates' car, handcuffed him, and placed him in the back seat of Deputy Miller's vehicle. Subsequently, two on-duty officers arrived on the scene, Deputy Roger Gottardi and Deputy Brian Williams. They removed Mr. Gates—still handcuffed—from Deputy Miller's car and Deputy Gottardi then sprayed Mr. Gates with pepper spray and beat him unconscious, slamming his face into the road's paving and causing serious injuries to Mr. Gates, including nerve damage and other trauma that will require at least four expensive surgeries to correct. The only explanation ever given for this beating was that Deputy Gottardi contended that Mr. Gates, a man of at most average size who was already handcuffed and in Deputy Miller's custody and sitting quietly in Deputy Miller's car, when removed from that car by Deputies Gottardi and Williams, and still handcuffed and under the two deputies' joint physical control, had somehow "resisted arrest" by Deputy Gottardi.

Although Deputy Miller was the only individual with personal knowledge of what he observed and why he stopped Mr. Gates, he never wrote any incident or arrest report regarding the events of that evening. Instead, Deputy Gottardi, who never saw Mr. Gates' car in motion, wrote and signed an arrest report, obviously based at most solely upon hearsay from Deputy Miller, that claimed Mr. Gates had been driving recklessly down I-12, going more than 100 miles an hour and running two trucks off the road. Deputy Gottardi wrote that Deputy Miller had chased Mr. Gates for 8 to 10 miles although the Louisiana State Cartographer later testified that in

actuality the distance between Deputy Miller's first sighting of Mr. Gates' car and his stopping it measured a mere 0.60 miles. Further, in conjunction with Mr. Gates' subsequent trial for the felony of aggravated flight from an officer, the St. Tammany Parish Sheriff's Office originally contended that it had "lost" the dispatch tapes that recorded Deputy Miller's radio traffic during that "chase" and then later, after it was compelled to locate those tapes hidden in an out-of-the-way Sheriff's facility, edited and altered them before reluctantly producing them to the defense.

Yet Deputy Gottardi's tendentious and self-serving third-party report was the only source used by either the District Court or the Fifth Circuit to establish the "facts" underlying Mr. Gates' arrest and assault.

Mr. Gates was taken from the arrest scene to the nearby Louisiana Heart Hospital, where, without his consent, a nurse drew a blood sample. That alone, under current case law,[1] would be enough to prevent that sample's being used as evidence of any state of intoxication, but it was only the first of a long series of serious due process violations. There was no chain of custody kept regarding that sample, which has completely disappeared, and the only testimony about its fate was that of the nurse who drew it and who stated at the felony trial that he placed it on a desk in the emergency room, after which he never saw it again.

There was never any evidence that the hospital's laboratory testing equipment was ever operated that night to test that sample,[2] nor was there any

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[1] *Birchfield v. North Dakota*, --- U.S. ---, 136 S.Ct. 2160, 2178, 195 L.Ed.2d 560 (2016

[2] One example of the prejudice to Mr. Gates from the long delay between his arrest and trial is that the hospital laboratory technician, who would have been the person to have conducted a

evidence that the testing machinery had been properly maintained or calibrated, but even if there had been such evidence, under Louisiana law that neither hospital lab, that machine, nor the operator on duty that night were certified to conduct blood alcohol testing for highway safety purposes. Further, dispatch tapes, even in their mutilated form, show that the Sheriff's Office's shift supervisor, then-Lieutenant Randy Smith, who is now the Sheriff of St. Tammany Parish, personally intervened to prevent the Louisiana State Police from obtaining and analyzing at the state crime laboratory a lawful blood alcohol sample.

Thus, the only "independent" evidence to support the state's later contention that Mr. Gates had a blood alcohol level of 0.273 consisted not of a report generated by a testing machine but instead of an unsigned word processing document, which was never certified as part of any official hospital record and the author of which was never identified or produced at trial for cross-examination. But the state's own toxicologist, when cross-examined at the subsequent felony trial, testified that had Mr. Gates had a blood alcohol level that high, then the dose of Demerol administered to him at Forest General Hospital in Hattiesburg, Mississippi, when his facial lacerations were sutured, would have killed him. Despite these factual and procedural infirmities, both

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blood alcohol test had one ever been performed, died during that long interim. This denied Mr. Gates the opportunity to confront the witness who allegedly generated the unsworn, uncertified "test result"—actually a word processing document that could have been created by anyone with access to a nurse's station in the hospital—that the state introduced at the felony trial. For example, at the time of Mr. Gates' arrest, the wife of Rodney Strain, the then-Sheriff, was a nurse employed by that hospital who would have had such access.

the Eastern District and the Fifth Circuit recited Mr. Gates' alleged blood alcohol level of 0.273 as though it were an established fact. (The district court actually referred to this as "0.280", which was beyond even the state's exaggerated claims although, under the circumstances, would have been an equal biological impossibility.)

The St. Tammany Parish District Attorney's Office initially charged Mr. Gates with the felony of aggravated flight and the misdemeanor of driving under the influence. The DUI charge was never set for hearing until 2013, years after the expiration of Louisiana's statutory one-year statute of limitations on misdemeanors. That felony charge finally came to a jury trial on 2012. Then in 2007, prior to the running of the civil statute of limitations, Mr. Gates filed a suit under 42 U.S.C. § 1983 against the St. Tammany Parish Sheriff and the deputies involved in his arrest.

After the filing of that civil suit, and while both the felony charge of aggravated flight and the misdemeanor charge of DUI were still pending, Charles Hughes, the attorney of record for St. Tammany Parish's liability insurer, asked the DA's Office to institute an additional misdemeanor charge of resisting arrest, as a tactic to obstruct Mr. Gates' § 1983 civil rights suit.[3] The Assistant DA handling Mr. Gates' cases, Ronald Gracianette, told Hughes he would do so only if he were given a letter from Deputy Miller, the officer who originally stopped Mr.

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[3] Under the then-current reading of *Heck v. Humphrey*, 512 U.S. 477 (1994), a guilty finding on that charge would have barred any excessive force recovery. Ironically, the strict application of this rule was cast into doubt by subsequent caselaw also involving allegations of police brutality by the St. Tammany Parish Sheriff's Office, *Bush v. Strain,* 521 F.3d 492 (5th Cir. 2008).

Gates, requesting such a charge. Later that day, Hughes delivered to Gracianette what purported to be a "victim impact letter" signed by Miller, although Miller—who by that time had been fired from the Sheriff's Office for lying to his superiors in unrelated matters—later testified under oath that he had neither written, signed, nor authorized any such letter. Gracianette himself testified that he instituted the charge of resisting arrest at Hughes' request, as he himself saw had no need for that charge because the felony flight charge carried a much longer potential sentence, so he acted solely on the strength of the forged "Miller letter".[4]

What was not disclosed at that time, and only came to light during the successful 2016 federal felony prosecution of the former District Attorney, Walter P. Reed, Gracianette's boss, was that Reed was then, and for long had been, "of counsel" to the principal defense firm for the Parish's liability insurer and annually derived hundreds of thousands of dollars in personal legal fees from that "private" representation.[5] This, of course, was a major financial conflict of interest with serous due process

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[4] The District Court's decision erroneously recited that the unsavory facts surrounding the production of Deputy Miller's purported "victim letter" were only evidenced by an affidavit from one of Mr. gates' former attorneys, in which, for ad hominem reasons, the District Court placed no credence. In fact, however, the transcript of Deputy Miller's unrebutted sworn testimony at a state-court pretrial hearing was in the record before the District Court but was ignored by that court.

[5] These sizable profits constitute precisely the sort of "stream of benefits" from abuse of a public office that is made a criminal offense under the Hobbs Act, 18 U.S.C. §1951 et seq. and is of a piece with the specific instances of misconduct in office that made up 14 of the felony counts upon which Walter Reed was convicted in 2016.

implications under *Tumey v. Ohio*, 273 U.S. 510, 522-23 & 535 (1927) (which may fairly be read to hold that a direct financial interest in an official integral to a criminal prosecution is ipso facto a denial of due process). (Warren Montgomery, Reed's successor as District Attorney, who continues to maintain the 2006-2007 misdemeanor charges against Mr. Gates, also continues to represent the Parish's liability insurer in his official capacity. This practice still bears the appearance of impropriety,[6] but at least Montgomery does not seem to be profiting personally from this arrangement in the blatant manner that Reed did.)

In 2012, the felony aggravated flight charge against Mr. Gates finally came on for trial, nearly six years after his initial arrest. At no time during those six years had the two misdemeanor charges of DUI and resisting arrest ever been set or noticed for hearing, nor were they formally included in the felony proceedings. Thus, under the governing Louisiana statute,[7] those misdemeanor charges were too stale to be tried and under federal speedy trial jurisprudence,[8] it must have been presumed that Mr. Gates had suffered due process harm from the prolonged and unreasonable delay of more than five years. After a week-long trial, a jury of 12 took approximately 20 minutes to find Mr. Gates not guilty of the felony charge.

