

No. _____

19-6843

IN THE SUPREME COURT
OF THE UNITED STATES

JAMES RICE,
Petitioner-Appellant

SEAN BOWERMAN, WARDEN,
TOLEDO CORRECTIONAL INSTITUTION

Respondent-Appellee.

v.

FILED
NOV 18 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
ORIGINATING CASE NUMBER 19-3005

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Was Petitioner James Rice denied the right to a speedy trial in the state courts? The Sixth Amendment to the Constitution of the United States guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" The Supreme Court of the United States set forth the requirements that constitute a speedy trial in their landmark case *Barker v. Wingo*, 407 U.S. 514 (1972). The argument that was presented to the Sixth Circuit Court of Appeals is contained in pages 2-22.
2. Did the federal courts err in finding that the judgment of the state courts was not an unreasonable application of *Barker v. Wingo*, 407 U.S. 514 (1972)? A state prisoner is entitled to habeas corpus relief if he can demonstrate that "the state court's adjudication of the prisoner's constitutional claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).
3. Did the federal courts err in barring consideration of the fourth factor of *Barker v. Wingo* (i.e., prejudice to the Petitioner by the unjustifiable delay between accusation and prosecution) because counsel did not assert the fourth factor in the habeas petition, and instead asserted it in the traverse? The Magistrate's Report and Recommendation in the district court specifically barred consideration of the fourth factor of *Barker v. Wingo* because counsel listed it in the traverse and not the habeas petition. Counsel did

properly object, but the district court judge and the Sixth Circuit Court of Appeals adopted the Magistrate's recommendation, citing Sixth Circuit case law only. The decision effectively foreclosed the Petitioner from relief on the speedy trial claim, and is unreasonable given that the fourth factor was argued at all required stages of the state court proceedings, and was, after all, presented in the traverse where reasonable under the particular circumstances of the instant case.

4. Was Petitioner James Rice entitled to the effective assistance of counsel in his federal habeas petition, where the Ohio Public Defender's Office volunteered to represent the Petitioner in federal court, and the habeas petition was arguably denied because counsel failed to assert the fourth factor of Barker v. Wingo (i.e., prejudice) until the traverse, and thus the federal courts barred consideration of the fourth factor? It is well established that ineffective assistance of counsel, whether at trial or in a direct appeal, must be attributed to the State and not the federal habeas petitioner. See Coleman v. Thompson, 501 U.S. 722, 752, 754 (1991); and Murray v. Carrier, 477 U.S. 478, 488 (1986). Ineffective assistance of counsel is established through a two pronged analysis, "[f]irst, the [petitioner] must show that counsel's performance was deficient ... [and] [s]econd, the [petitioner] must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). Had counsel included the fourth factor in the petition, all four factors would have been considered, and the Petitioner would have received habeas corpus relief.

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APPENDIX - Decision rendered by the Sixth Circuit Court of Appeals on 08/20/2019 (case no. 19-3005).

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

Barker v. Wingo, 407 U.S. 514 (1972)	iii, 10-12, 15-19
Coleman v. Thompson, 501 U.S. 722 (1991)	iv
Doggett v. United States, 505 U.S. 722 (1991)	12, 15, 19
Harrington v. Richter, 562 U.S. 86 (2011)	14
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Smith v. Hooey, 393 U.S. 374 (1969)	20
State v. Bonnell, 140 Ohio St.3d 209 (2014)	20
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 20, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Amendment VI to the Constitution of the United States.

STATEMENT OF THE CASE AND THE FACTS

I. Summary of relevant facts

On August 20, 2012, James Rice was arrested for having weapons under disability, and possession of drugs and paraphernalia in Butler County, Ohio Case No. CR2012-09-1520. RE 4-1, Page ID # 222; RE 4, Page ID # 69. He was taken to the county jail in Butler County, Ohio, on that day. RE 4, Page ID # 224. The next day, the Cincinnati Police Department began investigating Mr. Rice for alleged involvement in a robbery that took place on August 16, 2012, in Cincinnati, Ohio. RE 4, Page ID # 252.

