19-6880

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Gregory Bartunek - PETITIONER

vs.

United States of America - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF THE 8TH CIRCUIT

(19-1248)

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS

I. IS AN AFFIRMATIVE DEMONSTRATION OF PREJUDICE TO THE ACCUSED'S ABILITY TO DEFEND HIMSELF ESSENTIAL TO PROVE THE DENIAL OF HIS RIGHT TO A SPEEDY TRIAL?

II. SHOULD THE COURT ALLOW HABEAS CORPUS RELIEF OR SIMILAR COLLATERAL RELIEF FOR A SPEEDY TRIAL CLAIM BROUGHT BEFORE TRIAL? DOES DENIAL OF SUCH A CLAIM, NOT BASED ON ITS MERITS, VIOLATE THE PETITIONER'S DUE PROCESS RIGHTS?

III. SHOULD "EXCEPTIONAL CIRCUMSTANCES" BE REQUIRED TO BRING FORWARD A HABEAS CLAIM, BASED ON A SPEEDY TRIAL VIOLATION, PRIOR TO TRIAL? ARE SUCH CIRCUMSTANCES PRESENT IN THIS CASE? SHOULD THE PETITIONER'S WRIT FOR HABEAS THEN BE GRANTED?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Code

Court Rules

United States Constitution

State Statutes

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

The opinion of the United States court of appeals appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States district court appears at Appendix 2 to the petition and is unpublished.

BASIS FOR JURISDICTION

A. 09/20/2018 - Petition for Writ of Habeas Corpus filed with the USDC - Neb. (8:18CV440).

B. 01/08/2019 - Judgment from USDC denying and dismissing the Petition without prejudice.

C. 02/12/2019 - Judgment from USCA - 8th Cir. summarily affirming the District Court's Judgment. (19-1248).

D. 04/25/2019 - Order from USCA to extend time to file a Petition for Rehearing until 05/30/2019 granted.

E. 05/25/2019 - Order from USCA for Petition for Rehearing denied.

F. 09/25/2019 - Application to USSC to extend time to file a Petition for Writ of Certiorari until 11/22/2019 granted. (19A341).

G. 28 U.S.C. § 1254 - Statute confurring the U.S. Supreme Court jurisdiction to review on a writ of certiorari the Judgment and Order in question.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDANCES, AND REGULATIONS

1. Article I, § 9, cl. 2 of the U.S. Constitution
2. Preamble of the U.S. Constitution
3. First Amendment - "Right to Petition the Government"
4. Fourth Amendment - "Right to Be Secure"
5. Fifth Amendment - "Due Process"
6. Sixth Amendment - "Right to Counsel", "Speedy Trial"
7. Eighth Amendment - "Right to Bail", "Cruel and Unusual Punishment"
8. Fourteenth Amendment - "Equal Protection"
9. 18 U.S.C. § 2252
10. 18 U.S.C. § 2252A
11. 18 U.S.C. § 3142
12. 18 U.S.C. § 3145
13. 18 U.S.C. § 3161
14. 18 U.S.C. § 3509
15. 28 U.S.C. § 1254
16. 28 U.S.C. § 1291
17. 28 U.S.C. § 2241
18. 28 U.S.C. § 2243
19. 28 U.S.C. § 2255

STATEMENT OF THE CASE

A. Jurisdiction

District Court - 28 U.S.C. § 2241

Court of Appeals - 28 U.S.C. § 1291

Supreme Court - 28 U.S.C. § 1254

B. Facts

The Petitioner, Gregory Bartunek, is a federal prisoner confined at FCI Seagoville, TX, serving a 17.5 year sentence from criminal case: USA v. Bartunek, 8:17CR28 (D. Neb. 2017). On May 25, 2016, a Nebraska issued search warrant was exercised on Bartunek's residence. (Tr. at 292-93, Ex. 9)[1]. On January 19, 2017, Bartunek was indicted by a Federal Grand Jury and charged with: Count I - Violation of 18 U.S.C. § 2252A(a)(2), distribution, and Count II - Violation of 18 U.S.C. § 2252(a)(4)(B), possession of child pornography. (DCD 1)[2]. On February 16, 2017, Bartunek was arrested and confined at the Douglas County Department of Corrections. (DCD 9). On February 17, 2017, Bartunek was arraigned, entered a plea of "not guilty", and was appointed counsel, Assistant Federal Public Defender, Michael Maloney. (DCD 10,11). Maloney requested discovery material pursuant to Rule 16. (02/17/2017 Hearing at 4:11-12). Assistant U.S. Attorney, Michael Norris, agreed to produce Rule 16 discovery by February 24, 2017. (Id. at 4:15-17). Maloney agreed to have his pretrial motions filed by March 9, 2017. (Id. at 4:18-20). Maloney also asked for a detention hearing. (Id. at 5:6-7). On February 23, 2017, Magistrate Susan Bazis ordered Bartunek to be released. (DCD 17, 18). However, Bartunek was not released because the government told the Court that it may not have electronic monitoring equipment until Tuesday [February 28,

[1]Tr. refers to transcript of trial proceedings.

[2]DCD refers to District Court Docket.

