No.

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD JANUSZ,
Petitioner,
v.

ILLINOIS

Respondent.

Petition for a Writ of Certiorari to the
Illinois Appellate Court, Second District

PETITION FOR WRIT OF CERTIORARI

Stephen L. Richards *
Joshua S.M. Richards
53 West Jackson, Suite 756
Chicago, IL 60604
Sricha5461@aol.com
Attorneys for Richard Janusz
* Counsel of Record

QUESTION PRESENTED FOR REVIEW

1. Whether a defendant is denied due process of the fourteenth amendment to United States Constitution where his arraignment is delayed, for no apparent reason for 630 days after his arrest?

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The order of the Illinois Supreme Court, denying the petition for leave to appeal is unpublished. It is attached as Appendix A.
The order of the Illinois Appellate Court for the Second District is cited as *People v. Janusz*, 2020 IL App (2d) 190017443 and is attached as Appendix B.

JURISDICTION

The Illinois Supreme Court denied the Kinzys' petition for leave to appeal on January 29, 2021. This court has jurisdiction under 28 U.S.C. Sec. 1257.
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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Richard Janusz was accused, and convicted, in Illinois state court of multiple counts of predatory criminal sexual assault and child pornography. (R. C Vol. III, 500-14). He was not arraigned on these charges until 630 days after his arrest, and his motion to dismiss the charges based upon this delay was denied by the Illinois courts. The facts relevant to this issue are as follows.

Richard Janusz was arrested on August 1, 2014 and appeared in court on the same date. (R. 2-3). On that date, the court informed Janusz of the charges and possible penalties, but did not ask him to plead. (R. 2-6). The trial judge found probable cause for all charges (R. 6), set a demand bond of 5 million dollars (R. 7-8), and appointed the public defender to represent Mr. Janusz. (R. 8). The public defender requested August 20, 2014 as a subsequent court date. (R. 8-9). Richard Janusz was not arraigned, and no date was set for arraignment. (R. 2-13, C.L.R. 31).

On August 19, 2014, Richard Janusz, through counsel filed a demand for a speedy trial under 725 ILCS Section 5/103-5(b), and a continuing demand for speedy trial under 725 ILCS 5/103-5(a). (C.L.R. 38). On August 20,

2014, however, the public defender asked for a further status date and the case was continued to September 29, 2014. (R. 12-13). On that next date, the court suggested a further date of October 1, 2014 and the public defender indicated: "That will be fine." (R. 17-18). On November 4, 2014, retained counsel, Peter Gruber, substituted for the public defender. (R. 29-30, C.L.R. 83).

After a number of court dates, on October 15, 2015, the following colloquy occurred:

> "THE COURT: I'm not sure if we've had an arraignment on the case.
> [THE PROSECUTOR]: The indictment was tendered in 2014, so I hope so.
> THE COURT: There's been no arraignment. We'll mark this for arraignment on the next scheduled court date, please. Thank you."
> "November 12th."

(R. 65). The court's order on that date indicated that the arraignment was to take place on November 12, 2015.

However, on November 3, 2015, another court date was held, but there is no indication that any arraignment took place, and the case

was continued to December 3, 2015, for status review. (C.L.R. 100). No court was held on November 12, 2015. On December 3, 2015, a further status was held, but there was no arraignment. (R. 67-69).

On March 3, 2016, the following colloquy occurred:

> "THE COURT: That's fine. I'm just looking to see if there was an arraignment on this case for
> Mr. Janusz. I knew there was an indictment at one time.
> MR. WEICHEL: I have a note that says he was arraigned, Judge, but I don't know when that was.
> THE COURT: He was or wasn't?
> MR. WEICHEL: Was.
> THE COURT: All right.
> MR. WEICHEL: But I couldn't tell you when that was.
> THE COURT: Can you tell me the date of arraignment on this, please? I know it was set for
> arraignment. I'm not seeing it.
> MR. WEICHEL: I show he was indicted back in October of last year.
> THE COURT: I know. It shows several dates but I'm showing on

> those dates there's no notation on the order so I'm looking to see. He's not been arraigned, so on the next scheduled court date he needs to be brought over for arraignment as well.
> MR. WEICHEL: I'll mark that on the order.
> THE COURT: April 21st you said?
> MR. GRUBER: Yes, please.
> THE COURT: The 21st of April. Thank you."

(R. 76-77).

Finally, On April 21, 2016, 630 days after his arrest, Richard Janusz, was arraigned. (R. 80-87). He waived formal reading of the charges and entered a plea of not guilty. (R. 87).

Counsel filed a motion to dismiss on speedy trial grounds on October 12, 2017 (C.L.R. 261), an amended motion to dismiss on October 18, 2017 (C.L.R. 271), a second amended motion to dismiss on November 16, 2017 (C.L.R. 288), and a supporting Memorandum of Law on January 12, 2018. (C.L.R. 298). The prosecution filed a response to the motion on January 23, 2018. (C.L.R. 309). On January 31, 2018, Richard Janusz filed a third amended motion to dismiss on speedy trial grounds. (C.L.R. 329).

After argument, the trial court rejected Richard Janusz's contention that the unexplained 630 day delay before he was arraigned was a breach of his speedy trial rights and denied the motion. (R. 455).

On appeal, Richard Janusz claimed that the 630 day delay violated both his statutory speedy trial rights and his right to due process under the fourteenth amendment to the United States constitution. The court rejected the statutory speedy trial argument and ignored the due process claim. The due process claim was raised in a timely petition for leave to appeal to the Illinois Supreme Court. That court denied the petition for leave to appeal.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DETERMINE WHETHER AN UNEXPLAINED 630 DELAY IN ARRAIGNMENT FROM THE DATE OF ARREST VIOLATES THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS.

This court should grant the petition for writ of certiorari to determine whether the due process of the fourteenth amendment permits a delay of 630 days after arrest before a defendant is arraigned. This issue is a case of first impression before this court and involves a significant issue upon which there is no clear consensus among the lower courts.

In *Crain v. United States*, 162 U.S. 625, 643 (1896) this Court held that "at least in cases of felony" that a plea to an indictment, presumably at an arraignment is "necessary before the trial can be properly commenced, and that unless this fact appears affirmatively from

the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try."

However, eighteen years later, in *Garland v. Washington*, 232 U.S. 642, 646-47 (1914), this Court overruled *Crain*, holding that the lack of an arraignment and a formal plea was a mere "technical objection" which had been rendered unimportant by later developments in the law:

> "Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and

> greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away."

232 U.S. at 646.

This Court went on to say that:

> "Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain Case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled."

Garland, 232 U.S. at 646-47.

This Court should, however, grant the petition for writ of certiorari to consider whether *Garland* should be overruled and *Crain* reinstated.

Where constitutional procedural

guarantees are involved, this Court has increasingly come to the view that the meaning of these provisions is to be determined by considering the original intent of the Framers of the Constitution and the enactors of the Fourteenth Amendment, however "technical" and not by considerations of efficiency or judge-made policy. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004)(Confrontation clause of the Sixth Amendment bars the admission of testimonial hearsay, regardless of modern notions of "reliability"); *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000)(intent of Framers compelled conclusion that all elements of felony offense, including elements labeled as "sentencing factors" must be submitted to a jury).

