APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEAN WRIGHT, Petitioner-Appellant, v. STATE OF ALASKA, Respondent-Appellee.	No. 19-35543 D.C. No. 3:18-cv-00056-JKS MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted August 10, 2020
Anchorage, Alaska

Before: RAWLINSON, MURGUIA, and R. NELSON, Circuit Judges.
Concurrence by Judge MURGUIA

Appellant Sean Wright seeks review of the district court's denial of his petition for a writ of habeas corpus brought pursuant to 20 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 1291. Reviewing *de novo*, we reverse.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Following a jury trial, Wright was convicted of thirteen counts of sexual abuse of a minor and sentenced to fourteen years' imprisonment and ten years of supervised probation. *See Wright v. State*, 347 P.3d 1000, 1004-05 (Alaska Ct. App. 2015). As a result of the conviction, Wright must register as a sex offender for the remainder of his life. It is undisputed that Wright served the entirety of his sentence before relocating to Tennessee. A federal grand jury in Tennessee subsequently returned an indictment charging Wright with failure to register as a sex offender. Wright pled guilty to the charge and received a sentence of time served and five years of supervised release. Wright then filed the underlying habeas petition in the United States District Court for the District of Alaska challenging his Alaska conviction. The district court dismissed the petition with prejudice and denied the motion for reconsideration, finding that Wright was not in custody under 28 U.S.C. § 2254.

We review the denial of a habeas petition *de novo*. *See Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018).

Under 28 U.S.C. § 2254(a), federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution."

To be considered "in custody" under the statute, the petitioner must suffer "present restraint from a conviction." *Maleng v. Cook*, 490 U.S. 488, 492 (1989). "The Supreme Court has defined the phrase in custody to include both physical detention and other restraints on a man's liberty, restraints not shared by the public generally. . . ." *Veltmann-Barragan v. Holder*, 717 F.3d 1086, 1088 (9th Cir. 2013) (citation and internal quotation marks omitted).

A petitioner subject to probation is in custody under the statute. *See Chaker v. Crogan,* 428 F.3d 1215, 1219 (9th Cir. 2005). A petitioner incarcerated for failing to register as a sex offender is also in custody. *See Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001), *as amended*. We clarified in *Zichko* that:

> a habeas petitioner is in custody for the purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction is a necessary predicate to the failure to register charge.

Id. (citation and internal quotation marks omitted).

Wright's conviction and sentence for failure to register was "positively and demonstrably related to the [Alaska] conviction he attack[ed]." *Id.* (citation omitted). Therefore, the district court erred in ruling that Wright was not in custody. *See id.*

REVERSED AND REMANDED.[1]

[1] The district court stated in the alternative that even assuming Wright "may be considered in custody," the proper procedure would be for Wright to file a habeas petition in the federal district court in Tennessee pursuant to 28 U.S.C. § 2255. However, the district court did not provide any detailed analysis of this alternative ruling and it does not appear that the parties focused on this issue in the district court. Rather than addressing the issue as part of this appeal, we leave it to the district court to more thoroughly consider the issue on remand.

Wright v. State of Alaska, No. 19-35543

MURGUIA, Circuit Judge, concurring:

I join my colleagues in holding that, under *Zichko v. Idaho*, Wright is "in custody" for purposes of 28 U.S.C. § 2254(a). 247 F.3d 1015, 1019 (9th Cir. 2001). I write separately to clarify that, in my view, the district court on remand should consider transferring Wright's § 2254 petition to the Eastern District of Tennessee only if it determines that said district is a more convenient venue for the parties to litigate it. As I explain more fully below, I do not think it is necessary or appropriate to construe Wright's § 2254 petition as a § 2255 petition.

As our memorandum disposition points out, the district court stated that assuming Wright "may be considered currently in custody" pursuant to § 2254, "it appears that the proper procedure" would be for Wright to file a habeas petition in the Eastern District of Tennessee pursuant to § 2255. This is incorrect, in my view, because Wright is not attacking the constitutionality of his federal conviction for failing to register as a sex offender in Tennessee; he is collaterally attacking the constitutionality of his predicate Alaska conviction for sexual abuse of a minor. Because we hold today that he is in custody under § 2254 such that he may challenge his Alaska conviction, there is no need and no basis to instruct Wright to instead file a § 2255 petition in Tennessee federal court.

It is true that both the District of Alaska and the Eastern District of Tennessee have jurisdiction over Wright's § 2254 petition. *See Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484, 495 (1973). Therefore, on remand, the district court could transfer Wright's § 2254 petition against the State of Alaska to the Eastern District of Tennessee, but only if it concludes that said district is the most convenient venue for the parties—including the State of Alaska—to litigate it. *See* 28 U.S.C. § 1404(a); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000) (listing factors the district court should consider to determine whether transfer is appropriate).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SEAN WRIGHT, Petitioner, vs. STATE OF ALASKA, Respondent.	No. 3:18-cv-00056-JKS MEMORANDUM DECISION

Sean Wright, a state prisoner now represented by counsel, filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254, dated February 27, 2018. In the Petition, Wright challenges his 2009 conviction for sexually abusing two young girls on the ground that his speedy trial rights were violated when the State of Alaska filed a felony information against him in November 1999 but did not arrest or indict him on the charges until almost five years later, and he did not proceed to trial on the charges until almost ten years later. Respondent has answered, and Wright has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

In November 1999, Wright was charged in a felony information with sexually abusing two young girls. On direct appeal of his conviction, the Alaska Supreme Court laid out the following facts underlying the charges against Wright and the procedural background of his case:

A. Facts

The State began investigating Wright in February 1999 after receiving a report that Wright had sexually abused his eleven-year-old stepdaughter, K.A. K.A. and her mother, Evelyn Wright, had confronted Wright about the abuse, and Wright moved out of the home, at which point they informed the police. Alaska State Trooper Investigator Ruth Josten interviewed K.A. and Evelyn on February 16 and 17, 1999. Evelyn indicated that Wright may have also abused another child, M.C., the daughter of his prior long-term partner. On March 4, Josten made contact with M.C., who confirmed that Wright had sexually abused her a decade prior.

When the investigation into the sexual abuse began, Wright left the state. Initially, he stayed with his brother in Arkansas. He subsequently decided to leave Alaska permanently and, over the next five years, worked various jobs in Arkansas, Mississippi, Alabama, Georgia, Oklahoma, Tennessee, and Minnesota.

At first, Wright stayed in contact with Evelyn via phone and letter. He called Evelyn on February 28 and March 1, 1999, but would not say where he was. Josten placed a phone trap on Evelyn's phone on March 2. With the phone trap, the Matanuska Telephone Authority identified phone calls from Wright to Evelyn on March 9, 10, and 11 as coming from Arkansas. In phone calls between February 28 and April 1, Wright expressed concern that the calls might be monitored by police, checked to see whether a warrant had been issued for him, indicated that he was attempting to retain counsel, and expressed his desire to achieve a non-criminal resolution of the allegations against him.

In mid-March 1999, he returned to Alaska. He stayed with a friend in Anchorage except for the weekend of March 20-21, which he spent with Evelyn in Wasilla. While back in Alaska he sold land to a friend, arranged to sell his truck, and placed his personal belongings in storage. On March 22 he formally resigned from his job and took a "red-eye" flight that night back to Arkansas. While Wright was waiting for his flight out of Alaska, he wrote to a friend:

> I don't know what's going on but I got a bad feeling, time to travel while I can. Note to trust no one, I won't call for a long time and don't know where I'm going yet. Have to stick to myself and stay away from family and friends till my attorney knows what's happening and how to deal with it. So I act like a termite for a while and work where I can to pay lawyer and survive.

Josten did not learn that Wright had been in Alaska until May 1999. Wright did not return to Alaska until after he was arrested in Minnesota in 2004.

Wright telephoned Evelyn frequently for several months after permanently leaving the state, but according to Evelyn, this regular contact ended after a warrant was issued. On May 6, 1999 Wright wrote to Evelyn to send her an address where he could receive mail. The address was his brother's in Vilonia, Arkansas, but it was clear this was only a forwarding address. He wrote, "Bill will get my mail to me were [sic] I'm at." This was the only address Evelyn and Josten had for Wright.[FN1] The record reflects that Wright also occasionally received mail at several mailing addresses in Russellville, Arkansas, where he at times lived with a girlfriend.[FN2] And Wright kept his brother apprised of where he was working.

FN1. Evelyn used the Vilonia address to contact Wright in order to obtain a dissolution of their marriage. The Palmer superior court did so as well. Wright waived his right to appear in the dissolution proceedings and signed the dissolution paperwork before a notary in Arkansas.

FN2. At one of the Russellville addresses, Wright received a summons from a

law firm about a case in Juneau regarding his overdue student loans. He also gave a Russellville address to the Alaska Bureau of Vital Statistics when he made a request for a death certificate.

Josten completed her investigation in June 1999. She forwarded the information she had gathered to the district attorney's office for review, and, aware that Wright had fled the state, requested that an extraditable arrest warrant issue. Her request was declined, "inexplicably," according to the superior court.

Five months later, in November 1999, the State filed a criminal information with the court charging Wright with eleven counts of sexual abuse of a minor. On November 16, 1999, an arrest warrant was issued for Wright. But the warrant was non-extraditable, so it was not placed in the FBI's National Crime Information Center system.

In the summer of 1999, Josten was reassigned. Between then and 2004, she periodically checked for information about Wright using databases available to Alaska State Troopers, but she made no other efforts to locate Wright.

Wright obtained an Arkansas driver's license in 2001. And between 1999 and 2004 he worked at a number of nuclear facilities requiring security clearance. Had his warrant been entered into the National Crime Information Center database, his employers would have discovered it.

On September 17, 2004, almost five years after the felony information was filed, Alaska State Trooper Sergeant Iliodor Kozloff received an inquiry from an employer in Minnesota about Wright.[FN3] Sgt. Kozloff confirmed there was an arrest warrant for Wright, but discovered that it was non-extraditable. He then contacted the district attorney's office, which decided to obtain an extraditable warrant. Wright was subsequently arrested and brought back to Alaska.

FN3. According to the State, the personnel officer who made the inquiry was suspicious since "it appeared that Mr. Wright wasn't providing any residences since living in Alaska."

On October 3, 2004, Wright was arraigned on the charges filed in 1999. On October 12, 2004, a grand jury indicted Wright on eighteen counts of sexual abuse of a minor covering the abuse of K.A., M.C., and a third girl, T.W.[FN4]

FN4. The State later agreed to dismiss the counts pertaining to the abuse of T.W. on statute of limitations grounds.

B. The Superior Court Proceedings

In August 2005 Wright filed a motion to dismiss the indictment claiming that the delay in prosecuting him violated his due process and speedy trial rights. After extensive briefing and an evidentiary hearing spread over seven non-consecutive days, Superior Court Judge Philip Volland denied the motion in a 13-page written opinion. . . .

With respect to the due process claim, the court determined that Wright had failed to show actual prejudice or unreasonable delay, and found Wright largely responsible for the delay.

As to the speedy trial claim, the court implicitly determined that the speedy trial clock began to run when the information was filed in November 1999. The court then applied a four-factor balancing test to determine whether the delay deprived Wright of his right to a speedy trial. The test, laid out by the Supreme Court of the United States in *Barker v. Wingo*, requires a court to consider: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the speedy trial right, and (4) prejudice to the defendant.[FN5] The superior court found that none of the latter three factors favored

Wright.

FN5. 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In *State v. Mouser*, the court of appeals used this test in evaluating a speedy trial claim arising under the Alaska Constitution. 806 P.2d 330, 340 (Alaska App. 1991).

Wright unsuccessfully sought interlocutory review in state and federal courts.[FN6] He also brought numerous other motions before the case finally came to trial in May 2009. Wright renewed his speedy trial motion just prior to trial. Superior Court Judge Michael Spaan denied this motion, relying on Judge Volland's decision. Before the jury began deliberations Wright again renewed his motion to dismiss on speedy trial grounds. Judge Spaan again denied this motion. The jury convicted Wright on eight counts of sexual abuse of a minor involving M.C. and five counts involving K.A. After Wright was sentenced, he appealed to the court of appeals.[FN7]

FN6. *Wright v. State*, 347 P.3d 1000, 1005 & n.3 (Alaska App. 2015).

FN7. *Id.* at 1005.

C. The Court Of Appeals' Decision

The court of appeals held that Wright's speedy trial claim under the federal constitution was without merit.[FN8] The court explained that federal courts have held that such claims do not begin to run until either an arrest or the filing of formal charges in a court having jurisdiction to try the accused, whichever comes first.[FN9] Since the November 1999 information was filed in the district court, which does not have jurisdiction to try felonies, the federal speedy trial right did not attach until Wright's arrest in September 2004.[FN10] Wright made no claim that the post-arrest delay violated his rights. He therefore had no viable federal speedy trial claim.[FN11]

FN8. *Id.* at 1005-06.

FN9. *Id.* (citing 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.1(c), at 110 (3d ed. 2007)).

FN10. *Id.* at 1006.

FN11. *Id.*

But the court held that Wright's state speedy trial right attached when the felony information was filed in November of 1999.[FN12] The court based its holding in part on the court of appeals' decision in *State v. Mouser*[FN13] and in part on this court's decision in *Yarbor v. State*.[FN14]

FN12. *Id.* at 1006-07.

FN13. 806 P.2d 330 (Alaska App. 1991).

FN14. 546 P.2d 564 (Alaska 1976).

Turning to the trial court's decision, the court of appeals found that the trial court

had misapplied the four-factor Barker test.[FN15] According to the court of appeals, the trial court erred in finding Wright partially responsible for the delay because after he left Alaska he "was not hiding out, and the State had avenues of locating him" that likely would have been productive.[FN16] Further, the trial court should not have faulted Wright for failing to assert his speedy trial right because he was unaware that charges had been filed.[FN17] Moreover, the court of appeals held that since the lengthy delay was the responsibility of the State, a presumption of prejudice arose and additional findings were required as to whether the State had met its burden of rebutting the presumption or showing extenuating circumstances.[FN18]

FN15. *Wright*, 347 P.3d at 1007-09; *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

FN16. *Wright*, 347 P.3d at 1008.

FN17. *Id.* at 1009.

FN18. *Id.* at 1990-11.

The court of appeals noted that pretrial determinations of speedy trial claims are necessarily provisional because prejudice can be better evaluated after a trial, so it instructed the superior court to apply the four-factor test to the whole period between the filing of the information and the trial.[FN19] The court suggested that the pre-arrest delay, which it found to be the responsibility of the State, might be counterbalanced by the post-arrest delay, if found to be the responsibility of Wright.[FN20] The court further suggested that Wright's post-arrest litigation conduct might indicate that he was not actually interested in a speedy trial.[FN2T]

FN19. *Id.* at 1010-11.

FN20. *Id.* at 1011.

FN21. *Id.* at 1009, 1011 (citing *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986)).

The State filed a petition for review to this court contending that the speedy trial time should have run from Wright's 2004 arrest or indictment, rather than from the 1999 information. After oral argument we ordered supplemental briefing on whether the court of appeals erred in attributing the pre-arrest delay to the State rather than, as the superior court did, primarily to Wright's flight from the state once he realized he was under investigation.

State v. Wright, 404 P.3d 166, 168-71 (Alaska 2017).

In a reasoned, published opinion issued on September 22, 2017, the Alaska Supreme Court ultimately concluded that "a defendant becomes formally accused for speedy trial purposes under the Alaska Constitution not just upon indictment or arrest but also when the State files an information charging the defendant with a crime." *Id.* at 174. It nonetheless ruled

against Wright by finding that the superior court did not err in placing primary responsibility for the pre-arrest delay upon Wright. *Id.* at 178. The Supreme Court thus concluded that the superior court correctly decided that Wright was not denied his right to a speedy trial under the Alaska Constitution. *Id.* at 180.

Wright then timely filed a *pro se* Petition for a Writ of Habeas Corpus to this Court on February 25, 2018. Docket No. 1; *see* 28 U.S.C. § 2244(d)(1)(A). Wright concurrently moved for the appointment of counsel, which this Court, through a previously-assigned district court judge, granted. Docket Nos. 3, 5. Counsel filed an Amended Petition ("Petition;" Docket No. 16), which is before the undersigned judge and ripe for adjudication.

II. GROUNDS/CLAIMS

In his counseled Petition before this Court, Wright argues that the Alaska Supreme Court unreasonably applied clearly-established Supreme Court authority, *Barker v. Wingo*, 92 S. Ct. 2182 (1972), when it denied his federal speedy trial and due process claims in its decision affirming Wright's conviction and sentence.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The Supreme Court has explained that "clearly established Federal law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme Court] as of the time of the

relevant state-court decision." *Id.* at 412. The holding must also be intended to be binding upon the states; that is, the decision must be based upon constitutional grounds, not on the supervisory power of the Supreme Court over federal courts. *Early v. Packer*, 537 U.S. 3, 10 (2002). Where holdings of the Supreme Court regarding the issue presented on habeas review are lacking, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (citation omitted).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona,* 497 U.S. 639, 653 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *See Robinson v. Ignacio,* 360 F.3d 1044, 1055 (9th Cir. 2004) (citing *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002)). A summary denial is an adjudication on the merits and entitled to deference. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. DISCUSSION

To proceed under § 2254, a petitioner must "be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *See* 28 U.S.C. §§ 2241(c), 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). A petitioner who files a habeas petition after he

has fully served his sentence and who is not subject to court supervision is not "in custody" for the purposes of this Court's subject matter jurisdiction and his petition is therefore properly denied. *See Maleng*, 490 U.S. at 492. The custody requirement, however, does not require that a prisoner be physically confined. *Id.* at 491. For example, a petitioner who is on parole at the time of filing is considered to be in custody, *see Jones v. Cunningham*, 371 U.S. 236, 241-43(1963), as is a petitioner on probation, *see Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005), and a petitioner released on his own recognizance, *see Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 301-02 (1984) (pending retrial). Custody requires a significant restraint on the petitioner's liberty.

The parties agree that Wright completed service of his state sentence on September 17, 2016. Docket No. 16 at 7; Docket No. 28 at 25. In his Petition, Wright avers that, at the time the *pro se* petition was filed on February 27, 2018, Wright was still in the State's custody because he was subject to state probation and parole as a result of the 2009 conviction. Docket No. 28 at 25. He therefore argues that he satisfied the "in custody" requirement of 28 U.S.C. § 2254 when he filed the Petition. *Id.*; *see Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (holding that "in custody" status is satisfied for jurisdictional purposes even when the person is no longer in prison but remains on parole as a result of the conviction he is challenging). In his opposition, Respondent denies such contention, stating that Wright's sentence, including any terms of parole or probation, expired on September 17, 2016. Docket No. 28 at 25-30. Respondent thus denies that Wright was "in custody" at the time he filed his Petition and argues that the Petition should be dismissed on that ground. Because Wright did not deny this contention or otherwise provide evidence that Wright was on parole or probation on the 2009 conviction at the time he filed the instant Petition in February 2018, the Court must accept as true Respondent's statement to the contrary. *See Phillips*, 451 F.2d at 919.

Wright contends, however, that he meets the "in custody" requirement because he "remains subject to collateral consequences as a result of his illegal prosecution and conviction."

But the Ninth Circuit has consistently held that "merely being subject to a sex offender registry requirement does not satisfy the 'in custody' requirement after the original [sex offense] conviction has expired." *Zichko v. Idaho*, 247 F.3d 1015, 1020 (9th Cir. 2001); *see also McNab v. Kok*, 170 F.3d 1246 (9th Cir. 1999) (Oregon sex offender registration law does not place sufficient restraints on convicts to constitute custody).

Nonetheless, the Ninth Circuit has held that the "in custody" requirement is met where the habeas petition may be construed as a challenge to the petitioner's current confinement as enhanced by the expired conviction. *See, e.g.*, *Brock v. Weston*, 31 F.3d 887, 890-91(9th Cir. 1994) (the Ninth Circuit, applying *Maleng*, held that a habeas petitioner civilly confined under Washington's Sexually Violent Predator Act ("SVPA") met the "in custody" requirement for purposes of challenging his expired criminal conviction if the district court determined that the expired conviction served as a predicate for his current commitment). In *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001), the prisoner was convicted of failing to register as a sex offender where the registration requirement was triggered by a prior rape conviction for which the sentence was already complete. While in custody for failing to register, the petitioner filed a federal habeas petition challenging his rape conviction, and the Ninth Circuit found that a habeas petitioner is "in custody" for purposes of challenging an earlier, expired rape conviction when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction 'is a necessary predicate' to the failure to register charge. *Id.* at 1019-1020. The appellate court concluded that because the previous offense was "positively and demonstrably related" to the offense for which he was presently in custody on a non-expired state conviction, there was jurisdiction to entertain the petition. *Id.* at 1020.

Wright notes in his Petition that "[h]e is presently the subject of a federal prosecution in Tennessee for failing to register as a sex offender." *See United States v. Wright*, Case No. 1:17-cr-00112-HSM (E.D. Tenn.). A review of that case docket indicates that Wright pled guilty on

February 14, 2018, to one count of failure to register as a sex offender.[1] *Id*. at Docket No. 39. Judgment was rendered on March 5, 2019, and Wright was sentenced to time served and five years of supervised release. *Id.* at Docket No. 66. Even assuming that Wright may be considered currently in custody,[2] it appears that the proper procedure for Wright to challenge his current federal custody would be a motion filed in the Eastern District of Tennessee pursuant to 28 U.S.C. § 2255, challenging the final judgment entered in that case. *See* 28 U.S.C. § 2254(a) (mandating that a petitioner seeking relief under § 2254 must be not only "in custody," but in custody "pursuant to the judgment of a State court"); 28 U.S.C. § 2255(a) (requiring that a petitioner in federal custody must attack the federal judgment under which he is in custody); *Brock*, 31 F.3d at 889-90 (holding that petitioner was no longer in custody under expired sexual assault conviction for the purpose of a habeas petition but could satisfy the "in custody" requirement of § 2254 based on his current civil confinement pursuant to a state court judgment under the Washington Sexually Violent Predators Act). Accordingly, *Zichko*, which involved a state prisoner who was currently in custody on a non-expired state court conviction, does not apply in Wright's case.

For these reasons, Wright fails to establish that he meets the "in custody" requirement of 28 U.S.C. § 2254. Because the requirement is jurisdictional, *see Bailey v. Hill*, 599 F.3d 976, 978 (9th Cir. 2010) (The "'in custody' requirement is jurisdictional and therefore, 'it is the first

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[1] This Court takes judicial notice of the record in Wright's Tennessee case. Judicial notice is "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact." Black's Law Dictionary (10th ed. 2014); see *also Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 n. 3 (9th Cir. 2005) ("Materials from a proceeding in another tribunal are appropriate for judicial notice.") (internal quotation marks and citation omitted).

[2] The Ninth Circuit has held that a defendant who has "not served his term of supervised release" is "in custody" for purposes of federal habeas jurisdiction. *United States v.* Monreal, 301 F.3d 1127, 1132 (9th Cir. 2002). Nonetheless, as discussed above, Wright may not validly challenge an expired state conviction by way of 28 U.S.C. § 2254 merely because he is in custody in another jurisdiction on federal charges.

question we must consider.'") (citation omitted), Wright's Petition must be dismissed with prejudice.

V. CONCLUSION AND ORDER

Wright is not entitled to relief on any ground raised in his Petition.

IT IS THEREFORE ORDERED THAT the First Amended Petition for Writ of Habeas Corpus at Docket No. 16 is **DISMISSED WITH PREJUDICE** for failure to satisfy the "in custody" requirement of 28 U.S.C. § 2254.

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability. *See* 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" (quoting *Miller-El*, 537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Ninth Circuit Court of Appeals. *See* FED. R. APP. P. 22(b); 9TH CIR. R. 22-1.

The Clerk of the Court is to enter judgment accordingly.