2017]. (02/23/2017 Hearing at 20:4-6). That same day, Maloney received discovery material. (DCD 21). On February 24, 2017 Norris appealed the release order to the district court. (DCD 24). On February 28, 2017 another detention hearing was held before Judge Robert Rossiter, Jr. (DCD 17). Neither Norris nor Maloney presented any new evidence. (02/28/2017 Hearing at 4:6-19). Norris failed to provide any new evidence, or show any good cause, or any change in circumstances to warrant his appeal as required by 18 U.S.C. § 3142(f) and Rule 46.2. He knew these requirements for granting the appeal, but ignored them. However, Norris was quick to remind the Court of these requirements when Bartunek appealed Judge Rossiter's Order for detention, stating, "there's no change in circumstances, and that's what the Court has to look at right now is whether there has been a change in circumstances." (04/11/2017 Hearing at 34:14-16; DCD 45). After the February 28th hearing, Judge Rossiter granted the government's appeal, revoked the order of release, and detained Bartunek. (DCD 27,28).

Bartunek then attempted to contact Maloney. He sent Maloney a letter requesting an update on pretrial motions, and asked Maloney to appeal Judge Rossiter's detention order to the Court of Appeals. However, Maloney failed to respond to any of Bartunek's requests. Therefore, Bartunek filed motions to appoint new counsel. (DCD 29,33). Maloney failed to file any pretial motions, and was unable to meet the Pretrial Motion Deadline that he had previously agreed to. He extended the time to file Pretrial Motions until April 13, 2017. (DCD 31, 32, 34). A hearing was held on March 14, 2017 before Judge Bazis regarding Bartunek's motions. During the hearing Judge Bazis assured Bartunek that Maloney would meet with him to discuss discovery and other pretrial matters. After the hearing, Bartunek's motions were denied. (DCD 34).

Two weeks passed. No pretrial motions were filed by Maloney. Nor did he file an appeal to the detention order. Furthermore, Maloney failed to meet with Bartunek, or communicate with Bartunek at all. In an effort to move his case forward, On March 29, 2017 Bartunek filed a motion to terminate counsel. (DCD 36). At that point of time, Bartunek had been incarcerated for 45 days, and deprived of his property for over 10 months. On April 3, 2017 a hearing was held before Judge Bazis. (DCD 40). When the judge asked Bartunek what he wanted to do, Bartunek stated, "... well, I want to proceed with the assistance of a lawyer ... as per the constitution." (04/03/2017 Hearing at 8:16-20). At the end of the hearing, Judge Bazis ruled to allow Bartunek to proceed pro se and appointed the public defender, Maloney, as standby counsel. (Id. at 27:13-19).

Bartunek soon found that the limitations imposed on him by the Douglas County Department of Corrections ("Jail") was a great hinderence to preparing his defense. He was only allowed at most one hour a week in the Jail's law library. Bartunek asked and received an extention to file pretrail motions until April 28, 2017. (DCD 45). He also requested to be released pursuant to 18 U.S.C. § 3142(i), which stated in part that the judicial officer may permit the release of a person in custody of the United States for the preparation of the person's defense. (04/11/2017 Hearing at 39:20-25). His request to be released was denied by Judge Rossiter. (DCD 45). Bartunek had discovery material on a "thumb drive" that was only accessible on the Jail's law library computers. Bartunek sought the assistance of the court to give him more access to the Jail's law library to review his discovery and to prepare his defense. (DCD 51). On April 27, 2017 a hearing was held before Judge Bazis. She told Bartunek "I cannot direct the Doug- -- I have no control over the Douglas County

Department of Corrections ... I cannot order them to do that ...", in response to Bartunek's request. (04/27/2017 Hearing at 7:12-24). On April 28, 2017, Judge Bazis ruled that Bartunek was not legally entitled to any time in the Jail's law library, and instead he should turn to his counsel for any assistance. (DCD 78). However, Bartunek received no legal assistance from his standby counsel, either. When he brought this to the court's attention, on May 10, 2017, Judge Rossiter ruled that Bartunek was not entitled to any legal assistance from his standby counsel. (DCD 96).

For over a month, Bartunek had been denied access to the Jail's law library, his legal books, his discovery, and any assistance from Maloney, leaving him no means to prepare his pretrial motions and to prepare his defense. On May 5, 2017, Bartunek filed a motion to reconsider the Judge's rulings, and a motion for assistance. (DCD 99, 109). A hearing was held before Judge Bazis on May 24, 2017. Evidence regarding these issues was profered by Bartunek. (05/24/2017 Hearing, Exs. 101, 102). On May 25, 2017, Judge Bazis issued an Order to the Jail to allow Bartunek additional access to the Jail's law library and his discovery, and to keep his legal books in his jail cell. (DCD 126).

Even with Bartunek's severely restricted access to legal materials imposed by the jail, his standby counsel, and the court, Bartunek was able to file handwritten pretrial motions to suppress. (DCD 47, 69, 70, 71, 72, 80, 82, and 85). On June 22, 2017, Judge Bazis held an evedenturary hearing on Bartunek's pretrial motions. (DCD 168). On August 9, 2017, Judge Bazis filed her Findings and Recommendations, denying all of Bartunek's pretrial motions. (DCD 182). On October 11, 2017, Judge Rossiter accepted Judge Bazis' Findings and Recommendations. (DCD 208).

The government withheld discovery material from Bartunek for several months, causing significant delays in bring him to trial. Bartunek first asked for discovery through his counsel on February 17, 2017. (02/17/2017 Hearing at 4:11-12). Bartunek's counsel did receive some discovery, but only what the government decided that he should have. Bartunek renewed his request on April 11, 2017. (DCD 51). However, Bartunek did not receive all that he was entitled to, pursuant to Rule 16(a)(1)(E)(i) and (iii). In particular, Norris refused to allow Bartunek to access and copy computer files, data, and other items which the government had in its possession from the search and seizure of Bartunek's residence on May 25, 2016. (DCD 106-1). Bartunek filed five additional motions to compel, which were all denied: (DCD 79) on 05/01/2017; (DCD 100) on 05/11/2017; (DCD 127) on 05/25/2017; (DCD 133) on 05/30/2017; and (DCD 158) on 06/14/2017. Bartunek was not asking for contraban pursuant to 18 U.S.C. § 3509, but rather for exculpatory and other discovery material as allowed by the courts. Norris simply refused to work with Bartunek, insisting that his requests were "unclear", "not realistic", "not specific", and "not relevant". Norris stated, "Like many of his [Bartunek's] motions, it appears to be designed to harrass others involved in his case. Norris went on to say that Bartunek's son was complicating matters by providing Bartunek with legal information. Lastly, Norris tried to make Bartunek hire a "forensic expert" before he would work with him. (DCD 144; 10/16/2017 Hearing at 19:18-24).