As this Court delineated when it surveyed the case law in *Crain*, and as this Court acknowledged in *Garland*, the overwhelming legal consensus prior to *Garland* was that an arraignment and a plea were necessary elements to a prior conviction, and their absence was not a mere technicality.

Therefore, this Court should grant the petition for certiorari and reassess *Garland* in the light of the prevailing originalist interpretation of the Constitution.

Moreover, more recent decisions of this

Court have reemphasized the importance of an arraignment and have put *Garland*'s holding in doubt. This Court has held arraignment is a "critical stage" of criminal proceedings, *Powell v. Alabama*, 287 U.S. 45, 57, 53 (1932); Arraignment is the first step in the criminal prosecution and, as such, "far from a mere formalism." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), In fact, arraignment is so significant that a defendant's right to counsel attaches at that time and not before. *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

As this Court explained in *Kirby*:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is
> the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and

> procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable."

Kirby, 406 U.S. at 689-90. (Emphasis supplied).

In this case, for no good reason, this vital step in the criminal process, the "starting point of our whole system of adversary criminal justice" was unreasonably delayed for 630 days. This Court should therefore grant the petition to consider whether this unnecessary delay violates due process.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD JANUSZ

By:

/s/ Stephen L. Richards

Stephen L. Richards *
Joshua S.M. Richards
53 West Jackson, Suite 756
Chicago, IL 60604
Sricha5461@aol.com
Attorneys for the Petitioner Richard Janusz
* Counsel of Record

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APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

No. 126564

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff-Respondent,

-vs-

RICHARD JANUSZ,

Defendants-Appellant.

[January 29, 2021]

Disposition: Petition for leave to appeal denied.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

No. 2–19–0017

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

RICHARD JANUSZ,

Defendant-Appellant.

2020 IL App (2d) 190017

[February 1, 2018]

The PEOPLE of the State of Illinois, Plaintiff-Appellee, v. Richard JANUSZ , Defendant-Appellant.

Stephen L. Richards, of Chicago, for appellant. Richard D. Amato, State's Attorney, of Sycamore (Patrick Delfino, Edward R. Psenicka, and Richard S. London, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

JUSTICE BRIDGES delivered the judgment of the court, with opinion.

Stephen L. Richards, of Chicago, for appellant.

Richard D. Amato, State's Attorney, of Sycamore (Patrick Delfino, Edward R. Psenicka, and Richard S. London, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

JUSTICE BRIDGES delivered the judgment of the court, with opinion. ¶ 1 Following a jury trial, defendant, Richard Janusz , was found guilty of 11 counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and 4 counts of manufacturing child pornography (id. § 11-20.1(a)(1)(vii)). Defendant was sentenced to 101 years' imprisonment.

¶ 2 On appeal, defendant argues that the trial court erred in (1) denying his motion to dismiss on speedy-trial grounds and (2) denying his motion for a new trial based on his trial counsel's ineffective assistance. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial

¶ 5 Defendant was charged by information on August 1, 2014, with 15 counts of predatory criminal sexual assault of a child in violation of section 11-1.40(a)(1) of the Criminal Code of

2012 (Criminal Code) (id. § 11-1.40(a)(1)) and 3 counts of possession of child pornography in violation of section 11-20.1(a)(6) of the Criminal Code (id. § 11-20.1(a)(6)). The 15 counts of predatory criminal sexual assault of a child alleged that, between January 1, 2010, and July 30, 2014, defendant knowingly committed acts of sexual penetration of R.M., a minor under the age of 13, in that he placed his finger in R.M.'s sex organ. The three counts of possession of child pornography alleged that, on or about July 31, 2014, defendant possessed a visual reproduction or depiction by computer of a child whom defendant knew or should have known to be under the age of 13 engaged in the lewd exhibition of the child's genitals.

¶ 6 At the August 1, 2014, hearing, the court advised defendant of the charges against him and the punishments should he be convicted, including consecutive sentences of at least six years per charge of predatory criminal sexual assault of a child and lifetime registration as a sex offender. Defendant stated that he understood the charges against him, and the court appointed a public defender. On August 19, 2014, defendant filed a demand for a speedy trial.

¶ 7 On August 20, 2014, defendant appeared with his appointed counsel, and counsel requested a status date for after he had time to review material from the State. The court entered an order of continuance by agreement and set a status hearing for September 29, 2014. Following the September 29 hearing, the court entered additional orders of continuance by agreement, on September 29 and October 1, 2014.

¶ 8 On October 6, 2014, a grand jury returned a 30-count indictment against defendant. Counts I through XXVI were for predatory criminal sexual assault of a child (id. § 11-1.40(a)(1)) for committing acts of sexual penetration with R.M., including placing his penis in R.M.'s anus, placing his finger in R.M.'s sex organ, and placing his mouth on R.M.'s sex organ, and counts XXVII through XXX were for the manufacture of child pornography (id. § 11-20.1(a)(1)(i), (vii)) in that defendant photographed a child he knew to be under the age of 13 depicting a lewd exhibition of the child's unclothed pubic area, depicting a lewd exhibition of the child's unclothed breasts, and

depicting an act of sexual penetration involving defendant's sex organ and the child's anus.

¶ 9 Defendant acknowledged receipt of the indictment on October 8, 2014. The trial court stated that counsel would have the opportunity to review the indictment with defendant before an arraignment on the next court date. The case was again continued by agreement to November 4, 2014, but defendant was not arraigned on November 4.

¶ 10 Between the October 8 and November 4 hearings, defendant retained new counsel. At the November 4 hearing, defendant's new counsel filed an appearance and the trial court discharged the public defender. The case was continued by agreement after the November 4 hearing and again after a December 4 hearing.

¶ 11 The case was then continued multiple times at defendant's request: January 22, 2015 (for defense counsel to review discovery); March 12, 2015 (for defense counsel to review evidence in the possession of the police department); April

23, 2015 (following receipt of disclosures from the State); July 14, 2015 (after retaining an expert); August 24, 2015 (based on defendant's divorce trial set in September); October 15, 2015 (awaiting the ruling on defendant's divorce case); December 3, 2015 (following resolution of defendant's divorce case and the release of marital funds); January 4, 2016 (to acquire experts); and March 3, 2016 (waiting to hear from retained experts). Defense counsel failed to appear on June 18, 2015, and August 20, 2015, and those hearings were instead continued to July 14, 2015, and August 24, 2015, respectively. In addition, the court entered an order of continuance by agreement on November 3, 2015.

¶ 12 At the October 15, 2015, hearing, the trial court remarked that it was "not sure if we've had an arraignment on the case." The assistant state's attorney responded that the indictment was tendered in 2014, so she hoped so. The court scheduled defendant's arraignment for the next court date, but it did not occur. The court again brought up defendant's lack of an arraignment on March 3, 2016, and it set his arraignment for April 21, 2016.