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[6] It is fundamental to federally-guaranteed procedural due process that adjudicators must not only be impartial but must be seen to be impartial. Thus, giving an appearance of impropriety is a violation of U.S. Constitution, Amendment XIV. See, e.g., *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955); *U.S. v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995).

[7] La. Code Crim. Proc., Article 701.D(1)(b).

[8] See, e.g., *Barker v. Wingo,* 407 U.S. 514 (1972); *U.S. v. Tannehill*, 49 F.3d 1049, 1054 (5th Cir. 1995).

During that felony trial, after Mr. Gates unexpectedly (that is, unexpected by the state) took the stand in his own defense and the jury appeared to find his testimony credible, the state spent a final day on rebuttal testimony and evidence. At this point, over Mr. Gates' strenuous objections,[9] the state introduced before the jury all of its evidence pertaining to both the stale DUI charge and the stale resisting arrest charge. This was an obvious attempt to prejudice the jury against Mr. Gates and damage his credibility by painting him as a fractious, "fighting drunk" who could reasonably be believed to have had reason for fleeing from a police officer. So, the jury's general verdict in Mr. Gates' favor necessarily included a rejection of the state's evidence as to Mr. Gates' state of intoxication and of his alleged obstreperous conduct toward Deputies Gottardi and Williams.[10]

After the state lost the 2012 felony trial, it attempted in 2013 to set for trial the misdemeanor

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[9] The trial judge initially ruled that the state's proposed evidence of DUI must be excluded because of the lack of any chain of custody or certified hospital records. The state applied to the Louisiana First Circuit Court of Appeal for an emergency supervisory writ, which that appellate court granted that application and ordered the trial court to admit the challenged evidence. Mr. Gates then took his own emergency writ application to the Louisiana Supreme Court, which refused to hear his arguments, which resulted in the state's evidence being admitted before the jury

[10] Notably, Deputy Miller never testified that Mr. Gates resisted him in any way and Deputy Williams, although he arrived on the scene with Deputy Gottardi, testified that he did not observe Mr. Gates' interactions with Gottardi. So the only "evidence" of Mr. Gates' resisting arrest—an arrest that had already occurred at Deputy Miller's hands prior to Deputy Gottardi's arrival on the scene—was Gottardi's own; Gottardi had a self-evident interest in justifying his viciously beating of Mr. Gates.

charges of DUI and resisting arrest, even though, under Louisiana statutory law, those had prescribed (expired) in 2007. Although the clerk of the state district court had on file a current address for Mr. Gates, the sheriff made a purported attempt to serve a notice of hearing at another address that had no connection to him and, in fact, despite his having made over 50 appearances in the state district court in connection with his felony case, the state court case file makes it clear that Mr. Gates has never been served personally with any notice regarding these two misdemeanors.

Nevertheless, in 2017, while Mr. Gates' two consolidated § 1983 suits were still stayed by order of the Eastern District of Louisiana—at the request of the defendants—those same defendants moved to have the suits dismissed on the ground that Mr. Gates had failed to prosecute them because he had never surrendered himself for trial on the long-outdated misdemeanor charges.[11] Mister Gates requested an evidentiary hearing on that motion and was assured by the trial judge's staff that it was

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[11] Not only was Roger Gottardi, the deputy who attacked Mr. Gates, never disciplined for his unprovoked assault, but he remained on duty for years after that beating. During the pendency of this case in the Eastern District and the Fifth Circuit, in another highly-publicized incident, Gottardi severely beat an injured veteran in the victim's own home. This time, however, there was an outside witness, a local police chief, who refused to cover up this crime, which is currently under investigation by federal authorities. But St. Tammany Parish's misfeasance regarding Gottardi's actions—for example, Randy Smith, the shift supervisor who failed to do anything about Mr. Gates' beating, is now the current Sheriff—naturally created in Mr. Gates a well-founded and quite reasonable fear of life-threatening retaliation should he ever again find himself in the custody of the St. Tammany Parish Sheriff's Office.

routine practice to afford such a hearing but, on the date of the hearing, the trial judge refused to receive any evidence and ordered that the matter be taken up solely on the moving papers and arguments of counsel.

The trial court then granted the defendants' motion to dismiss, although there was no evidence in the record before the Eastern District to support that court's purported findings of fact that it used to dismiss these cases under Rule 41(b), Fed. R. Civ. Proc. Further, for ten years the trial court denied Mr. Gates any evidentiary hearing on his claims, in violation of Rule 52, Fed. R. Civ. Proc., nor with Rules 201 and 301, Fed. R. Evid. Among the "facts" that the district court cited in this fashion, but for which it had no evidentiary support in its record and which Mr. Gates would have rebutted at an evidentiary hearing, was the contention that he had never formally presented to the state courts his constitutional challenges to the maintenance of the two misdemeanor charges.[12]

The Eastern District of Louisiana likewise contended that the law failed to support Mr. Gates' "evidentiary use" double jeopardy challenge to the state's reuse against him of the DUI and resisting arrest evidence that the state had introduced in rebuttal, and the jury had rejected, at the felony flight trial. In effect, it stated that the constitutional

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[12] As the exhibits to his Rule 60 motion show, he had formally urged those speedy trial claims by motions filed on numerous occasions beginning in 2008. Each time, the state trial court refused to set those motions for hearing and the state appellate courts refused to review those denials. After the 2012 felony trial, he filed a formal motion to assert his "evidentiary use" double jeopardy challenge to the misdemeanor DUI and resisting arrest charges but those challenges were similarly disregarded by the state courts.

protection against double jeopardy only applies only to the title of the charges urged by the state and not to the evidence actually presented by the state in its attempt to prove those charges. In taking this position, it ignored this Court's governing case law,[13] and among the facts Mr. Gates intended expected to establish at the evidentiary hearing he was denied was the way in which, at his felony flight trial, the state compelled him to "run the gantlet" of its alleged evidence of intoxication and resisting arrest.

From this order of dismissal, Mr. Gates then filed a Rule 60 motion, to which were attached the exhibits and other evidences that he would have introduced at the evidentiary hearing;[14] that motion was likewise denied. Mister Gates then appealed that dismissal to the Fifth Circuit, which denied his appeal.

REASONS FOR ALLOWING WRIT APPLICATION

STANDARD OF REVIEW

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[13] *Dowling v. U.S.*, 493 U.S. 342, 347-48 (1990) (once certain evidence has been presented to a jury and rejected by a general verdict, that evidence can be reused against the same defendant, even on a differently-denominated charge, only for matters in limine and ancillary matters on which the state's burden of proof is the lesser standard of "by a preponderance of the evidence" and not the greater standard of "beyond a reasonable doubt").

[14] Among those exhibits were affidavits from several witness who would have testified at the hearing that, to their personal knowledge, St. Tammany Parish under Reed's District Attorney's Office had a pattern and practice of using pretexts and manipulation to prolong the criminal incarceration of civil rights plaintiffs in order to extort from them releases of their civil claims against the Parish.

The standard of review applicable to all the Questions Presented for Review herein is that of "clearly erroneous", pursuant to Rule 52(a)(6), Fed. R. Civ. Proc. Shane M. Gates respectfully suggests that the errors of law set forth herein are, indeed, clearly erroneous, including the classic error of law in which a trial court makes purported findings of fact for which there is no evidentiary basis in the record before it.

QUESTION PRESENTED FOR REVIEW NO. 1

The first Question Presented for Review raises an issue of public policy that is of nationwide importance. It is the prevailing practice in many, if not most, states to permit public prosecutors to conduct private legal practices alongside their public obligations. Indeed, often the part-time status and low prevailing salaries of the prosecutors virtually mandate such arrangements. However, where they exist, they must be monitored carefully because they always present fertile ground for, at best, conflicts of interest and, at worst, outright self-dealing of the sort the Hobbs Act is intended to prevent.

While most such conflicts of interest will not rise to the spectacular levels exhibited by Walter Reed's pursuant of personal financial gain, when his office instituted and pursued at least the misdemeanor charge against Shane Gates of resisting arrest, to benefit directly the financial interests of the insurance company that Reed secretly represented and from which he derived a large income, that potential is always present and must be strictly guarded against. It is all too often overlooked that federally-guaranteed due process includes the guarantee against even the appearance of impropriety in

criminal adjudications,[15] let alone the actuality of it as demonstrated in the instant case.

QUESTION PRESENTED FOR REVIEW NO. 2

The second Question Presented for Review raises another issue of public policy of broad importance. For more than 10 years, the Eastern District of Louisiana both denied Shane Gates the opportunity to have any evidentiary hearing on his claims and then, in an ironic inversion of normal notions of due process, dismissed his § 1983 suits on purported "findings of fact" resting solely on the representations of defendants' counsel and not on any properly confected factual record. In doing so, the district court also ignored the lengthy factual submissions that Mr. Gates had made in the form of lower court documents and transcripts of testimony that were attached as exhibits to pleadings and that clearly established the constitutional improprieties alleged in his suits.