It was not until August 24, 2017 that Bartunek was able to convince Norris and the Court to copy the requested data to USB drives that he could then review in the Jail's law library. (DCD 186, 194). Bartunek received the first USB drive a few weeks later. Analyzing the data was

time consuming because the jail refused to allow Bartunek Permissions needed to access some of the data, or to use forensic software that he had obtained to allow him to efficiently perform his investigaiton. (10/16/2017 Hearing at 23:9-31:16). During this time, Bartunek discovered that critical system files, folders, and user data was missing form the USB drives, and that the file dates were corrupted. (11/13/2017 Hearing at 26:23-27:2). He contacted Norris more than once to remedy the situation, but to no avail. (11/13/2017 Hearing, Exs. 1, 2, 3, 102, 103, and 104). Norris told the court that it was impossible to do what Bartunek requested, regarding the missing files and folders, and corrupt dates. (11/13/2107 Hearing at 27:11-20). He was wrong. On November 17, 2017, Bartunek filed another motion to get his discovery, and asked for additional time to review it. (DCD 232). A hearing was held before Judge Bazis on November 21, 2017. Norris told the court, "We gave you all the files that were available." (11/21/2017 Hearing at 35:13-29). However, Jordan Warnock, forensic expert for the government, contradicted Norris, when he told the court, "I can get those files ..." (11/21/2017 Hearing at 37:1-39:8). He also told the court that he could fix the dates.

Trial was originally scheduled for December 4, 2017. However, because the government failed to comply with Bartunek's discovery requests, the trial was delayed by 35 days, until January 8, 2018. (DCD 239). Norris agreed that he could give Bartunek his discovery as requested. (11/21/2017 Hearing at 44:19-45:5); DCD 240). On December 4, 2017, Judge Rossiter, on his own motion, continued the trial to January 22, 2018. His reason was because of Bartunek's pending appeal of his pretrial detention. (DCD 256). On December 7, 2017, Bartunek filed a motion to dismiss the case or delay the trial because he had not received the

discovery. (DCD 265). On December 12, 2017, the government filed a response. Norris told the court that he delivered some of the requested discovery to Bartunek on December 11, 2017. (DCD 266). On December 15, 2017, Judge Rossiter delayed the trial for another 49 days until March 12, 2018. (DCD 269).

In January, 2018, Bartunek's efforts to prepare for trial and to investigate the discovery was again hampered by both the Jail and the government. The Jail failed to give Bartunek access to the law library as per Judge Bazis' previous order, and Norris failed to deliver discovery in a timely manner. (DCD 277, 279, 286; 02/26/2018 Hearing, Exs. 101, 102). The latest discovery was not delivered to Bartunek until February 23, 2018. (03/05/2018 Hearing at 3:10-23). On February 26, 2018, a hearing was held by Judge Rossiter regarding trial logistics. (DCD 285). At the hearing, the judge discussed Bartunek's pro se status. Maloney agreed to meet with Bartunek to discuss these issues later that week. (02/26/2018 Hearing at 23:10-18). However, he failed to do so.

On March 2, 2018, Bartunek filed a motion to appoint counsel. On March 5, 2018, Judge Rossiter held a hearing on Bartunek's motion. (DCD 300). During the hearing, the judge asked Bartunek if he wanted Maloney to represent him. Judge Rossiter reminded Bartunek that Maloney was a well-established attorney. Bartunek believed it would be acceptable. (03/05/2018 Hearing at 4:8-5:12). However, Maloney then told the court that he needed to delay the trial for 4-5 months because he was too overburdened with other cases. (03/05/2018 Hearing at 4:20-25). Bartunek objected to the delay, pointing out that congress had envisioned having a trial within 70 days, not 120-150 days. (03/05/2018 Hearing at 6:19-7:18). Never-the-less, at the end of the hearing Judge Rossiter appointed Maloney as

Bartunek's attorney of record. (DCD 301). And on March 9, 2018, Judge Rossiter delayed the trial 168 days, 48 days longer than Maloney requested, until August 27, 2018. (DCD 303, 304).

On March 14, 2018, Bartunek filed a motion to reconsider appointment of counsel and the delay of the trial. In his motion, Bartunek pointed out that it was the standby attorney's duty to be prepared for trial, and obviously Maloney was not prepared. (DCD 305). He also filed a motion for justice to dismiss the case because the additional 168 day delay of the trial was unwarranted, and would violate his speedy trial rights. (DCD 307). On March 20, 2018, a hearing was held on Bartunek's motions. (DCD 308). During the hearing, Judge Rossiter told Bartunek that he would appoint the next CJA pannel attorney, and that "there'll be no other appointments". (03/20/2018 Hearing at 7:9-16). And, that if Bartunek changed his mind with respect to counsel, that "no other counsel will be appointed, nor will I reappoint Mr. Maloney or the Federal Public Defender's offoce." (03/20/2018 Hearing at 26:24-27:1). Judge Rossiter also assured Bartunek that the trial would be held "no longer down the road than that August date." (03/20/2018 Hearing at 24:20-14). When Bartunek asked to set the trial date earlier, based on speedy trial reasons, Judge Rossiter refused to discuss the matter, stating that any attorney would require the same amount of time to prepare for the trial. He also assured Bartunek that any experienced attorney as his counsel of record will communicate with him while handling the case. (03/20/2018 Hearing at 25:25-26:3). On March 20, 2018, Judge Rossiter appointed Andrew Wilson to represent Bartunek. (DCD 309).