Dated: May 8, 2019.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SEAN WRIGHT,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

No. 3:18-cv-00056-JKS

ORDER
[Re: Motion at Docket No. 34]

This Court denied Sean Wright, a former Alaska state prisoner now represented by counsel, habeas relief and a certificate of appealability ("COA") on May 8, 2019. Docket Nos. 32, 33. The Court concluded that Wright, whose sentence on his 2009 Alaska conviction for sexual abuse had expired prior to his filing the habeas petition, did not satisfy 28 U.S.C. § 2254's in custody requirement. The Court held that, although Wright was sentenced recently in the U.S. District Court for the Eastern District of Tennessee to time served and five years of supervised release on a federal conviction for failure to register as a sex offender, his status on federal supervised release did not render him in custody "pursuant to the judgment of a State court," as required by 28 U.S.C. § 2254(a). Docket No. 32 at 10 (citing *Brock v. Weston*, 31 F.3d 887, 889-90 (9th Cir. 1994) (holding that petitioner was no longer in custody under expired sexual assault conviction for the purpose of a habeas petition but could satisfy the "in custody" requirement of § 2254 based on his current civil confinement pursuant to a state court judgment

under the Washington Sexually Violent Predators Act)).

At Docket No. 34, Wright now moves for reconsideration of the Court's decision, citing *Piasecki v. Court of Common Pleas, Bucks County, PA*, 917 F.3d 161 (3d Cir. 2019), a decision of the Third Circuit that was filed during the pendency of briefing in the instant case and before this Court's judgment issued. In *Piasecki*, the Third Circuit held that the sex offender registration requirements under Pennsylvania state law were sufficiently restrictive to constitute custody, as required for the federal courts to have jurisdiction over a habeas petition that was filed after the petitioner's term of probation for child pornography convictions had expired, but while he was still subject to registration requirements. *Id.* at 170. Likewise, the *Piasecki* Court held that the sex offender registration requirements were part of the petitioner's sentence for child pornography convictions rather than mere collateral consequence of those convictions. *Id.* at 173-73.

GOVERNING LAW

A motion to reconsider a final appealable order is appropriately brought under either Federal Rule of Civil Procedure 59(e) or 60(b). *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991). Rule 59(e) allows a party to seek an order altering or amending a judgment. Rule 59(e) does not state when a court should reconsider a prior decision, but the Ninth Circuit has stated that "Rule 59(e) amendments are appropriate if the district court '(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Dixon v. Wallowa Cnty.*, 336 F.3d 1013, 1022 (9th Cir. 2003) (quoting *School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

Under Rule 60(b),

> the court may relieve a party...from a final judgment, order, or proceeding for the following reasons: (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 discharged; 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).

Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); *see also Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). Moreover, a motion for reconsideration generally "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (referring to Rule 59(e)); *see also Casey v. Albertson's Inc.*, 362 F.3d 1254, 1259-61 (9th Cir. 2004) (referring to Rule 60(b)); *Kona Enters.*, 229 F.3d at 890 (interpreting Rule 59(e)). The sole exception is when the court has committed "clear" or "manifest" error. Mere disagreement with a court's order, however, does not provide a basis for reconsideration. *See McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999).

DISCUSSION

Wright brings his reconsideration motion under Federal Rule of Civil Procedure 60(b)(6), which "permits reopening 'for any . . . reason that justifies relief' other than the more specific reasons set forth in Rule 60(b)(1)-(5)." *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013). He asks this Court to reconsider its decision in light of the Third Circuit's decision in *Piasecki*, which held that the registration requirements under Pennsylvania's Sexual Offender Registration and Notification Act ("SORNA") constituted "custody" for purposes of establishing federal jurisdiction. *Piasecki,* 917 F.3d at 170.

This Court, of course, is not bound by the Third Circuit's decision, which is contrary to those of all circuit courts who have faced the same issue. *See, e.g.*, *Hautzenroeder v. Dewine*, 887 F.3d 737 (6th Cir. 2018) (Ohio's SORNA); *Calhoun v. Att'y Gen.*, 745 F.3d 1070, 1074 (10th Cir. 2014) (Colorado); *Wilson v. Flaherty*, 689 F.3d 332, 335 (4th Cir. 2012) (Texas and Virginia); *Virsniecks v. Smith*, 521 F.3d 707, 717-20 (7th Cir. 2008) (Wisconsin); *Johnson v.*

Davis, 697 F. App'x 274, 275 (5th Cir. 2017) (Texas); *Dickey v. Allbaugh*, 664 F. App'x 690 (10th Cir. 2016) (Oklahoma). Indeed, the Ninth Circuit, the appellate court whose rulings are binding on this Court, has consistently concluded that the sex offender registration requirements it has considered are collateral consequences of the underlying conviction and do not constitute custody for purposes of § 2254 jurisdiction. *See Henry v. Lungren*, 164 F.3d 1240, 1241-42 (9th Cir. 1999) (California statute); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (Oregon statute); *Williamson v. Gregoire*, 151 F.3d 1180, 1182-84 (9th Cir. 1998) (Washington statute). Although Wright urges the Court to distinguish the Ninth Circuit precedent because the registration requirements Wright faces under the Tennessee SORNA are "more onerous" than those the Ninth Circuit previously considered, Docket No. 34 at 3, this Court is bound by the reasoning of *Williamson* and its progeny, which the Court continues to find both persuasive and controlling. Any argument to the contrary should be raised to and decided by the Ninth Circuit Court of Appeals.

CONCLUSION

Wright has not demonstrated that this Court should reconsider its earlier decision dismissing with prejudice the First Amended Petition for Writ of Habeas Corpus for failure to satisfy the "in custody" requirement of 28 U.S.C. § 2254.

IT IS THEREFORE ORDERED THAT the Motion for Reconsideration at Docket No. 34 is **DENIED**.

IT IS FURTHER ORDERED THAT the Court issues a Certificate of Appealability with respect to Wright's claims that the sex offender registration requirements he faces are significantly restrictive to satisfy the "in custody" requirement of 28 U.S.C. § 2254 and are part of his Alaska sentence rather than mere collateral consequences of his conviction. *See* 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further.'" (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003))). Any further request for a Certificate of Appealability must be addressed to the Ninth Circuit Court of Appeals. *See* FED. R. APP. P. 22(b); 9TH CIR. R. 22-1.

Dated: June 12, 2019.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge

FILED

OCT 9 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEAN WRIGHT, Petitioner-Appellant, v. STATE OF ALASKA, Respondent-Appellee.	No. 19-35543 D.C. No. 3:18-cv-00056-JKS District of Alaska, Anchorage ORDER

Before: RAWLINSON, MURGUIA, and R. NELSON, Circuit Judges.

Judges Rawlinson, Murguia and Nelson have voted to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

The Petition for Rehearing En Banc, filed September 16, 2020, is DENIED.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,	)	
	)	Supreme Court No. S-15917
Petitioner,	)	Court of Appeals No. A-10587
	)	
v.	)	Superior Court No. 3AN-99-09867 CR
	)	
SEAN WRIGHT,	)	O P I N I O N
	)	
Respondent.	)	No. 7200 – September 22, 2017
	)	

Petition for Review from the Court of Appeals of the State of Alaska, on appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Philip R. Volland and Michael R. Spaan, Judges.

Appearances: Timothy W. Terrell, Assistant Attorney General, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for Petitioner. Margie Mock, Contract Attorney, Anchorage, and Quinlan G. Steiner, Public Defender, Anchorage, for Respondent.

Before: Stowers, Chief Justice, Maassen, Bolger, and Carney, Justices, and Matthews, Senior Justice.[*] [Winfree, Justice, not participating.]

MATTHEWS, Senior Justice.
BOLGER, Justice, concurring.
CARNEY, Justice, concurring in part and dissenting in part.

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[*] Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

I. INTRODUCTION

In November 1999 the State filed a felony information charging Sean Wright with sexually abusing two young girls. Wright was not arrested or indicted on these charges until almost five years later. He moved to dismiss the charges, claiming, among other reasons, that his right to a speedy trial had been violated. The superior court denied this motion. On appeal, the court of appeals ordered a reassessment of Wright's claim.

We granted the State's petition for review and now decide two questions:

(1) Do speedy trial rights begin when a felony information is filed, or only when a defendant is arrested or indicted?

(2) Did the superior court err when it decided that Wright was more responsible than the State for the delay?

We conclude that speedy trial time begins to run from the filing of an information. We also find that the superior court did not err in attributing primary responsibility for the delay to Wright.

II. FACTS AND PROCEEDINGS

A. Facts

The State began investigating Wright in February 1999 after receiving a report that Wright had sexually abused his eleven-year-old stepdaughter, K.A. K.A. and her mother, Evelyn Wright, had confronted Wright about the abuse, and Wright moved out of the home, at which point they informed the police. Alaska State Trooper Investigator Ruth Josten interviewed K.A. and Evelyn on February 16 and 17, 1999. Evelyn indicated that Wright may have also abused another child, M.C., the daughter of his prior long-term partner. On March 4, Josten made contact with M.C., who confirmed that Wright had sexually abused her a decade prior.

When the investigation into the sexual abuse began, Wright left the state. Initially, he stayed with his brother in Arkansas. He subsequently decided to leave Alaska permanently and, over the next five years, worked various jobs in Arkansas, Mississippi, Alabama, Georgia, Oklahoma, Tennessee, and Minnesota.

At first, Wright stayed in contact with Evelyn via phone and letter. He called Evelyn on February 28 and March 1, 1999, but would not say where he was. Josten placed a phone trap on Evelyn's phone on March 2. With the phone trap, the Matanuska Telephone Authority identified phone calls from Wright to Evelyn on March 9, 10, and 11 as coming from Arkansas. In phone calls between February 28 and April 1, Wright expressed concern that the calls might be monitored by police, checked to see whether a warrant had been issued for him, indicated that he was attempting to retain counsel, and expressed his desire to achieve a non-criminal resolution of the allegations against him.

In mid-March 1999, he returned to Alaska. He stayed with a friend in Anchorage except for the weekend of March 20-21, which he spent with Evelyn in Wasilla. While back in Alaska he sold land to a friend, arranged to sell his truck, and placed his personal belongings in storage. On March 22 he formally resigned from his job and took a "red-eye" flight that night back to Arkansas. While Wright was waiting for his flight out of Alaska, he wrote to a friend:

> I don't know what's going on but I got a bad feeling, time to travel while I can. Note to trust no one, I won't call for a long time and don't know where I'm going yet. Have to stick to myself and stay away from family and friends till my attorney knows what's happening and how to deal with it. So I act like a termite for a while and work where I can to pay lawyer and survive.

Josten did not learn that Wright had been in Alaska until May 1999. Wright did not return to Alaska until after he was arrested in Minnesota in 2004.

Wright telephoned Evelyn frequently for several months after permanently leaving the state, but according to Evelyn, this regular contact ended after a warrant was issued. On May 6, 1999 Wright wrote to Evelyn to send her an address where he could receive mail. The address was his brother's in Vilonia, Arkansas, but it was clear this was only a forwarding address. He wrote, "Bill will get my mail to me were [sic] I'm at." This was the only address Evelyn and Josten had for Wright.[1] The record reflects that Wright also occasionally received mail at several mailing addresses in Russellville, Arkansas, where he at times lived with a girlfriend.[2] And Wright kept his brother apprised of where he was working.

Josten completed her investigation in June 1999. She forwarded the information she had gathered to the district attorney's office for review, and, aware that Wright had fled the state, requested that an extraditable arrest warrant issue. Her request was declined, "inexplicably," according to the superior court.

Five months later, in November 1999, the State filed a criminal information with the court charging Wright with eleven counts of sexual abuse of a minor. On November 16, 1999, an arrest warrant was issued for Wright. But the warrant was non-extraditable, so it was not placed in the FBI's National Crime Information Center system.

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[1] Evelyn used the Vilonia address to contact Wright in order to obtain a dissolution of their marriage. The Palmer superior court did so as well. Wright waived his right to appear in the dissolution proceedings and signed the dissolution paperwork before a notary in Arkansas.

[2] At one of the Russellville addresses, Wright received a summons from a law firm about a case in Juneau regarding his overdue student loans. He also gave a Russellville address to the Alaska Bureau of Vital Statistics when he made a request for a death certificate.

In the summer of 1999, Josten was reassigned. Between then and 2004, she periodically checked for information about Wright using databases available to Alaska State Troopers, but she made no other efforts to locate Wright.

Wright obtained an Arkansas driver's license in 2001. And between 1999 and 2004 he worked at a number of nuclear facilities requiring security clearance. Had his warrant been entered into the National Crime Information Center database, his employers would have discovered it.

On September 17, 2004, almost five years after the felony information was filed, Alaska State Trooper Sergeant Iliodor Kozloff received an inquiry from an employer in Minnesota about Wright.[3] Sgt. Kozloff confirmed there was an arrest warrant for Wright, but discovered that it was non-extraditable. He then contacted the district attorney's office, which decided to obtain an extraditable warrant. Wright was subsequently arrested and brought back to Alaska.

On October 3, 2004, Wright was arraigned on the charges filed in 1999. On October 12, 2004, a grand jury indicted Wright on eighteen counts of sexual abuse of a minor covering the abuse of K.A., M.C., and a third girl, T.W.[4]

B. The Superior Court Proceedings

In August 2005 Wright filed a motion to dismiss the indictment claiming that the delay in prosecuting him violated his due process and speedy trial rights. After extensive briefing and an evidentiary hearing spread over seven non-consecutive days,

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[3] According to the State, the personnel officer who made the inquiry was suspicious since "it appeared that Mr. Wright wasn't providing any residences since living in Alaska."

[4] The State later agreed to dismiss the counts pertaining to the abuse of T.W. on statute of limitations grounds.

Superior Court Judge Philip Volland denied the motion in a 13-page written opinion. The discussion portion of Judge Volland's opinion is set out in the appendix.

With respect to the due process claim, the court determined that Wright had failed to show actual prejudice or unreasonable delay, and found Wright largely responsible for the delay.

As to the speedy trial claim, the court implicitly determined that the speedy trial clock began to run when the information was filed in November 1999. The court then applied a four-factor balancing test to determine whether the delay deprived Wright of his right to a speedy trial. The test, laid out by the Supreme Court of the United States in *Barker v. Wingo*, requires a court to consider: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the speedy trial right, and (4) prejudice to the defendant.[5] The superior court found that none of the latter three factors favored Wright.

Wright unsuccessfully sought interlocutory review in state and federal courts.[6] He also brought numerous other motions before the case finally came to trial in May 2009. Wright renewed his speedy trial motion just prior to trial. Superior Court Judge Michael Spaan denied this motion, relying on Judge Volland's decision. Before the jury began deliberations Wright again renewed his motion to dismiss on speedy trial grounds. Judge Spaan again denied this motion. The jury convicted Wright on eight

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[5] 407 U.S. 514, 530 (1972). In *State v. Mouser*, the court of appeals used this test in evaluating a speedy trial claim arising under the Alaska Constitution. 806 P.2d 330, 340 (Alaska App. 1991).

[6] *Wright v. State*, 347 P.3d 1000, 1005 & n.3 (Alaska App. 2015).

counts of sexual abuse of a minor involving M.C. and five counts involving K.A. After Wright was sentenced, he appealed to the court of appeals.[7]

C. The Court Of Appeals' Decision

The court of appeals held that Wright's speedy trial claim under the federal constitution was without merit.[8] The court explained that federal courts have held that such claims do not begin to run until either an arrest or the filing of formal charges in a court having jurisdiction to try the accused, whichever comes first.[9] Since the November 1999 information was filed in the district court, which does not have jurisdiction to try felonies, the federal speedy trial right did not attach until Wright's arrest in September 2004.[10] Wright made no claim that the post-arrest delay violated his rights. He therefore had no viable federal speedy trial claim.[11]

But the court held that Wright's state speedy trial right attached when the felony information was filed in November of 1999.[12] The court based its holding in part on the court of appeals' decision in *State v. Mouser*[13] and in part on this court's decision in *Yarbor v. State*.[14]

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[7] *Id.* at 1005.

[8] *Id.* at 1005-06.

[9] *Id.* (citing 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.1(c), at 110 (3d ed. 2007)).

[10] *Id.* at 1006.

[11] *Id.*

[12] *Id.* at 1006-07.

[13] 806 P.2d 330 (Alaska App. 1991).

[14] 546 P.2d 564 (Alaska 1976).

Turning to the trial court's decision, the court of appeals found that the trial court had misapplied the four-factor *Barker* test.[15] According to the court of appeals, the trial court erred in finding Wright partially responsible for the delay because after he left Alaska he "was not hiding out, and the State had avenues of locating him" that likely would have been productive.[16] Further, the trial court should not have faulted Wright for failing to assert his speedy trial right because he was unaware that charges had been filed.[17] Moreover, the court of appeals held that since the lengthy delay was the responsibility of the State, a presumption of prejudice arose and additional findings were required as to whether the State had met its burden of rebutting the presumption or showing extenuating circumstances.[18]

The court of appeals noted that pretrial determinations of speedy trial claims are necessarily provisional because prejudice can be better evaluated after a trial, so it instructed the superior court to apply the four-factor test to the whole period between the filing of the information and the trial.[19] The court suggested that the pre-arrest delay, which it found to be the responsibility of the State, might be counterbalanced by the post-arrest delay, if found to be the responsibility of Wright.[20] The court further suggested

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[15] *Wright*, 347 P.3d at 1007-09; *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

[16] *Wright*, 347 P.3d at 1008.

[17] *Id.* at 1009.

[18] *Id.* at 1009-11.

[19] *Id.* at 1010-11.

[20] *Id.* at 1011.

that Wright's post-arrest litigation conduct might indicate that he was not actually interested in a speedy trial.[21]

The State filed a petition for review to this court contending that the speedy trial time should have run from Wright's 2004 arrest or indictment, rather than from the 1999 information. After oral argument we ordered supplemental briefing on whether the court of appeals erred in attributing the pre-arrest delay to the State rather than, as the superior court did, primarily to Wright's flight from the state once he realized he was under investigation.

III. STANDARDS OF REVIEW

The proper interpretation of the Alaska Constitution is a "question[] of law to which we apply our independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy."[22]

We review a trial court's findings of fact for clear error,[23] but the assessment of the legal consequences of the trial court's findings of fact is a question of law that we review de novo.[24]

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[21] *Id.* at 1009, 1011 (citing *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)).

[22] *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1115 (Alaska 2007) (citing *State Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 858 (Alaska 2003)).

[23] *Johnson v. State*, 328 P.3d 77, 81 (Alaska 2014).

[24] *See Michael v. State*, 115 P.3d 517, 519 (Alaska 2005); *Meyer v. State*, 368 P.3d 613, 615 (Alaska App. 2016).

"[W]e give no deference to the court of appeals's conclusions when we grant a petition for review."[25]

IV. DISCUSSION

A. Purposes Of The Right To A Speedy Trial

This case concerns the speedy trial guarantee expressed in the Alaska Constitution and its relationship to procedures for initiating criminal prosecutions. Article I, section 11 of the Alaska Constitution states: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial . . . ." This language is almost identical to the speedy trial clause in the Sixth Amendment to the United States Constitution.

The speedy trial right has its origins in English law. Sir Edward Coke wrote that "the innocent shall not be worn and wasted by long imprisonment, but . . . speedily come to his trial."[26] As this indicates, the core evil that the right was originally designed to prevent was lengthy pretrial incarceration. But modern cases have recognized that the right has broader purposes. Inordinate delay, regardless of incarceration, may impair a defendant's ability to prepare an effective defense.[27] And regardless of prejudice in attempting to defend on the merits, long delay may "seriously

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[25] *State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000).

[26] 1 SIR EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 315 (E. & R. Brooke eds. 1797) (1642), *quoted in Betterman v. Montana*, 578 U.S. ___, 136 S. Ct. 1609, 1614 (2016).

[27] *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (identifying "the most serious" interest that the speedy trial right protects as being the limits the right places on "the possibility that the defense will be impaired"); *United States v. Marion*, 404 U.S. 307, 320-21 (1971) ("Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.").

interfere with [a] defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family[,] and his friends."[28]

There are other legal protections against undue delay in bringing criminal charges to trial. Alaska Criminal Rule 45 requires a trial within 120 days from the date a charging document is served on a defendant, subject to defined excluded periods. This rule, promulgated in 1971, has sharply reduced the number of constitutional speedy trial claims asserted in our courts, as the proscriptions of Rule 45 are generally narrower than the limits of the constitutional speedy trial right.[29] Statutes of limitations also provide a limit beyond which the law irrebuttably presumes that a defendant cannot receive a fair trial.[30] And lengthy pre-accusation delay may result in a deprivation of due process.[31]

All of these protections have limits. They are not necessarily congruent with each other, nor does any one of them fully protect against undue delay.[32] The ultimate limits on delay — statutes of limitations — are tolled when an "indictment is

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[28] *See Marion*, 404 U.S. at 320; *see also Barker*, 407 U.S. at 537-38 (White, J., concurring).

[29] *Snyder v. State*, 524 P.2d 661, 664 (Alaska 1974) (noting that Rule 45 does not define the outer limits of Alaska's constitutional right to a speedy trial).

[30] *Marion*, 404 U.S. at 321.

[31] *Id.* at 324 (due process requires dismissal of an indictment if defendant shows that pre-indictment delay caused substantial prejudice to defendant's right to a fair trial and delay was an intentional means of gaining tactical advantage over the accused).

[32] *See Marks v. State*, 496 P.2d 66, 68 (Alaska 1972) (statute of limitations "does not fully define . . . rights with respect to the events occurring prior to indictment" (quoting *Marion*, 404 U.S. at 324)).

found" or an "information or complaint is instituted."[33] Further, there is no limitation period for many serious crimes,[34] including as of 2007, cases of felony sexual abuse of a minor;[35] for most other serious crimes the period is a lengthy ten years.[36] Meanwhile, a defendant asserting a due process claim of pre-accusation delay must prove both unreasonable delay and actual prejudice.[37] For a state constitutional speedy trial violation, under the analysis we use, proof of actual prejudice is not always required.[38] But the constitutional speedy trial right utilizes an ad hoc and imprecise balancing test,[39] and it does not attach until the defendant becomes an "accused,"[40] which is when the defendant is either arrested or formally charged.[41] The other protection against post-accusation delay, Rule 45, contains well-defined standards, but it does not begin to run until a defendant is served with the charging document.[42]

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[33] AS 12.10.010(b).

[34] AS 12.10.010(a).

[35] AS 12.10.010(a)(3).

[36] AS 12.10.010(b)(1).

[37] *See State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991) (citing *York v. State*, 757 P.2d 68, 70 (Alaska App. 1988)).

[38] *Id.* at 338.

[39] *Id.* at 340 (adopting the *Barker* test).

[40] Alaska Const., art. 1, § 11.

[41] *Yarbor v. State*, 546 P.2d 564, 567 (Alaska 1976).

[42] Alaska R. Crim. P. 45(c)(1).

B. The Criminal Information Was A Formal Charge That Started The Speedy Trial Clock.

The first question in this case is when a defendant is "formally accused" for purposes of starting the speedy trial clock under the Alaska Constitution. Specifically, this case concerns whether the filing of a criminal information triggers the speedy trial right.

In Alaska the initial pleading in a criminal case may be an information, a complaint, or an indictment. All are charging documents with formal requirements prescribed by rule.[43] All may charge either misdemeanors or felonies. But felony charges initiated by a complaint or information are generally not the final pleading required before a defendant can be brought to trial. For that, an indictment is necessary unless the defendant waives an indictment, in which case the trial may proceed based on an information.[44] Informations and complaints are generally similar. The main differences are that informations must be signed by the prosecuting attorney and complaints need not be,[45] and complaints can never serve alone as the basis for a felony prosecution, even if an indictment is waived, while informations can.[46] The filing of a complaint or information sets in motion a litigation process described in Alaska Criminal Rules 3, 4, 5.1, 7, and 9. But the rules do not indicate how the litigation process aligns with the state constitutional right to a speedy trial.

The State argues that the right to a speedy trial in cases where a defendant has not been first arrested should not attach until a charging document has been filed that

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[43] *See* Alaska R. Crim. P. 3 (complaint), 7 (indictment and information).

[44] Alaska R. Crim. P. 7; AS 12.80.020.

[45] Alaska R. Crim. P. 3, 7.

[46] Alaska R. Crim. P. 7.

is sufficient to compel a defendant to stand trial. Because an information is not a sufficient pleading to compel a person charged with a felony to stand trial unless the person waives indictment, the State contends that the speedy trial time did not begin to run in this case until Wright was arrested in September of 2004. By contrast, Wright argues that the speedy trial right attaches in felony cases when an information is filed and therefore the speedy trial time in this case began to run when the information was filed in November of 1999.

Both positions find substantial support in the case law of other jurisdictions.[47] Our case law has also considered the issue. In *Yarbor v. State*, we stated that the speedy trial time starts when the defendant "becomes formally accused — that is, the subject of a filed complaint or an arrest."[48] The State asks us to revisit this statement from *Yarbor*.