A trial court's findings of fact must be supported by the evidence in the record,[16] and may not be based on mere speculation or conjecture.[17] Therefore, findings of fact which are clearly erroneous may be—and should be—reviewed and reversed on appeal.[18] For the reasons set forth immediately below, just one example of these egregious errors is the district court's erroneous statement that Mr. Gates had never asserted his

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[15] U.S. Constitution, Amendment XIV; *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955); *U.S. v. Jordan,* 49 F.3d 152, 155 (5th Cir. 1995).

[16] *Weber v. McKee*, 215 F.2d 447 (5th Cir. 1954).

[17] *Solomon v. Northwestern State Bank,* 327 F.2d 720 (8th Cir. 1964).

[18] *Curtis v. Comm'r of Internal Revenue*, 623 F.2d 1047 (5th Cir. 1980).

double jeopardy claims in the state courts, when in fact he had presented them to every level of the state court system.

QUESTION PRESENTED FOR REVIEW NO. 3

The third Question Presented for Review raises substantial issues of procedural due process of which the most widely-applicable is probably that of the rare, but important, "evidentiary use" branch of the ban on imposing double jeopardy on criminal defendants. The district court's position, that double jeopardy only applies when a subsequent prosecution involves the same denominated charge as did a prior case, or a lesser-included offense within the prior charge, as affirmed by the Fifth Circuit, had the effect of overruling, sub silencio, *Dowling v. U.S.*[19] and determination that once certain evidence has been presented to a jury and rejected by a general verdict, that evidence cannot be reused against the same defendant, even on a differently-denominated charge, for any matter on which the state's burden of proof is the criminal standard "beyond a reasonable doubt" but only for matters in limine and ancillary matters on which the state's burden of proof is the lesser standard of "by a preponderance of the evidence".

This substantial erosion of the important guarantee against double jeopardy requires this Court's review and correction.

CONCLUSION

For the reasons set forth above, the Petitioner Shane M. Gates respectfully prays this Honorable Court to issue a Writ of Certiorari to review the Fifth

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[19] 493 U.S. 342, 347-48 (1990).

Circuit's erroneous upholding of the district court's dismissal of his § 1983 suits.

s/

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APPENDIX A

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IN THE UNITED STATES COURT OF APPEALSFOR THE FIFTH CIRCUIT

No. 17-30519

SHANE M. GATES,
Plaintiff – Appellant

v.

RODNEY JACK STRAIN, Sheriff, in his official and individual capacity; WALTER P. REED, District Attorney, in his official capacity; CHARLES M.HUGHES, JR., Attorney; NATHAN MILLER, Sheriff Deputy; ROGER GOTTARDI, Sheriff Deputy; BRIAN WILLIAMS, Sheriff Deputy; PHILIP DUIETT, Lacombe Nurse,
Defendants - Appellees

SHANE M. GATES,
Plaintiff – Appellant

v.

RICHARD SWARTZ, Judge; NICHOLAS F. NORIEA, JR., Assistant District Attorney; MARIE-ELISE PRIETO, Clerk of Court - St. Tammany; JEFFLANDRY, Louisiana Attorney General; RONALD GRACIANETTE, Assistant District Attorney; KATHY SHERWOOD, Captain; KATHRYN LANDRY;RODNEY STRAIN, St. Tammany Parish Sheriff Office Sheriff, also known

as Jack Strain; ST. PAUL FIRE ; MARINE INSURANCE COMPANY; WALTERP. REED,
Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC

(Opinion 03/22/2018, 5th Cir., _____ , _____F.3d ____)
Before KING, ELROD, and HIGGINSON, Circuit judges

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED

ENTERED FOR THE COURT:
_____s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-30519
Summary Calendar

STAMPED
United States Court of Appeals Fifth Circuit
FILED March 22, 2018
Lyle W.Cayce Clerk

SHANE M. GATES,
Plaintiff – Appellant

v.

RODNEY JACK STRAIN, Sheriff, in his official and individual capacity;WALTER P. REED, District Attorney, in his official capacity; CHARLES M.HUGHES, JR., Attorney; NATHAN MILLER, Sheriff Deputy; ROGERGOTTARDI, Sheriff Deputy; BRIAN WILLIAMS, Sheriff Deputy; PHILIPDUIETT, Lacombe Nurse,
Defendants – Appellees

SHANE M. GATES,
Plaintiff – Appellant

v.

RICHARD SWARTZ, Judge; NICHOLAS F. NORIEA, JR., Assistant District Attorney; MARIE-ELISE PRIETO, Clerk of Court - St. Tammany; JEFFLANDRY, Louisiana Attorney General; RONALD GRACIANETTE, Assistant District Attorney; KATHY SHERWOOD, Captain; KATHRYN LANDRY;RODNEY STRAIN, St. Tammany Parish Sheriff Office Sheriff, also known as Jack Strain; ST. PAUL FIRE ; MARINE INSURANCE COMPANY; WALTERP. REED,

Defendants – Appellees

No. 17-305192

Appeal from the United States District Court for the Eastern District of Louisiana USDC Nos. 2:07-CV-6983; 2:13-CV-6425

Before KING, ELROD, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

Shane Gates was arrested by the St. Tammany Parish Sheriff's Office in2006. In 2007, he filed this action under 42 U.S.C. § 1983 alleging that the arresting officers used excessive force and that he was being prosecuted in bad faith. The case has been stayed since 2008 pending the resolution of the underlying state criminal charges. He was acquitted of aggravated flight, a felony, in 2012, and the state then sought to pursue prosecution on the remaining misdemeanor charges of resisting arrest and driving while intoxicated. Gates then fled St. Tammany Parish, and has not appeared for trial on those charges. Gates moved in the district court to lift the

stay for the purpose of entering an injunction preventing the state from prosecuting him for the pending misdemeanor charges. The state moved to lift the stay for the limited purpose of dismissing the case with prejudice for failure to prosecute. The district court determined that *Younger* abstention precluded an injunction, and dismissed the case with prejudice. We affirm.

I.

On November 16, 2006, plaintiff-appellant Shane Gates was pulled over and arrested by deputies of the St. Tammany Parish Sheriff's Office. According to the police report, Deputy Nathan Miller signaled to Gates to pull over after observing Gates's vehicle swerve repeatedly while driving on Interstate 12.The report indicates that Gates then accelerated to 104 miles-per-hour in an attempt to flee before finally pulling over. Gates then opened his car door and fell to the ground. Deputy Miller attempted to move Gates away from the

shoulder of the interstate, but, according to the police report, Gates began to wrestle with Miller. Miller then held Gates down on the hood of his patrol car while waiting for backup. A few minutes later, Deputies Gottardi and Williams arrived. Gottardi advised Gates that he was under arrest and attempted to place him in handcuffs. The report indicates that Gates then began flailing his arms, and that Deputy Miller administered a one-second burst of pepper spray to stun Gates and enable the deputies to handcuff him, which they did. While Gottardi attempted to place Gates in the back of Williams's patrol car, the report states that Gates threw his head and body back against Gottardi. Gottardi took Gates down to the ground, causing

Gates's face to strike the asphalt and resulting in a one-half inch laceration near his left eye. Gates was transported to the emergency room for treatment. According to the police report, medical records from the emergency room indicate that Gates's blood alcohol level was .273 at the time he was admitted.

Gates's arrest report cites the following offenses: driving while intoxicated, reckless operation of a motor vehicle, open container in a motor vehicle, aggravated obstruction of a highway of commerce, and resisting an officer. He was later also charged with aggravated flight from a police officer. In 2007, Gates filed in federal district court a § 1983 suit alleging that the deputies used excessive force in arresting him and that he was being prosecuted in bad faith in state court.[1] He sought damages and an injunction preventing his prosecution in state court.1 That action was stayed in 2008,pending resolution of the underlying criminal charges against Gates. The action was reopened in 2012 after a state-court jury found Gates not guilty of aggravated flight, but then stayed again after the district court became aware

of still-pending misdemeanor charges including driving while intoxicated and resisting an officer. The misdemeanor charges were originally set for trial on August 31, 2012, but the trial was continued due to Hurricane Isaac. Gates was then ordered to appear on November 22, 2013, to be served with a new trial date. When he failed to appear, an attachment was issued for his arrest. He has failed to appear before the state court since, and his whereabouts are unknown, even to his counsel.

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[1] The 2007 action was later consolidated with a substantially similar related case Gates filed in 2013.

On October 20, 2016, defendants filed a motion in the district court requesting that the stay be lifted for the limited purpose of allowing Gates to appear for service for his misdemeanor trial and that, should he fail to appear, his § 1983 action should be dismissed under Fed. R. Civ. P. 41(b) for failure to prosecute. On December 14, 2016, the district court denied the motion, but ordered Gates to file, no later than January 23, 2017, a motion explaining why the Anti-Injunction Act, 28 U.S.C. § 2283, and related abstention doctrine did not preclude his request for an injunction. The district court warned that failure to file such a motion would result in dismissal of his case with prejudice pursuant to Rule 41(b). On January 23, 2017, Gates filed a motion asking the district court to lift the stay and enter an injunction preventing defendants from prosecuting him for the pending misdemeanor charges. Defendants then filed their own motion asking the district court to lift the stay and dismiss Gates's case with prejudice for failure to prosecute. After a hearing, the district court denied Gates's motion and granted defendants' motion to dismiss the case with prejudice. Gates timely appealed.