Wilson met with Bartunek on March 23, 2018. In no uncertain terms, Wilson told Bartunek that he was "in charge" and would make all the

decisions going forward. Bartunek asked Wilson to look into getting him released pending trial, based on due process violations, because of the length of time that he had already been incarcerated, and would continue to be incarcerated. He also asked Wilson to get an earlier trial date. However, Wilson refused to discuss the matter with Bartunek, or do anything. (See Offers of Proof - DCD 367, 368). On August 1, 2018, Wilson asked for a 60 day continuance of the trial. (DCD 320). Wilson told the court that he needed additional time to complete the forensic analysis. Bartunek opposed the continuation. (DCD 321). According to Warnock, the government's FBI forensic expert, it would take another expert less than a week to complete a forensic analysis, based on the analysis that he had already completed. (11/13/2017 Hearing, Ex. 104). Judge Rossiter granted Wilson's motion, continuing the trial until October 29, 2018. (DCD 322).

On September 6, 2018, Bartunek sent the court a motion to dismiss the case. On September 11, 2018, the court returned the motion to Bartunek, and forwarded a copy to Wilson, refusing to file it because Bartunek was represented by counsel. (District Court Case 8:18CV440, Appendix O). Wilson refused to talk to Bartunek about his motion, or file it. On September 20, 2018, Bartunek filed his Petition for Writ of Habeas Corpus. (District Court Case 8:18CV440, Filing No. 1). The petition was the same as Bartunek's motion that he attempted to file on September 6, 2018, in his criminal case.

Bartunek was kept in the dark by Wilson regarding any trial preparations or strategies. He refused to give Bartunek an accounting of his time. (DCD 367, 368). On October 3, 2018, Wilson asked Bartunek if he wanted a plea deal. Bartunek told Wilson that he wanted to go to trial. Wilson left, telling Bartunek that he would talk to the prosecutor

about a plea agreement. (District Court Case 8:18CV440, Filing No. 8). On October 17, 2018, Wilson met with Bartunek offering a plea agreement. When Bartunek refused to accept the agreement, Wilson had nothing more to say. That same day, Wilson had an off-the-record conversation with Judge Rossiter, asking him if he could withdraw as Bartunek's attorney. (10/17/2018 Hearing at 2:13-3:4). A hearing was immediately held. (DCD 331). According to Wilson, the attorney/client relationship was irrepairably broken. (10/17/2018 Hearing at 3:14-22). Bartunek asked to be allowed to present evedence in support of Wilson's motion. However, Judge Rossiter wouldn't allow it. (10/17/2018 Hearing at 24:21-25:8). Wilson made an oral motion to withdraw, which was denied (DCD 332).

On October 29, 2018, trial was held before Judge Rossiter. The prosecutors profferred 99 items of evidence, and called 9 witnesses. (DCD 346, 347). The government rested at the end of the day, October 30, 2018. (Tr. at 458:3). On October 31, 2018, Wilson rested for the defense, without profferring any evidence, or calling any witnesses. He offered no defense at all. (Tr. at 476:4-9). The defendant was found guilty of Count I - distributing child pornography, Count I - attempting to distribute child pornography, and Count II - possession of child pornography. (Tr. at 516:20-517:22). Sentencing was set for February 1, 2019.

On November 13, 2018, Bartunek asked Judge Rossiter to reconsider Wilson's motion to withdraw. (DCD 353). A hearing was held before Judge Rossiter on December 6, 2018. (DCD 356). Bartunek argued that Wilson was not competent, and that he was concerned about him representing him at sentencing and his direct appeal. Bartunek tried to proffer evidence supporting his claim. (This was the same evidence that Bartunek tried to introduce at the 10/17/2018 Hearing.) Judge Rossiter wouldn't listen

to Bartunek, or allow him to proffer the evidence. (11/13/2018 Hearing at 5:8-6:23).

In December 2018, Wilson mailed a copy of the Presentence Investigation Report ("PSR"), with instructions to submit any objections that Bartunek had to him. Wilson also told Bartunek that he would meet with him in a week to discuss the report. However, that didn't happen. On December 20, 2018, Wilson asked for a continuance of the Sentencing and Deadlines to Object. (DCD 358). An amended sentencing schedule was granted, setting sentencing for March 8, 2019. (DCD 359).

On January 8, 2019, Judge Richard Kopf denied and dismissed Bartunek's Petition for Writ of Habeas Corpus. His decision was based on the "exceptional circumstances" doctrine expressed in Jones v. Perkins, 245 US 390, 391 (1918), ("It is well settled that in the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and habeas corpus should not be granted in advance of trial.") (District Court Case 8:18CV440, Filing No. 13).