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[47] *Compare*, *e.g.*, *United States v. Madden*, 682 F.3d 920, 930 (10th Cir. 2012) ("The general rule is that the [federal] speedy trial right attaches when the defendant is arrested or indicted, depending on which comes first." (quoting *United States v. Gomez*, 67 F.3d 1515, 1521 (10th Cir. 1995))); *United States v. Dowdell*, 595 F.3d 50, 61 (1st Cir. 2010) (same); *United States v. Battis*, 589 F.3d 673, 678 (3rd Cir. 2009) (same); *People v. Martinez*, 996 P.2d 32, 41 (Cal. 2000) (felony complaint does not trigger federal speedy trial right); *and People v. Mitchell*, 825 N.E.2d 1241, 1243-45 (Ill. App. 2005) (felony complaint does not trigger state or federal speedy trial right), *with Scherling v. Superior Court*, 585 P.2d 219, 225 (Cal. 1978) (en banc) (state speedy trial protections attach after a complaint has been filed); *Jacobson v. Winter*, 415 P.2d 297, 300 (Idaho 1966) (state speedy trial right attaches when a criminal complaint is filed); *State v. Larson*, 623 P.2d 954, 957-58 (Mont. 1981) (state and federal speedy trial guarantee "is activated . . . by arrest, the filing of a complaint, or by indictment or information"); *People v. White*, 298 N.E.2d 659, 662 (N.Y. 1973) (state and federal speedy trial right attaches by filing of felony information or complaint, detainer warrant, or indictment); *State v. Selvage*, 687 N.E.2d 433, 436 (Ohio 1997) (filing of criminal complaint triggered speedy trial inquiry); *and State v. Lemay*, 455 N.W.2d. 233, 236 (Wis. 1990) (speedy trial right attaches when complaint and warrant are issued).

[48] 546 P.2d 564, 567 (Alaska 1976).

The criminal conduct in *Yarbor*, lewd and lascivious acts toward a child, took place in August 1973.[49] The police investigation ended ten days later, and the district attorney's office completed its review of the case in December 1973, when it notified the victim's mother that a criminal complaint was ready for her signature.[50] But she did not sign the complaint until March 1974.[51] Yarbor was served two days later, but not arrested.[52] He was indicted in April 1974 and tried in June 1974.[53] On appeal Yarbor challenged the delay in commencing prosecution on speedy trial grounds, arguing that the right to a speedy trial attached when the State acquired sufficient evidence to charge him.[54] The State argued that the speedy trial right should not attach prior to "accusation," a term that it defined as "that point in time when a person is officially charged with the

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[49] *Id.* at 565.

[50] *Id.*

[51] *Id.* at 566.

[52] *Id.*

[53] Brief for Appellee at 3, 5, *Yarbor*, 546 P.2d 564 (No. 2397).

[54] He relied on a law journal article that stated that the speedy trial right would begin "from the time the defendant is arrested, from the time of his initial arraignment, or from the time the charge is placed against the accused, whichever is first" unless the defendant could prove that the State "had sufficient evidence . . . to prosecute him prior to the date on which charges were formally brought," subject to exceptions if the delay was reasonably necessary and did not prejudice the accused in the presentation of his defense. Mark I. Steinberg, Comment, *Right to Speedy Trial: Maintaining a Proper Balance between the Interests of Society and the Rights of the Accused*, 4 UCLA ALASKA L. REV. 242, 259-60 (1974), *cited in* Brief for Appellant at 13-14, *Yarbor*, 546 P.2d 564 (No. 2397).

commission of a crime either by arrest, with or without a warrant, complaint, information or indictment, whichever occurs first."[55]

We rejected Yarbor's contention on several grounds. We noted that the United States Supreme Court in *United States v. Marion*[56] had rejected a similar argument and held instead that the right to a speedy trial does not attach until the defendant has been "formally accused."[57] We also observed that Yarbor's proposed rule would be difficult to administer, and might have adverse effects because it would create incentives to bring charges too hastily.[58] We concluded our discussion of the speedy trial claim with the following language:

> For these reasons, we now join our sister states in holding that the right to a speedy trial does not attach before the defendant becomes formally accused — that is, the subject of a filed complaint or arrest.[59]

The State now contends that the quoted statement from *Yarbor* is dictum rather than a holding, and therefore has limited precedential effect. The State also argues that even if the statement is a holding, it should be overruled because the criteria for

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[55] *See* Brief for Appellee at 8 n.1, *Yarbor*, 546 P.2d 564 (No. 2397). The State went on to note that "[t]he point of referrence [sic] is the same as that employed in Rule 45(c)(1), Alaska Rules of Criminal Procedure, to determine the time from which the 120 day period for trial under that rule begins running." *Id.* At that time Rule 45(c)(1) provided that speedy trial time would begin to run "[f]rom the date the defendant is arrested, initially arraigned, or from the date the charge (complaint, indictment, or information) is served upon the defendant, whichever is first." *Id.* at v.

[56] 404 U.S. 307, 321-22 (1971).

[57] *Yarbor*, 546 P.2d at 566 (citing *Marion*, 404 U.S. at 321-22).

[58] *Id.*

[59] *Id.* at 567.

overruling a holding are satisfied in this case.[60] Wright counters that the statement is a holding and therefore must be followed because the grounds for overruling a holding are not met. Wright also contends that the statement is consistent with substantial authority and furthers the purposes underlying the speedy trial guarantee.

We find it unnecessary to resolve the question of whether the *Yarbor* statement — that a defendant becomes formally accused when a complaint is filed — is a holding or dictum. Instead, we conclude today that a defendant becomes formally accused for speedy trial purposes under the Alaska Constitution not just upon indictment or arrest but also when the State files an information charging the defendant with a crime.

We reach this conclusion because the filing of an information marks the beginning of litigation against a defendant. An information is a formal document with prescribed contents.[61] It must include the name of the defendant, the statute the defendant is charged with violating, and a concise and definite written statement of the essential facts constituting the crime.[62] An information must also bear the signature of the prosecuting attorney.[63] It is a public document, available for view by anyone in the office of the clerk of court. When an information is filed, the title of the charges, a citation to the statutes on which the charges are based, and the defendant's name are

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[60] "We overrule a prior decision only when we are 'clearly convinced that (1) a decision was originally erroneous or no longer sound because of changed conditions; and (2) more good than harm would result from overruling it.' " *Charles v. State*, 326 P.3d 978, 983 (Alaska 2014) (quoting *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs, Office of Children's Servs.*, 303 P.3d 431, 447 (Alaska 2013)).

[61] Alaska R. Crim. P. 7.

[62] *Id.*

[63] *Id.*

promptly entered in the CourtView database, and thus become viewable by anyone with access to the internet. When the prosecutor's office files an information it "clearly manifest[s] its decision to prosecute."[64] And the filing of an information is sufficient to toll the statute of limitations on a criminal charge.[65]

When an information is filed the court must either issue a warrant of arrest or a summons requiring the defendant to appear in court at a specified time.[66] At the first appearance the judge treats a summoned defendant much like an arrested defendant. The judge informs the defendant of the charges and of any affidavit filed with it and makes sure the defendant has copies.[67] The judge also informs the defendant of his or her right to counsel, the potential penalties the defendant faces, and the defendant's right to remain silent.[68] If the defendant desires appointed counsel, the judge proceeds to determine the defendant's eligibility by reviewing his or her financial status, and if the defendant is eligible, appoints an attorney.[69] The judge also establishes the conditions of release applicable to the defendant.[70] In felony cases, the judge informs the defendant of his or her right to a preliminary hearing unless the defendant waives this right or consents to

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[64] *State v. Mouser*, 806 P.2d 330, 339 (Alaska App. 1991).

[65] AS 12.10.010(b).

[66] Alaska R. Crim P. 9(a). *See also* Alaska R. Crim. P. 4(a) (requiring a judge to find probable cause and issue a warrant or summons upon complaints).

[67] Alaska R. Crim. P. 5(c)(1)–(2).

[68] Alaska R. Crim. P. 5(c)(3)–(4).

[69] Alaska R. Crim. P. 5(a)(2)(E)(iii), 5(c)(3).

[70] Alaska R. Crim. P. 5(c)(5).

the filing of an information in superior court.[71] If there is a waiver or consent the judge "shall forthwith hold the defendant to answer in the superior court."[72] If not, the judge schedules a preliminary hearing, which must be held within 20 days of the initial appearance.[73]

The preliminary hearing is a trial in miniature. The State must present evidence in support of its case and the defense may present evidence.[74] All witnesses are subject to cross examination[75] and the defendant has the right to counsel.[76] If the judge determines there is no probable cause the defendant is discharged,[77] but if probable cause is found to exist the judge enters an order holding the defendant to answer and establishes conditions of release.[78]

All these actions and proceedings may come before an indictment. We believe that it cannot reasonably be said that a defendant who is a party to them has not been formally accused.

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[71] Alaska R. Crim. P. 5(e)(2). However, even when a defendant has not waived the right to a preliminary hearing, a preliminary hearing need not be provided if an indictment has already been returned on the same charges. *Martinez v. State*, 423 P.2d 700, 712 (Alaska 1967).

[72] Alaska R. Crim P. 5(e)(3).

[73] Alaska R. Crim. P. 5(e)(4).

[74] Alaska R. Crim. P. 5.1(b)–(c).

[75] *Id*.

[76] Alaska R. Crim. P. 5.1(a).

[77] Alaska R. Crim. P. 5.1(h).

[78] Alaska R. Crim. P. 5.1(I).

Further, the text of the Alaska Constitution suggests that the term "accused" applies at pre-indictment stages. Several of the rights addressed at the first appearance described above — e.g., the right to be informed of charges and to counsel — are rights secured by the second sentence of article 1, section 11 of the Alaska Constitution.[79] A charged person thus becomes an "accused" for the purposes of these rights after an information is filed and need not await an indictment before he or she is so considered. There is no indication that the first sentence of section 11 embraces a different meaning of "accused" than the second sentence.[80]

Moreover, the text of article 1, section 8 uses the term "accused" in a sense that can only precede an indictment. That section states in part:

> Grand Jury — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . . *Indictment may be waived by*

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[79] Article 1, section 11 of the Alaska Constitution provides:

> Rights of Accused — In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; 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.

[80] We recognize, of course, that each of the enumerated rights under article 1, section 11 can have different activation and termination points. *See State v. Wassillie*, 606 P.2d 1279, 1282 (Alaska 1980) (finding that the constitutional right to bail terminates upon conviction, but rejecting the argument that each of the rights in article 1, section 11 must terminate at the same point).

> *the accused. In that case the prosecution shall be by information.*[81]

If an "accused" can waive an indictment, it is not the indictment that confers "accused" status on a defendant. Thus, for defendants who have not been arrested, the term logically attaches when an information is filed against them.[82]

We believe that the purposes of the speedy trial right are best secured when the speedy trial clock begins with the filing of an information. As we observed above,[83] the purpose of the speedy trial guarantee is to prevent lengthy pretrial imprisonment and other adverse impacts of delay. Given the question in this case, incarceration is not a factor since it is undisputed that an arrest would trigger the attachment of speedy trial rights. But a long delay, regardless of incarceration, may impair a defendant's ability to prepare an effective defense, disrupt a defendant's employment, drain his or her financial resources, circumscribe his or her associations, subject the defendant to public shame, and create anxiety in the defendant and his or her family and friends.[84] These interests come into play as readily with the filing of an information as with the return of a grand jury indictment. A holding that speedy trial rights do not attach until an indictment issues potentially leaves a long period when a defendant is publicly accused by an information, suffers the detriments meant to be protected against by the speedy trial guarantee, but does not receive its protection.

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[81] Alaska Const. art 1, § 8 (emphasis added).

[82] Alternatively, the attaching event might be when the complaint or information is served, as in Alaska R. Crim. P. 45(c)(1).

[83] *See supra* Section IV.A.

[84] *United States v. Marion*, 404 U.S. 307, 320 (1971).

The fact that pending charges are now available on the internet in searchable form magnifies their potential for harm. Such broad publicity, especially when the charges are of a heinous nature, can effect a near banishment of the person charged from certain lines of work and certain sectors of society, and also increases the potential that charges may be filed or maintained for vindictive or otherwise improper purposes.

As already noted, a number of other jurisdictions are in accord with the view that the filing of a complaint or information rather than an indictment will start the speedy trial clock.[85] A good discussion of the reasons supporting this view is contained in *Commonwealth v. Butler*. There, the Massachusetts Supreme Judicial Court reached a conclusion similar to ours for similar reasons, stressing especially the detriments that can flow from public charges.[86] In *Butler*, the court held that a defendant's right to a speedy trial under the Massachusetts Constitution "attaches when a criminal complaint issues."[87] "Therefore, arrest, indictment, or a criminal complaint issued pursuant to Massachusetts law, whichever comes first, will start the speedy trial clock."[88] Moreover, the Massachusetts speedy trial right "does not distinguish between the types of cases, (misdemeanor or felony; within the district or superior court) to which the right to a

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[85] *See supra* note 47. A recent law review article lists ten states, including Alaska, that either consider a complaint or information to be an accusation for speedy trial purposes or, while not specifically addressing the question, contain language in their case law that so suggests. Mikel Steinfeld, *Rethinking the Point of Accusation: How the Arizona Court of Appeals Erred in* State v. Medina, 7 PHOENIX L. REV. 329, 354-55 (2013).

[86] 985 N.E.2d 377, 383 (Mass. 2013).

[87] *Id.*

[88] *Id.*

speedy trial attaches."[89] The court explained that "[t]he constitutional right to a speedy trial attaches because the subject of a criminal complaint is undoubtedly an 'accused,' and is not merely in 'the pre-accusation period when a police investigation is ongoing.' "[90] Observing that a "criminal complaint is a formal charging document in Massachusetts," the court stated that "[t]he fact that a complaint may be followed by an indictment . . . does not render a complaint any less of a formal accusation."[91] Finally, the court emphasized, as we do in the present case, that the public aspect of the charge is of primary importance: "Of perhaps greatest significance, the subject of a criminal complaint typically faces the same 'anxiety, concern, economic debilitation, public scorn and restraint on liberty' that the right to a speedy trial is intended to guard against."[92] The court determined that "no logical conclusion can be reached other than that the time within which an accused is to be secured in his right to a speedy trial must be computed from the time the complaint is filed against him."[93]

At stake in the present case is whether the delay between an information and an arrest should be assessed under the due process standard for pre-accusation delay or the speedy trial standard applicable to post-accusation delay. Under the due process standard, a defendant has the burden of proving both that the delay was unjustified and that the defendant suffered actual prejudice.[94] Under the speedy trial standard, if the

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[89] *Id*.

[90] *Id.* (quoting *Commonwealth v. Gove*, 320 N.E.2d 900, 905 (Mass. 1974)).

[91] *Id.*

[92] *Id.* (quoting *Gove*, 320 N.E.2d at 907).

[93] *Id.* (quoting *Jacobson v. Winter*, 415 P.2d 297, 300 (Idaho 1966)).

[94] *State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991).

defendant can show a delay of sufficient duration to be presumptively prejudicial, the four-factor balancing test is triggered.[95] Under this test the State has the burden of proving that the justification for the delay is valid[96] and prejudice may be presumed rather than proven when other factors weigh heavily against the State.[97] It is obvious that in speedy trial cases a heavier burden is placed on the State, and a lighter one on the defendant, than in cases of pre-accusation delay. This differential is justified because incarceration and the personal disruptions that flow from being publicly charged are normally not present in pre-accusation cases, while the possibility of prejudice from delay may be present in both.[98] In addition, an information manifests the State's decision to go forward with prosecution, whereas at the pre-accusation stage there may be uncertainty as to whether there will even be litigation.[99] When the State files an information, the State has placed the accused under a cloud of suspicion. At that point it is appropriate to employ the more demanding speedy trial standard. It imposes an incentive on the State to bring the accused to trial promptly and protects interests of the accused, placed at risk by the filing of the information, that are not well protected by the due process standard.

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[95] *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

[96] *Id.*; *McNelly v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003).

[97] *Mouser*, 806 P.2d at 342.

[98] *United States v. Marion*, 404 U.S. 307, 321-22 (1971).

[99] *Mouser*, 806 P.2d at 339.

For these reasons, we conclude that speedy trial time begins to run with the filing of an information.[100] Accordingly, Wright's constitutional speedy trial clock started in November 1999 when the State filed a criminal information against him.

C. The Superior Court Did Not Err In Placing Primary Responsibility For The Delay With Wright.

We turn now to the question of whether the superior court correctly decided that Wright bore most of the responsibility for the pre-arrest delay. This question requires an evaluation of the trial court's factual findings on the reasons for delay, which we review for clear error.[101] But we review de novo the superior court's legal conclusion that Wright failed to establish a violation of his constitutional right to a speedy trial.[102]

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[100] We do not decide whether a complaint filed by a police officer or private person would also mark the attachment of the speedy trial right, as that question is not presented in this case. There may be sufficient reasons not to start the time in such cases; such complaints may, for instance, be filed prematurely, at a time when further investigation is necessary and before the prosecutor has decided that prosecution is warranted. But a complaint filed with the assistance of the prosecutor — as in *Yarbor* — would seem to be indistinguishable from an information for speedy trial purposes.

[101] *See Lentine v. State*, 282 P.3d 369, 375-76 (Alaska 2012) (citing *Crowley v. State, Dep't of Health & Soc. Servs.*, 253 P.3d 1226, 1229 (Alaska 2011)); *see also Doggett v. United States*, 505 U.S. 647, 652 (1992) (reviewing the trial court's determinations as to the reasons for delay "with considerable deference").

[102] *Cf. Kodiak Island Borough v. Large*, 622 P.2d 440, 447 (Alaska 1981) (reviewing de novo "the legal consequences of undisputed occurrences"); *Meyer v. State*, 368 P.3d 613, 615 (Alaska App. 2016); *see also United States v. Velasquez*, 749 F.3d 161, 174 (3rd Cir. 2014) (reviewing de novo the legal conclusion about whether defendant established violation of constitutional right to speedy trial, but applying clear error to the underlying factual findings); *United States v. Robinson*, 455 F.3d 602, 607-08 (6th Cir. 2006) (same).

In analyzing Wright's speedy trial claim the superior court followed the four-factor balancing approach embraced by the Supreme Court of the United States in *Barker v. Wingo*[103] and adopted by the Alaska Court of Appeals in *State v. Mouser*.[104] We agree that this test presents an appropriate analytical structure for evaluating speedy trial claims brought under the Alaska Constitution. The four factors, as already noted, are: (1) length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his or her speedy trial right, and (4) the prejudice to the defendant.[105] No one of these factors is a necessary or sufficient condition to finding a speedy trial violation.[106] Rather, the factors are related and must be considered together with other relevant circumstances.[107]

The first factor, the length of delay, bears further explanation. It is both a triggering mechanism that activates the balancing test and a relevant factor for consideration when the balancing test is used.[108] Until there is a delay that is sufficiently lengthy that it may be said to be presumptively prejudicial, there is no need to conduct

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[103] 407 U.S. 514, 530 (1972).

[104] 806 P.2d at 340.

[105] *Barker*, 407 U.S. at 530.

[106] *Id.* at 533.

[107] *Id*.

[108] *Id.* at 530.

the balancing test.[109] In the present case, the superior court found the nearly five-year pre-arrest delay to be presumptively prejudicial,[110] thus triggering the balancing test.

While no one disputes the first factor in this case, the superior court and the court of appeals disagreed as to the second factor. When considering the reasons for the delay, the superior court stated that "part of the reason for the delay is the State's negligence in failing to issue an extraditable warrant for Wright's arrest. Had such a warrant been issued, the State would likely have located Wright when he applied for work at the nuclear facilities in Arkansas in 2000 which required security clearance."[111] But apart from the State's failure to obtain an extraditable warrant the court did not find other negligent conduct on the part of the State. The court focused largely on Investigator Josten, finding that her conduct was reasonable, in part because by September of 1999 she was no longer assigned to the case.[112] The court stated:

> Wright's argument that Josten could have located Wright by checking Palmer court records, Juneau court records, and Vital Statistics files places an unreasonable burden on law enforcement. By the time an arrest warrant was issued for Wright in September 1999, Josten was off the case and assigned different duties. She did what any reasonable officer would do under the circumstances and that is to periodically check with various police sources to see if Wright had surfaced. A more thorough investigation of a

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[109] *Id*.

[110] *See Rutherford v. State*, 486 P.2d 946, 952 (Alaska 1971) (14-month delay presumed prejudicial); *State v. Mouser*, 806 P.2d 330, 340 (Alaska App. 1991) ("[U]nexplained delays of fourteen months or more [are] presumptively prejudicial.").

[111] Appendix at 6.

[112] Appendix at 7.

> defendant's whereabouts cannot be expected of a police officer no longer having responsibility for the case.[113]

The court also concluded that "contacting Wright at his brother's without an extraditable warrant would only have alerted Wright that police were searching for him."[114]

The superior court concluded that the State's negligence in failing to obtain an extraditable warrant as a reason for delay was greatly outweighed by Wright's departure from the state when he realized he was under investigation. The court wrote that Wright's departure "made it impossible to comply with the right to speedy trial" and added a footnote stating that "defendant's causes for delay do not count towards determining speedy trial violation."[115] Earlier in its decision, when discussing Wright's due process claim, the court also placed primary responsibility on Wright for the delay:

> Wright voluntarily left the state once he realized he was under investigation for alleged sexual abuse of a minor. Wright moved from state to state and job to job until authorities found him in Minnesota. Wright was promptly extradited once located. The delay in indicting Wright was largely attributable to his flight from the state and his frequent moves to different states to obtain employment.[116]

The court of appeals interpreted the superior court's decision as finding Wright only partially at fault for the delay and found even this conclusion to be erroneous.[117] Instead, the court of appeals concluded, none of the responsibility for the

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113 Appendix at 6-7.

114 Appendix at 7.

115 Appendix at 6.

116 Appendix at 4.

117 *Wright v. State*, 347 P.3d 1000, 1008-09 (Alaska App. 2015).

delay should have been attributed to Wright.[118] The court accepted Wright's argument that "he was unaware that charges had been filed" and "that none of his actions were directed at avoiding apprehension."[119] The court also noted that the State had conceded that after Wright left the state he "was not hiding out, and the State had avenues of locating him that likely would have produced him within a brief period."[120] The court of appeals also wrote "that although Wright moved frequently for work, he maintained an Arkansas driver's license and a physical address that other Alaska state agencies used to communicate with him. Wright also repeatedly passed intensive security clearances that would have uncovered the arrest warrant if the information had been entered into the [National Crime Information Center] data base."[121]

But the court of appeals' conclusion that the trial court attributed only "partial" blame to Wright for the delay substantially understates the trial court's assessment of the relative responsibility of the parties. Initially, in the inquiry as to the due process clause, the trial court found that the responsibility "largely" fell on Wright: "[t]he delay in indicting Wright was largely attributable to his flight from the state and his frequent moves to different states to obtain employment."[122] When weighing the responsibility-for-delay factor in its speedy trial analysis, the trial court found against Wright even more heavily, concluding that Wright's flight from the state made it impossible for the State to comply with the speedy trial right.

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[118] *Id.*

[119] *Id.* at 1008.

[120] *Id.*

[121] *Id.* at 1009.

[122] Appendix at 4.

Wright's flight from the state did not make it literally impossible for the State to apprehend him. The trial court recognized this when it stated that an extraditable warrant would likely have been effective. We therefore understand the trial court's finding of impossibility not in its literal sense, but as a means of expressing the much greater responsibility that Wright should bear for the pre-arrest delay.

As so understood, we agree with the trial court. As between an individual who takes flight to avoid prosecution and a government that is negligent in its efforts to apprehend him, the relative responsibility for the ensuing delay must weigh heavily against the individual. Many authorities illustrate this point.[123]

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[123] The Sixth Circuit, in *Wilson v. Mitchell*, applied tort law principles to weigh the relative fault of the defendant and the state in causing a 22-year delay between the defendant's indictment and arrest. 250 F.3d 388, 395 (6th Cir. 2001). In analyzing the second *Barker* factor, the Sixth Circuit explained:

> Under general tort-law principles, an active tortfeasor is not entitled to either indemnity or contribution from a passive tortfeasor. . . . [U]nder our tort [law] analogy, because Wilson actively evaded discovery, and the state was, at worst, passive in its pursuit of him, we cannot attribute the primary responsibility for the delay to the state. Indeed, even if the police made mistakes in their search for Wilson, he is not entitled to relief on this ground so long as his active evasion "is more to blame for that delay."