II.

Gates first contends that the district court erred by not enjoining the state from prosecuting him for the pending misdemeanor charges. We review both the denial of a motion for a permanent injunction and an abstention ruling for abuse of discretion. *Tex. Ass'n of Bus. v. Earle,* 388 F.3d 515, 518 (5th Cir.

2004)(abstention ruling); *St. Paul Mercury Ins. Co. v. Williamson,* 332 F.3d304, 308 (5th Cir. 2003) (denial of motion for permanent injunction). However ,we review de novo both a district court's legal

determination regarding the applicability of the Anti-Injunction Act, *United States v. Billingsley*, 615 F.3d404, 409–10 (5th Cir. 2010), and "whether the requirements of a particular abstention doctrine are satisfied," *Tex. Ass'n of Bus.*, 388 F.3d at 518 (quoting *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d650, 652 (5th Cir. 2002)).

The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Section 1983 is an express authorization from Congress permitting federal courts to enjoin state proceedings in order to protect federal rights. See Mitchum v. Foster, 407 U.S.225, 242–43 (1972). However, § 1983 does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Id. at 243; see also *Younger v. Harris*, 401 U.S. 37, 43–47 (1971). Under the Younger abstention doctrine, federal courts should generally decline to exercise jurisdiction when: "(1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Bice v. La. Pub. Def. Bd.,* 677F.3d 712, 716 (5th Cir. 2012) (quoting *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982)).

Where those three criteria are satisfied, a federal court may enjoin a pending state-court criminal proceeding only if: (1) the state-court proceeding was

brought in bad faith or to harass the federal plaintiff; (2) the federal

plaintiff seeks to challenge a state statute that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it," or (3) where other "extraordinary circumstances" threaten "irreparable loss [that] is both great and immediate." *Younger,* 401 U.S. at 45,53–54; accord *Moore v. Sims*, 442 U.S. 415, 432–33 (1979).[2]

Here, the district court correctly determined that the three criteria that generally require Younger abstention are satisfied. First, Gates requested that the district court enjoin his pending state-court criminal proceeding. The federal proceeding would therefore clearly interfere with an ongoing state judicial proceeding. Second, the underlying state proceeding concerns the enforcement of state criminal laws, something in which the state has a strong interest. Third, Gates can raise his challenges to the state criminal proceedings in state court. To the extent that Gates argues that he has been unsuccessful or is likely to be unsuccessful in raising his constitutional claims in state court that is irrelevant. The relevant question is whether the would-be federal plaintiff has the opportunity to raise his federal claims in state court. See *Moore*, 442 U.S. at 425 ("[T]he federal court should not exert jurisdiction if the plaintiffs 'had an opportunity to present their federal claims in the state proceedings.'" (quoting

[2] We have recognized that application of the Younger abstention doctrine can also be waived, *Tex. Ass'n of Bus.,* 388 F.3d at 519, but Gates does not argue that the state has waived abstention here.

Juidice v. Vall, 430 U.S. 327, 337 (1977))); id. at 425–26 ("Certainly, abstention is appropriate unless state law clearly bars the interposition of the constitutional claims."). Gates does not contend that he cannot raise his constitutional claims in the state court. Accordingly, Younger abstention precludes an injunction here unless one of the three narrow exceptions applies.

Gates contends that the state prosecution has been taken in bad faith or that other extraordinary circumstances warrant enjoining the state criminal proceedings. Specifically, he argues that: (1) his prosecution for resisting an officer was instigated by the parish's insurer, St. Paul-Travelers (whom former district attorney Walter Reed privately represented and from whom he derived personal financial benefits, which Gates argues amounted to a Hobbs Act violation), in order to preclude § 1983 liability for excessive force; (2)prosecution for the pending misdemeanor offenses would constitute double jeopardy; and (3) prosecution would violate state and federal speedy-trial laws. We agree with the district court that Gates's asserted grounds for an injunction neither fit within the narrow bad-faith exception nor present the kind of extraordinary circumstances that justify departure from the general rule of non-interference.

To the first point, there is no evidence of bad faith. A prosecution is taken in bad faith if state officials proceed "without hope of obtaining a valid conviction." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971); accord *Ballard v. Wilson*, 856 F.2d 1568, 1571 (5th Cir. 1988). "[T]he 'bad faith' exception is narrow and should be granted parsimoniously." *Hefner v. Alexander*, 779 F.2d 277, 280(5th Cir. 1985). It is

Gates's burden to establish actual proof of bad faith. *Hensler v. Dist. Four Grievance Comm. of State Bar of Tex.*, 790 F.2d 390, 391(5th Cir. 1986). Here, Gates does not dispute that he was cited for resisting an officer on the day of his arrest. While he was not charged with resisting an officer in the original bill of information, two counts of resisting an officer (one with respect to Deputy Miller and one with respect to Deputy Gottardi) were added on September 10, 2007, after the district attorney received a statement from Deputy Miller expressing his belief that Gates should be charged with resisting an officer. While Gates contends that the Miller statement was forged, he has not proved that the state's prosecution for resisting arrest was

initiated without hope of obtaining a valid conviction.[3] Furthermore, while Gates makes much of his belief that the relationship between District Attorney Reed and St. Paul-Travelers amounted to a

[3] The only evidence that Gates cites that supports his allegation that the Miller letter was forged is the affidavit of his former attorney, Daniel Abel, in which Abel states that, in the course of representing Gates, he "acquired personal knowledge" of numerous crimes committed by the District Attorney's office, including the "forged 'victim letter' purporting to have been written by former Deputy Sheriff Nathan Miller." However, he does not establish any basis for his asserted personal knowledge. He does not assert, for example, that he was present when the allegedly forged letter was written, that he is familiar with Miller's signature and knows that the signature on the letter is not Miller's, or that anyone told him that the letter was forged. Accordingly, the statement in the affidavit that the Miller letter was forged would likely not be admissible as evidence at trial. *See United States v. $92,203.00 in U.S. Currency,* 537 F.3d 504, 508 (5th Cir. 2008)

violation of the Hobbs Act, he does nothing to connect that alleged violation to Younger's bad-faith exception. He appears to argue that Reed acted in bad faith by attempting to use the resisting-arrest charge to negotiate a release of Gates's § 1983 claims, but that argument fails. See *Town of Newton v. Rumery,* 480 U.S. 386, 393–98 (1987)(upholding enforcement of release-dismissal agreement dismissing criminal charges in exchange for waver of right to sue under § 1983).

Gates next contends that his prosecution for the misdemeanor offenses of driving while intoxicated and resisting an officer would constitute double jeopardy. Double-jeopardy claims can constitute the kind of extraordinary circumstances that justify an exception from Younger, see *Nivens v. Gilchrist*,444 F.3d 237, 242–43 (4th Cir. 2006); *Showery v. Samaniego*, 814 F.2d 200, 201n.5 (5th Cir. 1987), but Gates has not established a likely double-jeopardy violation. Gates argues that because the state presented evidence relevant to the driving-while-intoxicated and resisting-arrest charges during his trial for aggravated flight and the jury acquitted him, the state cannot present that same evidence again. He relies on *Dowling v. United States*, 493 U.S. 342 (1990), to argue that because the jury failed to find him guilty beyond a

reasonable doubt of aggravated flight, the state cannot now use any of the same evidence to convince a jury that he is guilty beyond a reasonable doubt of driving while intoxicated or resisting an officer. See id. at 348–49 (explaining that double jeopardy does not preclude introducing evidence to establish a fact a jury previously failed to find beyond a reasonable doubt were, at the subsequent trial, the jury was only

required to find that same fact by a lower evidentiary standard). But Gates misses *Dowling's* broader point. As the Supreme Court explained, the collateral-estoppel element of double jeopardy prevents relitigating "an issue of ultimate fact" that has already been "determined by a valid and final judgment." Id. at 347–48. But where, as here, a "prior acquittal did not determine an ultimate issue in the present case," double-jeopardy concerns are not implicated. Id. at 348. Gates has not" demonstrate[d] that his acquittal in his first trial represented a jury determination that he was not" driving while intoxicated or that he did not resist an officer.[4] See id. at 350. Accordingly, his prosecution for the pending misdemeanors would not violate the Double Jeopardy Clause and an injunction is not warranted on this basis.