¶ 13 Defendant was arraigned on April 21, 2016. The trial court admonished defendant that all 30 charges against him were Class X felonies and therefore he could not receive probation. The court also admonished him that, if he were convicted of all counts, his minimum sentence would be 186 years and his maximum sentence would be 1680 years. Further, the court continued, defendant would also be subject to at least three years of mandatory supervised release for up to natural life, and it advised him of his right to plead not guilty, his right to be represented by a lawyer, and his right to confront witnesses. Defendant stated that he understood his rights. Defendant waived a formal reading of the charges, and he pled not guilty. The court calculated this number using the minimum sentence for a Class X felony (6 years) times 31 counts. We note, however, that defendant was charged with 30 counts, so the minimum should have been 180 years.

¶ 14 On June 2, 2016, defense counsel requested additional discovery, based on defendant's expert's initial review. The trial court continued the case upon defendant's request.

¶ 15 On July 28, 2016, the trial court remarked that the case was getting old and that it needed to be either set for trial or in the posture of a plea. Defense counsel responded that the defense had hired an expert and that a large part of the delay was due to defendant's divorce case. Now that the divorce case was resolved, defendant was obtaining money through the marital estate, which had been frozen, to retain the expert. Defense counsel asked for a continuance to September 15, 2016, and the court entered the order. On September 15, the court granted another continuance, per defendant's request. It set a status hearing for October 25, 2016, and it set the jury trial for February 6, 2017. At the October 25 status hearing, defense counsel again sought a continuance to November 29, 2016, for filing pretrial motions, and the court granted the request.

¶ 16 On November 29, 2016, defendant filed a motion to dismiss. He argued that various counts were duplicative, violating the "one act, one crime" doctrine, and he sought dismissal of multiple counts. The trial court denied the motion to dismiss on January 20, 2017, and it continued the case to January 27 for any additional motions. Defendant filed additional

motions on that date, including a demand for a bill of particulars and a motion for discovery, and the case was continued at defendant's request.

¶ 17 On January 31, 2017, the court determined that the State did not need to respond to defendant's bill of particulars. Defense counsel then stated that he still intended to file another motion once his expert provided a report. Counsel agreed that he would not be ready for trial the next week. He was seeking a continuance. The State interjected that this delay was not occasioned by the State. The court agreed and turned to counsel, asking "[a]nd that's tolled on the speedy trial because they're answering ready, correct?" Counsel responded yes and then stated that "I don't think we've ever pulled the trigger on [defendant's] speedy, but I would in fact toll it again." The case was continued on defendant's request, and the January 31, 2017, continuance order stated: "delay occasioned by the defense" and "speedy tolled." The case was continued several more times by either agreement or defendant's request.

¶ 18 On October 12, 2017, defendant filed a motion to dismiss, based on a violation of his right to a speedy trial under the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/103-5, 114-1 (West 2016)) as well as the sixth amendment of the United States Constitution (U.S. Const., amend. VI). Therein, defendant argued that no trial date was set within 120 days of him being taken into custody and that the delay could not be attributable to him. In addition, he argued that he had not been arraigned for 630 days and that this delay was attributable to the State. The matter was continued, and the trial date was stricken.

¶ 19 On October 18, 2017, defendant filed an amended motion to dismiss, and on November 16, 2017, he filed a second amended motion to dismiss. The second amended motion added numerous dates when the case was continued and argued that those delays were attributable to the State or the trial court. Defense counsel did not file his memorandum in support of his motion to dismiss until January 12, 2018, after several more continuances.

¶ 20 The trial court denied defendant's motion to dismiss on February 1, 2018. In addressing the dates of the continuances, the court disagreed that the continuances were attributable to the State or the court. Rather, the continuances were either attributable to defendant or by agreement. Therefore, it concluded, all the cited continuances tolled the speedy-trial period. The court also determined that there was no requirement that defendant be arraigned within a certain time frame following his indictment. It noted that defendant acknowledged that he could find no case law specific to the issue requiring arraignment within a certain time frame of an indictment.

¶ 21 B. Trial

¶ 22 Defendant's jury trial commenced on May 7, 2018. R.M. testified as follows. She was born on April 11, 2003, and was 15 years old at the time of the trial. Defendant was her stepfather. Her parents divorced when she was two years old, and her mother moved in with defendant after the divorce. She lived with her mother and defendant in several houses, first in Sheridan

(and then at two residences in Sycamore. The family moved from Sheridan to Sycamore when she was in fifth grade. They moved again to another residence in Sycamore by the time she was in sixth grade.

¶ 23 Defendant sexually abused her beginning when she was six or seven years old. The first time that defendant abused her, he touched her breast and nipple with his hand. This occurred in their truck while they were driving back from bowling. It made her feel unsafe.

¶ 24 Defendant touched her with his hand on subsequent occasions. He used his hand to touch her "vaginal area" under her clothing. He touched her "[i]nside and outside." She described the experience as painful. She was still at the Sheridan house when this type of touching began.

¶ 25 This type of touching continued at the Sycamore residences. At the first residence, he touched her when they were either in his room, the living room, or the basement. When they

were in his room, it was on the bed. He touched her "vaginal [sic] and [her] boob" when they were on the bed. When he touched her vaginal area, he touched "inside." He touched her when they were in his room more than five times.

¶ 26 When defendant touched her when they were in the living room, she would be on his lap, on the couch. He would put his hand in her pants and "go inside" her vaginal area. Sometimes others were present in the room, but they could not see what was happening. She was covered by a blanket from the torso down. Sometimes she jerked away because she was in pain. Defendant touched her when they were in the living room several times. R.M. had tried to tell people that defendant touched her when the abuse first began, but people did not believe her.

¶ 27 In the basement, defendant would be in a chair and she would be on his lap. When she was on his lap, he put his hand down her pants and touched her inside her vaginal area. This occurred more than five times.

¶ 28 The same type of touching occurred at the second Sycamore residence. There, defendant touched her when they were in his room and in the living room. He touched her inside her vaginal area with his hand more than five times.

¶ 29 In addition, defendant used his tongue to touch her vaginal area and her nipple. The first incident was in her bedroom at the Sheridan residence, before she went to bed. She remembered that the next day was "crazy hair day" at school. She wanted to get hair products for her hair, and defendant said that, if he could lick her vaginal area, he could get her the products but that, if she did not let him, he could not. She let him do it, and it felt gross.

¶ 30 Defendant used his tongue to touch her in the same way at the Sycamore residences as he had at the Sheridan residence. She did not know how many total times he used his tongue to touch her, but it was more than once.

¶ 31 Defendant also touched her with his penis by putting his penis inside her anus. This first

happened at the first Sycamore residence. It was in his room, and nobody else was home that day. She remembered that she was wearing SpongeBob pajama pants and a shirt with a cheetah print heart and that she was playing a game on her phone. Defendant came out of the shower naked and had her come to him. He pulled down her pants and inserted his penis into her anus. It felt painful.