The Hamilton County Prosecutor's Office filed charges in this case against Rice on January 30, 2013. *State v. Rice*, 1st Dist. Hamilton No. C-150191, 2015-Ohio-5481, ¶ 7-10; RE 4, Page ID # 163-64. At that time Rice was incarcerated in a state prison in Ohio. *Id.* at ¶ 5; RE 4, Page ID # 162. He was moved from Butler County Jail to the Ohio Correctional Reception Center on October 31, 2012. RE 4, Page ID # 248. Mr. Rice would later be transferred to London Correctional Institution and remain in the custody of the Ohio Department of Rehabilitation and Correction (hereafter "DRC") until August 19, 2014. RE 4, Page ID # 250.

Police Specialist Les Mendes of the Cincinnati Police Department acknowledged that he knew that Rice was in state prison but made no effort to contact DRC to serve Rice with the criminal complaint until August 19, 2014.

Rice at ¶ 12-13; RE 4, Page ID # 164-65. On that date, Rice was arrested at London Correctional Institution upon the completion of his previous prison term. *Id.*

On December 1, 2014, Rice filed a motion to dismiss the charges because his constitutional speedy trial rights had been violated. *Rice* at ¶ 13; RE 4, Page ID # 165. The motion was 16 pages and contained 20 exhibits. RE 4, Exhibit 4, Page ID # 37-103. One of the exhibits was a certificate of incarceration from DRC that documented Rice's time in DRC custody from October 31, 2012, until August 19, 2014. RE 4, Exhibit 4, Page ID #75. That certificate was not notarized by a DRC official until November 13, 2014. *Id.*

The State did not file a written response to the motion to dismiss. The trial court held a pre-trial hearing after which the trial court denied Rice's motion to dismiss. RE 4 Page ID # 104; RE 4-1 Page ID # 209-282. Later, a jury trial was held in the case, and Rice was convicted of aggravated robbery and aggravated burglary. RE 4, Page ID # 105-108. He was sentenced to an aggregate prison term of 25 years. RE 4, Page ID # 114.

For ease of review, the relevant dates are presented in the chart below:

Date	Event	Record
August 16, 2012	Burglary and robbery occur for which Mr. Rice would later be charged.	RE 4, Page ID # 29-31
August 20, 2012	Mr. Rice is arrested in Butler County Case No. CR2012-09-1520, and held at the Butler County Jail.	RE 4-1, Page ID # 222
October 24-25, 2012	Mr. Rice pleads guilty and is sentenced to a two-year prison term in Butler County Case No. CR2012-09-1520.	RE 4, Page ID # 71
October 31, 2012	Mr. Rice is admitted to the Correctional Reception Center, which is a state prison run by DRC.	RE 4, Page ID # 248
January 30, 2013	Criminal charges in the instant case are filed against Mr. Rice, as well as a warrant for his arrest.	RE 4, Page ID # 169
August 19, 2014	Mr. Rice is arrested in the instant case upon his release from London Correctional Institution	RE 4, Page ID # 164-65
August 28, 2014	Mr. Rice was indicted for aggravated robbery and aggravated burglary.	RE 4, Page ID # 165
November 13, 2014	Certificate of incarceration from DRC was notarized.	RE 4, Exhibit 4, Page ID #75
December 1, 2014	Mr. Rice filed a motion to dismiss his case because his right to a speedy trial had been violated.	RE 4, Page ID # 165
January 12-13, 2015	A hearing was held on the motion to dismiss, and the trial court denied the motion.	RE 4 Page ID # 104; RE 4-1 Page ID # 209-282

II. Factual determinations of the state court of appeals

On direct appeal, Ohio's First District Court of Appeals made the following factual findings:

{¶ 2} In August 2012, Rice, who was on parole to the Commonwealth of Pennsylvania, met with his parole officer, James Hubbell, with the Adult Parole Authority ("APA") in Butler County. During the course of the meeting, Rice indicated that he needed to obtain a travel permit from his car. Hubbell and another parole officer accompanied Rice to his car. Rice then consented to a search of his vehicle by Hubbell and his partner, who found a bag on the rear seat of the vehicle which contained firearms, a holster, gloves, ski masks, zip ties, and a counterfeit police badge. Rice was arrested and placed in the Butler County jail. Hubbell then referred the matter to the city of Hamilton Police Department in Butler County, Ohio.

{¶ 3} Shortly thereafter, Michael Waldeck, with the city of Hamilton Police Department, took the information regarding Rice and placed it on the Southwestern Ohio Police ("SWOP") Intelligence Website. He also sent out an email to other police agencies, which contained Rice's photograph and detailed the items recovered from Rice's vehicle, in the event that Rice may have fit the description of a potential suspect in any unresolved criminal case.