Finally, Gates argues that an injunction is warranted because his prosecution for the pending misdemeanors would violate state and federal speedy-trial laws. However, the alleged denial of a speedy trial is not itself a legitimate basis on which to enjoin a state criminal proceeding. See *Brown v. Ahern*, 676 F.3d 899, 902–03 (9th Cir. 2012) (holding that federal courts may not enjoin state criminal prosecution on basis of alleged speedy-trial violation absent an independent showing of bad faith or other extraordinary

circumstances); *Brown v. Estelle,* 530 F.2d 1280, 1282–83 (5th Cir. 1976)(recognizing that, in the context of a pre-trial habeas petition, a federal court

[4] As the district court noted, driving while intoxicated and resisting an officer are not among the essential elements of aggravated flight. Compare La. Rev. Stat. § 14:108.1(aggravated flight) with La. Rev. Stat. § 14:98 (driving while intoxicated) and La. Rev. Stat.§ 40:1390 (resisting an officer).

may not normally enjoin state prosecution based on alleged speedy-trial violation*); Moore v. DeYoung*, 515 F.2d 437, 446 (3d Cir. 1975) ("[F]ederal courts should not permit the claimed denial of a speedy trial, presented in a pre-trial application for habeas, to result in the 'derailment of a pending state proceeding.'" (quoting *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S.484, 493 (1973))). Accordingly, this, too, fails to warrant the extraordinary remedy of enjoining a state criminal proceeding.

III.

Gates also appeals the district court's dismissal, with prejudice, of his claims pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. He contends that dismissal was inappropriate because any inaction was attributable to the district court's stay of the proceedings, at the state's request, rather than to his lack of effort in prosecuting his claims. The state responds that the stay of Gates's federal suit was due to his failure to appear before the state for a trial on his pending misdemeanor charges.

District courts have the authority, pursuant to both their own "'inherent power' . . . to manage their own affairs" and Rule 41(b) of the Federal Rules of Civil Procedure, to dismiss cases with prejudice for failure to prosecute. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962); accord *Morris v. Ocean Sys., Inc.,* 730 F.2d 248, 251 (5th Cir. 1984). However, because of the severity of the sanction, "we have stated that it is 'a drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice.'" *Morris,* 730 F.2d at 251 (quoting *Burden v. Yates*, 644 F.2d 503, 505(5th Cir. 1981)). We review a district court's dismissal with prejudice for abuse of discretion. *Id.*

Dismissal with prejudice is appropriate only where there is "a showing of (a) a clear record of delay or contumacious conduct by the plaintiff, and (b)where lesser sanctions would not serve the best interests of justice." *Id.* at 252.Furthermore, we affirm dismissals with prejudice generally only where those prerequisites are accompanied by "certain 'aggravating factors,' such as (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct." Id. (quoting *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982)).Here, there is a clear record of delay and contumacious conduct attributable to Gates himself. This matter was stayed in the district court for nearly ten years pending the resolution of Gates's underlying criminal charges. For over five years, that stay has been the result of Gates's failure to appear before the state to stand trial for his pending misdemeanor charges. We have previously instructed that, following *Heck v. Humphry*, 512 U.S. 477 (1994),district courts should stay § 1983 cases that may implicate the validity of pending criminal proceedings until those underlying proceedings have run their course. See *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) ("The court may—indeed should—stay proceedings in the section 1983 case until the pending criminal case has run its course, as until that time it may be difficult to determine the relation, if any, between the two."). Gates's intentional flight has prevented resolution of his pending misdemeanor charges and, pursuant to Mackey and Heck, has accordingly prevented him from prosecuting his§ 1983 claims. Furthermore,

Gates was warned, both in the district court's order and at a motions hearing, that failure to appear in state court or establish the inapplicability of Younger could result in dismissal with prejudice. Under the circumstances, the district court acted well within its discretion in concluding that lesser sanctions would be insufficient and dismissing Gates's

suit with prejudice. See *Nottingham v. Warden, Bill Clements Unit*, 837 F.3d438, 442–43 (5th Cir. 2016) (affirming dismissal with prejudice where plaintiff had received prior warning).

IV.

Gates also argues that the district erred by denying his request for an evidentiary hearing and by making factual findings not supported by the record. Where the application of Younger does not turn on disputed facts, no evidentiary hearing is required. See *Boyd v. Farrin*, 575 F. App'x 517, 521 (5thCir. 2014) (affirming dismissal of claims for injunctive relief pursuant to Younger without evidentiary hearing); *Mason v. Departmental Disciplinary Comm.,* 894 F.2d 512, 516 (2d Cir. 1990); *Jacobson v. Village of Northbrook Mun. Corp.*, 824 F.2d 567, 570 (7th Cir. 1987); *cf. Anderson v. Jackson*, 556F.3d 351, 361 (5th Cir. 2009) (holding that district court did not abuse its discretion in denying preliminary injunction without holding evidentiary hearing where it did not rely on disputed facts in determining whether injunction should issue and where permitted extensive briefing and hear oral argument). Here, the district court did not abuse its discretion in denying the injunction without first holding an evidentiary hearing because it did not relyon any disputed facts in deciding whether to

issue the injunction,[5] and there was extensive briefing as well as numerous hearings below at which the parties could present their claims.

Gates also contends that the district court made "numerous" erroneous factual findings. The only alleged error he actually identifies, however, is an allegedly unsupported statement regarding a blood-alcohol test performed at the hospital shortly after Gates's arrest. He argues that there is no competent evidence of that blood test that would be admissible at trial. However, whether the evidence of the blood-alcohol test would be admissible at trial is irrelevant here. The district court did not rely on that evidence in concluding that *Younger* abstention applied and that dismissal with prejudice was warranted.

V.

Finally, Gates appears to contend that the district court erred by denying his Rule 60(b) motion for reconsideration. While not explicitly challenging the denial of the motion, he argues that the district court erred by finding his motion untimely. But the district court did not deny the motion as untimely. Rather, the district court analyzed the motion under the

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[5] As noted above, the only disputed evidence arguably relevant to the Younger issue is the Abel affidavit in which Gates's former attorney states that the Miller letter was forged. But, given the above-noted weaknesses in that affidavit, see supra note 3, it did not create a dispute of fact necessitating an evidentiary hearing. See *Ty, Inc. v. GMA Accessories, Inc.,*132 F.3d 1167, 1171 (7th Cir. 1997) (stating that the party seeking an evidentiary hearing "must show . . . that he has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue an injunction")

rubric of Fed. R. Civ. P. 60(b) rather than 59(e) based on its determination that the motion had been filed more than 28 days after the court's judgment. See Fed. R. Civ. P. 59(e)("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."); *Benson v. St. Joseph Reg'l Health Ctr.*, 575F.3d 542, 547 (5th Cir. 2009) (stating that courts "may treat an untimely 59(e)motion to alter or amend the judgment as if it were a Rule 60(b) motion"(quoting *Halicki v. La. Casino Cruises, Inc.,* 151 F.3d 465, 470 (5th Cir. 1998)).But here, Gates's motion was explicitly titled, and argued, as a "Rule 60 Motion." Furthermore, even if the district court did err by analyzing the motion as a Rule 60(b) motion, despite the motion being so styled, any error was harmless as the district court's reasons for denying the motion—including that the motion rehashed arguments previously raised and failed to present new, previously unavailable evidence—apply with equal force under Rule59(e). *See Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004)

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("This Court has held that [a Rule 59(e)] motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.").

VI.

For the foregoing reasons, we AFFIRM.

APPENDIX C

Case 2:07-cv-06983-CJB-JCW Document 270 Filed 06/01/17 Page 1 of 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANE M. GATES	)	CIVIL ACTION
	)	
VERSUS	)	No. 07-6983
	)	c/w 13-6425
SHERIFF RODNEY JACK STRAIN, ET AL.	)	SECTION: "J"(2)

ORDER

Before the Court is a Motion for Reconsideration pursuant to Federal Rule of Civil Procedure 60(b) (R. Doc. 258) filed by Plaintiff Shane Gates. Mr. Gates urges the Court to reconsider its Order and Reasons (R. Doc. 255) denying Plaintiff's Motion for Injunction and to Lift Stay (R. Doc. 240) and granting Defendants' Motion to Lift Stay and Dismiss (R. Doc. 243). Defendants oppose Plaintiff's motion. (R. Doc. 267).

The Federal Rules of Civil Procedure do not expressly allow motions for reconsideration of an order. *Bass v. U.S. Dep't of Agric.*, 211 F.3d 959, 962 (5th Cir. 2000). However, the Fifth Circuit has consistently recognized that parties may challenge a judgment or order under Federal Rules of Civil Procedure 59(e) or 60(b). See *Templet v. HydroChem, Inc., 367 F.3d 473, 483* (5th Cir. 2004). The difference between a Rule 60(b) and 59(e) motion is based on timing. If the motion is filed within twenty-eight days of the final judgment, then it falls under Rule 59(e). *In re FEMA*

Formaldehyde Prods. Liab. Litig., No. 07-1873, 2012 WL 458821, at *2 (E.D. La. Feb. 13, 2012). However, if the motion is filed more than twenty-eight days after the final judgment it is governed by Rule 60(b). See id.