Id. at 396 (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)). *See also United States v. Arceo*, 535 F.3d 679, 685-86 (7th Cir. 2008) (attributing "most of the blame for the delay" to the defendant, who fled the jurisdiction when he became "aware that criminal charges were forthcoming" and hid from authorities "in a calculated effort to avoid arrest and prosecution"); *People v. Hsu*, 85 Cal. Rptr. 3d 566, 572 (Cal. App. 2008) (explaining that a defendant's active evasion must be weighed more heavily than the state's failure to pursue the defendant diligently enough because to hold otherwise would "encourage[] defendants to become fugitives" (emphasis omitted)); *People v. Perez*, 279 Cal. Rptr. 915, 922 (Cal. App. 1991) ("[T]he prosecution cannot be held (continued...)

The superior court's characterization of Wright's conduct as "flight from the State"[124] has evidentiary support and therefore is not clearly erroneous. As Wright was leaving the state he left the following note to a friend:

> I don't know what's going on but I got a bad feeling, time to travel while I can. Note to trust no one, I won't call for a long time and don't know where I'm going yet. Have to stick to myself and stay away from family and friends till my attorney knows what's happening and how to deal with it. So I act like a termite for a while and work where I can to pay lawyer and survive.

The court of appeals stressed that after Wright left the state he was living and working under his own name and that the State had means of locating Wright that could readily have been successful.[125] But these observations, in our view, do not undercut the superior court's determination that the primary responsibility for the delay was Wright's act of fleeing the state. It is likely not a simple matter to change one's identity and yet remain eligible for well-paying construction jobs. Wright apparently hoped that by leaving the state and, as he put it, "acting like a termite," his absence would create sufficient difficulties for the State so that he could escape prosecution. This strategy worked for about five years, and the superior court was right to reject Wright's

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[123](...continued)
accountable for delay caused by defendant's unilateral action in fleeing the jurisdiction in order to avoid prosecution.").

[124] Appendix at 4.

[125] *Wright*, 347 P.3d at 1009.

attempt to blame the State for its success.[126] We therefore affirm the superior court's determination that Wright bore primary responsibility for the delay.

This means that the superior court's determination that Wright's speedy trial claim was without merit also must be affirmed. Wright was primarily responsible for the lengthy delay, and the delay did not prejudice him in preparing his defense, so the first, second, and fourth factors of the *Barker* balancing test weigh heavily against Wright. And any dispute as to the third factor — whether Wright should be faulted for failing to assert his speedy trial right or whether his non-assertion is irrelevant under the circumstances of this case — is moot because that factor cannot be favorable to Wright; at best it is neutral.

V. CONCLUSION

For these reasons we conclude that the superior court correctly decided that Wright was not denied his right to a speedy trial under the Alaska Constitution. We therefore REVERSE the decision of the court of appeals and REMAND this case with directions to AFFIRM the decision of the superior court.

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[126] We note that we find that the focus of the trial court solely on Investigator Josten's actions after September 1999 was too narrow. The focus should have been on whether the police as a whole were negligent. There is no suggestion in the record that once Josten was off the case another officer was assigned to pursue it. But even if we assume that the State was negligent in failing to further investigate Wright's whereabouts, that negligence, like the negligence of the State in failing to issue an extraditable warrant, would clearly be secondary to Wright's flight as an assignable cause for delay.

BOLGER, Justice, concurring.

I agree with the court's opinion that the State did not violate Sean Wright's right to a speedy trial. But I disagree with the court's conclusion that a prosecutor's information is a formal charge sufficient to initiate a felony prosecution within the meaning of this constitutional guarantee. The Alaska Constitution requires a grand jury indictment to initiate a felony prosecution. Therefore, until the defendant has been arrested or indicted, we should apply the due process test to assess preindictment delay.

A. Alaska Law Requires The Grand Jury To Return An Indictment To Initiate Felony Charges.

The right to a speedy trial does not accrue until the defendant is arrested or formally charged.[1] A formal charge means a criminal charge that "alone gives 'the court jurisdiction to proceed to trial.' "[2] For example, the filing of a criminal complaint in a felony matter generally will not trigger the defendant's right to a speedy trial.[3] In the

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[1] 5 WAYNE R. LAFAVE, ET. AL., CRIMINAL PROCEDURE § 18.1(c) (4th ed. Supp. 2016) (citing *United States v. Marion*, 404 U.S. 307 (1971)).

[2] *Id*. (quoting *People v. Martinez*, 996 P.2d 32, 41 (Cal. 2000)); *see also United States v. MacDonald*, 456 U.S. 1, 10 (1982) (holding that speedy trial period did not commence because "there was no criminal prosecution pending on which [the defendant] could have been tried until the grand jury . . . returned the indictment"); *Martinez*, 996 P.2d at 41-42 ("[A] pleading does not constitute a 'formal charge' for purposes of attaching the federal Constitution's speedy trial right unless the pleading is a formal accusation upon which a defendant may be brought to trial in the court with jurisdiction over prosecution of the offenses alleged."); *State v. Gee*, 471 A.2d 712, 716 (Md. 1984) ("[T]he document consisting of a warrant of arrest and statement of charges on which the warrant is based . . . is a 'formal charge' in the contemplation of the speedy trial right *when a defendant is subject to be tried on that document*." (emphasis in original)).

[3] *People v. Mitchell*, 825 N.E.2d 1241, 1243 (Ill. App. 2005) ("[E]ither an arrest or a *formal* accusation — and not merely *any* charging instrument — is needed to (continued...)

majority of state jurisdictions that requires a grand jury indictment to initiate felony charges,[4] the speedy trial right does not accrue until arrest or indictment, whichever comes first.[5] This is also the rule in the federal courts, where the right to a grand jury for

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[3](...continued)
start the speedy-trial clock." (emphases in original)); *State v. Caffey*, 438 S.W.2d 167, 171 (Mo. 1969) ("The constitutional right to a speedy trial has no application until a criminal *prosecution* is commenced. The constitutional provisions invoked contemplate a pending charge and not merely a pending complaint, which represents a mere possibility that a criminal charge will be filed." (emphasis in original)).

[4] The 18 states that grant the right to a grand jury to those accused of serious crimes are Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. 4 LAFAVE ET AL., *supra* note 1, § 15.1(d).

[5] *See Preston v. State*, 338 A.2d 562, 565 (Del. 1975) ("We hold . . . that the speedy trial guarantee of the Sixth Amendment does not attach at the time of the filing of a complaint and the issuance of an arrest warrant."); *Wooten v. State*, 426 S.E.2d 852, 855 (Ga. 1993) ("The Sixth Amendment does not guarantee a right to a speedy *arrest*. However, an inordinate delay between the time a crime is committed and the time a defendant is arrested or indicted may violate *due process* . . . ." (emphases in original)); *State v. Aguirre*, 670 A.2d 583, 585 (N.J. Super. App. Div. 1996) (distinguishing between speedy trial right and "claims under the Due Process Clause arising from undue pre-indictment or pre-arrest delay"); *State v. Allen*, 237 S.E.2d 64, 66 (S.C. 1977) ("Their right to a speedy trial attached . . . at the time the arrest warrants were served; and not . . . when the warrants were issued . . . ."); *State v. Utley*, 956 S.W.2d 489, 493 (Tenn. 1997) ("Like the other courts that follow the majority view, this Court has determined that a warrant alone does not trigger speedy trial analysis; to the contrary, a formal grand jury action or the actual restraints of an arrest are required."); *Rios v. State*, 718 S.W.2d 730, 732 (Tex. Crim. App. 1986) (defendant's statutory speedy trial right was not violated because although "a formal complaint was filed . . . , the purpose was to secure a felony arrest warrant from a justice of the peace sitting as a magistrate, not to constitute a charging instrument for trial of a felony offense in district court[,] . . . [and] a criminal action . . . did not commence until the indictment was filed in district court"); *State v.*
(continued...)

those accused of federal felonies is guaranteed by the Fifth Amendment.[6] As the United States Supreme Court has recognized, "when no indictment is outstanding, only the

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[5](...continued)
Hinchman, 591 S.E.2d 182, 187 (W. Va. 2003) ("[W]here there has been no arrest or indictment, the Sixth Amendment right to a speedy trial is not implicated[,]" [but when] the prosecution "may have substantially delayed the institution of criminal proceedings . . . the Fifth Amendment due process standard is utilized." (quoting *State v. Drachman*, 358 S.E.2d 603, 627 (W. Va. 1987))); *see also Goncalves v. Commonwealth*, 404 S.W.3d 180, 199 (Ky. 2013); *State v. Harper*, 613 A.2d 945, 946 n.1 (Me. 1992) (first citing *State v. Joubert*, 603 A.2d 861, 863 (Me. 1992); and then citing *State v. Cadman*, 476 A.2d 1148, 1151 n.4 (Me. 1984)); *State v. Philibotte*, 459 A.2d 275, 277 (N.H. 1983); *State v. Pippin*, 324 S.E.2d 900, 904 (N.C. App. 1985). *But see Ex parte Walker*, 928 So. 2d 259, 264 (Ala. 2005) ("[T]he length of delay is measured from the date of the indictment or the date of the *issuance of an arrest warrant* — whichever is earlier . . . ." (emphasis added) (quoting *Roberson v. State*, 864 So. 2d 379, 394 (Ala. Crim. App. 2002))); *Commonwealth v. Butler*, 985 N.E.2d 377, 383 (Mass. 2013); *People v. Taranovich*, 335 N.E.2d 303, 306 (N.Y. 1975); *State v. Selvage*, 687 N.E.2d 433, 435 (Ohio 1997).

[6] *See Butler v. Mitchell*, 815 F.3d 87, 89 (1st Cir. 2016) ("Under the Sixth Amendment . . . the speedy-trial right attached, and the count began, not when the complaint was issued, but when the . . . indictment was announced."); *United States v. Hicks*, 779 F.3d 1163, 1167 (10th Cir. 2015) ("A defendant's constitutional right to a speedy trial 'attaches when he is arrested or indicted on federal charges, whichever comes first.' " (quoting *United States v. Banks*, 761 F.3d 1163, 1181 (10th Cir. 2014))); *United States v. Claxton*, 766 F.3d 280, 294 (3d Cir. 2014); *United States v. Young*, 657 F.3d 408, 414 (6th Cir. 2011); *United States v. Jenkins-Watts*, 574 F.3d 950, 966 (8th Cir. 2009); *United States v. Knight*, 562 F.3d 1314, 1323 (11th Cir. 2009); *United States v. Uribe-Rios*, 558 F.3d 347, 358 n.8 (4th Cir. 2009); *United States v. Tchibassa*, 452 F.3d 918, 922 (D.C. Cir. 2006); *United States v. Bloom*, 865 F.2d 485, 491 (2d Cir. 1989); *see also Amos v. Thornton*, 646 F.3d 199, 206 (5th Cir. 2011) (applying the rule that the Sixth Amendment right "attaches at the time of arrest or indictment, whichever comes first" when analyzing charges for Mississippi, an indictment state (quoting *Nelson v. Hargett*, 989 F.2d 847, 851 (5th Cir. 1993))).

'*actual* restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment.' "[7]

Alaska is one of the jurisdictions where an indictment is required to formally charge a criminal defendant with a felony. "In Alaska felony charges must be initiated by grand jury indictment unless the defendant waives indictment."[8] "This requirement ensures that a group of citizens will make an independent determination about the probability of the accused's guilt 'before the accused suffers any of the grave inconveniences which are apt to ensue upon the return of a felony indictment.' "[9]

The delegates at the Alaska Constitutional Convention considered and rejected the original Committee proposal, which would have allowed prosecutors the option of prosecuting by either information or indictment. Instead, the delegates voted in favor of an amendment that retained the indictment requirement, which is now enshrined in article I, section 8.[10] Accordingly, our court rules require that a felony

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[7] *United States v. Loud Hawk*, 474 U.S. 302, 310 (1986) (omission in original) (emphasis in original) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)).

[8] *Cameron v. State*, 171 P.3d 1154, 1156 (Alaska 2007); *see also* Alaska Const. art. I, § 8 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .").

[9] *Cameron*, 171 P.3d at 1156 (quoting *State v. Gieffels*, 554 P.2d 460, 465 (Alaska 1976)).

[10] *See generally* 2 Proceedings of the Alaska Constitutional Convention (PACC) 1322-37 (Jan. 6, 1956); Alaska Const. art. I, § 8. As the sponsor of the amendment explained,

> there isn't any question that each grand jury that sits returns some 'no true bills' . . . [which] means that somebody has been charged with a crime by the district attorney and the

(continued...)

charge "shall be prosecuted by indictment, unless indictment is waived."[11] Only non-felony offenses "may be prosecuted by [either] indictment or information."[12] If a felony indictment is waived, then "the prosecution shall be by information or complaint."[13]

In my opinion, the court's analysis is incomplete because of the lack of recognition of an important qualifier: the accused's right to a speedy trial in article I, section 11, applies only to a criminal prosecution. "In all *criminal prosecutions*, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve . . . ."[14] This term comes into play in the court's discussion of article I, section 8, the grand jury clause, which states in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time

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[10](...continued)

> district attorney . . . has presented all of his evidence to the grand jury and in spite of that the grand jury has said that there is no cause to hold this man for trial, and the man has been released without going through a trial to a regular jury. Certainly under those circumstances it can't be said that the grand jury serves no useful purpose. It serves a distinctly useful purpose.

2 PACC at 1327.

[11] Alaska R. Crim. P. 7(a).

[12] *Id.*

[13] AS 12.80.020.

[14] Alaska Const. art. I, § 11 (emphasis added); *cf.* United States v. MacDonald, 456 U.S. 1, 6 (1982) ("The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .' A literal reading of the Amendment suggests that this right attaches only when a formal criminal charge is instituted and a criminal prosecution begins.").

> of war or public danger. Indictment may be waived by the accused. In that case *the prosecution* shall be by information.[15]

The court's opinion reasons that the statement that the indictment may be waived by "the accused" implies that a person may be an accused before an indictment.[16] But the opinion ignores the fact that the "prosecution" itself cannot begin until the grand jury has returned an indictment or the accused has waived the indictment. If we assume that this term has a similar meaning in these related sections, then the speedy trial right cannot attach until the formal felony prosecution begins — upon indictment or waiver.[17]

In the absence of a waiver, the information that the State filed to obtain a warrant for Wright was inadequate to initiate his formal prosecution for felony charges and insufficient to trigger his entitlement to a speedy trial.

B. The Authority The Court's Opinion Relies Upon Is Distinguishable.

The court's opinion in the case at hand implies that we decided in *Yarbor v. State* that a defendant becomes formally accused upon the filing of a complaint.[18] In my opinion, this language is taken out of context. The *Yarbor* case establishes only that, contrary to the defendant's argument in that case, the right to a speedy trial does not attach "when the state has acquired sufficient evidence to charge an individual with a

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[15] Alaska Const. art. I, § 8 (emphasis added).

[16] Op. at 19-21.

[17] The court's description of "all [the] actions and proceedings [that] may come before an indictment" is not to the contrary. *See* Op. at 19. These procedures do not occur until a felony defendant actually appears in court — generally after an arrest, when the defendant's speedy trial rights have already attached.

[18] Op. at 14 (discussing *Yarbor v. State*, 546 P.2d 564 (Alaska 1976)).

crime."[19] And *Yarbor*'s statement that "we now join our sister states in holding that the right to a speedy trial does not attach before the defendant becomes formally accused"[20] cites at least three other opinions stating or implying that a pre-indictment complaint is insufficient to trigger the speedy trial guarantee.[21]

The court's opinion relies on *Commonwealth v. Butler*, a Massachusetts case.[22] But the *Butler* court interpreted the language of article 11 of the Declaration of Rights of the Massachusetts Constitution, which is much different from the text of the speedy trial rights in the Alaska and U.S. Constitutions:

> Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.[23]

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[19] *Yarbor*, 546 P.2d at 566-67.

[20] *Id*. at 567 (footnotes omitted) (citations omitted).

[21] For instance, in *People ex rel. Coca v. District Court*, the court held that the right to a speedy trial was not triggered by the filing of a complaint and issuance of a warrant, 530 P.2d 958, 959-60 (Colo. 1975) (en banc). *See also State v. Lee*, 519 P.2d 56, 60 (Ariz. 1974) ("We have held that the right to a speedy trial commences at the time the accused has been held to answer by a magistrate or after an indictment has been returned." (citations omitted)); *State v. Bessey*, 328 A.2d 807, 817 (Me. 1974) ("We observe, first, that the right to a speedy trial does *not* arise until criminal prosecution has begun and a defendant has become an 'accused.' Pre-indictment delay does not deny a defendant's Sixth Amendment right." (emphasis in original)).

[22] Op. at 22-23 (discussing *Commonwealth v. Butler*, 985 N.E.2d 377 (Mass. 2013)).

[23] Mass. Const. pt. 1, art. 11. In contrast, the Alaska and federal constitutions (continued...)

The *Butler* court alluded to this difference in its analysis.[24] The language of the Massachusetts provision is concerned with prompt administration of justice generally, rather than speedy criminal trials specifically. This language could easily cover more stages than the criminal trial process, including pre-arrest and pre-indictment delays.

In a related proceeding, the First Circuit distinguished the *Butler* holding as "a rule of state constitutional law" and explained on the same facts that "[u]nder the Sixth Amendment . . . the speedy-trial right attached, and the count began, not when the complaint was issued, but when the 1999 indictment was announced."[25] The First Circuit's conclusion is more persuasive, given that Alaska's speedy trial right closely resembles the text of the Sixth Amendment, not Massachusetts's article 11.

The court's opinion also cites *Scherling v. Superior Court* for the proposition that under the California Constitution "speedy trial protections attach after a complaint has been filed."[26] This is a correct but incomplete statement. The *Scherling* court goes on to clarify that the scope of that right changes based on the stage of the delay — and effectively describes a due process test when the delay occurs between the complaint and an indictment or arrest:

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[23](...continued)
provide that "[i]n all criminal prosecutions, the accused shall [have or enjoy] the right to a speedy and public trial." Alaska Const. art. I, § 11; U.S. Const. amend. VI.

[24] "[A]rt. 11 does not distinguish between the types of cases . . . to which the right to a speedy trial attaches; it states that the right to a speedy trial applies to '[e]very subject of the [C]ommonwealth.' " *Butler*, 985 N.E.2d at 383 (third and fourth alterations in original).

[25] *Butler v. Mitchell*, 815 F.3d 87, 89 (1st Cir. 2016). The court also rejected the defendant's invitation to apply the *Butler* court's reasoning to federal law. *Id.* at 90.

[26] Op. at 14 n.47 (citing *Scherling v. Superior Court*, 585 P.2d 219, 225 (Cal. 1978) (en banc)).

> Unlike federal law . . . this state has extended the [speedy trial] right to the pre-indictment and pre-arrest stage, holding that it attaches under article I, section 15, of our Constitution after a complaint has been filed. But the consequence of a violation depends upon the stage at which a violation of the right occurs. The right to a speedy trial following the filing of an indictment or information and the time limitations applicable thereto are set forth by statute and a violation of the statute is presumed to be prejudicial. *A violation at a prior stage depends upon a balancing of the prejudicial effect of the delay and the justification therefor.*[27]

For delays prior to the filing of an indictment or information, California thus applies the same test "regardless of whether [the] defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute."[28]

Finally, the court's opinion[29] cites *People v. White* for the proposition that the New York speedy trial right is "violated if there is an excessive delay between institution of the prosecution — whether by felony information or complaint, detainer warrant or indictment — and the trial."[30] But like the California court in *Scherling*, the New York court in *White* recognized that the speedy trial and due process rights may sometimes merge.[31] And later decisions reinforce that in New York, "the factors utilized

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[27] *Scherling*, 585 P.2d at 225–26 (emphasis added) (footnotes omitted) (citations omitted). Under the California Constitution, "[t]he defendant in a criminal cause has the right to a speedy public trial." Cal. Const. art. 1, § 15.

[28] *Scherling*, 585 P.2d at 226.

[29] Op. at 14 n.47.

[30] *People v. White*, 298 N.E.2d 659, 662 (N.Y. 1973)).

[31] *White*, 298 N.E.2d at 662 ("It may be that [the due process] doctrine has now been incorporated in the 'speedy trial' guarantee of the Sixth Amendment . . . but (continued...)

to determine if a defendant's rights have been abridged are the same whether the right asserted is a speedy trial right or the due process right to prompt prosecution."[32] Accordingly — and in contrast to the Alaska rule we announced in *Yarbor* — New York's speedy trial right can apparently attach *before* arrest, information, indictment, or even a warrant or complaint — even from the time of the offense.[33]

C. The Speedy Trial Clause Does Not Apply To These Circumstances.

When there has been no arrest or formal charge, the application of the speedy trial clause does not promote the purposes of that provision. The speedy trial

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[31](...continued)
it is only of limited analytical importance whether the right is one of a 'speedy trial' or of 'due process of law.' " (quoting *People v. Winfrey*, 228 N.E.2d 808, 812 (N.Y. 1967))).

[32] *People v. Vernace*, 756 N.E.2d 66, 67 (N.Y. 2001) (citing *People v. Staley*, 364 N.E.2d 1111, 1113 (N.Y. 1977)); *see also id.* ("In this State, 'we have never drawn a fine distinction between due process and speedy trial standards' when dealing with delays in prosecution." (quoting *People v. Singer*, 376 N.E.2d 179, 186 (N.Y. 1978))). These factors are "the extent of the delay," "the reasons for the delay, the nature of the underlying charge, whether there has been an extended period of pretrial incarceration, and whether there is any indication that the defense has been impaired by reason of the delay." *Id.* (citing *People v. Taranovich*, 335 N.E.2d 303, 306 (N.Y. 1975)).

[33] *See Singer*, 376 N.E.2d at 185-86 ("[M]ore realistically, it could be said that [the defendant] was actually although not formally accused of the homicide . . . when he was confronted by the police with the crime scene photographs of the dead girl; informed they 'knew' that he did it, and went into a state of shock in response to the charge."); *Taranovich*, 335 N.E.2d at 307 ("[T]his defendant was not deprived of his constitutional right to a speedy trial. A one-year delay between the alleged occurrence of a crime and an indictment for a class C felony . . . in and of itself does not entitle a defendant to a dismissal of the indictment . . . ."); *People v. Wiggins*, 395 N.Y.S.3d 395, 399 (N.Y. App. Div. 2016) ("[T]he six-year delay between the shooting in 2008 and defendant's guilty plea in 2014 was 'extraordinary.' ") (applying *Taranovich* factors), *leave to appeal granted*, 74 N.E.3d 688 (N.Y. 2017).

clause is intended: "(1) to prevent harming the defendant by a weakening of his case as evidence and memories of witnesses grow stale with the passage of time; (2) to prevent prolonged pre-trial incarceration; and (3) to limit the infliction of anxiety upon the accused because of long-standing charges."[34] But there is nothing in the record indicating that Wright suffered any anxiety or public humiliation; indeed, he asserted that he was completely unaware that the State had obtained an arrest warrant.[35] Prior to Wright's arrest, he obviously did not suffer from incarceration; he was moving from job to job and state to state. And Wright did not contest the trial court's finding that he suffered no actual prejudice as a result of this delay.[36] So the purposes of the speedy trial clause do not apply to the period before Wright's arrest.

Moreover, these circumstances do not support the application of the test we generally apply to determine a speedy trial violation. This test considers the length of the delay, the reasons for the delay, any demand for trial by the accused, and prejudice to the defendant.[37] As the court of appeals noted, it would be unfair to consider the factor that Wright did not demand a speedy trial prior to his arrest because he was unaware that an information had been filed.[38] And even if Wright had demanded a speedy trial, the superior court would have been powerless to schedule one. A trial could not be

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[34] *Rutherford v. State*, 486 P.2d 946, 947 (Alaska 1971).

[35] The court of appeals noted that Wright "was able to live freely and openly [prior to his arrest], unaffected by the anxiety, stress, and 'public obloquy' that [felony] charges might otherwise bring." *Wright v. State*, 347 P.3d 1000, 1007 (Alaska App. 2015).

[36] *Id.* at 1006.