¶ 32 Defendant took pictures of her that day. He took pictures of her breasts; she was lifting her shirt up to expose them. The State showed her People's Exhibit 1, which was the picture of her breasts. She identified herself in the picture, and the exhibit was admitted into evidence. She also identified pictures of her vaginal area taken by defendant that same day. Those pictures were admitted into evidence.

¶ 33 Defendant also made her touch him by putting her hand on his penis. This occurred more than once. It felt disgusting and hairy.

¶ 34 On July 31, 2014, around 5 a.m., the police showed up at her house. She was taken to family counseling, where she was interviewed and told what defendant had done to her.

¶ 35 On redirect, R.M. stated that the abuse happened often, making it hard to remember specific dates.

¶ 36 Shannon Krueger testified next as follows. She was a certified pediatric nurse practitioner, and she worked for the University of Illinois College of Medicine Medical Evaluation Response Initiative Team program. They took referrals from the Department of Children and Family Services and other agencies when a child was suspected to have been physically or sexually abused. She examined R.M., and R.M. told her about defendant touching her, beginning around age seven. R.M. told her that defendant touched both her vaginal area and her "butt," including that defendant had progressed to putting his penis in her anal area. R.M. said that defendant touched her about four times a week, sometimes touching her underneath a

blanket while in the presence of other family members.

¶ 37 Krueger's examination revealed redness of the labia minora and some anal laxity. The findings were nonspecific, but that was not unusual in an abuse case. The hymenal, vaginal, and anal tissues were observed, and they are mucous membranes, which are made to stretch and which heal quickly. Thus, any finding of ripping or tearing of these membranes was rare in these types of abuse cases.

¶ 38 Detective Jonathan Miller testified that he interviewed defendant on July 31, 2014, and that the interview was recorded on video. The video of the interview was admitted into evidence. Miller testified that he asked defendant whether defendant penetrated R.M., and defendant responded that he rubbed around the vagina and applied pressure.

¶ 39 After the State rested, defendant moved for a directed verdict on the counts involving

penetration of R.M.'s sex organ by defendant's finger. The trial court denied the motion.

¶ 40 On May 10, 2018, the jury found defendant guilty of 11 counts of predatory criminal sexual assault of a child: one instance of placing his penis in R.M.'s anus, two instances of placing his mouth on R.M.'s sex organ, and eight instances of placing his finger in R.M.'s sex organ. It also found defendant guilty of four counts of manufacturing child pornography. Defendant was sentenced to 101 years in the Illinois Department of Corrections.

¶ 41 C. Posttrial

¶ 42 Following the jury verdict, defense counsel withdrew his representation of defendant, and defendant retained substitute counsel. His new counsel entered an appearance on July 13, 2018.

¶ 43 On July 30, 2018, defendant moved for a new trial and/or judgment notwithstanding the verdict. He filed a supplemental motion for new

trial on November 5, 2018. In part, defendant argued that he was deprived of the effective assistance of counsel for his trial counsel's failure to submit instructions on the lesser included offense of aggravated criminal sexual abuse for the charges of predatory criminal sexual assault of a child. He also argued that the court erred in denying his motion to dismiss on speedy-trial grounds.

¶ 44 The trial court heard defendant's motion for new trial on January 3, 2019. Defendant testified at the hearing as follows. Before the trial, his trial counsel never discussed with him the possibility of submitting an instruction on the lesser included offense of aggravated criminal sexual abuse. Before his trial counsel moved for a directed verdict, defendant asked him to include a lesser-included-offense instruction in the directed-verdict motion. Trial counsel did not do so. Defendant was unaware that the lesser-included-offense instruction could have been submitted to the jury. Had he known, he would have requested that the instruction go to the jury.

¶ 45 Defendant clarified on cross-examination that he believed that the lesser-included-offense instruction could be submitted to the judge but that he could not ask for it to be submitted to the jury. He thought that it was the judge's decision to submit the instruction to the jury.

¶ 46 The trial court denied the motion for a new trial. First, it did not believe defendant's testimony. It did not believe that defendant asked his trial counsel for a lesser-included-offense instruction, and it did not believe defendant's testimony that he thought he could ask for a lesser-included-offense instruction on a directed verdict but not at other times. Moreover, even if the court believed defendant, the decision was a matter of trial strategy. The court believed that counsel's trial strategy was to demonstrate that defendant was "out-and-out not guilty" instead of asking for a lesser-included-offense instruction.

¶ 47 Defendant timely appealed.

¶ 48 II. ANALYSIS

¶ 49 Defendant makes two arguments on appeal. First, he argues that the trial court erred in denying his motion to dismiss on speedy-trial grounds. In particular, he argues that he was not arraigned until 630 days after his arrest and that the delays in his arraignment were not attributable to him. Second, defendant argues that the trial court erred in denying his motion for a new trial, because his trial counsel was ineffective for failing to submit instructions on the lesser included offense of aggravated criminal sexual abuse. We address his arguments in turn.

¶ 50 A. Speedy Trial

¶ 51 Defendant argues that his delayed arraignment violated his right to a speedy trial and that therefore the trial court erred in denying his motion to dismiss on speedy-trial grounds. Citing section 103-5(a) of the Code of Criminal Procedure (725 ILCS 5/103-5(a) (West 2016)), defendant argues that an unexplained

delay in arraignment beyond 120 days from the date of an arrest violates a defendant's speedy-trial right. He notes that he was arrested on August 1, 2014, and demanded a speedy trial on August 19, 2014, but that he was not arraigned until April 21, 2016, which was 630 days following his arrest.

¶ 52 Further, he continues, an arraignment is not optional but is a critical stage of a criminal proceeding. Defendant concedes that the Code of Criminal Procedure does not specify a time frame for arraignment, but he argues that, under ordinary principles of statutory construction, an arraignment must occur within a reasonable time after an arrest. He argues that his arraignment more than 600 days following his arrest was unreasonable.

¶ 53 Defendant admits that his attorneys acquiesced to "a large number of continuances" between his demand for a speedy trial on August 19, 2014, and his arraignment on April 21, 2016. Defendant argues, however, that in the absence of an arraignment, trial delays cannot be attributed to him. Defendant argues that,

without an arraignment, it was not possible for him to agree to a postponement of the trial. Moreover, he argues that a defendant has no right to demand or refuse an arraignment and that therefore the delay in his arraignment cannot be attributed to him. He argues that the delay in his arraignment was solely the fault of the court and the State.

¶ 54 The State responds that defendant has failed to cite case law supporting that the delays in his arraignment were not attributable to him. The State agrees with defendant that section 103-5 provides an accused's statutory right to a speedy trial and that, in this case, section 103-5(a)'s 120-day term applied. Id. However, the State argues that, under section 103-5(a), any delay occasioned by the defendant will be excluded from the speedy-trial term. The State continues, noting that a delay is occasioned by a defendant when his acts caused or contributed to a delay resulting in the postponement of the trial, that is, any action that moves the trial date outside of the speedy-trial term. The State argues that, here, defendant was arraigned prior to the trial and prior to raising a speedy-trial objection and that each continuance between

defendant's arrest and his arraignment was either by his request or by agreement.