Plaintiff's motion for reconsideration was filed on April 24, 2017. Plaintiff seeks reconsideration of this Court's March 24, 2017 Order and Reasons. Accordingly, Plaintiff's motion was filed more than twenty-eight days from the Court's Order and Reasons and will be analyzed pursuant to Rule 60(b).

To prevail on a motion under Rule 60(b), the movant must clearly establish one of six factors: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharge; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b). However, motions to reconsider or amend a final judgment are "extraordinary remedies" and are "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before entry of judgment." Templet, 367 F.3d at 478-79. Also, such motions should not be used

to "re-litigate prior matters that . . . simply have been resolved to the movant's dissatisfaction." *See Voisin v. Tetra Techs., Inc., No.* 08-1302, 2010 WL 3943522, at *2 (E.D. La. Oct. 6, 2010).

Plaintiff asserts his motion under Rule 60(b)(1), (3), and (6). Nevertheless, the motion merely rehashes arguments previously raised ad nauseam. After reviewing the record, the parties' memoranda, and the applicable law, the Court finds that Plaintiff has not demonstrated that the Court made a material mistake of fact or law, that judgment was unfairly obtained by Defendants' fraudulent acts, or that extraordinary circumstances are present that would warrant relief. The dismissal of Plaintiff's lawsuit was a direct result of him purposefully evading the state court system for years. This Court has permitted Plaintiff to fully and fairly present his arguments over the last nine years. His dissatisfaction with the result is not grounds for granting the relief requested.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration (R. Doc. 255) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Reply (R. Doc. 269) is DENIED AS MOOT.

New Orleans, Louisiana this 1st day of June, 2017.

s/

CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANE M. GATES	)	CIVIL ACTION
	)	
VERSUS	)	No. 07-6983
	)	13-6425
SHERIFF RODNEY JACK STRAIN, ET AL.	)	SECTION: "J"(2)
	)	

J U D G M E N T

Considering the court's Order and Reasons dated March 24, 2017 and the court's Order dated April 17, 2008, and previous court orders filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Rodney J. "Jack" Strain, Jr., in both his individual capacity and his official capacity as former Sheriff of St. Tammany Parish, Deputy Rodney J. "Jack" Strain, Jr., in both his individual capacity and his official capacity as former Sheriff of St. Tammany Parish, Deputy Nathan Miller, Deputy Roger Gottardi, Captain Kathy Sherwood, Deputy Brian Williams, Walter P. Reed, in both his individual and his official capacity as former District Attorney for the 22nd Judicial District Court, Assistant District Attorney Ronald Gracianette, Assistant District Attorney Nicholas F. Noriea, Jr., Kathryn Landry, former Louisiana Attorney General James D. Caldwell, Office of the Louisiana Attorney General, Judge Richard Schwartz of the 22nd Judicial District Court,

Marie-Elise Prieto, in her individual and her official capacity as former Clerk of Court for the Parish of St. Tammany, Charles M. Hughes, Jr., Philip Duiett, Louisiana Medical Center and Heart Hospital, LLC, St. Paul Insurance Company, St. Paul Fire and Marine Insurance Company, and against Plaintiff, Shane M. Gates, dismissing the plaintiff's suit, with prejudice.

New Orleans, Louisiana, this 27th day of MARCH, 2017.

s/
UNITED STATES DISTRICT JUDGE

APPENDIX E

Case 2:07-cv-06983-CJB-JCW Document 255 Filed 03/24/17 Page 1 of 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANE M. GATES	)	CIVIL ACTION
	)	
VERSUS	)	No. 07-6983
	)	c/w 13-6425
SHERIFF RODNEY JACK STRAIN, ET AL.	)	SECTION: "J"(2)

ORDER & REASONS

Before the Court are two motions. First is Plaintiff, Shane Gate's ("Plaintiff") Motion for Injunction and to Lift Stay (Rec. Doc. 240) and an opposition (Rec. Doc. 242) thereto filed by Defendants.[1] Second is Defendants' Motion to Lift Stay and Dismiss (Rec. Doc. 243), an opposition (Rec. Doc. 249) thereto filed by Plaintiff, and a reply (Rec. Doc. 254) filed by

[1] Defendants include: Rodney J. "Jack" Strain, Jr., in both his individual capacity and official capacity as former Sheriff of St. Tammany Parish, Deputy Nathan Miller, Deputy Roger Gottardi, Captain Kathy Sherwood, Deputy Brian Williams, Walter P. Reed, in both his individual and official capacity as former District Attorney for the 22nd Judicial District Court, Assistant District Attorney Ronald Gracianette, Assistant District Attorney Nicholas F. Noriea, Jr., Kathryn Landry, former Louisiana Attorney General James D. Caldwell, Officer of the Louisiana Attorney General, Judge Richard Schwartz of the 22nd Judicial District Court, Marie-Elise Prieto, in her individual and official capacity as former Clerk of Court for the Parish of St. Tammany, and Charles M. Hughes, Jr., collectively referred to as "Defendants."

Defendants. Having considered the motions and legal memoranda, the record, and the applicable law, the Court finds that Plaintiff's Motion for Injunction and to Lift Stay (Rec. Doc. 240) should be DENIED. Further, the Court finds that Defendants' Motion to Lift Stay and

Dismiss (Rec. Doc. 243) should be GRANTED, and Plaintiff's lawsuit should be DISMISSED WITH PREJUDICE.

FACTS AND PROCEDURAL BACKGROUND

On November 16, 2006, Plaintiff was arrested for (1) obstruction of a highway, (2) driving while intoxicated, (3) having an open alcohol container in his vehicle, (4) reckless operation, and (5) resisting arrest. (R. Doc. 121 at 1.) The facts surrounding Plaintiff's arrest are disputed between the parties, which forms the basis of this § 1983 lawsuit brought by Plaintiff. In short, Plaintiff contends that he was beaten by St. Tammany Parish deputies during his arrest. The facts preceding this supposed beating are alleged by Plaintiff as follows: Plaintiff had just left a car dealership in Slidell, Louisiana and was traveling on Interstate Highway 12 to Covington, Louisiana. Plaintiff noticed a police car behind him and he pulled to the side of the road. Plaintiff claims to have gotten out of his vehicle where he was then thrown on the hood of the police car. Plaintiff contends that because the hood of the police car was hot, he attempted to free himself from the hood of the car, which caused the arresting deputy to use his pepper spray on Plaintiff. Plaintiff alleges that he was then handcuffed, forced against the hood of the police car once again, and then thrown onto the pavement and beaten until he became unconscious.

Plaintiff contends that he then awoke in the emergency room with extensive lacerations and injuries to his eye, face, neck, and mouth. At some point during his time at the hospital, a blood alcohol test was conducted, which resulted in a reading of approximately .280—over three times the legal limit in Louisiana. Similarly, Plaintiff contests the circumstances surrounding the blood alcohol test. Plaintiff apparently alleges that the nurse who conducted the test used an alcohol swab on the area where Plaintiff's blood was drawn prior to drawing his blood which caused the elevated results. As a result of these incidents, Plaintiff filed a § 1983 lawsuit against Defendants in this Court.

Plaintiff maintains that over the next several months the deputies fabricated a story to cover up these events. Plaintiff alleges, inter alia, that Charles Hughes, the attorney for the sheriff's office and the deputies involved, threatened and persuaded the District Attorney, on the eve of trial, to file new charges of resisting arrest in an attempt to defeat Plaintiff's § 1983 lawsuit. Plaintiff contends that he was then offered only $10,000 for a release of his claims.

Plaintiff's § 1983 lawsuit was stayed in April of 2008, pending resolution of the criminal charges against him in the Twenty-Second Judicial District Court for the Parish of St. Tammany, Louisiana. In August of 2012, Plaintiff advised the Court that he was found not guilty of the crime of aggravated flight in

the state court proceedings, and the stay of Plaintiff § 1983 case was lifted. However, when the Court discovered that Plaintiff still had at least two

misdemeanor charges pending, including resisting an officer, the Court reinstituted the stay until the remaining charges were resolved.

In November of 2013, a state court judge issued an attachment for Plaintiff's arrest for failing to appear to be served for his misdemeanor trial. To date, Plaintiff has not presented to the state court to receive service and stand trial for the pending misdemeanor charges. On October 20, 2016, Defendants filed a motion requesting that the stay in Plaintiff's § 1983 case be lifted for the limited purpose of allowing Mr. Gates to appear for service for his misdemeanor trial, and if he failed to appear, that this lawsuit be dismissed under Federal Rule of Civil Procedure 41(b) for failure to prosecute. On December 14, 2016, Judge Stanwood Duval Jr. held oral argument on the motion. While Judge Duval denied the motion at oral argument, he stated that Plaintiff's § 1983 lawsuit would be dismissed pursuant to Rule 41(b) if Plaintiff did not file a motion concerning the alleged inapplicability of the Anti-Injunction Act, 28 U.S.C. § 2283, and *Younger v. Harris*, 401 U.S. 37 (1971), in light of Plaintiff's speedy trial and double jeopardy arguments. On January 23, 2017, Plaintiff filed the present Motion for Injunction and to Lift Stay. Plaintiff's lawsuit

was then transferred to this Court in light of Judge Duval's retirement.