[37] *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972).

[38] *Wright*, 347 P.3d at 1009.

scheduled before Wright's arrest because there were no charges pending in a court with jurisdiction to bring him to trial.

The remaining factors in the speedy trial test focus on the length and reasons for the delay and the prejudice to the defendant. But we have another test that explicitly focuses on these factors — the due process test for preindictment delay.[39]

We applied the due process test to a case remarkably similar to Wright's in *State v. Gonzales*.[40] Similar to Wright, Gonzales became aware that the authorities were investigating him for sexual abuse of his girlfriend's ten-year-old daughter.[41] Similar to Wright, Gonzales left Alaska suddenly and did not return for many years.[42] Gonzales was not arrested until he returned to the state almost ten years later.[43] We recognized that the defendant's flight was a reasonable basis for the State to delay a grand jury indictment.[44] We therefore concluded that the resulting preindictment delay did not violate Gonzales's right to due process.[45]

I believe the same due process analysis should apply to Sean Wright. I would reverse the court of appeals' decision because a prosecutor's information in a felony case is not a formal charge for purposes of the speedy trial clause.

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[39] *State v. Gonzales*, 156 P.3d 407, 411-12 (Alaska 2007).

[40] Under this test, "the defendant must prove both that the delay was not reasonable and that the defendant suffered actual prejudice from the delay." *Id.* at 411 (footnote omitted) (citing *State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991)).

[41] *Id*. at 409.

[42] *Id*. at 409-10.

[43] *Id*. at 410.

[44] *Id.* at 412-15.

[45] *Id.* at 415.

CARNEY, Justice, concurring in part and dissenting in part.

I concur in the court's conclusion that the filing of an information starts the speedy trial clock.

But I disagree with the court's conclusion that the superior court did not err in holding that the pretrial delay was Wright's fault. I am persuaded that the superior court clearly erred in so holding. And while I recognize that this court owes no deference to the court of appeals' decision in this matter, I believe that its opinion of the facts of the case and the impact those facts had upon the pretrial delay more accurately reflects what occurred.

Not only did the State concede that "Wright was not hiding out, and the State had avenues of locating him that likely would have produced him within a brief period,"[1] but after leaving Alaska Wright made no attempt to hide his whereabouts or his identity. On the contrary, he remained in touch with his wife, the mother of the young girl he abused. He returned to Alaska and stayed at her home, he called her, and he sent and received mail from her. While the Palmer District Attorney's office was working with the Alaska State Troopers to investigate his case, the Palmer Court presided over the dissolution of his marriage. In addition, the Juneau court sent him documents relating to a student loan matter. Wright also contacted the Alaska Department of Health and Social Services to obtain a death certificate.[2] A number of Alaska state agencies therefore had contact information for Wright while he was outside of the state.

In addition, "Wright worked at a number of nuclear facilities that required security clearances. To obtain these clearances, [he] provided his name, address, date

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[1] *Wright v. State,* 347 P.3d 1000, 1008 (Alaska App. 2015).

[2] *Id.* at 1004.

of birth, and social security number, along with copies of his drivers's license and social security card."[3] He made no attempt to conceal his identity.

I agree with the court that Investigator Josten "did what any reasonable officer would do under the circumstances."[4] But the superior court's focus on the single investigator's actions was misplaced. The Alaska State Troopers are a statewide agency, currently employing some 300 uniformed officers and 147 civilian employees.[5] There is no suggestion in the record that another officer was assigned after the first officer's reassignment. The failure to assign another trooper to continue the investigation after Josten's reassignment further demonstrates the State's negligence in searching for Wright, particularly given the quantity and seriousness of the allegations against him. In addition, the Palmer District Attorney's delay in charging Wright and its or the troopers' failure to obtain an extraditable warrant contribute to the State's responsibility for the pretrial delay.

I would therefore conclude that the superior court erred in holding Wright responsible for the *pre*-arrest delay. But I agree with the court of appeals' suggestion that the *post*-arrest delay is another matter altogether, and may well demonstrate that he had no interest in a speedy trial.

I would decide this case as did the court of appeals, and reverse and remand it to the superior court for further findings. I therefore respectfully dissent from this portion of the court's decision.

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[3] *Id.*

[4] Opinion at 27-28 (quoting Appendix at 7).

[5] *History of the Alaska State Troopers*, DEP'T OF PUB. SAFETY, ALASKA STATE TROOPERS, http://dps.alaska.gov/ast/history.aspx (last visited June 6, 2017).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SEAN WRIGHT,	)
	)
Defendant.	)
	)

Case No. 3AN-99-9876 CR

EXCERPT OF
ORDER RE MOTION TO DISMISS FOR PRETRIAL DELAY*

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II. Discussion

Wright has not made a showing of actual prejudice necessary to trigger the due process clause.

The due process clauses of the United States and Alaska Constitutions protect the accused against unreasonable pre-accusation delay.[17] The primary concern of the rule against pre-accusation delay is the impact of the delay on the accused's ability

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* This decision has been edited to conform to the technical rules of the Alaska Supreme Court, internal citations have been omitted, and typographical errors have been corrected.

[17] *State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991) (citing *United States v. Marion*, 404 U.S. 307, 324 (1971)).

to present a defense, not on the length of the delay itself.[18] To prevail on such a claim, the accused must establish both the absence of a valid reason for the delay, and that the delay caused actual prejudice to the defendant.[19] A showing of potential or possible prejudice will not suffice.

In considering a claim of unreasonable delay, the court must strike a balance weighing the reasonableness of the justification for delay against the degree of prejudice to the defendant. The burden of proof is on the defendant to show the absence of a valid reason for the delay; however, once the issue is raised, the State has the burden of presenting sufficient reasons for such delay.[20] When sufficient reasons are advanced by the State, the defendant must show the State's reasons do not justify the delay.[21] The defendant also has the burden to prove actual prejudice.[22]

To establish actual prejudice, the defendant must present a "particularized showing that the unexcused delay was likely to have a specific and substantial adverse impact on the outcome of the case."[23] At the very least, the accused must show that, but for the delay, he would have been able to present favorable evidence. Mere speculation about the loss of favorable evidence is insufficient. Absent a showing of specific adverse impact stemming from the delay, the requirement of prejudice is not met, and the

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[18] *Id*.; *see also Smith v. State*, No. A-6340, 1998 WL 191146, at *3 (Alaska App. Apr. 22, 1998).

[19] *Mouser*, 806 P.2d at 336.

[20] *Id*. (quoting *Alexander v. State*, 611 P.2d 469, 474 (Alaska 1980)).

[21] *Id*.

[22] *Id*.

[23] *Id*. at 337.

balancing procedure is simply not triggered, even if there is no reason advanced by the State for the delay.[24]

In a recent decision, *State v. Gonzales*,[25] the Alaska Supreme Court reemphasized that the burden of proof rests with the defendant claiming unreasonable pre-indictment delay. In *Gonzales*, the defendant fled the state after being accused of sexually abusing the ten-year-old daughter of his girlfriend in 1992. Gonzales resurfaced in Alaska ten years later, at which point Anchorage police resumed the investigation. Gonzales was arrested after a search of Gonzales's home revealed thousands of images of child pornography.[26] Gonzales was then indicted on various counts of sexual abuse of a minor stemming from the 1992 allegations.

Gonzales moved the superior court to dismiss the charges against him arguing unreasonable pre-indictment delay. The superior court granted the motion on the basis that the State failed to put forth any good reason for the delay.[27] The Court of Appeals affirmed the superior court finding that "the State presented no evidence justifying the delay."[28]

The Alaska Supreme Court reversed the decision of the two lower courts and remanded the case back to the superior court, concluding that the lower courts did

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[24] *Id*. at 338. The *Mouser* court held that anxiety of the accused, and possible memory loss to the defendant and witnesses do not act as a showing of actual prejudice.

[25] *State v. Gonzales*, 156 P.3d 407 (Alaska 2007). Gonzales's departure and absence from the state is quite analogous to Wright's departure and absence in this case.

[26] *Id*. at 410.

[27] *Id*.

[28] *Id*. (quoting *State v. Gonzales*, 121 P.3d 822, 826 (Alaska App. 2005)).

not properly assign the burden of proof to the defendant.[29] In reaching this conclusion, the Supreme Court found that the lower courts erred in finding that the ten-year pre-indictment delay was unreasonable.[30] The Court held that "because the delay here was caused largely by the actions of the defendant, the ten-year delay was nonetheless reasonable."[31]

The same holds true in Wright's case. Wright voluntarily left the state once he realized he was under investigation for alleged sexual abuse of a minor. Wright moved from state to state and job to job until authorities found him in Minnesota. Wright was promptly extradited once located. The delay in indicting Wright was largely attributable to his flight from the state and his frequent moves to different states to obtain employment. As such, the length of the delay is not unreasonable. Moreover, Wright has advanced no evidence of actual prejudice caused by the State's delay in arresting him and bringing him before the court.[32] Without meeting his burden of showing actual prejudice, Wright is not entitled to relief under the due process clause.

Wright is not entitled to relief under the speedy trial clause.

The Sixth Amendment of the United States Constitution, as well as Art. I, section 11 of the Alaska Constitution, guarantee an accused the right to a speedy trial. Courts have identified three objectives of the speedy trial guarantee: (1) to prevent harming the defendant by a weakening of his case as evidence and memories grow stale

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[29] *Id*. at 411-12.

[30] *Id*. at 412-14.

[31] *Id*. at 414.

[32] Wright's assertion that he has lost the defense of "planted memory," asserted for the first time in his post-hearing briefing, is purely speculative. The court sees no reason why that defense cannot now still be asserted.

with the passage of time; (2) to prevent prolonged pre-trial incarceration; and (3) to limit the infliction of anxiety upon the accused because of longstanding charges.[33] For this reason, a showing of actual prejudice is not a prerequisite to relief under the speedy trial clause; a showing of possible prejudice may suffice.[34]

To determine whether a defendant has been denied the right to speedy trial, courts must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant.[35] The accused must show that the length of the delay is presumptively prejudicial, or alternatively, that he was actually prejudiced to invoke the above test. When a delay is extensive, prejudice may be presumed. Alaska courts have considered a delay of over fourteen months presumptively prejudicial. The right to a speedy trial attaches when the defendant becomes formally accused.[36] In calculating the period of delay, any delay caused by the defendant is excluded.[37]

The delay of five years in Wright's case is of sufficient duration to be presumptively prejudicial; however, this delay does not invariably violate Wright's right to speedy trial. Instead, prejudicial delay only triggers the four-part balancing test articulated in *Mouser*. When using the balancing test, the court must determine precisely

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[33] *State v. Mouser*, 806 P.2d 330, 338 (Alaska App. 1991) (citing *Rutherford v. State*, 486 P.2d 946, 947 (Alaska 1971)).

[34] *Id*. (citing *Moore v. Arizona*, 414 U.S. 25, 26-27 (1973)).

[35] *Smith v. State* , No. A-6340, 1998 WL 191146, at *2 (Alaska App. Apr. 22, 1998) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)); *Mouser*, 806 P.2d at 340.

[36] *Yarbor v. State*, 546 P.2d 564, 567 (Alaska 1976).

[37] *Springer v. State*, 666 P.2d 431, 435 (Alaska App. 1983).

how heavily any lack of diligence should weigh against the state.[38] Deliberate attempts to delay trial in order to impede defense should weigh heavily against the State, while more neutral reasons, such as negligence, should be weighed less heavily. Valid reasons, such as missing witness[es], should serve to justify appropriate delay.[39]

In the present case, it is clear that the five year delay is presumptively prejudicial. The court finds that part of the reason for the delay is the State's negligence in failing to issue an extraditable warrant for Wright's arrest. Had such a warrant been issued, the State would likely have located Wright when he applied for work at the nuclear facilities in Arkansas in 2000 which required security clearance. But Wright's departure from the state during the investigation, and after the warrant was issued for his arrest, made it impossible to comply with the right to speedy trial.[40] Wright had no less than sixteen different jobs in different states and locations during his absence. Between jobs he would be in Arkansas part of the time. With a few exceptions, Wright generally stayed at one location for only a few months.[41] Due diligence only requires that the State make reasonable efforts to find a defendant whose whereabouts were unknown and bring

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[38] *Mouser*, 806 P.2d at 341.

[39] *Id*.

[40] As mentioned, the defendant's causes for delay do not count towards determining speedy trial violation.

[41] Wright worked at the Pine Bluff Arsenal nuclear facility for one year beginning in 1999, and at the Sequoyah Nuclear Plant in Tennessee for eight months in 2003. Other than a six-month job at Arkansas Nuclear One in Arkansas in 2000, Wright's periods of employment were brief.

him to trial.[42] The court finds Investigator Josten's attempts to locate Wright throughout his absence from the State were reasonable.

Wright's argument that Josten could have located Wright by checking Palmer court records, Juneau court records, and Vital Statistics files places an unreasonable burden on law enforcement. By the time an arrest warrant was issued for Wright in September 1999, Josten was off the case and assigned different duties. She did what any reasonable officer would do under the circumstances and that is to periodically check with various police sources to see if Wright had surfaced. A more thorough investigation of a defendant's whereabouts cannot be expected of a police officer no longer having responsibility for the case.

Wright's argument that Josten knew (or should have known) that Wright was at his brother's residence shortly after he left Alaska also misses the mark. Josten had no arrest warrant for Wright at the time, was not certain he was at his brother's because of phone calls to Evelyn from different numbers, and was declined an extraditable arrest warrant when she requested it. Contacting Wright at his brother's without an extraditable warrant would have only alerted Wright that police were searching for him.

Despite knowing of the investigation against him, Wright never asserted his right to speedy trial. In *Mouser*, the Court of Appeals noted that the defendant presented no evidence indicating that he made any effort to inquire into the status of his case during the period of delay, nor did he advance an explanation for the apparent lack of inquiry.[43] Here, it is equally clear that Wright did not inquire into the status of his case at any time.

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[42] *Odekirk v. State*, 648 P.2d 1039, 1043 (Alaska App. 1982).

[43] *Mouser*, 802 P.2d at 342.

While memories may have faded in Wright's case, witness statements from the police investigation remain intact. Wright has not asserted that witnesses important to his defense cannot now be located or cannot now recall events. Wright has not been incarcerated during the delay in bringing him to trial. Balancing all these factors, the court concludes that Wright's speedy trial rights have not been violated.

For the foregoing reasons, Wright's Motion to Dismiss is DENIED.[44]

DATED at Anchorage, Alaska this 8th day of May, 2007.

/s/
Philip R. Volland
Superior Court Judge

[44] Wright's Motion to Dismiss the Special Findings to the Indictment is DENIED AS MOOT in light of *State v. Dague*, 143 P.3d 988 (Alaska App. 2006).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SEAN WRIGHT, Appellant, v. STATE OF ALASKA Appellee.	Court of Appeals No. A-10587 Trial Court No. 3AN-99-9876 CR O P I N I O N No. 2447 — March 27, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland and Michael Spaan, Judges.

Appearances: Marjorie Mock, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Smith, Superior Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Sean Wright was convicted of one count of first-degree sexual abuse of a minor and multiple counts of second-degree sexual abuse of a minor for conduct involving his stepdaughter and the daughter of a prior long-term girlfriend. In this appeal, Wright argues that his constitutional right to a speedy trial under the federal and state constitutions was violated because there was almost five years of delay between the filing of the felony information charging Wright with this conduct and Wright's ultimate arrest and subsequent indictment.

We conclude that Wright's speedy trial right claim under the federal constitution is without merit given the generally accepted rule that a felony information filed in a court without jurisdiction to try the defendant is insufficient to trigger the protections of the Sixth Amendment's speedy trial provision. Our analysis is different, however, for Wright's speedy trial claim under the Alaska Constitution. Under our precedent, the filing of a felony information triggers the protections of the state constitutional right to a speedy trial.[1] We therefore conclude that Wright has a state constitutional speedy trial claim with regard to the pre-arrest, pre-indictment delay that occurred in his case.

However, for the reasons explained in this opinion, we conclude that a remand to the superior court is needed to properly resolve this claim. On remand, the superior court must take into account not only the five years of pre-arrest delay, which (as we explain) is fully attributable to the State, but also the five years of post-arrest delay, which the State claims is primarily attributable to Wright.

As a separate point on appeal in his co-counsel brief, Wright also argues that he is entitled to jail-time credit for the time he spent on electronic monitoring pending his trial. We find no merit to this claim and affirm the decision of the superior court on this issue.

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[1] *See State v. Mouser*, 806 P.3d 330, 339 (Alaska App. 1991).

Facts and procedural history

Evelyn Wright had three daughters from a previous marriage when she married Sean Wright in November 1996. The family lived in Anchorage from 1996 until the summer of 1998, when they moved to Wasilla.

That Halloween, the family had a big party. Before the party started, Evelyn went to look for ten-year-old K.A. K.A.'s bedroom door was locked. Wright, who was inside the room, opened the door and said he locked it because K.A. was fighting with her sister.

Approximately three months later, in early February 1999, after watching a video at school about pedophilia, K.A. told her mother that she was being sexually molested by Wright. She reported that Wright came into her room on Halloween, locked the door, took off his pants, and touched her vagina with his fingers and tongue.

Evelyn and K.A. confronted Wright about K.A.'s allegations. Wright claimed he did not remember doing anything to K.A. Wright moved out two weeks later. The day after Wright left, Evelyn called the police.

Alaska State Trooper Ruthan Josten was assigned to the case. K.A. told Josten that Wright touched her breasts and vagina with his fingers and mouth and rubbed his penis against her vagina. Evelyn told Josten that Wright may have also abused the daughter of his prior long-term girlfriend, M.C.

Josten contacted M.C., who told Josten that Wright sexually abused her in Anchorage from 1987-1989, and that she went to live with her biological father to get away from Wright. At trial, M.C. testified that Wright initially began by rubbing her back and fondling her breasts. Later, he grew bolder and began to touch her vagina; he would also rub his penis between her thighs without penetrating her or ejaculating.

While the investigation into the sexual abuse was ongoing, Wright went to visit his brother in Arkansas. He subsequently decided to leave Alaska permanently.

In June 1999, after Wright left Alaska, Josten sent a report to the Palmer District Attorney's office requesting a warrant for Wright's arrest. That request was initially declined. Five months later, on November 12, 1999, the Office of Special Prosecutions and Appeals filed a criminal information charging Wright with eleven counts of sexual abuse of a minor. An arrest warrant was issued four days later.

The arrest warrant was entered into the Alaska Public Safety Information Network (APSIN), an Alaska-only database. However, even though the State was aware that Wright was living outside Alaska, the warrant did not designate Wright's offenses as extraditable, nor did the State enter the arrest warrant into the FBI's National Crime Information Center (NCIC) database. Josten apparently commented at the time that the State may have had financial reasons for not making the warrant extraditable.

From 2000 to 2004, Josten ran periodic searches for Wright in a national database that recorded driver's licenses, deaths, and other similar information. But Josten's searches were not comprehensive or consistent, and she failed to locate Wright.

Wright continued to communicate with Evelyn by telephone and mail during this time. He also received mail from the State of Alaska on other matters, including a notice of a hearing on the dissolution of his marriage to Evelyn from the Palmer trial court, a notice regarding his overdue student loans from the court system, and a death certificate that he requested from the Alaska Department of Health and Social Services.

In addition, throughout this time, Wright worked at a number of nuclear facilities that required security clearances. To obtain these clearances, Wright provided his name, address, date of birth, and social security number, along with copies of his driver's license and social security card. Had the warrant for Wright's arrest been entered into the national NCIC database, Wright's employers would have discovered the arrest warrant and the sexual abuse charges.

On September 17, 2004, almost five years after the felony information was filed, Sergeant Iliodor Kozloff of the Alaska State Troopers received a voicemail inquiry about Wright from a manager at a nuclear facility in Minnesota. Kozloff ran Wright's name through the APSIN database and saw that there was a warrant for Wright's arrest. He also checked NCIC, but discovered that the warrant was not in that database. Kozloff contacted the District Attorney's office, which then made the decision to extradite Wright and to enter the warrant into NCIC. Kozloff arranged for the local sheriff's office to arrest Wright when he returned to the facility the next day.

Wright waived extradition, and the Alaska State Troopers brought Wright back to Alaska, where a grand jury indicted him on eighteen counts of first- and second-degree sexual abuse of a minor for conduct involving K.A., M.C., and a third girl, T.W. (The counts involving T.W. were later dismissed because the statute of limitations had already run.[2])

Just under a year after the grand jury issued its indictment, Wright filed a motion to dismiss the indictment, arguing that the almost five-year delay between the filing of the felony information and his arrest violated due process and his constitutional right to a speedy trial.

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[2] The counts involving T.W. related to conduct alleged to have taken place in either 1979 or 1980. At that time, the statute of limitations for first- and second-degree sexual abuse of a minor was five years. *See* former AS 12.10.010 (1980). In 1983, the legislature extended the applicable limitations period an additional five years. Because the original statute of limitations had not yet run, this meant that the statute of limitations for the alleged conduct involving T.W. expired sometime in either 1989 or 1990. *See State v. Creekpaum*, 753 P.2d 1139, 1144 (Alaska 1988) (describing 1983 legislative changes and consequences for cases where the original statute of limitations had not yet expired).

In 1992, the legislature abolished the statute of limitations for first- and second-degree sexual abuse of a minor. *See* ch. 79, § 19, SLA 1992; *see also* ch. 86, § 2, SLA 2001. The charges involving T.W. were nevertheless time-barred because the statute of limitations had already run before the legislative change went into effect.

Superior Court Judge Philip R. Volland denied Wright's motion, finding that the pre-arrest delay was partially attributable to Wright because he had failed to follow-up on the results of the investigation and because his frequent moves made him difficult to locate. Judge Volland also found that Wright had not shown that he had suffered any actual prejudice from the pre-arrest delay. Wright filed interlocutory petitions to this Court and the Alaska Supreme Court, which were denied.[3]

In the years following his arrest, Wright continued to litigate other pretrial issues and also changed lawyers multiple times. Wright's case finally went to trial in May 2009, almost five years after his arrest and indictment, and almost ten years after the initial filing of the felony information. Wright was out on bail on electronic monitoring for the majority of the post-arrest, post-indictment period of time.

On the eve of trial, Wright filed a "renewed motion to dismiss because of prosecutorial delay," again arguing that the *pre*-arrest delay violated his constitutional speedy trial rights. Wright did not make any speedy trial claims about the five-year *post*-arrest delay.

Superior Court Judge Michael Spaan, who presided over Wright's trial, denied the renewed speedy trial motion "for the reasons given by Judge Volland."

At trial, K.A. testified with specificity about the incidents of sexual abuse that occurred in Anchorage and the details of the Wasilla Halloween incident. However, K.A. was unable to recall details about the other sexual abuse that was alleged to have occurred in Wasilla. Based on K.A.'s lack of recall, Judge Spaan granted Wright's motion for judgment of acquittal on those Wasilla counts.

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[3] Wright also filed a petition for habeas corpus in federal district court. The petition was dismissed without prejudice under the doctrine of federal abstention. Wright appealed this dismissal to the Ninth Circuit, which affirmed on the same procedural ground. *See Wright v. Volland*, 331 Fed. App'x 496 (9th Cir. 2009).

M.C. also testified at trial and was able to recall all of the alleged incidents of sexual abuse.

Before the jury retired to deliberate, Wright renewed his speedy trial motion, claiming that the trial had shown that he was prejudiced by the pre-arrest delay. Judge Spaan again denied the motion, finding that the trial had not shown any prejudice to Wright's defense caused by the pre-arrest delay.

The jury convicted Wright of the eight counts of sexual abuse of a minor involving M.C. and the remaining five counts of sexual abuse involving K.A.

Judge Spaan sentenced Wright to a composite term of 14 years with 2 years suspended, 12 years to serve, and 10 years of supervised probation. Wright requested jail-time credit for the years he spent on electronic monitoring prior to trial. The court denied this request, ruling that Wright was not entitled to jail-time credit for electronic monitoring.

This appeal followed.

Wright's claim that he became formally "accused" for purposes of the state and federal speedy trial provisions when the State filed a felony information in district court

The speedy trial clause of the Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... ."[4] Article I, Section 11 of the Alaska Constitution contains a nearly identical provision: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial ... ."[5]

Under both provisions, a defendant must qualify as an "accused" before the protections of the speedy trial provisions are triggered.[6] "The general rule [is] that the speedy trial right attaches at the time of arrest or formal charge, whichever comes first ... ."[7] But the federal definition of "formal charge"differs from the definition under our state constitution.