¶ 55 We reject defendant's argument that his arraignment violated his statutory right to a speedy trial. In Illinois, a defendant has both a constitutional and a statutory right to a speedy trial. *People v. Bauman* , 2012 IL App (2d) 110544, ¶ 16, 367 Ill.Dec. 421, 981 N.E.2d 1149 (citing U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. I, § 8, and 725 ILCS 5/103-5 (West 2010)). The Illinois speedy-trial statute implements the constitutional right to a speedy trial (id.), although the constitutional and statutory rights to a speedy trial are not necessarily coextensive (*People v. Kilcauski* , 2016 IL App (5th) 140526, ¶ 19, 407 Ill.Dec. 107, 62 N.E.3d 352).

¶ 56 On appeal, defendant argues his statutory right to a speedy trial. Our standard of review for a statutory speedy-trial issue is twofold. First, absent an abuse of discretion, we will sustain the trial court's determination as to who is responsible for a delay in the trial (*People v. Kliner* , 185 Ill. 2d 81, 115, 235 Ill.Dec. 667, 705

N.E.2d 850 (1998)), and, second, we review de novo the ultimate question of whether the defendant's statutory right was violated (*People v. Pettis* , 2017 IL App (4th) 151006, ¶ 17, 415 Ill.Dec. 838, 83 N.E.3d 422). To avoid infringements of the defendant's constitutional right to a speedy trial, the statutory speedy-trial provisions are to be liberally construed in favor of the defendant. *Bauman* , 2012 IL App (2d) 110544, ¶ 16, 367 Ill.Dec. 421, 981 N.E.2d 1149.

¶ 57 Because defendant was in custody following his arrest, the relevant speedy-trial provision is section 103-5(a) of the Code of Criminal Procedure (725 ILCS 5/103-5(a) (West 2016)). It provides:

"Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant * * *. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." Id.

There is no question that more than 120 days passed between when defendant was arrested and when he was tried. See *People v. May*o , 198 Ill. 2d 530, 536, 261 Ill.Dec. 910, 764 N.E.2d 525 (2002) (the statutory period begins to run from the day the defendant is taken into custody, regardless of a formal trial demand). Accordingly, the relevant question is whether defendant occasioned the delay in his trial. Delay is occasioned by a defendant when his acts caused or contributed to a delay resulting in a postponement of his trial. *People v. Murra*y , 379 Ill. App. 3d 153, 158-59, 318 Ill.Dec. 102, 882 N.E.2d 1225 (2008). Actions that cause or contribute to a delay include requests and agreements for a continuance. *People v. Patterson* , 392 Ill. App. 3d 461, 467, 332 Ill.Dec. 58, 912 N.E.2d 244 (2009).

¶ 58 The trial court found that the delays in this case were attributable to defendant. The court cited the numerous continuance orders from when defendant was taken into custody until when he was arraigned. The record reflects that all these continuance orders were entered either at defendant's request or by agreement. See supra ¶¶ 7-11. Defendant even concedes that his attorneys acquiesced to numerous continuances.

Because a defendant occasions a delay under section 103-5(a) when he requests or agrees to a continuance and because these continuances resulted in defendant's trial commencing beyond the 120-day statutory period, the trial court's determination that these delays were occasioned by defendant was not an abuse of discretion. We further note that many of the continuances following defendant's arraignment on April 21, 2016, until his trial on May 7, 2018, were occasioned by defendant. See supra ¶¶ 14-19.

¶ 59 Nevertheless, defendant argues that section 103-5(a) required his arraignment within either 120 days or a reasonable time and that any delay of his trial before he was arraigned could not be attributed to him. We decline to interpret section 103-5(a) as providing an implicit time frame for an arraignment. Section 103-5(a) specifically contemplates the time frame for proceeding from custody to trial . See *People v. Cordell* , 223 Ill. 2d 380, 390, 307 Ill.Dec. 669, 860 N.E.2d 323 (2006) (Section 103-5(a) "provides only a starting point—the date custody begins, and an ending point—120 days later."). It is silent on arraignment, as well as any other stage between a defendant's custody and trial.

At oral argument, defendant's counsel conceded that his speedy-trial argument was based on the delay in his arraignment and that, absent his delayed arraignment, the continuances would have been delays occasioned by defendant and he would have had no good speedy-trial argument.

¶ 60 Consider the scenario where a defendant is arraigned 150 days after entering custody. His trial commences thereafter, without any delay attributed to the defendant. In such a situation, section 103-5(a) would be violated. Importantly, the statutory violation would not be because the defendant's arraignment occurred outside the 120-day period but rather because his trial commenced outside the 120-day statutory period. In a different scenario, if a defendant were timely tried without being arraigned, the failure to arraign the defendant would not necessarily affect the validity of the proceedings. See 725 ILCS 5/113-6 (West 2016) ("Neither a failure to arraign nor an irregularity in the arraignment shall affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such failure or irregularity.").

¶ 61 Finally, defendant is incorrect that he could not occasion delay prior to his arraignment. See *Cordell* , 223 Ill. 2d at 390, 307 Ill.Dec. 669, 860 N.E.2d 323 (delay does not need to be of a set trial date; delay includes any action by either party or the trial court that moves the trial date outside of the 120-day statutory window). In fact, as in this case, a delay in an arraignment can be attributed to the defendant and toll the speedy-trial window. See *People v. Boyd* , 363 Ill. App. 3d 1027, 1037, 301 Ill.Dec. 56, 845 N.E.2d 921 (2006) ("[A]ny delay resulting from a defendant's failure to proceed with an arraignment is chargeable to the defendant [citation]."); *People v. Paulsgrove* , 178 Ill. App. 3d 1073, 1076, 128 Ill.Dec. 111, 534 N.E.2d 131 (1988) (explaining that any delay occasioned by the defendant's refusal to proceed with an arraignment should be charged to the defendant).

¶ 62 Accordingly, defendant's statutory speedy-trial right was not violated, and the trial court did not err in denying defendant's motion to dismiss.

¶ 63 B. Ineffective Assistance of Counsel

¶ 64 Defendant's second argument is that the trial court should have granted his motion for a new trial, based on his trial counsel's ineffective assistance. Specifically, defendant argues that his trial counsel did not discuss with him whether to submit an instruction on aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2014)), which was a lesser included offense of predatory criminal sexual assault of a child (id. § 11-1.40). He argues that the decision whether to tender an instruction on a lesser included offense belongs to a defendant but that the trial court here focused on his counsel's performance instead of counsel's failure to discuss the instruction with him.

¶ 65 Moreover, defendant argues that his trial counsel's failure to submit the instruction was prejudicial. Several of the predatory-criminal-sexual-assault-of a child counts alleged that defendant placed his finger in R.M.'s sex organ. Defendant argues that aggravated criminal sexual abuse, which requires an act of sexual

conduct done for sexual gratification or arousal, is contained within the charge of predatory criminal sexual assault, which requires an act of sexual penetration. Further, the evidence at trial would have allowed a rational jury to find him guilty of aggravated criminal sexual abuse and not guilty of predatory criminal sexual assault, with respect to the charges based on digital penetration. Defendant points to Miller's testimony that defendant denied penetrating R.M.'s vagina but rather said that he rubbed around her vagina and applied pressure. Defendant also cites his counsel's closing argument, where counsel argued that defendant "[threw] away his self-protection and he [told] the truth," in that he confessed that he rubbed, touched, and fondled R.M. but denied any penetration.