{¶ 4} On August 31, 2012, Specialist Les Mendes with the Cincinnati Police Department contacted Hubbell. Mendes told Hubbell that Rice may have been involved in a home invasion in Hamilton County on August 16, 2012. Mendes was looking at charging Rice with aggravated burglary and impersonating a police officer. Hubbell could not recall telling Mendes that Rice was in custody, and he testified that his notes from their phone conversation did not reflect that any conversation to that effect had taken place. Hubbell testified that he had a second phone call with Mendes on September 10, 2012, when Mendes had relayed that two witnesses had picked Rice out of a photo lineup.

{¶ 5} Hubbell's supervisor, Teresa Williams, testified that Rice was arrested on August 20, 2012, prosecuted by Butler County, and sentenced to the Ohio Department of Rehabilitation and Correction ("ODRC") for 24 months. Williams testified that she took the initial phone call from Mendes on August 31, 2012. Mendes was looking at Rice and possibly other people for a home invasion. Williams testified that she had "specifically told Detective Mendes that [Rice] was in custody for the new [Butler County] charges, and also the APA had a hold on him that, even if he had posted bond, he wouldn't be leaving jail because he was on supervision to [the APA] for the Commonwealth of Pennsylvania," which had not yet issued a warrant for Rice's arrest.

{¶ 6} On September 19, 2012, Williams had another conversation with Mendes to relay some additional information that Hubbell had discovered. Mendes had stated in his initial call with the Butler County APA that Rice had committed the home invasion sometime between 11:30 p.m. and midnight on August 16th, but that Rice had purportedly been in Cambria County, Pennsylvania the morning of August 17th. So, Williams had shared with Mendes that there might be a time issue. Hubbell contacted the clerk of courts in Cambria County and determined that Rice had been seen at a window making a payment at 9:06 a.m. and again at 9:28 a.m. on the morning of August 17, 2012. Per their investigation with Google maps, Williams and Hubbell determined that Rice could have made it from Cincinnati, Ohio, to Cambria County in six hours and 20 minutes. Williams gave this information to Mendes on September 19, 2012. Williams could not recall if she had mentioned during the September 19, 2012 phone call whether Rice was in custody, but she testified that there had been no change in Rice's status at that point.

{¶ 7} Anthony Spinney, a civilian deputy with the Hamilton County Sheriff's Office, testified that before entering the complaint and warrant that had been sworn out by Mendes into the computer system, he ran a Law Enforcement Automated Data Systems ("LEADS") check and a National Criminal Information Center ("NCIC") background check. On January 30, 2013, a complaint, affidavit, and

arrest warrant were entered into the clerk of court's system. Spinney testified that he had no information regarding the service of the warrant, and that he was unable to determine if someone was currently incarcerated.

{¶ 8} Regina Cox testified that she is employed by ODRC. She testified that Rice had been sentenced to two years in prison for having a weapon under a disability and for possession of drugs. She testified that a LEADS check had been run when Rice was admitted to ODRC on October 31, 2012, and 30 days before he was released from ODRC on August 19, 2014.

{¶ 9} Cox testified that ODRC notified the Hamilton County Sheriff's Office by letter on July 30, 2014, that Rice was in custody at the London Correctional Institute ("LoCI"), that he had outstanding charges against him, and that he was being released on August 19, 2014. The letter referenced a Hamilton County case number and a warrant against Rice that had been entered on January 30, 2013.

{¶ 10} Mendes testified that he was investigating a home-invasion burglary on August 16, 2012. He first heard of Rice when he read an email by the Hamilton Police Department to the SWOP Intel on August 21, 2012. He did a query on Rice and then contacted the issuing department. He looked over the report of the burglary offense, checked it with the height and weight of Rice, and compiled a photo lineup with Rice's photo to show the victims. On August 25, 2012, three of the four victims identified Rice as the perpetrator.

{¶ 11} Mendes contacted the APA in Butler County and spoke with Hubbell and Williams, who advised him that Rice was in custody. Mendes testified that he waited until January 30, 2013, to swear out the complaint and warrant, because he had lost contact with the victim. She was not returning his calls, and he wanted to confirm that she wanted to move forward with the charges. He filed the charges after he had heard back from her.