The federal courts have repeatedly held that, for purposes of the Sixth Amendment, a "formal charge" means a criminal charge that "alone gives the court jurisdiction to proceed to trial ... ."[8] Therefore, a felony information filed in an Alaska

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[4] U.S. Const. amend. VI.

[5] Alaska Const. art. I, § 11.

[6] *United States v. Marion*, 404 U.S. 307, 320-21 (1971); *State v. Mouser*, 806 P.2d 330, 338 (Alaska App. 1991).

[7] 5 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 18.1(c), at 110 (3d ed. 2007); *see Mouser*, 806 P.2d at 339 (citation omitted).

[8] 5 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 18.1(c), at 111 (3d ed. 2007); *see United States v. Harris*, 551 Fed. App'x 699, 704 (4th Cir. 2014) ("The Sixth Amendment right to a speedy trial does not apply to ... pre-indictment delay, as it does not attach until the defendant has been indicted or arrested.") (internal quotation marks omitted); *United States v. Madden*, 682 F.3d 920, 930 (10th Cir.

(continued...)

district court, which has no jurisdiction to try the defendant on felony charges, is insufficient to trigger the speedy trial protections of the Sixth Amendment.[9] Instead, this type of pre-arrest, pre-indictment delay is evaluated only as pre-accusation delay under the due process clause of the federal constitution.[10] And, unlike a speedy trial claim, a pre-accusation claim always requires proof of actual prejudice to the defense.[11]

Here, Wright makes no pre-accusation delay claim and largely concedes that he cannot meet the actual prejudice standard required for such a claim. Instead, his

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[8] (...continued)
2012); *United States v. Dowdell*, 595 F.3d 50, 61 (1st Cir. 2010); *United States v. Rose*, 365 Fed. App'x 384, 389 (3rd Cir. 2010) (absent arrest, indictment required to trigger speedy trial right); *United States v. Sprouts*, 282 F.3d 1037, 1042 (8th Cir. 2002); *Cowart v. Hargett*, 16 F.3d 642, (5th Cir. 1994); *Pharm v. Hatcher*, 984 F.2d 783, 785-86 (7th Cir. 1993) (defendants are only "accused" for purposes of the Sixth Amendment when an official charging document vesting the court with jurisdiction to try them is filed); *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978) (a defendant is not "accused" prior to indictment even if a felony complaint has been filed); *Favors v. Eyman*, 466 F.2d 1325, 1327-28 (9th Cir. 1972) (filing of a criminal complaint does not trigger a defendant's Sixth Amendment rights); *but see United States v. Terrack*, 515 F.2d 558, 559 (9th Cir. 1975) (noting that "the filing of a criminal complaint, or the indictment where there is no complaint, marks the inception of the speedy trial guarantee of the Sixth Amendment") (internal quotations omitted).

[9] *See People v. Martinez*, 996 P.2d 32, 35 (Cal. 2000) (recognizing that filing of federal complaint in court without jurisdiction to try the defendant does not trigger protections of Sixth Amendment but does trigger protections of speedy trial clause of the California Constitution).

[10] *See United States v. Lovasco*, 431 U.S. 783, 790 (1977); *State v. Gonzales*, 156 P.3d 407, 411 (Alaska 2007).

[11] *Lovasco*, 431 U.S. at 790 (proof of actual prejudice is "a necessary but not sufficient element of a due process claim"); *Gonzales*, 156 P.3d at 411 ("To establish an unconstitutional pre-indictment delay, the defendant must prove both that the delay was not reasonable and that the defendant suffered actual prejudice from the delay.").

federal claim for relief relies on his assumption that the protections of the Sixth Amendment apply to the pre-arrest, pre-indictment delay that occurred in his case. Because that assumption is incorrect, we conclude that there is no merit to Wright's federal speedy trial claim.

However, the speedy trial analysis is different under the Alaska Constitution. In *State v. Mouser*, this Court acknowledged the "general consensus" that speedy trial rights are triggered by the formal filing of a public charge "in a form that would vest the court in which it is filed with jurisdiction to try the accused."[12] But we nevertheless held that the filing of a felony information in district court was still sufficient to trigger the protections of the Alaska Constitution's speedy trial clause.[13]

We based this holding, in part, on the Alaska Supreme Court's decision in *Yarbor v. State.*[14] In *Yarbor*, the State served a felony complaint on the defendant and subsequently indicted him.[15] On appeal, Yarbor argued that his right to a speedy trial under the state constitution attached as soon as the State had probable cause to charge him with a crime, even if the State had not yet initiated the prosecution.[16] The supreme court disagreed, holding instead that Yarbor's state speedy trial rights began to run on the date he became formally "accused" — which the court characterized as the date Yarbor became "the subject of a filed complaint or an arrest."[17]

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[12] *State v. Mouser*, 806 P.2d 330, 339 (Alaska App. 1991).

[13] *Id.*

[14] 546 P.2d 564 (Alaska 1976).

[15] *Id.* at 565-66.

[16] *Id.* at 566.

[17] *Id.* at 567.

The State argues that this language in *Yarbor* was dictum and does not bind this Court. The State further argues that *Mouser* was wrongly decided and should be overturned.

We recognize that there is persuasive value in the State's arguments, particularly in the context of Wright's case. Wright asserts that he was unaware of the felony charges until his arrest, which means he was able to live freely and openly during this time, unaffected by the anxiety, stress, and "public obloquy" that such charges might otherwise bring.

We nevertheless decline to overrule *Mouser* for two reasons.[18] First, as the State recognizes, we have no authority to overturn *Yarbor*, and we are not fully persuaded that *Yarbor* should be read as narrowly as the State suggests. The question in *Yarbor* was when the defendant's speedy trial rights began to run. *Yarbor* involved a defendant who was subject to both a felony complaint and a later indictment, and the supreme court appears to have decided that his speedy trial rights commenced upon the filing of the felony complaint.[19]

Second, we still agree with the underlying reasoning in *Mouser* that a felony information (even without an indictment) represents the State's decision to end the investigatory phase of a case and formally and publicly charge the suspect with a crime.[20]

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[18] *See State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996) (a prior decision should be overruled only if the court is clearly convinced that the precedent is erroneous or no longer sound because of changed conditions, and that more good than harm would result from overturning the case).

[19] *Yarbor*, 546 P.2d at 567.

[20] *Mouser*, 806 P.2d at 339.

Accordingly, we conclude that *Mouser* remains good law and that Wright became "accused" for purposes of Alaska's constitutional speedy trial protections when the felony information was filed.

Why we conclude that a remand is required to resolve Wright's speedy trial claim under the Alaska Constitution

Speedy trial claims under the Alaska Constitution are governed by the *Mouser/Barker* test, which directs courts to consider and balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his speedy trial right; and (4) the prejudice to the defendant.[21] None of these four factors is sufficient, on its own, to support a finding that a defendant's speedy trial right was violated.[22] Rather, the factors "must be considered together with such other circumstances as may be relevant."[23]

Because the ultimate inquiry is whether the delay in bringing the accused to *trial* was unreasonable, this analysis necessarily takes account of the total pretrial delay. As the United States Supreme Court explained in *United States v. MacDonald*:

> Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial — when prejudice can be better gauged — would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal, and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to

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[21] *Id.* at 340 (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

[22] *See id.*; *see also Barker*, 407 U.S. at 533.

[23] *Barker*, 407 U.S. at 533.

dismiss necessarily "remains open, unfinished [and] inconclusive" until the trial court has pronounced judgment.[24]

1. Length of the Delay

The first factor, the length of the delay "is to some extent a triggering mechanism" for the rest of the balancing test.[25] Unless a defendant can show that the delay in his case caused *actual* prejudice, the defendant must show that the length of the delay was sufficient to qualify as "presumptively prejudicial."[26]

Under Alaska law, the length of delay is calculated by first excluding any periods of delay caused by the defendant.[27] Once this delay is excluded, any unexplained delay of fourteen months or longer is generally considered presumptively prejudicial for purposes of triggering inquiry into the other *Mouser/Barker* factors.[28]

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[24] *United States v. MacDonald*, 435 U.S. 850, 858-59 (1978) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *see In re Kashamu*, 769 F.3d 490, 492 (7th Cir. 2014) ("[U]ntil the [trial] court proceedings are complete, the causes and duration of the delay, the defendant's responsibility for it, and the harm to the defendant for the delay, cannot be determined.").

[25] *Mouser*, 806 P.2d at 340 (quoting *Barker*, 407 U.S. at 530).

[26] *Id.* (citing *Barker*, 407 U.S. at 530).

[27] *Springer v. State*, 666 P.2d 431, 435 (Alaska App. 1983) (citing *Tarnef v. State*, 512 P.2d 923, 933 (Alaska 1973)).

[28] *Compare Rutherford v. State*, 486 P.2d 946, 947, 951-52 (Alaska 1971) (fourteen-month delay presumed prejudicial), *Glasgow v. State*, 469 P.2d 682, 688-89 (same), *and Mouser*, 806 P.2d at 339-40 (noting that "unexplained delays of fourteen months or more [are] presumptively prejudicial" and holding that approximately twenty-month delay must be deemed prejudicial), *with Nickerson v. State*, 492 P.2d 118, 120 (Alaska 1971) (absent actual prejudice, eight-month delay is not presumptively prejudicial).

Here, Judge Volland found that the almost five years of pre-arrest delay qualified as presumptively prejudicial for purposes of triggering inquiry into the other *Mouser/Barker* factors. The State does not dispute this finding.

2. Reason for the Delay

The second factor, the reason for the delay, is an inquiry into "whether the government or the criminal defendant is more to blame for [the] delay."[29] Evidence that the prosecution engaged in deliberate delay to gain a tactical advantage weighs heavily against the government while more neutral reasons, such as negligence or overcrowded courts, weigh less heavily but are nonetheless relevant.[30] Delay attributable to the defendant or to defense counsel weighs against the defendant.[31]

Here, Judge Volland found that the blame for the pre-arrest delay rested with both the State and Wright. The judge faulted the State for failing to issue an extraditable warrant, but the judge also found that Wright's departure from the state, and his frequent changes of residence, made the State's efforts to locate him more difficult and expensive and were thus "causes of delay" directly attributable to him.

Wright argues that he should not be held responsible for any of the pre-arrest delay, given that he was unaware that charges had been filed, and given that none of his actions were directed at avoiding apprehension.

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[29] *Doggett v. United States*, 505 U.S. 647, 651 (1992).

[30] *Barker*, 407 U.S. at 531; *see Doggett*, 505 U.S. at 657.

[31] *Vermont v. Brillon*, 556 U.S. 81, 90 (2009).

We agree. As the State concedes in its appellate briefing, "Wright was not hiding out, and the State had avenues of locating him that likely would have produced him within a brief period."[32]

We note that although Wright moved frequently for work, he maintained an Arkansas driver's license and a physical address that other Alaska state agencies used to communicate with him.[33] Wright also repeatedly passed intensive security clearances that would have uncovered the arrest warrant if the information had been entered into the NCIC database. Given these facts, we conclude that the trial court erred in attributing partial blame for the pre-arrest delay to Wright.

However, the question of who is to blame for the lengthy *post*-arrest delay must be resolved by the superior court on remand. Although the State asserts that the bulk of this delay is attributable to Wright, the court made no direct findings on this issue.

3. Wright's Assertion of his Right to a Speedy Trial

The third factor is whether, and when, the defendant asserted his right to a speedy trial. A defendant's failure to assert the right to a speedy trial will generally make it difficult to prove he was denied that right.[34]

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[32] *See United States v. Boone*, 706 F. Supp. 2d 71, 74-75 (D.D.C. 2010) (defendant not to blame for delay, even though he was aware of the investigation against him, when the defendant had no knowledge of the arrest warrant and was living at a relative's house where the government had reason to believe he resided).

[33] *See United States v. Brown*, 535 F.3d 344, 349 (6th Cir. 1999) (defendant not to blame for delay where defendant unaware of indictment and law enforcement did not attempt to contact defendant even though they knew they could potentially reach him through his attorney).

[34] *See Barker*, 407 U.S. at 529, 532.

Judge Volland found that Wright failed to assert his speedy trial right as soon as he could have because Wright failed to inquire into the status of the police investigation to determine if charges had been filed. But we agree with Wright that a defendant's knowledge that he is being investigated is not the same as knowledge that he has been accused.[35] Because Wright was unaware that charges had been filed, his failure to assert his speedy trial right prior to his arrest cannot be weighed against him.[36]

However, Wright's actions *after* he became aware of the charges are relevant to the superior court's assessment of this factor. As the United States Supreme Court explained in *United States v. Loud Hawk*, a defendant's assertion of his speedy trial right must be viewed in the context of the defendant's other conduct, including the filing of frivolous, repetitive, or unsuccessful motions.[37] Conduct suggesting that the defendant was not actually interested in a speedy trial, despite his protestations that his speedy trial rights have been violated, weigh against the defendant.[38]

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[35] *See Boone*, 706 F. Supp. 2d at 77 ("Mere awareness that the police are looking for a person does not obligate that person to affirmatively seek out the police to find out what, if any, problem exists."); *see also United States v. Molina-Solorio*, 577 F.3d 300, 306 (5th Cir. 2009) ("[T]he law does not require [a defendant] to assume the existence of, and ask for a speedy trial on, a charge he is not actually aware of.").

[36] *Doggett*, 505 U.S. at 653-54.

[37] *United States v. Loud Hawk*, 474 U.S. 302, 314-15 (1986); *see also United States v. Frye*, 489 F.3d 201 (5th Cir. 2007); *United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001).

[38] *Loud Hawk,* 474 U.S. at 315 (noting that the filing of "repetitive and unsuccessful motions" that serve to delay trial militates against finding that a defendant has asserted his speedy trial rights even when the defendant simultaneously moves for dismissal on speedy trial grounds); *see also Frye*, 489 F.3d at 211-12 (finding that motions for dismissal on speedy trial grounds do not amount to an assertion of the speedy trial right where the defendant also repeatedly sought continuances); *O'Dell*, 247 F.3d at 671-72 (finding that defendant did not assert his right to a speedy trial where he simultaneously filed multiple

(continued...)

Here, Judge Volland expressed concern that Wright was using various tactics to intentionally delay his trial. The State points to other instances of what appear to be delaying tactics on Wright's part, including repeatedly filing pro se motions that he had been warned would not be entertained by the court. We agree that Wright's post-arrest conduct is relevant to the superior court's determination of whether, and to what extent, this factor weighs in Wright's favor.

4. Prejudice to Wright

The fourth factor, prejudice, is assessed in the light of the purposes of the speedy trial provision: (1) to prevent undue and oppressive incarceration prior to trial; (2) to minimize the anxiety and concern accompanying public accusation; and (3) to minimize delays that impair the accused's ability to defend against the charges.[39] Because Wright was unaware that he had been charged prior to his arrest and was not incarcerated prior to his arrest, he can only claim the third type of prejudice.

This third type of prejudice — damage to the defense — is the most serious and the hardest to prove.[40] As the United States Supreme Court has noted, "what has been forgotten can rarely be shown."[41] Therefore, when the other *Mouser/Barker* factors

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(...continued)
delaying motions).

[39] *State v. Mouser*, 806 P.2d 330, 338 (Alaska App. 1991) (citing *Rutherford v. State*, 486 P.2d 946, 947 (Alaska 1971)); *see Doggett*, 505 U.S. at 654 (citations omitted); *Barker*, 407 U.S. at 532 (citations omitted).

[40] *Doggett*, 505 U.S. at 655; *Barker*, 407 U.S. at 532.

[41] *Barker*, 407 U.S. at 532.

weigh heavily against the State, a showing of possible prejudice may be sufficient for the accused to prevail.[42]

Wright contends that because the pre-arrest delay in his case was so long, the court must apply an irrebuttable presumption of prejudice in his case. Although we agree with Wright that a presumption of prejudice applies to this case because of the length of the pre-arrest delay, we disagree that this presumption is irrebuttable.

In *Doggett v. United States*, the United States Supreme Court recognized that particularly lengthy and excessive pretrial delay can compromise the reliability of a trial in ways that "neither party can prove, or, for that matter, identify."[43] But the Court also recognized that "presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria."[44] Instead, presumed prejudice is "part of the mix of relevant facts and its importance increases with the length of the delay."[45] Thus, a defendant is not entitled to relief based on excessive delay if the presumption of prejudice is "extenuated, as by the defendant's acquiesence," or if the presumption of prejudice is persuasively rebutted by the government.[46]

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[42] *Mouser*, 806 P.2d at 342.

[43] *Doggett v. United States*, 505 U.S. 647, 658 (1992) (granting relief in case involving eight and a half years of post-indictment delay).

We note that *Doggett* and the other federal case law cited in this opinion remain merely persuasive authority in Wright's case because Wright's claim is limited to the additional protections he has under the Alaska Constitution. *See Waiste v. State*, 10 P.3d 1141, 1146-47 (Alaska 2000); *cf. People v. Martinez*, 996 P.2d 32, 36 (Cal. 2000) (declining to adopt *Doggett* analysis for pre-indictment pre-arrest speedy trial claim that could only be raised under state constitution).

[44] *Doggett*, 505 U.S. at 656 (citing *Loud Hawk,* 474 U.S. at 315).

[45] *Doggett*, 505 U.S. at 655-56.

[46] *Id.* at 658.

In this case, we have no findings on whether the lengthy post-arrest delay in this case extenuated the presumption of prejudice caused by the pre-arrest delay. Nor do we have findings on whether the State can successfully rebut the presumption of prejudice. The State urges us to find that it successfully rebutted any presumption of prejudice in Wright's case. It points out that the sexual abuse charges involving M.C. were already a decade old at the time the charges were filed against Wright and that long delays in reporting are not uncommon in sexual abuse cases.[47] The State also points out that K.A.'s memory problems at trial ultimately prejudiced the State rather than Wright, resulting in the trial judge granting judgments of acquittal on some of the counts involving K.A.

We agree that these are important factors to consider in evaluating whether the State rebutted the presumption of prejudice caused by the pre-arrest delay. But we conclude that this question is more appropriately resolved by the superior court as part of the larger remand needed in this case.

We therefore direct the superior court on remand to reassess Wright's speedy trial claim under the Alaska Constitution. In assessing Wright's claims under the *Mouser/Barker* test, the superior court should consider the *total* amount of pretrial delay that occurred in this case — that is, both the pre-arrest delay (which is attributable to the State for the reasons explained in this opinion) and the post-arrest delay (which has not yet been litigated and will require additional findings). In addition, the superior court should consider (1) whether the presumed prejudice caused by the pre-arrest delay in

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[47] *Cf.* Minutes of House Judiciary Committee, House Bill 396, testimony of Cindy Smith, Executive Director of Alaska Network on Domestic Violence and Sexual Assault, log no. 375 (Jan. 17, 1998) (testifying in favor of eliminating statute of limitations for certain sexual abuse offenses because many victims of child sex abuse do not come forward until years after the offense and delay is not uncommon in prosecuting these cases).

Wright's case was extenuated by his subsequent post-arrest conduct; and, if not, (2) whether the State can successfully rebut the presumption of prejudice.

Once the superior court accords the proper weight to each of the *Barker/Mouser* factors, it must balance all four factors to determine whether Wright's constitutional speedy trial right under the Alaska Constitution was violated. The superior court should provide a copy of its written decision on this issue to this Court which will resume consideration of Wright's case at that time.

Why we conclude that Wright is not entitled to jail-time credit for the time he spent on electronic monitoring prior to trial

At sentencing, Wright requested jail-time credit for the time he spent on electronic monitoring prior to trial. The superior court denied this request.

In his co-counsel brief, Wright argues that this decision was error. He acknowledges that AS 12.55.027(d) prohibits credit against a sentence of imprisonment for time spent on electronic monitoring, but he argues that the statute should not apply to him because it went into effect after he began his electronic monitoring.

We rejected a similar ex post facto claim in *Fungchenpen v. State*.[48] We held that the legislature's purpose in enacting AS 12.55.027 was to clarify pre-existing law and to confirm that jail-time credit would not be given for time served on electronic monitoring; the statute did not create new law.[49] Our decision in *Fungchenpen* controls Wright's claim.

Wright also argues that the restrictions placed on his freedom through the electronic monitoring denied him liberty without due process of law, and that his bail conditions were excessive in violation of the Fourteenth Amendment.

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[48] 181 P.3d 1115 (Alaska App. 2008).

[49] *Id.* at 1116.

We find no merit to these claims. In *Matthew v. State*, the defendant was subject to electronic monitoring and his conditions of release required him to be at his residence, his work, or directly commuting between the two, and to not consume alcohol.[50] We found that these conditions of release did not approximate incarceration because Matthew was unencumbered by institutional rules — as long as he was at home or at work, he could do whatever he wanted and associate with whomever he wanted.[51] Wright's conditions of release were more lenient than Matthew's, and were likewise not excessive or a denial of due process. We therefore affirm the superior court's decision denying Wright credit for time spent under electronic monitoring.

Conclusion

We REMAND this case to the superior court for further findings consistent with this opinion. We retain jurisdiction. The superior court shall issue its written decision within 90 days of the issuance of this opinion. If the parties wish to respond to the findings on remand, they shall file their memoranda within 30 days thereafter.

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[50] *Matthew v. State*, 152 P.3d 469, 472 (Alaska App. 2007).

[51] *Id*. at 472-73.

FILED

MAY 27 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEAN WRIGHT, Plaintiff - Appellant, v. PHILLIP VOLLAND, Judge; et al., Defendants - Appellees.	No. 08-35724 D.C. No. 3:07-cv-00244-JWS MEMORANDUM [*]

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted May 5, 2009 [**]
Seattle, Washington

Before: WARDLAW, PAEZ, and N.R. SMITH, Circuit Judges.

Sean Wright appeals from the district court's denial of his pretrial habeas petition on *Younger* abstention grounds. Wright claims that the five-year delay between the time when he was charged with sexual abuse of a minor and his arrest

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violates his Sixth Amendment right to a speedy trial. We have jurisdiction under 28 U.S.C. §§ 2241(c)(3) and 1291, and we affirm.

1. Because Wright asks us to order the state of Alaska to dismiss the charges against him, and because the state appellate courts have not yet had the opportunity to examine the merits of Wright's constitutional claims, *Younger v. Harris* mandates that we abstain from intervening in the ongoing state criminal proceedings absent extraordinary circumstances. *See* 401 U.S. 37, 46 (1971). Wright failed to demonstrate any "'special circumstances'" warranting federal intervention. *See Carden v. Montana*, 626 F.2d 82, 83 (9th Cir. 1980) (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 489 (1973)).

Wright has not demonstrated irreparable injury by the simple fact that he must wait to assert his speedy trial claim on direct appeal in the event he is convicted. *See id.* at 84. "[U]nlike the Double Jeopardy Clause, the Speedy Trial Clause, when raised as an affirmative defense, does not embody a right which is necessarily forfeited by delaying review until after trial." *Id.*; *see also United States v. MacDonald*, 435 U.S. 850, 861 (1978) (noting that the Speedy Trial Clause does not "encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all"). Though courts may consider a lengthy delay between indictment and arrest as presumptively prejudicial on post-conviction

habeas review, *Doggett v. United States*, 505 U.S. 647, 656–57 (1992), such a delay alone does not give rise to a constitutionally invalid trial which would warrant federal intervention, *see MacDonald*, 435 U.S. at 861 ("It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. . . . [The loss of the right to a speedy trial], by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered."); *see also Doggett*, 505 U.S. at 656 (clarifying that "presumptive prejudice cannot alone carry a Sixth Amendment claim").

Wright's asserted inability to obtain bail pending post-conviction review fails because the length of typical state appellate proceedings does not justify federal intervention. *See Edelbacher v. Calderon*, 160 F.3d 582, 587 (9th Cir. 1998). Wright also argues that due to the nature of the charges—sexual abuse of a minor—testimonial evidence will be especially important to the government's case, he will be abused in prison, and a conviction will result in enduring social stigma. We, however, decline to fashion a broad exception to the *Younger* rule based upon the nature of the charged offense.