In short, Plaintiff argues that trial of the pending resisting an officer and driving while intoxicated misdemeanors would violate the "evidentiary fact branch" of double jeopardy. (Rec. Doc. 240-1, at 16.) Further, Plaintiff argues that the time period within which to commence a misdemeanor trial has long passed, and that prosecution on these charges

violates his right to a speedy trial. Thus, Plaintiff asks this Court to enjoin the state court from proceeding with the misdemeanor charges against him, and to lift the stay on his pending § 1983 lawsuit. In response, Defendants argue that Plaintiff is not entitled to an injunction, and that his § 1983 lawsuit should be dismissed for failure to prosecute. On March 16, 2017, the Court held oral argument on the parties' motions. In open court, the Court ruled that Plaintiff's Motion for Injunction and to Lift Stay (Rec. Doc. 240) was DENIED and that that Defendants' Motion to Lift Stay and Dismiss (Rec. Doc. 243) was GRANTED. In addition to the reasons stated at oral argument, the Court issues these written reasons.

PARTIES' ARGUMENTS

1. Plaintiff's Arguments

Plaintiff raises two main arguments in support of his motion. First, Plaintiff argues that this Court is not barred by the Anti-Injunction Act from enjoining the state court from pursuing the

pending misdemeanor charges. Specifically, he argues that if he is subject to such prosecution it would violate the Fifth Amendment's guarantee against double jeopardy, which is an exception to the Anti-Injunction Act and the Younger abstention doctrine. Plaintiff contends that because he was found not guilty in state court for the aggravated flight charge, and in that trial the state presented evidence of his alleged intoxication, that the "evidentiary fact branch" of double jeopardy prevents the state from now pursuing the driving while intoxicated misdemeanor. Second, Plaintiff argues that under the Louisiana Code of Criminal Procedure "no trial shall be commenced . . . [i]n misdemeanor cases after one

year from the date of institution of the prosecution." La. Code Crim. Proc. 578. Therefore, because Plaintiff was arrested on November 16, 2006, and the state court felony trial concluded on July 27, 2012, more than five years passed since Plaintiff's arrest. Accordingly, Plaintiff argues that prosecution of the misdemeanor charges is time barred, and if he is subject to prosecution on the pending misdemeanors it would violate his right to a speedy trial. For these reasons, Plaintiff asks this Court to prevent the Louisiana state court from trying him on the pending misdemeanor charges.

2. Defendants' Arguments

Defendants argue that due to Plaintiff's inaction, Plaintiff's § 1983 lawsuit should be dismissed, with prejudice,

for failure to prosecute under Federal Rule of Civil Procedure 41(b). Defendants contend that this case has not progressed solely because of plaintiff's deliberate delay. In response to Plaintiff's request for an injunction, Defendants contend that this Court is not permitted to enjoin the state court misdemeanor proceedings pursuant to the Anti-Injunction Act and the Younger abstention doctrine. Defendants further argue that double jeopardy is inapplicable to Plaintiff's pending misdemeanor charges, the cases cited by Plaintiff in his request for an injunction provide no support for his request, and that Plaintiff may assert his speedy trial defense at trial on the misdemeanor charges.

DISCUSSION

The main issue this Court must decide is whether it has the authority to enjoin Plaintiff's state court

misdemeanor prosecution. It is well-settled that a federal court should not interfere in pending state court criminal proceedings absent the threat of "irreparable injury" that is "both great and immediate." *Savoy v. Gusman*, No. 15-4906, 2016 WL 1411310, at *3 (E.D. La. Mar. 1, 2016) (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)). In situations such as this, where a petitioner seeks to enjoin state court prosecution through the federal system, the Federal Anti-Injunction Act, 28 U.S.C. § 2283, prohibits this Court from enjoining state criminal proceedings except where expressly authorized by Congress or where necessary in aid of this Court's

jurisdiction. Id. (citing *Younger*, 401 U.S. at 41, 53-54*; Walck v. Edmondson,* 472 F.3d 1227 (10th Cir. 2007); *Harmon v. City of Kansas City, Mo.*, 197 F.3d 321, 325 (8th Cir. 1999)). Thus, pursuant to Younger, a federal court must abstain from interfering with state court criminal proceedings when (1) the federal proceeding would interfere with an "ongoing state judicial proceeding", (2) the state has an important interest in regulating the subject matter of the claim, and (3) the plaintiff has "an adequate opportunity in the state proceedings to raise constitutional challenges." *Bice v. La. Pub. Defender Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (quoting *Middesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). If these prerequisites are satisfied, then a federal court can assert jurisdiction only if "certain narrowly delimited exceptions to the abstention doctrine apply." Id. (citing *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004)). Exceptions to Younger abstention include:

(1) if the state court proceeding was brought in bad faith or with purpose of harassing the federal

plaintiff;
(2) if the state statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it; or
(3) application of the doctrine is waived.
Id. at 716 n.3.

The ongoing state proceeding here is Plain-tiff's criminal prosecution in the Twenty-Second Judicial District Court for the Parish of St. Tammany, Louisiana. Specifically, Plaintiff has at least two misdemeanor charges pending—operating a vehicle while intoxicated and resisting an officer.[2] Plaintiff asks this Court to enjoin and restrain Defendants from proceeding with these pending misdemeanor charges which would directly interfere with an "ongoing state judicial proceeding." See *Bice*, 677 F.3d at 717.

The next issue is whether the state court can provide an adequate remedy for the violation of federal rights. Id. at 718. "All that is required in order for *Younger* . . . to apply is an opportunity to fairly pursue the constitutional claims in the ongoing state proceeding, the failure to avail oneself of such opportunity does not mean that the state proceedings are inadequate." *DeSpain v. Johnston*, 731 F.2d 1171, 1180 (5th Cir. 1984) (emphasis added) (internal quotations and alterations omitted). In late 2013, or

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[2] At oral argument, Plaintiff's counsel argued that there are only two pending misdemeanor charges—one count of driving while intoxicated and the other for resisting an officer. Defend-ants contend that there are three pending misdemeanors—one count of driving while intoxicated and two counts of resisting an officer.

early 2014, Plaintiff filed a motion to quash the pending misdemeanor charges on the grounds of double jeopardy and denial of due process in the Twenty-Second Judicial District Court, the Louisiana Court of Appeal for the First Circuit, and the Louisiana Supreme Court, all of which denied

Plaintiff's request. (Rec. Doc. 240-1, at 10.) However, Plaintiff has never asserted his speedy trial or double jeopardy defenses in the ongoing state proceeding. See id. In fact, Plaintiff has refused to even receive service for the pending charges, and his misdemeanor trial date has not been set. Thus, the appropriate venue to raise the current arguments are in the state court in Plaintiff's misdemeanor trial. Accordingly, Plaintiff has an available process for pretrial review of his constitutional challenges, and may preserve these challenges for appeal after trial, should he be convicted. See *Savoy,* 2016 WL 1411310, at *3. Finally, the criminal proceedings against Plaintiff involve a matter of state criminal law and state interests. Id. Thus, each of the factors favor abstention in this case. Plaintiff must demonstrate that one of the narrow exceptions to Younger applies in order for the Court to consider interfering with the state court criminal proceedings.

Plaintiff argues that two exceptions to *Younger* apply in this case. First, Plaintiff argues that if he is subjected to the pending misdemeanor charges in state court it would violate his double jeopardy rights. Second, Plaintiff argues that if he was subject to the pending misdemeanor charges it would violate his right to a speedy trial. Plaintiff raised his first argument almost five years ago in this Court. See (Rec. Doc. 196.) Specifically, Plaintiff argued that having been acquitted of the aggravated

flight charge, "the district Attorney cannot now bring these old charges offering the same evidence again." (Rec. Doc. 163, at 1.) As this Court held then, "Plaintiff's contention lacks merit." (Rec. Doc. 196, at 3.) This Court explained:

> The jury acquitted Mr. Gates after concluding that the evidence presented by the prosecution failed to satisfy the prosecution's burden of proving the elements of aggravated flight and its lesser included offenses beyond a reasonable doubt. No jury has yet evaluated the prosecution's evidence to determine whether it establishes beyond a reasonable doubt the elements of resisting an officer. Because the elements of the aggravated flight and resisting an officer are not identical, plaintiff's acquittal does not negate the possibility of a conviction for resisting an officer. . . .

Id. Accordingly, Plaintiff's argument that he would be subject to double jeopardy if this Court does not enjoin the state court proceeding on the misdemeanor resisting an officer charge is unconvincing and is not an exception to the Younger abstention doctrine.