On January 18, 2019, Bartunek sent a letter to the court with concerns about Wilson, since he failed to meet with him or to explain anything about the PSR or the sentencing process. (DCD 361). Bartunek did mail Wilson what he believed were material objections to the report, but did not hear back from Wilson. Wilson simply refused to have a dialog with Bartunek. On February 11, 2019, Wilson filed Objections to the Revised PSR and a motion for a downward departure/variance. (DCD 365, 366). Wilson's Objections failed to address the majority of Bartunek's objections. Furthermore, Wilson's motion and brief was "bare-bones" to say the least. He stated that there should be a downward departure based on the defendant's age, health, and military service, without any details or supporting

arguement. Wilson also asked for a downward variance based on another case in the district court, United States v. Abraham, 944 F.Supp.2d 723. (District Court Case 8:12CR384 (2013)). Again, Wilson failed to include any details or arguement, whatsoever. On February 14, 2019, Bartunek filed a motion to appoint new counsel, and to file "Offers of Proof" supporting his motion. (DCD 367, 368). Bartunek's motion was denied. Finally, since Bartunek did not hear from Wilson about his objections, or meet with him and go over them, Bartunek filed his objections directly with the court. (DCD 372, 373).

On March 8, 2019, a sentencing hearing was held before Judge Rossiter. During the hearing the judge overruled all but three of Wilson's objections. Wilson made several errors because he failed to consider changes made in the Revised PSR compared to the original. (03/08/2019 Hearing at 24, 26, 29-32). He faile to make an arguement regarding the departure. (03/08/2019 Hearing at 34:19-35:7). He also failed to make an arguement for the variance. (03/08/2019 Hearing at 36:20-37:4). Even though Norris had previously offered Bartunek a plea agreement of 4-7 years on Count I, dismissing Count II, Norris argued for the statutory maximum sentence of 20 years. (03/08/2019 Hearing at 46:18-56:11; over 8 minutes long). Wilson did not make any objections to the 15 year supervised release or conditions of release. (03/08/2019 Hearing at 63:15-21). Nor did he object to the restitution claim. (03/08/2019 Hearing at 63:25-64:16). Bartunek was sentenced to 17.5 years imprisonment, with 15 years of supervised release on Count I, and 10 years imprisonment, with 15 years of supervised release on Count II, served concurrently. (DCD 381).

Bartunek sent a letter to the court asking that new counsel be appointed for his appeal, which was denied. (03/08/2019 Hearing at 3:8-17).

On March 18, 2019, Wilson filed a notice of appeal. (DCD 384). His case was docketed in the United States Court of Appeals for the Eighth Circuit ("USCA") as Case No. 19-1584. He also filed a motion to withdraw as counsel. (DCD 385). Wilson told the court that it would be a conflict of interest to represent Bartunek. Judge Rossiter denied Wilson's motion. Howeber, he indicated that there was merit in Wilson's claim, but that he would leave it up to the Court of Appeals to decide. (DCD 388). On March 20, 2019, Bartunek sent a letter to the court asking to appoint new counsel. He told the court Wilson was ineffective, that he was instrumental in violating Bartunek's right to a speedy trial, and that he would not provide competent counsel in the appellate process, as it would be a "conflict of interest" for him to do so. (DCD 396). Both Bartunek and Wilson file motions with the Court of Appeals for Wilson to withdraw and to appoint new counsel. Both motions were denied. (USCA Case No. 19-1584, ID: 4774090, 4775829).

On May 9, 2019, Wilson asked for and was granted an extention of time to file his brief to the Court of Appeals until June 14, 2019. (USCA Case No. 19-1584). Wilson's brief was filed with the Court of Appeals on June 14, 2019. The issues in his brief dealt only with errors in admitting evidence and testimony in the trial. He failed to brief any other issues, such as, prosecutorial misconduct/vindictiveness, ineffective counsel, due process violations, speedy trial violations, illeagal search and seizure, et. al.

Bartunek filed a timely appeal of his habeas dismissal in Case No. 8:18CV440. It was docketed in the USCA as case 19-1248. On February 12, 2019, the Court of Appeals summuarily affirmed the district court's judgment. (USCA Case No. 19-1248, ID: 475564). Bartunek asked for an extention to

file a Rehearing, which was granted, extending the date to May 30, 2019. On May 23, 2019, Bartunek filed his Petition for Rehearing. In his petition, he ased the Court of Appeals to reconsider his Appeal of the Habeas, because he exhaused all of his remedies, and that there were exceptional circumstances to grant the writ. Alternatively, he asked the Court to combine his habeas with his current appeal in his criminal case, for judicial efficiency. On June 25, 2019, the Court of Appeals denied Bartunek's Rehearing. Bartunek filed a timely motion to extend his deadline to file a Writ of Certiorari. It was granted, extending the deadline to November 22, 2019.

REASONS FOR GRANTING THE WRIT

I. IS AN AFFIRMATIVE DEMONSTRATION OF PREJUDICE TO THE ACCUSED'S ABILITY TO DEFEND HIMSELF ESSENTIAL TO PROVE THE DENIAL OF HIS RIGHT TO A SPEEDY TRIAL?

"The Speedy Trial Clause's core concern is impairment of liberty." (United States v. Loud Hawk, 474 US 302, 312 (1986)). The "major evils" against which the Speedy Trial Clause is directed is: (i) "undue and oppressive incarceration"; and (ii) "anxiety and concern accompanying public accusation." An inordinate delay between commission of a crime and trial, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to obloquy, and create anxiety in him, his family, and his friends." (United States v. Marion, 404 US 307, 320 (1971)). In addition to these "personal prejudices", there is also "legal prejudice". The third interest that the Speedy Trial Clause was designed to protect is: (iii) prejudice to the defendant's defense." (Barker v. Wingo, 407 US 514, 532 (1972)).