2. *McNeely v. Blanas*, 336 F.3d 822 (9th Cir. 2003), does not mandate a contrary result. There, we granted pretrial habeas relief on speedy trial grounds to a state prisoner who was actually detained in custody for five years without a

preliminary hearing or trial. *Id.* at 824. Pretrial habeas relief on speedy trial grounds is appropriate when a state prisoner requests the federal courts to order the state court to afford the petitioner a trial, *Braden*, 410 U.S. at 485–86, but no case "permit[s] the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court," *see id.* at 493, as Wright seeks to do here. As in *Carden*, by denying relief to Wright now, "we are neither rejecting the merits of the . . . Sixth Amendment claim nor totally denying . . . a federal forum to assert it." *See* 626 F.2d at 85. We hold only that "federal interference with the state proceeding [i]s premature." *See id.*

AFFIRMED.

MINUTES OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SEAN WRIGHT	v.	*STATE OF ALASKA SUPERIOR COURT SYSTEM, et al.*
THE HONORABLE JOHN W. SEDWICK		CASE NO. 3:07-cv-00244 (JWS)
PROCEEDINGS: **ORDER FROM CHAMBERS**		Date: August 7, 2008

At docket 11, respondent State of Alaska filed a motion to dismiss the amended petition for a writ of *habeas corpus* filed by petitioner Sean Wright. The motion was fully briefed. Magistrate Judge Smith filed an initial report at docket 23 recommending that the motion be granted. Petitioner filed an objection at docket 24 to which respondent replied at docket 31. Thereafter, the magistrate judge filed a final report at docket 35 recommending that the petition be dismissed without prejudice.

In a case such as this, the district court reviews the recommendations by the magistrate judge pursuant to the following standard: All recommended findings of fact as to which an objection is noted and all recommended conclusions of law are reviewed *de novo,* while all recommended findings of fact as to which no objection is taken are reviewed for clear error. Based on the record in this case and having applied the aforesaid standard of review, this court concludes that the recommendations in the final report from the magistrate judge are in all material respects correct. While the initial report did include an erroneous finding of fact, that error has been corrected in the final report. In *Carden v. Montana*, 626 F.2d 82, 83-84 (9th Cir. 1980), Judge Farris explained that principles of comity mandate that federal courts not entertain pre-conviction *habeas* challenges to state criminal prosecutions except in the most exceptional of situations. "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." *Carden*, 626 F.2d at 84. For the reasons ably discussed by Magistrate Judge Smith, this court holds

that the circumstances in this case are not sufficiently extraordinary to warrant departure from the basic principles of comity reflected in decisions such as *Carden*.

This court adopts the recommended findings of fact and conclusions of law in the report from the magistrate judge at docket 35. Based thereon, the motion at docket 11 is **GRANTED**. Wright's amended petition is hereby **DISMISSED** without prejudice.

On July 29, 2008, at docket 34, Wright filed a motion to expedite consideration of his amended petition. The court having ruled as set forth above, the motion at docket 34 is **DENIED** as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SEAN WRIGHT, Petitioner, vs. STATE OF ALASKA, Respondent.	No. 3:07-CV-00244-JWS-DMS **FINAL REPORT AND RECOMMENDATION REGARDING RESPONDENT'S MOTION TO DISMISS AMENDED HABEAS PETITION [DOCKET 11]**

I. MOTION PRESENTED

Petitioner Sean Wright is awaiting trial in the Alaska Superior Court on multiple counts of sexual abuse of a minor. Based on state court on-line records, the trial for Petitioner Wright (case no. 3 AN-S99-9876Cr) is currently scheduled for August 11, 2008. Wright filed an amended habeas petition under 28 U.S.C. § 2241, requesting this Court order the state to dismiss the charges against him on the basis that the delay in bringing his case to trial violates his Sixth Amendment right to a speedy trial and his right to due process under the Fifth and Fourteenth Amendments (Doc. 9).

Respondent, the State of Alaska, responded by filing this motion to dismiss (Doc. 11). In this motion, Respondent does not address the merits of Petitioner's speedy trial and due process claims; rather Respondent argues that this Court should abstain from interfering with the on-going state criminal prosecution based on the Ninth Circuit's general rule of abstention in pre-conviction habeas relief cases as set forth in Carden v. Montana, 626 F.2d 82 (9th Cir. 1980). Petitioner objects to the motion to dismiss (Doc. 12). He argues that the delay in this case and

the nature of the charges represent an extraordinary circumstances that warrant federal review prior to trial, and he cites McNeely v. Blanas, 336 F.2d 822 (9th Cir. 2003) for the proposition that this Court can consider his speedy trial claim on the merits prior to his state trial.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

The state of Alaska began investigating Petitioner Wright in February of 1999 after receiving a report that Wright was abusing his 11-year-old stepdaughter. Alaska State Trooper Investigator Ruth Josten was assigned to the case and interviewed the young girl and her mother. Wright was out of state at that time. While investigating Wright, she learned that he had allegedly sexually abused another child. Around mid-March, Wright returned briefly to Alaska, but then left the state permanently. Investigator Josten was out of town during the time Wright returned to Alaska.

Investigator Josten continued to investigate Wright and the complaint against him. Approximately eight months later, in November 1999, the state filed an information against Wright for multiple counts of first degree sexual abuse of a minor and multiple counts of second degree sexual abuse of a minor. The case was assigned number "3AN-S99-9876." The state then issued an arrest warrant for Wright on November 16, 1999. For unknown reasons, the state

[1] This report and recommendation addresses only the Respondent's motion to dismiss and not the merits of Petitioner's habeas claims. This Court recognizes that in his amended habeas petition, Petitioner sets forth more detailed facts regarding the investigation of Wright and his life after leaving the state of Alaska; however, the Respondent has not briefed the merits of Petitioner's habeas claim nor has this Court received transcripts of the state court's evidentiary hearings and the exhibits involved in those hearings to be able to make detailed findings of facts. Therefore, the facts in this report and recommendation are the minimal, undisputed facts relevant to provide background and determine whether dismissal is appropriate. The source for the facts in this report and recommendation are based on the facts summarized in the state district court's opinion on petitioner's speedy trial claim, Docket 9-20 (Exhibit 18 of Petitioner's Amended Habeas Petition) and on the other exhibits attached to the amended habeas petition.

never issued an extraditable warrant. As a result, the arrest warrant for Wright was not placed in the National Crime Information Center system. Based on the state court's record, Josten periodically checked for information about Wright using two computer search systems, "Intel" and "ASPIN." She made no other efforts to locate Wright.

Based upon the information filed with Wright's amended petition and on the state court's pre-trial decision on the speedy trial issue, Wright was not in hiding after he moved from Alaska. For example, in 2000, he obtained a dissolution of marriage from the state of Alaska where his signature on the paperwork was notarized in Arkansas; he received an Arkansas driver's license in 2001; he received a United States passport in 2001; he had contact with Alabama police after a car accident in 2001; he registered a car in Arkansas in 2002; he paid local personal property taxes in Faulkner County, Arkansas from 2000 to 2004; he paid federal income taxes and listed an Arkansas residence on those taxes; he worked in high-security construction jobs where he was required to fill out a detailed personal history and was subject to criminal record checks.

In 2004, as a result of one of these construction job security checks, an employer made contact with the state of Alaska and learned of the 1999 arrest warrant. The Alaska authorities were thereby alerted to Wright's location. Wright was subsequently arrested in September of 2004 and indicted and arraigned on the charges in October of 2004.

Wright filed a motion to dismiss in state court based on due process and speedy trial arguments, under both federal and state law. The evidentiary hearings were conducted over a nineteen-month period and the state trial judge issued an opinion denying the motion on May 8, 2007 on both due process grounds and on speedy trial grounds (See Doc. 9-20). Wright immediately filed a petition for review with the Alaska Court of Appeals based on Rule 402 of

the Alaska Rules of Appellate Procedure[2], which was denied. Thus, the appellate court did not conduct a review of the trial court's decision but simply denied pre-trial review of an otherwise unappealable order. Petitioner then filed a request for discretionary review to the Alaska Supreme Court in July of 2007, which was also summarily denied. He then filed his federal habeas petition under 28 U.S.C. § 2241. See White v. Lambert, 370 F.3d 1002, 1006 (9th Cir.),

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[2] Rule 402 addresses "Petitions for Review of Non-Appealable Orders or Decision" and reads as follows:

(a) **When Available.** (1) An aggrieved party, including the State of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appealable under Rule 202, and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal....

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) **When Granted.** Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

cert. denied, 543 U.S. 991, 125 S.Ct. 503, 160 L.Ed.2d 379 (2004) (holding that 28 U.S.C. § 2241 confers jurisdiction on a district court to consider a state prisoner's *pre-trial* habeas claim that he is in custody in violation of the Constitution or laws of the United States, as opposed to 28 U.S.C. § 2254, which confers jurisdiction on a district court to consider a state prisoner's *post-trial* habeas claim that he is custody, *pursuant to a state court judgment*, in violation of the Constitution or laws of the United States)(emphasis added); Stow v. Murashige, 389 F.3d 880, 886-87 (9th Cir. 2004). At the time Wright filed his amended habeas petition, Wright's trial was scheduled for February of 2008. At the time Respondent filed this motion to dismiss, the trial was scheduled for March of 2008. According to the state court on-line records, the trial is now scheduled for August of 2008.[3]

Wright was in jail for fourteen months following his arrest (from October 2, 2004 through November 22, 2005).[4] In November of 2005 he was put on pre-trial release and, based on Wright's petition, currently works as a heavy-equipment operator in Alaska. However, he is required to wear an ankle monitor and is precluded from returning to Arkansas to visit his family.

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[3] This Court notes that there has been two periods of delay: 1) almost five years between the state's filing of charges against Wright and his arrest on the charges; and 2) almost four years between Wright's arrest/arraignment and this habeas petition. Neither Petitioner nor Respondent has provided any specific details or arguments about the reasons for post-arrest delays except that the delay involves Wright's attempt to have the state court, and now federal court, consider his due process and speedy trial claims. A review of Petitioner's habeas claims reveals that Petitioner's due process and speedy trial claims are based solely on the five-year delay between the state's filing of an information and his arrest.

[4] Petitioner states that he was in jail from October 2, 2004 through November 22, 2005. He also asserts he was in jail for sixteen months. Based on the dates presented to this Court and the record before it, it appears that Petitioner was in jail for fourteen months. It is unclear whether he spent another two months in jail. Regardless, the exact amount of time he was in jail before being released does not need to be determined. It is undisputed that he spent at least fourteen months in jail.

III. ANALYSIS

A. Speedy Trial

The right to a speedy trial applies to state criminal prosecutions under the Sixth and Fourteenth Amendments to the United States Constitutions. Klopfer v. North Carolina, 386 U.S. 213, 221-23 (1967). The right to a speedy trial under the Sixth Amendment begins at the start of a criminal prosecution, which is at the time of formal filing of an accusation in court or by arrest on accusation. United States v. Marion, 404 U.S. 307, 320 (1971). The purposes served by this right are to prevent undue and oppressive incarceration before trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibilities that a long delay will impair the ability of an accused to defend himself. United States v. Ewell, 383 U.S. 116, 120 (1966).

Based upon the United States Supreme Court decision in Barker v. Wingo, 407 U.S. 514 (1972), when deciding whether a delay in the trial of an accused has violated the Sixth Amendment, courts apply a balancing test where conduct of the prosecution and the conduct of the defendant are weighed. Id. at 530. According to the Court, "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his [speedy trial] right." Id. The Court establish a four-factor analysis that courts use as guidance on this issue. The four factors are: 1) the length of the delay; 2) the reasons for the delay; 3) the accused's assertion of the right to speedy trial; 4) the prejudice caused by the delay. Id.

In Doggett v. United States, 505 U.S. 647 (1992), the Supreme Court applied these four

factors and held that the 8 1/2-year delay between the defendant's indictment and his arrest due to the government's negligence in locating the defendant when defendant was unaware of the charges against him during this delay, violated the defendant's Sixth Amendment right to a speedy trial. As to the first factor set forth in Barker, the Court held that to even trigger a speedy trial analysis, the length of the delay must be long enough to cross over "the threshold dividing ordinary from 'presumptively prejudicial.'" Doggett, 505 U.S. 647, 651-52 (1992). The Court noted that generally post-accusation delay becomes presumptively prejudicial as it approaches one year and found that the 8 1/2-year delay certainly triggered the speedy trial inquiry. Id. at 652 n.1. As for the second factor, the Court examined the reason for the delay, looking at the diligence of the government in bringing the defendant to trial. The Court deferred to the lower court's determination that the government was negligent in pursuing the defendant by not making any serious effort in locating him for arrest. Id. at 652. On the third factor, the Court noted that the record supports a finding that the defendant did not know of his indictment until his arrest more than eight years later and so he could not have brought the speedy trial claim any sooner. Id. at 653. On the fourth factor, the Court looked at whether the defendant had to show specific evidence of *actual* prejudice in order to support a speedy trial claim. The Court found that excessive delay is *presumptively* prejudicial and stated that "[w]hile such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria, ... it is part of the mix of relevant facts, and its importance increases with the length of the delay." Id. at 655-56. Ultimately, the Court held that although the government did not delay in bad-faith and although the defendant could not demonstrate exactly how the delay had prejudiced him, the government's negligence in causing a "delay six times as long as that generally sufficient to

trigger judicial review," coupled with the presumption of prejudice that was not waived by the defendant nor persuasively rebutted, entitled defendant to relief. Id. at 656. See also United States v. Mendoza, No. 06-50447, 2008 WL 2468742 (9th Cir. June 20, 2008) (holding that an eight-year delay between defendant's indictment and arrest was a result of the government's negligence—because defendant did not attempt to avoid detection and the government made no serious effort to find the defendant—and thus the court presumes that the defendant suffered prejudice to warrant dismissal of the indictment).

Wright argues that his situation is similar to the situation in Doggett and that he is entitled to relief because of this violation of his Sixth Amendment speedy trial rights. He also more generally argues that the delay has violated his due process rights because his opportunity to obtain a fair trial, to locate witnesses who could testify in his favor, and to confront the evidence against him has been dissipated with the passage of time. Regardless of the merits of Wright's speedy trial claim or due process claim, as Respondent argues in this motion to dismiss, this Court's ability to issue federal pre-trial habeas relief for an on-going state criminal prosecution is limited in many respects. According to Respondent, Wright is not entitled to pre-trial habeas relief because of these limitations.

B. Limitations on Pre-Trial Habeas Relief

1. Abstention

In Younger v. Harris, 401 U.S. 37 (1971) the United States Supreme Court precluded federal courts from issuing injunctions of pending state criminal prosecutions absent special or extraordinary circumstances. Id. at 40, 53-54. The Ninth Circuit applied this Younger abstention doctrine to habeas corpus requests in Drury v. Cox, 457 F.2d 764, 764-65 (9th Cir. 1972) (per

curiam), stating that "only in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from and the case concluded in the state courts." Indeed, in Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), the Supreme Court reaffirmed the established rule that federal adjudication of an affirmative defense through a § 2241 habeas petition prior to a state criminal trial interfered with state adjudication and was therefore prohibited by principles of comity unless the petitioner could show that special circumstances warranted federal intervention. Id. at 489.

In Carden v. Montana, 626 F.2d 82 (9th Cir. 1980), the Ninth Circuit found that principles of comity and federalism require that a federal court abstain from considering a pre-trial habeas challenge unless the petitioner has 1) exhausted available state judicial remedies and 2) special circumstances warrant federal intervention. Id. at 83-84.

2. Special Circumstances to Warrant Pre-Trial Relief

In this case, the parties do not dispute that Petitioner Wright has exhausted his state remedies with regards to his *pre-trial* habeas claims because he has no more avenues for asserting his due process and speedy trial claims in state court prior to trial. He presented the arguments to the Alaska Appeals Court, requesting that under Rule 402 of the Alaska Rules of Appellate Procedure the appellate court review the trial court's denial of his pre-trial motion. He was summarily denied review of the issue. The Alaska Supreme Court also denied review.

Therefore, federal intervention pursuant to § 2241 is warranted if Petitioner Wright can demonstrate "special circumstances" justifying federal intervention of the state court's on-going criminal case. Carden, 626 F.2d at 83-84 (holding that the petitioners failed to demonstrate the

type of special circumstances warranting federal intervention prior to trial, even though petitioners exhausted their state avenues for asserting their speedy trial claim prior to trial).

The special circumstances exception to the general rule against pre-conviction relief in federal court requires more than just a showing of extra cost, anxiety, or inconvenience. Younger, 401 U.S. at 46. It also requires more than just a showing of those circumstances that bear on the merits of the speedy trial claim itself. See Carden, 626 F.2d at 84 (stating that while the state court found the state responsible for the deliberate delay, such a finding only bears on the merits of the speedy trial claim and was not a special circumstance reflecting on the appropriateness of federal intervention). "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." Id. (citing Perez v. Ledesma, 401 U.S. 82, 85 (1971)).

One extraordinary circumstance that can justify federal pre-trial habeas relief is a violation of a defendant's double jeopardy rights. In Mannes v. Gillespie, 967 F.2d 1310 (9th Cir. 1992), the Ninth Circuit stated that a petitioner's exhausted pre-trial claim that a state prosecution will violate the Double Jeopardy Clause is an exception to the rule requiring federal courts to abstain from interfering with pending state prosecutions. Id. at 1312. The court noted that "[b]ecause full vindication of the [Double Jeopardy] right necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy." Id. In Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984) the Supreme Court highlighted the unique nature of the double jeopardy right, stating that the right

"'protects interests wholly unrelated to the propriety of any subsequent conviction'" and that requiring the defendant to go through a retrial "would require him to sacrifice one of the protections of the Double Jeopardy Clause." Id. at 302-03 (citations omitted).

Certain speedy trial claims may also involve extraordinary circumstances warranting pre-trial habeas relief. In Braden, the Supreme Court recognized that when a petitioner brings a pre-trial speedy trial claim demanding enforcement of the state's affirmative constitutional obligation to bring him promptly to trial, relief under 28 U.S.C. § 2241 is proper. Braden, 410 U.S. at 489-90. However, the Court in Braden stressed that the petitioner in that case was not seeking to litigate a federal defense to criminal charges and have the case dismissed altogether, but rather the petitioner was seeking to compel the state to promptly bring him to trial on those charges. Id. The Court reaffirmed that pre-trial federal habeas corpus is not generally used to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court. Id. Indeed, the Ninth Circuit in Carden distinguished speedy trial claims from double jeopardy claims, stating that "the Speedy Trial Clause, when raised as an affirmative defense, does not embody a right which is necessarily forfeited by delaying review until after trial." 626 F.2d at 84 (citing United States v. MacDonald, 435 U.S. 850 (1978)). Indeed, speedy trial rights do not necessarily protect against going through the trial itself, which is at the heart of the double jeopardy protections. See Price v. Georgia, 398 U.S. 323, 331 (1970) (stating that the Double Jeopardy Clause "is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict").

3. *McNeely* case

Despite the federal courts' policy of abstention in most on-going state criminal

proceedings, the Ninth Circuit has granted pre-trial relief of dismissal to a petitioner bringing a § 2241 habeas petition based upon a speedy trial claim. In McNeely v. Blanas, 336 F.3d 822 (9th Cir. 2003), the Ninth Circuit held that a pre-trial delay of more than five years violated the detained petitioner's speedy trial rights and ordered the state court to dismiss the criminal case. Id. at 832.

In that case, McNeely, the petitioner, was arrested in 1998 on California felony charges. Five years later, at the time the Ninth Circuit reviewed the case, he had not had a preliminary hearing or a trial. McNeely, 336 F.3d at 824-25. According to the court, the case had been repeatedly continued due to competency hearings, replacements of counsel, a period where petitioner was committed to a state hospital, disqualification of two judges, and other procedural matters. Id. at 825.

The court did not address the abstention policy and simply applied the four-factor speedy trial analysis set forth in Barker. First, it found that the delay was long enough to trigger a Barker analysis. Id. at 826. Second, it found that the state failed to carry its burden of explaining the delays by not providing a complete record or transcripts of the state court status conferences, commitment hearings, and the like. Id. at 828-29. Therefore, the court concluded that the failure of the state to meet its burden of explaining the delays in detail was egregious given the petitioner's lengthy incarceration, his self-representation, the state's refusal to provide transcripts, and the parties' disputes over minute entries. Id. at 828. The court alternatively found that even the scant record provided to the federal court demonstrated that the state was at fault for the long delay. Id. at 829. Third, the court found that petitioner did not add to the delay in a significant manner. Id. at 831. Fourth and finally, the court, citing to Doggett, stated that

because of the lengthy delay a showing of particular prejudice to McNeely was not required. Id. Considering all the circumstances involved— the length of the delay, the nature of the charges, McNeely's impaired memory resulting from medication, the vagueness of the charges against him, and the fact that he had been subjected to oppressive pretrial incarceration— the court found that McNeely was strongly prejudiced by the delay. Id. at 832. The court then granted the § 2241 petition and ordered the state to release McNeely from custody, but it allowed the state to bring civil commitment proceedings against McNeely under state law. Id.

Wright argues because of the long delay in bringing him to trial and because of the nature of the charges, this Court, like the court in McNeely, can consider his speedy trial claims on the merits prior to trial. Respondent argues that McNeely did not discuss the policy of abstention and cannot be read to change the restrictions on federal inference with pending state criminal prosecutions set forth in Braden and Carden. Respondent states that McNeely can be read as a singular application of the Carden principles– where the circumstances were considered extraordinary enough to warrant pre-trial relief. Furthermore, Respondent argues that the circumstances in McNeely are distinguishable from this case.

C. Wright's Request for Pre-Trial Relief

This Court concludes that Petitioner Wright has not demonstrated that his situation presents a special circumstance warranting federal interference with the on-going state criminal case. As discussed above, pre-trial habeas relief that interferes with pending state prosecutions is only appropriate "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending

state prosecutions appropriate." Carden, 626 F.2d at 84 (citing Perez v. Ledesma, 401 U.S. 82, 85 (1971)). Petitioner does not argue that this is a case of harassment or bad faith. Indeed, nothing in the record suggests that there is anything harassing or malicious regarding the prosecution.

This Court also finds that Petitioner's situation does not present extraordinary circumstances where irreparable injury has been demonstrated to justify pre-trial relief. This Court recognizes that in McNeely the Ninth Circuit granted § 2241 pret-trial habeas relief to a petitioner who claimed a lengthy delay violated his speedy trial rights. However, it finds that the McNeely case does not renounce the abstention policy clearly set forth in Carden for any § 2241 case involving a similar lengthy delay prior to trial. The Ninth Circuit in McNeely did not provide any analysis of Carden or the abstention doctrine; thus, it did not *explicitly* carve out a general exception to the abstention policy in cases involving lengthy delays prior to trial.

Furthermore, the Ninth Circuit's emphasis on the specific facts surrounding the delay and the resulting prejudice to the petitioner in the McNeely case also suggests that the case did not *implicitly* carve out a general exception to the abstention policy in cases involving lengthy delays prior to trial. Instead, as Respondent argues, McNeely can be read as a singular application of the Carden principles— where the combined, specific circumstances were extraordinary enough to cause irreparable injury to the petitioner. While the court did not discuss abstention specifically, it clearly stressed the substantial prejudice to the petitioner, suggesting that there had been irreparable harm to the petitioner to warrant pre-trial relief.

This Court finds that many of the circumstances in McNeely are distinguishable from Wright's situation:

1) In McNeely, the five-year delay was between arrest and a preliminary hearing and trial.

During this five-year delay, petitioner McNeely was held in jail. The court noted that petitioner McNeely had been "subjected to oppressive pretrial incarceration." McNeely, 336 F.3d at 832. In Wright's case, the five-year delay was between the filing of charges and arrest, during which time Wright was not incarcerated or monitored. After arrest, Wright was in jail for fourteen months and since November of 2005 has been on pre-trial, monitored release.

2) In McNeely, petitioner McNeely had never even received a probable cause determination at a preliminary hearing during the five-year delay, unlike Wright, whose charges were reviewed for probable cause when he was indicted by a grand jury after his arrest.

3) The court in McNeely noted that the charges against the petitioner were vague and unspecific. Id. at 832. In this case, there has been no argument or finding that the charges are vague.

4) In McNeely, the state had continually challenged petitioner McNeely's competency and delayed the case with competency hearings. McNeely spent a portion of time in a state hospital as a result of these competency hearings. Id. at 825. According to the court, McNeely was forced to undergo treatment with medication and that medication impaired his memory. Id. at 832. No such situation exists in Wright's case.