{¶ 12} Mendes testified that he may have contacted the Butler County jail, but he did not believe he had ever contacted the Butler County clerk's office to determine what had happened with Rice's arrest in Butler County. He did not believe he had ever contacted the ODRC to determine if Rice was incarcerated, but he did have knowledge, based on his conversations with Hubbell and Williams, that Rice was "doing some time for the prior offense, the probation violation." He did not recall a specific date when he learned this, but testified that it was probably prior to signing the warrant. Mendes further testified that he never contacted the ODRC to let them know an incarcerated person has a warrant. Instead, ODRC contacts him to let him know when it is time to pick up the inmate.

{¶ 13} On August 19, 2014, Mendes traveled to LoCI where he arrested Rice. A grand jury indicted Rice on August 28, 2014, for one count of aggravated burglary and one count of aggravated robbery with firearm specifications arising out of the August 16, 2012 incident. On December 1, 2014, Rice filed a motion to dismiss the indictment against him on speedy-trial grounds. At the conclusion of the evidentiary hearing, the trial court denied Rice's motion, and his case proceeded to trial before the jury, which found him guilty of the charges and specifications.

III. Subsequent procedural history

Mr. Rice filed a timely direct appeal in the Ohio First District Court of Appeals on March 11, 2015. RE 4, Page ID # 118-119. Mr. Rice raised the following assignment of error on direct appeal:

The trial court abused its discretion in failing to grant defendant's motion to dismiss for violation of his speedy trial rights under the United States Constitution, the Ohio Constitution, and the Ohio Revised Code.

RE 4, Page ID # 128-147. The state appellate court overruled the assignment of error raised by Mr. Rice. *State v. Rice*, 1st Dist. Hamilton No. C-150191, 2015-Ohio-5481, ¶14-43; RE 4, Page ID 165-177. One state appellate court judge dissented, and stated that she would have found that Rice's constitutional speedy trial rights were violated. *Rice* at ¶ 44-52; RE 4, Page ID # 177-82.

Mr. Rice filed a timely notice of appeal in the Ohio Supreme Court. RE 4, Page ID # 187-88. In the accompanying jurisdictional memorandum, Mr. Rice raised three propositions of law which related to the denial of his speedy trial rights. RE 4, Page ID # 195-205. The Ohio Supreme Court declined jurisdiction and did not hear Mr. Rice's case. RE 4, Page ID # 208.

On May 2, 2017, Mr. Rice filed his 28 U.S.C. §2254 habeas petition. RE 1, Page ID #1-19. Mr. Rice's habeas petition raised a single ground for relief:

GROUND ONE: James Rice's right to a speedy trial under the United States Constitution was violated due to the State's unjustifiable delay between accusation and prosecution. *Barker v. Wingo*, 407 U.S. 514 (1972).

RE 1 Page ID #5, 15-19. The Warden/Respondent filed "Respondent Warden's Answer/ Return of Writ" on June 23, 2017. RE 5, Page ID # 934 – 957. Mr. Rice filed Petitioner's Travers to Respondent's Return of Writ on October 30, 2017. RE 14, Page ID # 1946-1960.

The Magistrate Judge issued its Report and Recommendations on June 15, 2018, and recommended that the petition be dismissed, but that Mr. Rice be

granted a certificate of appealability. RE 17, Page ID # 1964-1980. Both Mr. Rice and the respondent filed objections to the report and recommendation. RE 20, Page ID # 1984-1989; RE 21, Page ID # 1990-1998. On September 24, 2018, the District Judge returned the matter to the Magistrate Judge to analyze the objections and file a supplemental report. RE 22, Page ID # 1999.

On October 5, 2018, the Magistrate Judge issued its Supplemental Report and Recommendations, and again recommended that the petition be dismissed, but that Mr. Rice be granted a certificate of appealability. RE 23, Page ID # 2000-2006. Both parties filed supplemental objections to the Supplemental Report and Recommendations. RE 24, Page ID # 2007-2013; RE 25, Page ID # 2014-2022.

On December 11, 2018, the District Judge issued its “Decision and Entry Adopting the Report and Recommendation (Doc. 17) and the Supplemental Report and Recommendation of the United States Magistrate Judge (Doc. 23) and Terminating This Case in this Court.” RE 27, Page ID # 2031-2035. In that decision, the District Judge dismissed Mr. Rice’s petition and issued a certificate of appealability. RE 27, Page ID # 2035.