The question at hand begs to answer a more encompasing question, "Whether any prejudice to the defendant, either personal or legal, is relevant in proving a denial of his right to a Speedy Trial?" Stated as:

> WHERE CONSIDERATION OF THE FIRST THREE [BARKER] FACTORS COALESCE IN THE DEFENDANT"S FAVOR, DOES PREJUDICE -EITHER ACTUAL OR PRESUMED- BECOME TOTALLY IRRELEVANT IN PROVING A DENIAL OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL?

The Supreme Court identified fourt factors relevant to a speedy trial analysis: 1) length of delay; 2) reason for delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. (Id. at 530). Barker teaches that all relevant factors should be considered. However,

many courts in the Fifth and Eleventh Circuits have held that if the first three factors coalesce in the defendant's favor, then an affirmative demonstration of prejudice is not necessary. See Hoskins v. Wainwright, 485 F.2d 1186, 1192 (5th Cir. 1973); Prince v. Alabama, 507 F.2d 693, 706-707 (5th Cir. 1975); United States v. Mitchell, 769 F.2d 1544, 1547 (11th Cir. 1985); and Ringstaff v. Howard, 885 F.2d 1542, 1543 (11th Cir. 1989). Other circuits have not adopted this "coalescence theory". Even the Supreme Court is confronted with two conflicting lines of authority, the one declaring that "limit[ing] the possibility that the defense will be impared" is an independent and fundamental objective of the Speedy Trial Clause, e.g., Baker at 532, and the other declaring that it is not. e.g., United States v. Marion, 404 US 307, 320 (1971). United States v. MacDonald, 456 US 1, 8 (1982); United States v. Loud Hawk, 474 US 302, 312, (1986). (Doggett v. United States, 505 US 647, 662 (1992)).

While it is true that the possibility that the defense will be impaired is an important consideration, it certainly cannot be the primary interest that the Speedy Trial Clause was meant to protect. If this were true, then the Speedy Trial Clock would start the moment the crime was committed, because prejudice to the defense stems from the interval between the crime and the trial. However, in most cases, the Speedy Trial Clause only applies to an "accused"; the right does not attach before indictment or arrest. (Marion at 313-315, 320-322; Dillingham v. United States, 423 US 64, 64-65 (1975)). Even in Barker, the court stated that only if special circumstances were present in the case, and if they outweigh the inevitible personal prejudice resulting from delay, would it be necessary to consider whether there has been or would be prejudice to the defense at trial. (Barker at 538).

In this case, not only do the first three Barker factors weigh in the defendant's favor, but the fourth factor does also. "The first factor, length of delay, functions as a triggering mechanism, and the remaining factors are examined only if the delay is long enough to be presumptively prejudicial." (United States v. Yehling, 456 F.3d 1236, 1244 (10th Cir. 2006)). A delay approaching a year may meet the threshold for presumptively prejudical delay requiring application of the Barker factors. (United States v. Shepard, 462 F.3d 847, 864 (8th Cir. 2006); Doggett at 652.n1). A state may adopt a specific rule for the purposes of defining its own constitution, see Conn. Gen. Stat. § 54-82l, or Congress may statutorily create a specific limit, 18 U.S.C. § 3161, et. seq., or courts may impose a specific time frame pursuant to their own supervisory powers, see Baker at 530.n29, 523.n18, citing Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971)(six months). Looking at the first Barker factor, the defendant was incarcerated for well over a year, 20 months, before going to trial; February 17, 2017 until October 29, 2018. Because the defendant was incarcerated the entire time, and exposed to the same harsh jail conditions with convicted criminals, including felons, the first Barker factor weighs heavily in favor of the defendant.

Looking at the second Barker factor requires an in-depth analysis to discover the true reasons for such a long delay. Looking soley at the docket, motions, and orders, leads one to falsely believe that the defendant was the cause of most of the delays. This is not true. In fact, most of the delays were caused by: 1) Prosecutor; 2) Defendant's Counsel; 3) Incarceration/Jail; and 4) The Court Itself. (Collectively called the "Government").

The Prosecutor initially introduced delay by moving to detain the

defendant, and when he was ordered to be released, by appealing the decision, keeping the defendant in jail. Later, he withheld discovery for such an extended period of time that the defendant was forced to ask for one condinuance after another.

The defendant's first attorny, Maloney, did nothing for 45 days, over one-half of the statutory speedy trial limit, because he was severly overburdened with other cases. The defendant's second attorney was a "dump lawyer", wanting to do nothing but force the defendant into taking a plea deal.

While in Jail, the Jail failed to follow its own procedures and judicial orders, regarding access to the law library and legal resources. This severely hampered the defendant's ability to prepare his pretrial motions, perform discovery, and prepare for trial, causing further delays.

Finally, the Court itself was the cause of thee delays: 1) denial of access to legal resources; 2) failing to grant several discovery motions to compel, for over six months; 3) ignoring the 70-day statutory speedy trial time limits; and allowing the defendant's attorneys to delay the trial because of conjested public defender's case loads, and for unreasonable and unknown reasons. The court went so far to declase that any lawyer would require at least six (6) months to prepare for trial, without considering any specifics.

The following table shows the delays and continuances in this case, and the underlying "true cause" of the delays. Table 1:

Delay	Dates	DC D	Cause	Reason
11	02/17-02/28	12, 24, 28	Prosecutor/Court	Detention
35	03/09-04/13	31, 34	Maloney	Overburdened
15	04/13-04/28	45	Incarceration	Limited Resource
11	05/04-05/15	87, 89	Prosecutor	Limited Resource
35	08/21-09/25	191, 196	Incarceration	Limited Resource

Table 1. (Cont.):

Delay	Dates	DCD	Cause	Reason
35	12/04-01/08	232, 237	Prosecutor/Court	Discovery Delay
49	01/22-03/12	265, 269	Prosecutor/Court	Discovery Delay
168	03/12-08/27	303, 304	Court	Overburdened
63	08/27-10/29	320, 322	Wilson	Dump Lawyer

Total: 422 days.