Based on these distinct facts in McNeely, this Court cannot find that the Ninth Circuit believed the lengthy delay prior to trial alone was the extraordinary circumstance warranting § 2241 habeas relief. The length of the delay was one of many factors demonstrating irreparable harm to the petitioner in McNeely. Therefore, Wright's contention that the length of the delay itself is an extraordinary circumstance warranting pre-trial relief is overstated.

Wright argues that the nature of the charges against him, involving sexual abuse of a

minor, establishes an extraordinary circumstance warranting pre-trial review of his habeas claims. He states that in cases involving sexual abuse of a minor, the state often relies on testimonial evidence rather than physical evidence, and thus these cases are especially time sensitive.[5] This Court acknowledges the time sensitivity involved with testimonial evidence. However, in the absence of the specific, combined circumstances and prejudice considered and articulated by the Ninth Circuit in McNeely, this Court finds that Carden requires this Court to abstain from interfering with the pending state court proceedings regardless of the validity of Wright's underlying claims. When the final judgment has been issued and when Petitioner has then gone through the state court appeal process, the defendant may then re-file his petition for habeas corpus.

IV. RESPONSE TO PETITIONER'S OBJECTIONS

At Docket 23, this Court filed an Initial Report and Recommendation on the Respondent's Motion to Dismiss (the "initial report"), recommending that the 28 U.S.C. § 2241 habeas corpus petition be dismissed based on the Ninth Circuit's policy of abstention. At Docket 24, Petitioner filed objections to the initial report. At Docket 26, Petitioner filed an accompanying motion along with his affidavit, requesting an evidentiary hearing to demonstrate the irreparable harm Petitioner has faced and will face during any incarceration periods. The Respondent submitted a response to both Petitioner's objection and Petitioner's motion for an

[5] Petitioner Wright also states that if he is convicted of the sexual abuse charges, he will be ineligible for bail pending appeal and that sexual abuse of a minor is viewed as the most repugnant crime and that if he has to appeal a conviction from jail, his life will be in danger. This Court is not insensitive to these concerns, but these concerns are present in many criminal cases, and there is no support in the case law to suggest that these concerns are sufficient to overcome comity concerns and the policy of abstention in pending state court criminal proceedings.

evidentiary hearing (Docs. 31, 32). This Court has carefully reviewed the objections, and while the Court has made revisions to the facts to address Petitioner's objections and added a more complete statement regarding speedy trial precedent in Section III.A, it declines to alter its recommendation in any substantive manner.

A. Factual Objections

Petitioner objects to this Court's statement that he had not been incarcerated after his arrest. Petitioner asserts that he was in jail for sixteen months after his arrest and then released from prison and placed on ankle monitoring in November of 2005.[6] Respondent does not contest this fact, and thus this Court has changed the report and recommendation to reflect this fact.

Petitioner also requests this Court to provide more detailed factual conclusions regarding 1) the efforts of the state to locate Petitioner during the beginning of the investigation and 2) the contact between Petitioner and his ex-wife, who lives in Alaska, during this delay period. In the facts, this Court makes clear that Petitioner was not in hiding during the period of delay. The level of specificity requested by Petitioner is not required to resolve the comity issue raised by Respondent. The statement of facts contains those undisputed facts necessary to provide background and to determine this motion to dismiss. The report and recommendation does not set forth all the facts that would be necessary for a determination of the merits of the due process and speedy trial claims.

Petitioner also requests this Court to consider in its final report and recommendation his experiences with other inmates while he was in jail for fourteen months. Petitioner states he was assaulted, intimidated, and robbed by other inmates during his fourteen months of incarceration

[6] See footnote 4 above.

and contends that the mistreatment was due to the fact that he is charged with sexual abuse of a minor. While this information was not presented in the original briefing on this motion, Petitioner supplemented his objections to the initial report with a request for an evidentiary hearing, along with an affidavit from him detailing his mistreatment in jail. Respondent objects to the addition of new facts about alleged mistreatment by other inmates in jail (Docs. 31, 32). Respondent argues these new alleged facts were not present in the record and should not be introduced at this time. Respondent also argues that the alleged mistreatment fails to show how his incarceration meaningfully prejudiced his ability to defend himself during trial. Respondent also points out that the reason why Petitioner was assaulted is not clearly stated in the affidavit and does not prove that the mistreatment was because he is charged with sexual abuse of a minor.

This Court declines to include facts about Petitioner's mistreatment during the time he was in prison in the report and recommendation. Based on this Court's review, Petitioner would like this Court to consider this new information because he feels it demonstrates the risks he has faced and will face if he is convicted and sent to prison before he is able to again raise his habeas claims in federal court. He appears to suggest that these new facts about his safety demonstrate the extraordinary circumstances that would show irreparable harm, warranting pre-trial consideration in federal court. Again, as stated in footnote 4, this Court finds that Petitioner does not face an extraordinary circumstances simply because of the nature of his alleged crimes against minors. While this Court is not insensitive to Petitioner's concerns about the nature of the charges against him, the State of Alaska clearly prosecutes many people for crimes related to sexual abuse of minors and incarcerates those found guilty. This Court declines to recommend that a broad exception to the abstention doctrine be created for those charged with sexual abuse

of minors. This Court also declines to recommend that an exception to the abstention doctrine be crafted for a defendant who states he has been threatened or mistreated by other inmates. Petitioner failed to present timely evidence that the Department of Corrections cannot take adequate steps to protect inmates in their facilities who are charged with the sexual abuse of minors.

B. Legal Objections

1. Legal standard. Petitioner appears to assert that this Court did not apply the correct standard regarding the abstention doctrine. Petitioner states that the language cited by the Ninth Circuit in Carden should only be applicable to cases where injunctive relief is sought and not habeas corpus relief. This Court declines to change its analysis.

It is clear that the abstention doctrine dictates that federal courts not interfere with on-going state criminal proceedings absent some type of special or unusual circumstances. Such circumstances could be proven harassment, bad faith prosecution, *or other extraordinary circumstances* where irreparable injury can be shown. See Perez v. Ledesma, 401 U.S. 82, 85 (1971). This Court noted that there is no harassment or bad faith prosecution at issue in this case and so the issue is whether or not there are extraordinary circumstances present in Petitioner's case to overcome the policy of abstention.

As the analysis in Section III.B.1 demonstrates, the abstention doctrine, while established in the context of cases involving injunctive relief, is also applicable to cases involving habeas corpus relief. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489 (1973), Drury v. Cox, 457 F.2d 764, 764-65 (9th Cir. 1972) (per curiam), Carden v. Montana, 626 F.2d 82, 83-84 (9th Cir. 1980). There is no basis in the cases to suggest that a different standard should apply

to habeas relief when considering the whether to address a 28 U.S.C. § 2241 petition on the merits or to abstain from interfering with state court proceedings.

2. Irreparable harm. Petitioner asserts that this case presents extraordinary circumstances that will cause irreparable harm to Petitioner if his federal claims are not considered prior to trial. Specifically, Petitioner argues that if he is convicted on the first degree sexual abuse of a minor charges, he will not be eligible for bail during his state post-trial appeal under AS § 12.30.040(b)(1) and thus he will suffer irreparable harm. In support of this argument, Petitioner requests that this Court take evidence about his mistreatment by other inmates while initially in jail. For the reasons discussed in the previous section (IV.B.1), this Court finds that Petitioner does not face an extraordinary circumstances simply because of the nature of his alleged crimes against minors. It also declines to recommend that an exception to the abstention doctrine be crafted for a defendant who shows he has been threatened or harmed by other inmates, particularly when only supposition but no evidence is provided by Petitioner regarding the motivation for the alleged assault. Furthermore, Petitioner may be eligible for bail if he is convicted of the lesser second degree abuse charges.

Petitioner also reasserts the same argument about evidence that he presented in his original response to this motion to dismiss. Petitioner claims that the passage of time has made it difficult for him to present an adequate defense. Again, this Court finds that the delay alone is not an extraordinary circumstance to justify interference with the on-going criminal prosecution. Given that under Alaska law, AS § 12.10.010(a)(3), felony sexual abuse of a minor does not have a statute of limitations, Petitioner's contention that he is irreparably harmed by the passage of

time does not create an unusual or extraordinary circumstance.[7] Even if the state had not filed the information against Petitioner and arrest warrant for Petitioner until he was discovered in 2004, the state would have been able to prosecute Petitioner for the alleged crimes at that time because of the broad statute of limitations. Petitioner's concern about the effect of the passage of time on the testimonial evidence against him would still be present.

3. State court appellate procedure. Petitioner claims that the state showed complete disregard for his due process and speedy trial pre-trial claims and therefore argues that it would be pointless for the federal court to refrain from hearing the case until he has gone to trial and state appellate procedures. This Court disagrees. Based on the record provided, it appears that the Alaska Court of Appeals did not consider and reject Petitioner's claims on the merits. Instead, it summarily denied review of the issue pre-trial under Rule 402 of the Alaska Rules of Appellate Procedure (Doc. 9-22). There is nothing presented by Petitioner to suggest that the trial court's decision on Petitioner's due process and speedy trial claims will not be reviewed in detail on direct appeal (if convicted) once judgment becomes final. Therefore, this Court finds that it is not pointless to wait until the trial is complete and, if necessary, until Petitioner has proceeded through the direct appeal process.

Petitioner also argues that because the state trial court misapplied federal law on the due

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[7] This statute of limitations was enacted in 1992 pursuant to 1992 Alaska Sess. Laws Ch. 79, §§ 19-20 (H.B. No. 396) and codified at AS § 12.10.020(c). It was made applicable to all offenses committed on or after September 14, 1992 and to all offenses that could have been prosecuted pursuant to the prior version of the statute on the day before September 14, 1992. 1992 Alaska Sess. Laws Ch. 79, §33 (H.B. No. 396). Thus, the open-ended statute of limitations would apply to the pending charges against Petitioner. The content of AS § 12.10.020(c) was moved to AS § 12.10.010 (a)(2) pursuant to 2001 Alaska Sess. Laws Ch. 86 (H.B. No. 210). This provision was then renumbered AS § 12.10.010(a)(3) in 2007 pursuant to 2007 Alaska Sess. Laws Ch. 24.

process and speedy trial claims, this Court should consider the petition now because he is entitled to relief. This motion addresses the issue of abstention and does not specifically deal with the merits of his claims. The Court has not considered the claims on the merits or reviewed the state court's analysis and thus takes no position on whether or not the state court was clearly in error. Instead, this Court based its recommendation solely on whether abstention requires that the state complete its full appellate process before reviewing Petitioner's federal claims. This Court has reviewed the Ninth Circuit precedent and distinguishes McNeely from Petitioner's situation. This Court finds that the combined circumstances in this case do not demonstrate any unique, extraordinary situation that warrants a deviation from the abstention doctrine.

V. CONCLUSION

For the foregoing reasons, this Court respectfully recommends that Respondent's Motion to Dismiss at Docket 11 be GRANTED and Petitioner's Amended Petition be DISMISSED WITHOUT PREJUDICE.

DATED this 4th day of August, 2008, at Anchorage, Alaska.

/s/ Deborah M. Smith
DEBORAH M. SMITH
United States Magistrate Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN J. ZICHKO,
Petitioner-Appellant,

v.

STATE OF IDAHO; LARRY WRIGHT, Warden; ALAN LANCE,
Respondents-Appellees.

No. 98-35825

D.C. No.
CV 97-00206-EJL

OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
April 4, 2001--Seattle, Washington

Filed May 3, 2001

Before: David R. Thompson, Stephen S. Trott, and
Richard A. Paez, Circuit Judges.

Opinion by Judge Paez

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COUNSEL

Tom Kummerow, Washington Appellate Project, Seattle,
Washington, for the petitioner-appellant.

L. LaMont Anderson, Office of Attorney General, Boise, Idaho, for the respondents-appellees.

OPINION

PAEZ, Circuit Judge:

John J. Zichko appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He is seeking relief from the judgment of conviction entered against him on June 2, 1987, for raping his minor daughter. This appeal raises preliminarily the question of whether a habeas petitioner may challenge an underlying, expired rape conviction while in custody for failing to comply with a state sex offender registration law. We conclude that he may. Zichko alleges substantively in his habeas petition that he was denied effective assistance of counsel when his

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attorney failed to consult with him about appealing his initial conviction, as required by Roe v. Flores-Ortega , 528 U.S. 470 (2000). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Because Zichko procedurally defaulted that claim, we affirm.

BACKGROUND

Zichko pled guilty to the charge of raping his daughter and, on June 2, 1987, the Idaho District Court sentenced him to an indeterminate period of 10 years. He did not appeal.

Zichko filed an application for post-conviction relief in the Idaho District Court on September 18, 1989, raising two grounds for relief: (1) that he received ineffective assistance of counsel; and (2) that his guilty plea was not knowingly, intelligently, and voluntarily given. Specifically, Zichko alleged that his original attorney, William V. Brown, threatened him and his family by advising that he would have to vigorously cross-examine Zichko's daughter, the alleged victim, to provide an adequate defense. Zichko also claimed that his attorney failed to fully advise him of the matters surrounding the charges and failed to raise statute of limitations and alibi defenses. Zichko and his wife testified at an evidentiary hearing before the Idaho District Court. The court denied the

petition, making the following factual findings relevant to this appeal: "Zichko requested neither an appeal nor a motion to withdraw his guilty plea[,] [and] [n]o appeal was filed."

Zichko appealed to the Idaho Court of Appeals, which affirmed on procedural grounds the trial court's dismissal of Zichko's petition. The unpublished decision explained that Zichko's brief "does not specify any error with respect either to the sufficiency of the evidence to support the factual findings made by the district court or the conclusions of law applied by the court to the facts found," as required by Idaho statutory and case law. Zichko did not appeal to the Idaho Supreme Court.

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On March 28, 1996, Zichko wrote a letter to the Clerk of the Idaho Supreme Court inquiring about the status of his appeal in the intermediate appellate court. The Clerk responded that the Court of Appeals had issued its decision on February 21, 1996, and that the time for filing a petition of review in the Supreme Court had expired. Zichko proceeded to file a series of motions, not relevant to this appeal, in the state courts.

Meanwhile, on May 8, 1997, Zichko filed the instant pro se petition for a writ of habeas corpus in federal district court alleging the following grounds: (1) William V. Brown's threats to Zichko and his family to coerce Zichko to plead guilty rendered Brown's representation ineffective; (2) Brown had a conflict of interest because he had previously represented a white supremacist and had ties to the tourist industry in Kootenai County; (3) Idaho District Court judge James Judd had a conflict of interest because he had ties to casino gambling and the dog track in Post Falls, which Zichko opposed; and (4) Zichko was deprived of a preliminary hearing on a superseding charge.

The district court granted the state's motion to dismiss the petition on July 16, 1998. Of relevance for this appeal is Zichko's first ground for relief, ineffective assistance of counsel. The district court held that Zichko had procedurally defaulted the ineffective assistance of counsel claim by failing to present it to the Idaho Supreme Court. The court then held that Zichko had failed to show the requisite "cause and prejudice" necessary to overcome the procedural default. In October 1998, the district court denied Zichko's request for a certifi-

cate of appealability ("COA").

On January 25, 1999, however, we granted Zichko a COA on a single issue: whether remand is necessary for the district court to determine whether Zichko consented to his trial counsel's failure to file a notice of appeal from the judgment of a conviction, as required by Lozada v. Deeds, 964 F.2d 956 (9th

Cir. 1992), and United States v. Stearns, 68 F.3d 328 (9th Cir. 1995). Zichko now relies on the Supreme Court's more recent decision in Flores-Ortega, which abrogated Lozada and Stearns and limited trial counsel's duty in this regard.

STANDARD OF REVIEW

We review a district court's decision dismissing a 28 U.S.C. § 2254 habeas petition de novo. Bribiesca v. Galaza, 215 F.3d 1015, 1018 (9th Cir. 2000). But under the Anti-Terrorism and Effective Death Penalty Act of 1996, we may grant habeas relief to a person in state custody only if the claimed constitutional error "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).

The district court's factual findings are reviewed for clear error. Lopez v. Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc). The state court's determination of the facts is presumed to be correct. 28 U.S.C. § 2254(e)(1).

DISCUSSION

A. JURISDICTION

The first issue we confront is whether the district court had jurisdiction over Zichko's petition. For a federal court to have jurisdiction over a habeas petition filed by a state prisoner, the petitioner must be "in custody." See, e.g., Brock v. Weston, 31 F.3d 887, 888 (9th Cir. 1994). "The general rule concerning mootness has long been that a petition for habeas corpus becomes moot when a prisoner completes his sentence before the court has addressed the merits of his petition." Larche v. Simons, 53 F.3d 1068, 1069 (9th Cir. 1995) (citing Robbins v. Christianson, 904 F.2d 492, 494 (9th Cir. 1990)).

In this case, Zichko was released from prison on his original rape conviction in March 1994. His original 10-year sen-

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tence would have ended on June 1, 1997, less than a month before he filed his habeas petition in district court. The district court never addressed the merits of Zichko's petition; instead, it dismissed the petition on procedural grounds on July 16, 1998, more than a year after the sentence would have been completed had he been incarcerated for the full 10 years.

Zichko was, however, incarcerated for failing to register as a sex offender as required by Idaho law, Idaho Code§§ 18-8301 - 18-8326, at the time he filed his habeas petition and at the time it was dismissed by the district court. Several times, we have held that merely being subject to a sex offender registry requirement does not satisfy the"in custody" requirement after the original rape conviction has expired. See, e.g., McNab v. Kok, 170 F.3d 1246 (9th Cir. 1999); Williamson v. Gregoire, 151 F.3d 1180 (9th Cir. 1998). In none of our previous cases, however, was the petitioner actually incarcerated for failing to register. In contrast, in this case of first impression, Zichko was incarcerated at all relevant times.

"It is well settled that a habeas corpus petitioner meets the statutory `in custody' requirements when, at the time he files the petition[ ] . . . he is in custody pursuant to another conviction that is positively and demonstrably related to the conviction he attacks." Carter v. Procunier , 755 F.2d 1126, 1129 (5th Cir. 1985). Zichko was subject to Idaho's registration requirement only because of his initial rape conviction. We now hold that a habeas petitioner is "in custody" for the purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction "is a necessary predicate" to the failure to register charge. Brock, 31 F.3d at 890 (holding that the habeas petitioner could challenge an earlier, expired conviction while involuntarily committed for treatment as a violent sexual predator). The district court had jurisdiction over Zichko's petition.

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B. PRESENTATION TO THE DISTRICT COURT

The State of Idaho first argues that we may not consider this claim, that Zichko was denied ineffective assistance of

counsel when attorney Brown did not appeal the initial conviction, because Zichko did not present it to the district court. It is true that " `[h]abeas claims that are not raised in the petition before the district court are not cognizable on appeal.' " Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 952 (9th Cir. 1993) (quoting Belgarde v. Montana , 123 F.3d 1210, 1216 (9th Cir. 1997)).

Zichko did raise an ineffective assistance of counsel claim in the United States district court. The specific factual bases for that claim were that Attorney Brown:

> threatened my family to get a bogus guilty plea . . . [;] [h]e did not check into exculpatory evidence . . . [;] [h]e entered a bogus stipulation in a child protection case that was somehow used in a child protection case . . . [;] [he] would not tell me just what it was that was `adjudicated to' at the 1987 criminal case trial, which put the sex offenders jacket on me[;] . . . [and he] was on medication for his terminal cancer and had mood-swings.

Zichko did not specifically identify the failure to appeal as one of the grounds for an ineffective assistance of counsel claim. However, we have a "duty . . . to construe pro se pleadings liberally." Hamilton v. United States , 67 F.3d 761, 764 (9th Cir. 1995) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quotation omitted)). This rule particularly applies to complaints and motions filed by pro se prisoners. See, e.g., United States v. Seesing, 234 F.3d 456, 462-63 (9th Cir. 2001).

Zichko did allege that his attorney had failed to communicate with him at times, a concern in which the Flores-Ortega decision was grounded. 528 U.S. at 480 (holding that

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"counsel has a constitutionally-imposed duty to **consult** with the defendant about an appeal" in certain circumstances) (emphasis added). And elsewhere in the petition, Zichko claimed that his "public defender said he would appeal the case but he did not, as he told a Presbyterian minister he would appeal . . . ." Given our duty to read Zichko's petition liberally, these two statements are sufficient to establish that Zichko did raise the claim in his federal habeas petition. The district court could have looked to the entire petition to see if the ineffective assistance of counsel claim had any merit; had

it done so, the court would have found the allegation that Brown failed to appeal. Cf. Selam, 134 F.3d at 952 (reaching the merits of the petitioner's claim because he"**did** raise his sexual abuse conviction in his habeas petition, although not as clearly as he might have") (emphasis in original). Zichko's ineffective assistance of counsel claim under Flores-Ortega was thus adequately presented to the district court.

C. PROCEDURAL DEFAULT

Next, the state argues that Zichko procedurally defaulted this claim, when his brief to the state appellate court did not comply with the proper form and when he did not subsequently appeal to the Idaho Supreme Court. We agree.

The intermediate appellate court's denial of Zichko's petition for post-conviction relief is a procedural bar to our consideration of his claim. The independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Coleman v. Thompson, 501 U.S. 722, 729-730 (1991) (citing Wainwright v. Sykes, 433 U.S. 72, 81, 87 (1977); Ulster County Court v. Allen, 442 U.S. 140, 148 (1979)). "For a state procedural rule to be `independent,' the state law basis for the decision must not be interwoven with federal law." LaCrosse v. Kernan, No. 97-55085, 2001 WL 286421, *1 (9th Cir. March 26, 2001) (as amended) (citing

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Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Harris v. Reed, 489 U.S. 255, 265 (1989)). In this case, the Idaho Court of Appeals relied entirely on state procedural rules in affirming the denial of Zichko's petition for post-conviction relief. In its opinion, the court did not mention Zichko's federal claims, or any aspect of federal procedural or substantive law.

With regard to the adequacy prong, in order "to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of petitioner's purported default." Petrocelli v. Angelone, 242 F.3d 867, 875 (9th Cir. 2001). In holding that Zichko defaulted his claim by failing to specify any error in the trial court's findings of fact or conclusions of law, the Idaho appellate court relied on Idaho App. R. 35(a)(4) and (6), which require appellate briefs to include:

> [a] list of issues presented on appeal, expressed in the terms and circumstances of the case . . . . The issues shall fairly state the issues presented for review . . . . The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

Idaho appellate courts have been relying on these provisions for many years, including in cases before Zichko's original conviction, to reject appeals. See, e.g. , Cox v. Mountain Vistas, Inc., 639 P.2d 12, 17 (Idaho 1981); Drake v. Craven, 672 P.2d 1064, 1066 (Idaho Ct. App. 1983). Zichko has not argued that the rule has not been consistently applied, and we find no evidence that it has not been. Therefore, by failing to comply with Idaho's clear and well-established rule of appellate procedure, Zichko procedurally defaulted his claim.

We also find that Zichko procedurally defaulted his claim by failing to appeal his state post-conviction petition to

the Idaho Supreme Court. A habeas petitioner must present his claims to the state's highest court in order to satisfy the exhaustion requirement of 28 U.S.C. §§ 2254(b)(1) and (c). O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Zichko's failure to present the ineffective assistance of counsel claim to the Idaho Supreme Court "in a timely fashion has resulted in a procedural default of those claims." Id. at 848 (citing Coleman, 501 U.S. at 731-32).

Zichko has not attempted to demonstrate cause and prejudice or to make a showing of actual innocence to overcome the procedural default. See Kibler v. Walters, 220 F.3d 1151, 1153 (9th Cir. 2000) (as amended) (quoting Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir. 1994)). Rather, he argues that a state procedural rule may not deprive him of what he contends is his constitutionally-guaranteed right to appeal. The case upon which he relies for that proposition, Fay v. Noia, 372 U.S. 391 (1963), has been abrogated by subsequent Supreme Court decisions. See Coleman, 501 U.S. at 745 ("Our cases after Fay that have considered the effect of state procedural default on federal habeas review have taken a markedly different view of the important interests served by state procedural rules."). Today, even in cases where a peti-

tioner has "defaulted his entire state collateral appeal[,] . . . federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that the failure to consider the federal claim will result in a fundamental miscarriage of justice." Id. at 749-50.

We agree with the district court that Zichko defaulted his ineffective assistance of counsel claim, and we decline to reach the merits of his habeas petition.

AFFIRMED.

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