REASONS FOR GRANTING THE PETITION

James Rice's constitutional right to a speedy trial was denied when law enforcement deliberately waited 18 months to serve him with the complaint that had been issued against him. There are four factors that reviewing courts consider in assessing whether a speedy trial violation occurred. *Barker v. Wingo*, 407 U.S. 514, 530-31, 33 (1972). All four of those factors weighed against the State, as explained below in greater detail.

The first factor articulated in *Barker* is the length of the delay. *Barker* at 530. This factor weighs in Mr. Rice's favor, because delays of 12 months or longer are presumptively prejudicial towards defendants. *Doggett v. United States*, 505 U.S. 647, 652, (1992), fn. 1.

The second *Barker* factor is the justification for the delay. *Barker* at 530. This also weighs in Mr. Rice's favor because the State knew Mr. Rice's exact location, but declined to serve him with the complaint.

The third *Barker* factor is whether the defendant asserted their rights to a speedy trial. *Barker* at 530. This factor weighs in Mr. Rice's favor, because he made a forceful and timely assertion of his right to a speedy trial.

The fourth and final *Barker* factor is whether the defendant was prejudiced by the delay. *Barker* at 530. This factor weighs in Mr. Rice's favor for four reasons: (1) Prejudice is presumed after an 18-month delay; (2) Mr. Rice was

denied the possibility of a concurrent prison term; (3) evidence was lost; and (4) witnesses' memories had faded.

Because all four of the factors articulated in *Barker* weigh in Mr. Rice's favor, it was objectively unreasonable for the Ohio First District Court of Appeals to conclude that his speedy trial rights were not violated.

STANDARD OF REVIEW

"This Court applies *de novo* review to the decision of the district court in a habeas corpus proceeding." *Maples v. Stegall*, 340 F. 3d 433, 436 (6th Cir. 2003). A state prisoner's petition may be granted when the state court's adjudication of the prisoner's constitutional claim either:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning:

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e]

Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

In *Harrington v. Richter*, the Supreme Court of the United States issued additional guidance on how the “unreasonable application” standard should be applied in AEDPA cases. 562 U.S. 86, 102-03 (2011). The Supreme Court explained that “unreasonable application” means more than that the state court’s conclusion was unreasonable. *Id.* Instead, writs may only be issued in cases “where there is no possibility fair-minded jurists could disagree that the state court’s decision conflicts with” Supreme Court precedent. *Id.* “As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” *Id.*

Determinations of factual issues by a state court are presumed correct. 28 U.S.C. § 2254(e)(1). The applicant for a writ of habeas corpus has the burden of rebutting that presumption by clear and convincing evidence. *Id.*

ARGUMENT

GROUND FOR RELIEF

James Rice's right to a speedy trial under the United States Constitution was violated due to the State's unjustifiable delay between accusation and prosecution. *Barker v. Wingo*, 407 U.S. 514 (1972).

Petitioner James Rice's right to a speedy trial was denied when law enforcement deliberately waited 18 months to serve him with the complaint that had been issued against him. In *Barker v. Wingo*, the Supreme Court identified four factors that reviewing courts should consider in assessing a speedy-trial violation: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530-31, 33 (1972). None of the factors are essential or dispositive; rather, they are interrelated, and courts must consider them comprehensively. *Id.* Here, each factor weighs in favor of finding a speedy trial violation, as will be discussed below in greater detail.

1. The length of the 18-month delay weighs against the State.

The first factor articulated in *Barker* is the length of the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 (1972). The delay in this case was longer than 18 months. Delays that are longer than one year are presumptively prejudicial towards defendants. *Doggett v. United States*, 505 U.S. 647, 652, (1992), fn. 1.

The Ohio First District Court of Appeals correctly found that this factor weighed

against the State, and warranted further inquiry into the other three factors. *State v. Rice*, 2015-Ohio-5481, ¶.24 (1st.Dist.App.), citing *Doggett*. RE 4, Page ID # 168.

2. The delay was unjustified, because the State knew exactly where to find Mr. Rice, but decided not to serve him with the criminal complaint.

The second factor articulated in *Barker* is the justification for the delay.