The total time the defendant was incarcerated before trial was 619 days. The total delays caused by the "Government" was 422 days, or 2/3 the total time. Certainly, the second Barker factor also weighs heavily in favor of the defendant.

There is no question that the defendant asserted his speedy trial rights early and continuously throughout the entire proceedings. He first expressed his concerns to the court on March 14, 2017, when he asked for new counsel, because his current counsel was too overburdened by other cases to work on his case. (DCD 34). Then again, on April 3, 2017, when he bacame pro se in order to expidite his case. (DCD 40). He asked for help from the court more than once, to give him resources to reduce the amount of time needed to prepare for trial. The longer he was incarcerated, the more he asserted his right. After being incarcerated for over a year, on February 23, 2018, he filed a motion to dismiss the case or bring him to trial for violating his speedy trial rights. (DCD 284). He again asserted his right in March, 2018, after he found out that the trial was being delayed for almost six (6) months. (DCD 305, 307). And, on August 3, 2018 he objected to the additional two (2) month delay. (DCD 321). F||nally, on September 20, 2018, after Wilson refused to talk to him about the matter, he filed his habeas in the district court. (U.S. Dist. Court Case: 8:18CV440 (Neb.)). These actions show that the third Barker factor weighed heavily in favor of the defendant, too. As in this case, the

record clearly shows that the first three Barker factors alone are significant enough to prove that the defendant's right to a speedy trial was violated well before tiral. Furthermore, in this case, the defendant suffered personal prejudice, having been incarcerated the entire time. Therefore, waiting until trial to render proof of the fourth Barker factor was unnessary, because it could not be weighty enough to tip the scales in favor of the government, in the face of the weight of the other factors which favor the defendant.

II. SHOULD THE COURT ALLOW HABEAS CORPUS RELIEF OR SIMILAR COLLATERAL RELIEF FOR A SPEEDY TRIAL CLAIM BROUGHT BEFORE TRIAL? DOES DENIAL OF SUCH A CLAIM, NOT BASED ON ITS MERITS, VIOLATE THE PETITIONER'S DUE PROCESS RIGHTS?

"The right to a speedy trial is a fundamental as any of the rights secured by the Sixth Amendment." (Klopfer v. North Carolina, 386 US 213, 223 (1967)). "The writ of habeas corpus is a fundamental guarantee of liberty." (Rose v. Ludy, 455 US 509, 547 (1982)). While the writ of habeas corpus cannot be used as a "writ of error" (appeal), if in the court's proceedings, the defendant's constitutional rights have been denied, the remedy of habeas corpus is available. (Bowen v. Johnston, 306 US 19, 23-24 (1939). Habeas Corpus relief is available prior to trial pursuant to 28 U.S.C. § 2241.

There is no doubt that the habeas corpus claim in this case is akin to motions in a criminal case that fall within the class of final collateral orders, decisions "which finally determin claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is is adjucated." (Cohen v. Beneficial Industrial Loan Corp., 337 US 541,

546, (1949)). This class of motions include motions on bail, Stack v. Boyle, 342 US 1 (1951), and motions to dismiss on double jeopardy grounds, Abney v. United States, 431 US 651, 652 (1977).

To fall within the limited class of final collateral orders, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the case," and (3) "be effectively unreviewable on appeal from a final judgment." (Coopers & Lybrand v. Livesay, 437 US 463, 468 (1978)). Certainly, a violation of the right to a speedy trial is final, because "dismissal of the charges is the only possible remedy for denying the defendant a speedy trial." (Strunk v. United States, 412 US 434 (1973)). Thus, it conclusively determines the disputed question.

"The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our constitution." (Klopfer at 226). Thus, it does resolve an important issue. And in this case it is completely separate from the "litigation on the merits," because as previously argued, it can be decided before trial.

To satisfy the third prong of the Coopers & Lybrand test, the order at issue must involve "an asserted legal and practical value of which would be destroyed if it were not vindicated before trial." (United States v. MacDonald, 435 US 850, 860 (1978)). Since the primary purpose of the speedy trial clause is to prevent prolonged incarceration and punishment before trial, to force a defendant to go through a trial and then wait until he is sentenced and his direct appeal is completed, robs him of his right, and violates due process by punishing not only before trial, but for a significant time after trial. There is no way to vindicate the

loss of the right after trial. Although the defendant's speedy trial claim could have been raised on direct appeal, the defendant's counsel refused to do so because he was a primary contributor to the violation. Furthermore, claims not raised on appeal are normally barred in a 28 U.S.C. § 2255 action, United States v. Moss, 252 F.3d 1000 (8th Cir. 2001), and would be lost forever. In this case, the habeas claim does meet the Coopers & Lybrand test, and the court should allow the petition to be granted.

III. SHOULD "EXCEPTIONAL CIRCUMSTANCES" BE REQUIRED TO BRING FORWARD A HABEAS CLAIM, BASED ON A SPEEDY TRIAL VIOLATION, PRIOR TO TRIAL? ARE SUCH CIRCUMSTANCES PRESENT IN THIS CASE? SHOULD THE PETITIONER'S WRIT FOR HABEAS THEN BE GRANTED?