However, for the first time, Plaintiff argues that if he is subject to trial on the misdemeanor charges it would violate the "evidentiary fact branch" of double jeopardy.[3] (Rec. Doc. 240-1, at 16.) Plaintiff argues that while the State did not need to present evidence of Plaintiff's alleged intoxication and resisting arrest in order to demonstrate the essential elements of

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[3] *See Stringer v. Williams,* 161 F.3d 259 (5th Cir. 1999) (noting that a violation of double jeopardy clause is an exception to Younger abstention).

aggravated flight, it nevertheless chose to do so as a tactical advantage.

Plaintiff argues that the State now seeks to use this same evidence to prove the essential elements of the driving while intoxicated and resisting arrest misdemeanors. Once again, however, Plaintiff's contention lacks merit. In essence, Plaintiff argues that because he was acquitted of aggravated flight, the jury necessarily determined an ultimate issue of fact that he was not intoxicated and did not resist arrest.

"The Supreme Court has established that issue preclusion, also called collateral estoppel, is 'embodied in the Fifth Amendment guarantee against double jeopardy.'" *United States v. Sarabia*, 661 F.3d 225, 229 (5th Cir. 2011) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). The Fifth Circuit has applied issue preclusion to criminal proceedings in two ways: 1) to "bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution"; and (2) if the fact is not an essential element of the subsequent prosecution, to "bar the introduction or argumentation of facts necessarily decided in the prior proceeding." Id. (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). Plaintiff bears the burden of proving that the issue he seeks to foreclose was necessarily decided in the first trial. Id. at 229-30. To determine what the jury in the first trial necessarily decided, the Court must examine "the record of [the] prior proceeding, taking into account the pleadings,

evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which

the defendant seeks to foreclose from consideration." Id. at 230 (quoting *Yeager v. United States*, 557 U.S. 110 (2009)).

A review of the trial transcript in Plaintiff's state court trial reveals that evidence of Plaintiff's alleged intoxication was presented to the jury. However, driving while intoxicated and resisting arrest are not among the essential elements of the felony crime of aggravated flight. Compare La. Rev. Stat. § 14:108.1 with La. Rev. Stat. § 14:98 and La. Rev. Stat. § 40:1390. Further, Plaintiff admits that "the issues of alcoholic intoxication and resisting arrest are not among the essential elements of the felony crime of unlawful flight." (Rec. Doc. 240-1 at 9.) Moreover, Plaintiff has not satisfied his burden of proving that the jury necessarily decided that Plaintiff was not driving while intoxicated and did not resist an officer. The jury was only asked to determine whether Plaintiff was guilty of aggravated flight. Consequently, double jeopardy does not bar subsequent prosecution of Plaintiff's misdemeanor charges and is not an exception to the Younger abstention doctrine.[4]

[4] To the extent that Plaintiff seeks to re-litigate his "bad-faith prosecution" arguments the Court refuses to consider such arguments. This litigation spans a decade, and this Court has on at least two other occasions determined that Plaintiff is not entitled to injunctive relief for alleged bad-faith prosecution as to the misdemeanor claims. *See Gates v. Strain*, No. 07-6983, 2011 WL 2690607(E.D. La. July 11, 2011); Rec. Doc. 196, at 3; Rec. Doc. 200, at 4. As previously noted by this Court, "any 'new' evidence of 'bad-faith,' 'manufacturing,' and 'altering' can be presented in [Plaintiff's] defense and will speak directly to a jury's decision as to guilt or innocence on the charges brought." (Rec. Doc. 200, at 5.)

Plaintiff's second argument, that prosecution of the misdemeanors would violate his right to a speedy trial, also lacks merit. In essence, Plaintiff seeks federal habeas relief.[5] See (Rec. Doc. 240-1, at 10-11.) However, Petitioner is clearly not "in custody" as defined by 28 U.S.C. § 2254 or 28 U.S.C. § 2241.[6] Although individuals may be "in custody" despite not being physically confined, "in custody" means that the petitioner be in custody under the conviction or sentence under attack at the time the habeas petition is filed. *Robertson v. Brown*, No. 113-023, 2013 WL 5723934, at *2 (S.D. Ga. Oct. 21, 2013) (citing *Maleng v. Cook,* 490 U.S. 488, 490-91 (1989)). Plaintiff has not yet been tried, let alone convicted, on the pending misdemeanor charges.

Nevertheless, Plaintiff's argument lacks merit for additional reasons. Plaintiff asks this Court to enjoin the state court from prosecuting him on the misdemeanor offenses; he does not request

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[5] At least twice in his motion Plaintiff requests habeas-type relief. Plaintiff specifically argues that "he is, again, standing before this Court in the same essential situation as would a defendant who has been convicted in the state courts, had that conviction affirmed, and is now seeking collateral post-conviction vindication of his violated constitutional rights."

[6] It also appears that Plaintiff failed to exhaust his state court remedies prior to filing for such "habeas" relief, as there has not been a trial on the merits of the underlying misdemeanor charges, and Plaintiff has not raised his speedy trial defense. Thus, assuming Plaintiff was convicted of the misdemeanor offenses, he has yet to appeal the conviction to Louisiana's highest court, which means that his claims are unexhausted and barred from habeas review.

that the state bring him to trial on the misdemeanor offenses. As noted by the Fifth Circuit in *Brown v. Estelle,* there is a distinction between petitioners who seek to dismiss an indictment or prevent prosecution and those who wish to force the state to go to trial. 530 F.2d 1280 (5th Cir. 1976). Dismissing an indictment or preventing prosecution is normally not attainable by way of pretrial habeas corpus. *Id.* at 1283. Even assuming this case was in the proper procedural posture for federal habeas relief, which it is not, when a federal habeas petitioner asserts a speedy trial defense, the petitioner is not permitted to derail "a pending state proceeding by [attempting] to litigate constitutional defenses prematurely in federal court." *Braden v. 30th Jud. Cir. Ct. of Ky.,* 410 U.S. 584, 493 (1973). Rather, "the claimed violation may be remedied by [a] decision on the merits so that the right is not irreparably lost if review is postponed until final judgment is rendered on the merits." *Savoy,* 2016 WL 1411310, at *4 (quoting *Atkins v. Michigan*, 644 F.2d 543, 546 (6th Cir. 1981)). Accordingly, the requested relief is unwarranted, and Plaintiff's speedy trial argument is not an exception to Younger abstention in this case.

The Court must now determine whether it should dismiss Plaintiff's § 1983 lawsuit with prejudice pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute. Rule 41(b) of the Federal Rules of Civil Procedure provides that a court may, in

its discretion, dismiss any action based on the failure of the plaintiff to prosecute or comply with any order of the court. *Diaz v. Guynes, No.* 13-4958, 2017 WL 86135, at *2 (E.D. La. Jan. 10, 2017) (citing cases). In determining whether dismissal with prejudice is warranted for failure to prosecute, courts consider

whether one or more of three "aggravating factors" are present: (1) delay attributable directly to the plaintiff, rather than his attorney; (2) actual prejudice to the defendant; and (3) delay caused by intentional conduct. *Callip v. Harris Cnty. Child Welfare Dept.,* 757 F.2d 1513, 1519 (5th Cir. 1985). However, the Fifth Circuit cautions that dismissal with prejudice is reserved for "the most egregious circumstances." Id. (quoting *Rogers v. Kroger Co.,* 669 F.2d 317, 320 (5th Cir. 1982)).

Defendants argue that all of the above-outlined factors are satisfied in this case. Specifically, Defendants assert that since 2013, Plaintiff has "purposefully evaded the state court system, even after an attachment for his arrest was issued" and after this Court ruled that Plaintiff had no grounds to enjoin the state court proceedings. In response, Plaintiff argues that Defendants "have, at every turn, obstructed and delayed [Plaintiff's] prosecution. . . ." In essence, Plaintiff argues that he has not resolved the underlying criminal proceedings because they are unlawful and unconstitutional.

Dismissal with prejudice is appropriate in this case. As the Court stated at oral argument, all three "aggravating factors" are present here. Plaintiff is the sole cause of the delay attributable to this matter by failing and refusing to respond to a state court issued warrant for his arrest, and failing to appear for those state court charges and present any defenses he may have. Plaintiff's own attorney admitted to the Court in oral argument that he does not know if Plaintiff still resides in the United States, that he does not have an address for Plaintiff's residence, and does not know Plaintiff's telephone number. Thus, it is apparent that the delay in this

case has been caused solely by Plaintiff's actions or lack thereof. Second, Defendants have suffered obvious and actual prejudice as a result of Plaintiff's delay. Defendants have had to spend extensive time and money over the last ten years in defending and responding to this litigation. Finally, the delay was caused by Plaintiff's intentional conduct, there is no other way to explain Plaintiff's actions. This is clearly an example of the most egregious of circumstances. Accordingly, dismissal with prejudice is appropriate.

CONCLUSION

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Injunction and to Lift Stay (Rec. Doc. 240) is **DENIED**. Further, the Court finds that Defendants' Motion to Lift Stay and Dismiss (Rec. Doc. 243) is **GRANTED**, and Plaintiff's lawsuit is **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana this 24th day of March, 2017.

s/
CARL J. BARBIER
UNITED STATES DISTRICT JUDGE