Barker, 407 U.S. at 530. The State refused to serve Mr. Rice for 18 months, even though it knew his exact location. The Ohio First District Court of Appeals explained:

Here, the record reflects that the complaint was filed and a warrant was issued to Rice at his home address. Officer Mendes testified that he did nothing to locate Rice after the warrant had been issued, because he knew Rice had been incarcerated. Mendes testified that he had never contacted the ODRC to let them know that an incarcerated subject had a warrant against him. Instead, Mendes waited for the ODRC to contact his department when the defendant was ready to be transported or released. Williams testified that she had told Officer Mendes on August 31, 2012, that Rice was incarcerated. Because the record reflects that Officer Mendes knew Rice was incarcerated, yet made no attempt to serve Rice with the criminal complaint, the state bears significant responsibility for the 18-month delay. Thus, the second factor weighs slightly against the state and in favor of Rice.

State v. Rice, 2015-Ohio-5481, ¶ 26 (1st.Dist.App.); RE 4, Page ID # 169. The failure to serve Mr. Rice with the complaint was intentional and systematic, as Officer Mendes would “never” contact ODRC to serve defendants. As the Ohio First District Court of Appeals noted, “the state bears significant responsibility for the 18-month delay.” *Id.*

3. **Mr. Rice's assertion of his right to a speedy trial was forceful and timely.**

The third factor to be considered is whether the defendant asserted the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Courts "assess whether a defendant has made a timely assertion of his or her right to a speedy trial in light of the totality of the circumstances, including the length and occasion for the delay and the conduct of both the defendant and the prosecution." *Id.* at 530.

Mr. Rice was arrested on August 19, 2014. He filed a motion to dismiss on speedy trial grounds on December 1, 2014. RE 4, Page ID #37. The motion was 16 pages long and accompanied by 20 exhibits. RE 4, Page ID #37-103.

The First District Court of Appeals unreasonably found that this factor weighed against Mr. Rice. *Rice* at ¶ 27; RE 4, Page ID # 169-70. To that effect, it stated:

While generally when the defendant has filed a motion to dismiss based on speedy trial violations, Ohio courts [have] weigh[ed] the third *Barker* factor in the defendant's favor, there is a significant four-month gap for which Rice bears some responsibility. Thus, we conclude that the third factor weighs slightly in the State's favor.

Id. (quotation omitted). This was unreasonable for several reasons. First, the delay was closer to three months, rather than four. More significantly, there is no evidence that the timing of the motion was unreasonable. The motion was long and complex, and counsel could not have written it immediately. Some items were provided in discovery, and could not have been obtained immediately. Mr. Rice

was not even indicted until August 28, 2014. *Rice* at ¶ 13; RE 4, Page ID # 165.

The certificate of incarceration that was attached to the motion was not signed and notarized by ODRC staff until November 13, 2014. RE 4, Page ID #75. In her dissenting opinion, Judge Cunningham correctly reasoned as follows:

The record reflects that Rice's motion to dismiss contained numerous exhibits that precipitated an evidentiary hearing on the motion. While his counsel could have conceivably proposed his argument to the court at an earlier stage of the proceedings, given the amount of evidence presented with the motion, this was not a case of last-minute maneuvering by Rice.

Rice ¶ 48; RE 4, Page ID # 180.

The Ohio First District Court of Appeals applied this standard incorrectly when it found that it weighed against Mr. Rice. The relevant questions for the third *Barker* factor are “whether and how” the defendant asserts their right, rather than when the defendant asserts their right. *Barker* at 531. When reviewing the assertion factor, a forceful objection is given more weight than a purely pro forma objection. *Barker* at 529. Here, Mr. Rice filed a lengthy and complex motion to assert his right to a speedy trial, and again asserted his right at the ensuing evidentiary hearing. RE 4, Page ID #37-103; RE 4-1, Page ID # 209-282.

Further, any weight in the State's favor for this factor is trivial when compared to the delay precipitated by the State. The State knew where Mr. Rice was before trial and decided not to serve him with a copy of the complaint for 18 months. The First District Court of Appeals afforded that only slight weight. *Rice*

at ¶ 26; RE 4, Page ID # 169. It was unreasonable to then assign the same weight against Mr. Rice for using a small fraction of the 18 months to file a complex motion. *Id.* at 27; RE 4, Page ID # 169-70.

Further still, there was no prejudice at all to the State by the timing of Mr. Rice's motion.