"The guarantee of a speedy trial is "one of the most basic rights preserved by our constitution." (Smith v. Hooey, 393 US 374, 375 (1969)). "Any trial proposed to be conducted after the speedy trial time has elapsed must be stayed." (Strunk v. United States, 412 US 434, 439-440 (1973)). However, there is no effective method in place to prevent the trial from occurring. Unlike a bail claim which can be immediately appealed pursuant to 18 U.S.C. § 3145, a speedy trial claim cannot. And yet, both serve a common purpose, to protect the defendant's liberty, and to "prevent undue and oppressive incarceration prior to trial." (Marion at 320). Although 28 U.S.C. § 2241 allows habeas claims to be made before trial, the petitioner must exhaust his remedies, and show that there are "exceptional circumstances" for the claim to be judged on its merits. (Jones at 391). However, a violation of the defendant's right to a speedy trial is an exceptional circumstance in itself, due to the nature of the right and what it protects. Barker delt with the process for determining whether a denial of the speedy trial occured; it did not deal with the

method or remedy for the denial of this right. "By definition, such denial is unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial. (Strunk at 438-439). A new trial will not cure a speedy trial violation.

28 U.S.C. § 2243 directs the court on how it sould deal with writs of habeas corpus. It states in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."
>
> "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice (emphasis added) require."

Nothing in the statute even hints that there should be exceptional circumstances in order to grant the writ. The "exceptional circumstances" and "comity" and "exhaustion" doctrines are simply judicial lawmaking that "complicate and delay the resolution of claims that are not frivilous." (Rose at 522). As in this case, the courts have used these doctrines as "a blunderbuss to shatter the attempt of litigation of constitutional claims..." (Braden v. 30th Judicial Circuit Court of Ky., 410 US 448, 490 (1973)).

The petitioner has yet to find any case law that even begins to define what constitutes exceptional circumstances. Nor has the district court or the court of appeals shed any light on the matter. Never-the-less, the facts of this case speak for themselves. A brief summary shows: 1) there was almost a 2½ year delay between the time the defendant was first accused of the crimes and the trial, and a 20 month delay between

his arrest and the trial; 2) on May 25, 2016, the defendant was accused of the crimes during an interrogation by the Omaha Police Officer, David Pecha, after the defendant's possessions were seized, however, he was not arrested at that time; 3) on December 30, 2016, the defendant sued the State of Nebraska, et. al, to get his property back; 4) the state retaliated by soliciting the federal government to prosecute the case, not filing any state charges; 5) the defendant was indicted on January 19, 2017, but not arrested until February 16, 2017; 6) the defendant was ordered released pending trial, but detained instead by an exceptionally rare appeal by the government, without any grounds to do so, essentially "judge shopping"; 7) one attorney was too overburdened by other cases to work on the defendant's case, and the other was only interested in dumping the case via a plea agreement; 8) the court excused the counsel's delays, going so far as to say that all lawyers needed at least 6 months to prepare for trial, totally disregarding the speedy trial act; 9) the government withheld evidence for several months, causing delays after the fact; 10) for a time, the court prevented the defendant from accessing any legal resources; 11) the court excused the jail for limitations they imposed on the defendant in preparing for his defense because they were overcrowded and understaffed, blaiming the defendant for being pro se, instead; 12) the court took over 4 months to rule on the defendant's pretrail motions; 13) and the court forced the defendant's counsel, Wilson, to defend the defendant against Wilson's will, and over the objections of the defendant.

The speedy trial clause protects interests wholly unrelated to the merits of the case, as well as prejudice to the defense, and increases the chances of the defendant being found guilty, and receiving a harsher

punishment than defendants that have not been incarcerated for such a long time before trial. A requirement that a defendant run the entire gamet of federal proceedures, including the trial, sentencing, and direct appeal, prior to consideration of his speedy trial claim, would require him to sacrifice the protections of the speedy trial clause, namely to insure that justice was swiftly administered, and to prevent punishing the defendant prior to trial.

This case is unitue in many ways, falling into the exceptional class, meriting consideration of his speedy trial claim. The egregious behavior of the "Government" (the prosecutor, the defense, the jail, and the court) in this case warrants the court to grant this writ.

CONCLUSUION

This case presents novel and unresolved issues, not previously addressed by the decisions of the Supreme Court. In addition, there are issues presented which were decided by different circuit courts that conflict with eachother.

For several years federal and appellate judges "have lost the sight of the true office of the great writ of habeas corpus." (Rose at 456). The writ of habeas corpus is so important to our liberty, that it was specifically addressed in the original Constitution, stating: "The priveledge of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require it." (U.S. Constitution, Ar. I, § 9, c. 2). This Suspension "Clause not only protects against arbitrary suspensions of the writ but also guarantees (emphasis added) an affirmative right to judicial inquiry into the causes of detention." (Boumediene v. Bush, 553 US 723, 744 (2008)).

In 2009, Kevin Phelps finally received justice when the Ninth Circuit

ruled that his habeas motion be evaluated on its merits. In his case, a crucially important point had been repeatedly overlooked:

> "Over eleven years ago, a man came to federal court and told a federal judge that he was being unlawfully imprisioned in violation of his rights guaranteed to him by the Constitution of the United States. More than eleven years later, not a single federal judge has ever once been allowed to seek to discover whether that claim was true."

(Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009)). Is every defendant doomed to the same fate as Mr. Phelps?

In recent years, a concern for procedure has far too often obscured or eclipsed the equally important, if not greater role to be played by dedication of the courts to justice. It was, after all, in order "to establish justice" that our constitution was written. (U.S. Constitution, Preamble).

WHEREFORE, the petitioner prays that the court grant this petition, dismiss the case, and release the petitioner, or other remedies that the court deems appropriate.

Respectfully Submitted,

Gregory P. Bartunek Date: 11/13/2015

Gregory P. Bartunek