¶ 66 The State responds that the trial court properly denied defendant's motion for a new trial. The State does not contest that aggravated criminal sexual abuse is a lesser included offense of predatory criminal sexual assault of a child. Nevertheless, the State argues, the decision whether to include the instruction was a matter of trial strategy. Moreover, the State continues, the court made specific credibility findings

against defendant on his motion for a new trial. In particular, the court found defendant's testimony on the motion incredible, stating:

"I don't believe [defendant]. I don't believe [defendant] when he just testified that he knew he could at [the] directed [verdict] stage ask for a lesser-included offense * * * I don't believe him when he said that he asked [counsel] for a lesser-included offense, and I find his testimony incredible."

The State argues that the court's credibility determination is due great deference and that this alone should lead us to affirm on this issue.

¶ 67 The State continues, arguing that, regardless of the court's credibility determinations, defendant was not entitled to the lesser-included-offense instruction. The State cites testimony from the trial, including R.M.'s testimony that defendant touched her both inside and outside of her vaginal area on multiple occasions. The State also cites defendant's admissions that he rubbed, touched, and fondled R.M.'s genitals, and it argues that

these admissions alone can support sexual penetration.

¶ 68 We hold that the trial court did not err in denying defendant's motion for a new trial, because defendant's trial counsel was not ineffective. We generally review a trial court's decision on a motion for new trial for an abuse of discretion. *Hamilton v. Hastings* , 2014 IL App (4th) 131021, ¶¶ 24, 383 Ill.Dec. 667, 14 N.E.3d 1278, 26. However, the core issue here is whether defendant's trial counsel was ineffective. In reviewing a claim of ineffective assistance of counsel, we defer to the trial court's factual findings, but we review de novo the ultimate issue whether counsel was ineffective. *People v. Westmoreland* , 2013 IL App (2d) 120082, ¶ 27, 375 Ill.Dec. 275, 997 N.E.2d 278.

¶ 69 Under the sixth amendment, a defendant is guaranteed the right to effective counsel at all critical stages of a criminal proceeding. U.S. Const., amend. VI ; *People v. Sturgeon* , 2019 IL App (4th) 170035, ¶ 81, 430 Ill.Dec. 615, 126 N.E.3d 703. To demonstrate ineffective assistance of counsel, a defendant must show

two elements: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defendant. *People v. Jackson* , 2020 IL 124112, ¶ 90, —— Ill.Dec. ——, —— N.E.3d —— (citing *Strickland v. Washington* , 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice means that, absent counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Id. A defendant must satisfy both prongs, and therefore we may dispose of an ineffective assistance claim on either prong. Id.

¶ 70 We dispose of defendant's claim on the prejudice prong because there was no reasonable probability that the jury would have convicted defendant of aggravated criminal sexual abuse instead of predatory criminal sexual assault of a child. Here, the salient difference between the two offenses is that predatory criminal sexual assault of a child requires an act of "sexual penetration" (720 ILCS 5/11-1.40(a) (West 2014)), whereas aggravated criminal sexual abuse requires "sexual conduct" (id. § 11-1.60(b), (c)). The Criminal Code defines sexual penetration as:

"[A]ny contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person , including, but not limited to, cunnilingus, fellatio, or anal penetration." (Emphasis added.) Id. § 11-0.1.

In contrast, sexual conduct requires only any knowing touching or fondling by the accused, either directly or through clothing, of the body of a child under 13 years of age for the purpose of sexual gratification or arousal. Id.

¶ 71 Whether sexual penetration occurred is a question of fact to be determined by the jury. *People v. Hillier* , 392 Ill. App. 3d 66, 69, 331 Ill.Dec. 108, 910 N.E.2d 181 (2009). In Hillier , the court affirmed a finding of sexual penetration even without specific testimony that the defendant was inside the victim's vagina. See id. (a jury may reasonably infer penetration based on testimony that a defendant "rubbed," "felt," or "handled" the victim's vagina, and

this inference is unreasonable only if the victim denies penetration). Recently, this court held that a victim's testimony that the defendant "touched" and "poked" her vagina was evidence from which a reasonable jury could infer sexual penetration by the defendant's finger. *People v. Foster* , 2020 IL App (2d) 170683, ¶¶ 32-36, —— Ill.Dec. ——, —— N.E.3d ——. In Foster , we based the holding on the totality of the circumstances, which included the victim's use of the words "hurts," "puts," and "would put" to describe the defendant's intrusion to her vagina. (Internal quotation marks omitted.) Id. ¶ 36. Moreover, we are cognizant that sexual penetration is not limited to an intrusion, however slight, of the vagina; the female sex organ also includes the labia majora and the labia minora. *People v. W.T.* , 255 Ill. App. 3d 335, 347, 193 Ill.Dec. 437, 626 N.E.2d 747 (1994) ; see *People v. Gonzalez* , 2019 IL App (1st) 152760, ¶ 46, 436 Ill.Dec. 150, 142 N.E.3d 253 (affirming the jury's finding of an act of sexual penetration where one victim circled the labia majora on a diagram to identify where the defendant was " 'rubbing and pressing down' ").

¶ 72 At trial, R.M. repeatedly testified that, when defendant touched her with his hand, he

touched her inside her vaginal area. She testified that, beginning at the Sheridan residence, defendant used his hand to touch her under her clothing. He touched her "[i]nside and outside," and she described the touching as painful.

¶ 73 Turning to the first Sycamore residence, R.M. testified that, when she and defendant were on his bed, he touched "inside" her vaginal area. He did this more than five times. She testified that, when they were in the living room, she would sit on his lap on the couch. He would put his hand down her pants and "go inside" her vaginal area. She sometimes jerked away because she was in pain. He did this several times. She also testified that, when they were in the basement, she would sit in his lap and he would put his hand down her pants and touch her inside her vaginal area. This occurred more than five times.

¶ 74 Finally, R.M. testified that defendant touched her inside her vaginal area more than five times at the second Sycamore residence. The touching occurred in his room and in the living room.

¶ 75 R.M.'s testimony was sufficient for a rational jury to find that defendant committed acts of sexual penetration and to convict defendant of predatory criminal sexual assault of a child. Moreover, defendant's statements do not contradict that sexual penetration occurred. Rather, his statements were that he rubbed around and applied pressure to R.M.'s vagina. Those statements alone would have been sufficient for a jury to have found sexual penetration (see supra ¶ 71), but those statements were not alone in this case. R.M.'s testimony consistently described an intrusion of defendant's hand into her vaginal area, and thus there was no reasonable probability that an instruction for aggravated criminal sexual abuse would have resulted in a different outcome. Accordingly, defendant did not establish that his trial counsel was ineffective and the trial court did not abuse its discretion in denying defendant's motion for a new trial on that basis.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we affirm the judgment of the De Kalb County circuit court.