Mr. Rice made a complete and timely assertion of his right to a speedy trial. The conclusion that this factor weighed against Mr. Rice was unreasonable.

4. Mr. Rice demonstrated prejudice from the delay.

The fourth and final factor is the prejudice to the defendant from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). To prevail on a constitutional speedy trial claim, the defendant need not demonstrate specific ways in which his defense had been prejudiced by the delay. *Doggett v. United States*, 505 U.S. 647, 655-656 (1992). “[E]xcessive delay presumptively compromises the reliability of the trial in ways that neither party can prove, or for that matter, identify.” *Id.* at 655. Proof of particularized prejudice is therefore not essential to a speedy trial claim. *Id.* at 655-58. In *Doggett*, the Supreme Court presumed that a delay of eight and one-half years prejudiced the defense. Further, the Supreme Court noted that lower courts have generally found post-accusation delay “presumptively prejudicial” as the delay approaches one year. *Id.* at 652, fn. 1. Accordingly, prejudice is presumed in this case.

Further, Mr. Rice has shown actual prejudice. By deliberately refusing to serve Mr. Rice before his prior prison term expired, the State denied Mr. Rice the possibility of serving the terms concurrently. The Supreme Court noted that an already-incarcerated person is prejudiced by delay because “the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.” *Smith v. Hooey*, 393 U.S. 374, 378 (1969).

The Report and Recommendation, and the decision adopting it, found that the possibility of concurrent sentences was inconsequential because Mr. Rice did not “cite any statutory provisions or Ohio case law that would suggest concurrent sentences would be appropriate under these circumstances, nor do they cite any practice of the Hamilton County Common Pleas Court in this regard.” RE 17, Page ID # 1978.

Under Ohio law, there is a statutory presumption in favor of concurrent sentences. *State v. Bonnell*, 140 Ohio St. 3d 209, 211 (2014). That presumption can be overcome when a judge makes specific statutory findings. *Id.*; O.R.C. 2929.14(C)(4).

Because of the State’s willful delay, it is impossible to know whether the trial court would have made the findings required to impose consecutive sentences. This will always be the case when the State delays the service of a complaint until

after a prior prison term is complete. This is why the Supreme Court noted that losing the *possibility* of concurrent sentences was prejudicial. *Hooey* at 378.

The possibility of concurrent sentences was not the only prejudice that Mr. Rice suffered. The State destroyed evidence and the memories of witnesses faded. The State explained that, regarding evidence recovered from Mr. Rice's vehicle, "a great majority of the evidence was purged over the last two years from the property room as part of their routine." RE 4-2, Page ID # 1476. Over defense objection, the trial court allowed photographs of the missing evidence. RE 4-2, Page ID # 1477-78. Detective Mendes testified that the firearm that was not destroyed was "the only piece of evidence that exists in this case." RE 4-2, Page ID # 1697. Further, one of the victims could not remember what her assailant looked like because of the passage of time. RE 4-2, Page ID # 1593. The Report and Recommendation ignored the missing evidence and faded memories.

The Supplemental Report and Recommendation, and the decision adopting it, incorrectly found that Mr. Rice had waived his claim of prejudice from loss of evidence by failing to raise it in state and federal court pleadings. RE 23, Page ID # 2003, RE 27, Page ID # 2033. However, Mr. Rice did argue to the state court of appeals that he was prejudiced by the loss of evidence and by the fading of witness' memories. RE 4, Page ID # 140. He repeated this argument in his traverse. RE 14, Page ID # 1957-59. Accordingly, Mr. Rice did not forfeit the

claim in either state court or federal habeas proceedings. Mr. Rice demonstrated particularized prejudice, and he has not forfeited the claim.

In summation, there were four reasons that Mr. Rice was prejudiced from the delay in this case: (1) prejudice is presumed after an 18-month delay; (2) Mr. Rice was denied the possibility of a concurrent prison term; (3) evidence was lost; and (4) memories faded. It was unreasonable of the Ohio First District Court of Appeals to conclude that the prejudice factor weighed against Mr. Rice.

CONCLUSION

All four of the factors articulated in *Barker* weigh in Mr. Rice's favor. Accordingly, Mr. Rice is entitled to a writ of habeas corpus. He respectfully requests that this Court reverse the district court and order that Mr. Rice be granted a writ of habeas corpus.

Respectfully submitted,



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