¶ 78 Affirmed.

Justices McLaren and Schostok concurred in the judgment and opinion.

APPENDIX C

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT
DEKALB COUNTY, ILLINOIS

No. 2014-CF-000575

[August 15, 2018]

Honorable Judge Philip G. Montgomery, Presiding

THE COURT: Okay, thank you.

Okay. I've considered the arguments of counsel, the applicable law, and the written pleadings in the file.

On August 1st, 2014 the defendant was charged by way of information with 15 counts of predatory criminal sexual assault of a child and three counts of possession of child pornography.

On August 19th, 2014 a written speedy trial

demand was filed.

On October 6th, 2014 by way of indictment, the defendant was charged with 26 counts of predatory criminal sexual assault of a child and four counts of manufacture of child pornography.

On April 21st, 2016 the defendant was arraigned.

On October 12th, 2017 the defendant filed his first motion to dismiss based on speedy trial arguments as well as others.

On October 18th, 2017 the defendant filed an amended motion to dismiss based on speedy trial violation.

On November 16th, 2017 the defendant filed a second amended motion to dismiss based on speedy trial violation.

And then on January 31st he filed his third motion to dismiss based on a speedy trial violation.

On January 12th, 2018 the defendant filed a memorandum of law in support of his motion alleging among other things that the delay

between the date of indictment and the date of arraignment are all attributable to the State.

Additionally, that there were court scheduling issues that caused delay, and all those delays should be attributable to the State. The dates the defendant claims the Court was unavailable and are therefore attributable to the State are as follows: October 1st, 2014; January 22nd, 2015; March 12th, 2015; July 14th, 2015; August 20th, 2015; August 24th, 2015; December 3rd, 2015; January 14th, 2016; and April 21st, 2016.

He then states several delays were attributable to the State. Those dates include August 1st, 2014; August 20th, 2014; October 8th, 2014; October 15th, 2015; March 3rd, 2016; June 2nd, 2016; July 28th, 2016; March 16th, 2017; April 20th, 2017; May 11th, 2017; and June 1st of 2017.

A defendant's right to a speedy trial is governed by 725 ILCS 5/103-5. This section states in pertinent part that every person in custody in this state for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant. Delay shall be considered to be agreed to by the defendant

unless he objects to the delay by making a written demand for trial or an oral demand for trial on the record.

The defendant has the burden of proving that the State has violated this statute.

725 ILCS 5/111-1 et al. governs commencement of prosecutions. It does not provide a statutory framework as to the timeframe between indictment and arraignment.

The defendant in his memorandum acknowledges that he could find no case law specific to this issue requiring somebody be arraigned within a certain timeframe .of an indictment. the defendant be arraigned within a certain timeframe of indictment.

Case law is clear that an express agreement to a continuance on the record is an affirmative act attributable to the defendant.

Looking at the dates the defendant claims the There is no requirement that Court was unavailable and should be attributable to the State in the order the defendant has written them in paragraph 7 are as follows:

October 1st, 2014 the case is in front of Judge McAdams. The defendant's attorney at that time was not Mr. Gruber. The defendant's attorney indicated he had received additional discovery, and that the matter was also up for discussion relative to bond conditions. Defendant's attorney stated:

> "DEFENDANT'S ATTORNEY: Since this is Judge Stuckert's bond, I'd just as soon have her deal with it when she gets back.
> THE COURT: What date would you like before Judge Stuckert?
> DEFENDANT'S ATTORNEY: October 8th."

And that was the date the defendant was given at his request. The court order also shows this date was by agreement.

January 22nd, 2015 the case appeared before Judge Pilmer.

> "THE COURT: Good morning, Mr. Gruber. What are you asking? What do you want me to do?
> MR. GRUBER: Well, I've received discovery, I'm still going through that

> with my client, and we are in negotiations with the State. Could I have the 12th, Thursday the 12th of March?"

And the Court gave it the date Mr. Gruber asked for.

Additionally, the court order is marked continued by the defendant.

June 12th, 2015 Judge Pilmer was presiding.

The Court states:

> "THE COURT:
> So this is up for further status.
> MR. GRUBER: Yes, your Honor. I need to go to the police department and view the evidence that the police have in their possession. You have the evidence the State has disclosed to me, but there's certain evidence that can't be tendered to me. I can view it at the confines of the police department.
> THE COURT: Okay. How long is it going to take you?
> MR. GRUBER: At least a month. Also

there's a separate matter that's in the middle of trial upstairs as well as a family case matter that will determine whether or not there's any money to do any sort of expert, so we're in a holding pattern at least for as far as that is concerned.
THE COURT: As far as a future date?
MR. GRUBER: Either 30 or 45, depending on the Court's schedule and the State's decision.
MS. FINLEY: Somewhere in April, late April?
MR. GRUBER:
Sure. Could we go to the 23rd of April?
MS. FINLEY: That's fine.
THE COURT: I'll continue the case until April 23rd, then, Mr. Janusz.
DEFENDANT: Thank you, your Honor.
THE COURT: Thank you.
MR. GRUBER: Thank you, your Honor."

Additionally, the court order is marked continued by defendant.

July 14th, 2015 Judge Pilmer was presiding.

"THE COURT:
This is up for status. Is that correct?
MR. GRUBER:
That is true, your Honor. We've engaged in services of an expert and we would like a 45-day status date.
THE COURT: Okay. State have any objection?
MS. FINLEY: Not at this time.
THE COURT: That would put.us towards the end of August.
MR. GRUBER: I was thinking August 20th.
Well, that's a little less than 45 days.
THE COURT: Thursday the 20th. Is that correct?
MR. GRUBER: That would be fine.
THE COURT: Okay.
So Mr. Janusz, I'm going to continue your case to Thursday, August 20th. That will be at 8:45 a.m. for status.
DEFENDANT: Thank you, your Honor.
THE COURT: Thank you."

Additionally, the court order was marked on defendant's motion.

August 20th, 2015 Judge Matekaitis was

presiding.

On this court date Mr. Gruber never came to court.

The following colloquy occurred:

> "MS. FINLEY: That's Mr. Gruber' s case.
> THE COURT: This matter comes before the Court for status.
> MS. FINLEY: This is Mr. Gruber's case.
> THE COURT: Mr. Janusz, Mr. Gruber is not present yet in the courtroom. We're going to pass it and see if he joins us. If not, we'll
> get you another court date, all right?
> DEFENDANT: Thank you.
> THE COURT: Thank you, Mr. Janusz.
> (Whereupon other cases were heard.)
> (The following proceedings were had in open court.)
> THE COURT: Has anybody seen or heard from Mr. Gruber?
> MS. FINLEY: No. He's failed to appear on a prior court date, Judge. If we can put it over till next Tuesday,

> and I will call him.
> THE COURT: Do you know that he has any are you aware of any court dates he has scheduled for next week in this courtroom?
> MS. FINLEY: No.
> THE COURT: All right, Mr. Janusz. Unfortunately your attorney is not appearing in court today. We've concluded the rest of the bond call without the benefit of your attorney being present, so I'm going to continue the matter over till Monday morning at 8:45 and direct the clerk to notify Mr. Gruber of the new court date and time with regards to the your case, all right?
> DEFENDANT: Thank you, your Honor."

The case was then continued on defendant's motion.

August 24th, 2015 Judge Matekaitis was presiding.

> "MR. GRUBER: · Good morning, your Honor.
> Peter Gruber on behalf of Mr. Janusz.

THE COURT:
Good morning, Mr. · Janusz.
DEFENDANT:
Good morning, your Honor.
MR. GRUBER: Your Honor, we currently have a trial set in the family case on September 30th, and based upon how that goes will determine what experts if any we can hire for this particular case. I'd be looking for a status in this case around October 15th.
THE COURT: Any objection, State?
MS. FINLEY: No objection at this time on defendant's motion.
THE COURT: Defendant's motion continued for status October 15.
Mr. Janusz, your next court date as it relates to the felony matters would be October 15th at 8:45 in the morning. All right?
DEFENDANT:
Thank you, your Honor.
THE COURT:
Thank you."

The court order indicates the case was continued on the defendant's motion.

December 3rd, 2015 Judge Filmer was presiding.

> "MS. FINLEY: Judge, we're here for status this morning. I believe Mr. Gruber was determining his next course of action based on things that were happening in the family case.
> MR. GRUBER: True. We received a judgment on the divorce action earlier this week from Judge Matekaitis, and as a result of that, I'll be able to do certain things with the defense that were held in.abeyance due to material funds not being released. With that in mind, I'd ask for a status date of January 15th.
> MS. FINLEY: That's a Friday?
> MR. GRUBER: · Is that a Friday?
> MS. FINLEY: Yes.
> MR. GRUBER: Oh, I'm sorry. I'm looking at the wrong year. Maybe the 14th, then? I know that's a Jury trial week.
> MS. FINLEY: That's s fine.
> THE COURT: That should be fine.
> So January 14th at 8:45, Mr. Janusz, and Mr. Gruber will be in contact with you between now and then, okay?

> DEFENDANT: Thank you, your Honor.
> THE COURT: Thank you.
> MR. GRUBER: Thank you."

The court order indicates it was continued on defendant's motion.

January 14th, 2016 I was the judge handling the case on that court date.

> "THE COURT: How are we proceeding today,Mr. Gruber?
> MR. GRUBER: Your Honor, I'm going to be asking for a status about 45 days out. A family case matter had concluded in December, and we're in the process of obtaining portions of the marital estate so that we can hire experts.
> THE COURT: That would put us to about March 3rd, Ms. Caplan.
> MS. CAPLAN: That's fine, Judge.
> THE COURT: Okay. On defendant's motion the case is going to be continued until March 3rd. Sir, your next court date is March 3rd. We'll see you in front of Judge Stuckert on that court date, okay?

> DEFENDANT: Thank you, your Honor."

Again the court order indicates this was continued on defendant's motion.

The final date for paragraph 7, April 21st, 2016. Again I was presiding and the defendant was arraigned. After the arraignment, the following colloquy occurred:

> "THE COURT:
> What's the suggested future court date?
> MR. GRUBER: Either June 19th or 26th for status.
> MS. CAPLAN: May or June?
> MR. GRUBER: I'm sorry, May.
> THE COURT: She's not here either day.
> MR. GRUBER: June 2nd?
> MS. CAPLAN: I know she's here on June 2nd.
> THE COURT: She is.
> MR. GRUBER: Okay.
> THE COURT: Sir, your next court date is going to be Thursday, June 2nd at 8:45. You'll be with Judge Stuckert on that court date.
> DEFENDANT: Thank you.

THE COURT: You're welcome."

Again the court order is marked on defendant's motion.

Looking at the aforementioned court dates, never is there a suggestion that because Judge Stuckert, the Judge assigned to the case, was not present and was unavailable was the continuance because of this. One of the court dates the defendant would attribute to the State Mr. Gruber didn't even appear, but another way, the defendant has advanced no argument nor does the record reflect that Judge Stuckert's unavailability was the cause for any of the continuances. Had the defendant wanted an issue addressed immediately, all he had to do was ask. He chose not to.

Therefore, the Court will make a finding that all the above-referenced continuances toll the speedy trial demand period, and are not solely attributable to the State.

As to paragraph 8 of his motion and the next set of dates, August 1st, 2014 was the first time the case was in court. After the defendant was advised of his rights and penalties, the Public Defender was appointed. After bond was set,

Mr. Carlson of the Public Defender's Office stated:

> "MR. CARLSON: Judge, could we have a court date of August 20th? If we need to bring it in sooner, we will do so."
> The Court then said:
> "THE COURT: August 20th is the next court date as asked by the defendant's attorney."

The order reflects this date was by agreement.

August 20th, 2014 Mr. McCulloch of the Public Defender's Office appeared.

> "MR. McCULLOCH: I met with Mr. Janusz yesterday. I have received 150 pages approximately of material from the State this morning. We'd ask for a further status date. I'm told that there is a good deal more information coming, so whatever is convenient with the State.
> MS. FINLEY: Go out to the end of September?
> MR. McCULLOCH: Sure. How about the 22nd or 29th?"

The Court then set the date of September 29th, 2014 as the defendant's attorney asked for. order is marked by agreement.

The next court date was October 8th, 2014. During this court date there was a discussion regarding the defendant being allowed to see his son. Eventually the Court asks:

> "THE COURT: Mr. McCulloch, so what date would you like, then?
> MR. McCULLOCH: How about November 4th?"

Pursuant to defendant's attorney's request, defendant is given November 4th, 2014. The court order is marked by agreement.

Although defendant's motion refers to October 15th, 2017 which he then was able to clear up, the case was actually on the call October 15th of 2015.
On October 15th, 2015 Mr. Gruber states:

> "MR. GRUBER: Your Honor, we have finished the divorce case and we're waiting for a ruling on that. That will

> have some impact on our ability to prepare our case, so I would look for a status on November 12th."

Pursuant to Mr. Gruber's request, the case is then continued to November 12th The order is marked on defendant's motion.

The next court date is March 3rd, 2016. On March 3rd, 2016 Mr. Gruber states:

> "MR. GRUBER: Your Honor, the divorce case is concluded and we are in the process of withdrawing money from several retirement accounts. I have been able to retain a forensic computer analyst, and I have tendered him discovery. I'm waiting for feedback from him regarding additional discovery. I would ask for the April 21st date if I may."

Whereupon the case was continued to the date Mr. Gruber asked for.

June 2nd, 2016:

> "MR. GRUBER:
> Your Honor, we were able to retain

> an expert in this case, and I have filed a request for additional discovery based on his initial review of the discovery we have already received.
> THE COURT: All right.
> MR. GRUBER: I don't know how long it will take the State to do that.
> MS. CAPLAN: Frankly, Judge, the stuff he's written down, I'm not a computer expert and don't know what it is, so I'm going to have to speak with my computer expert and get that together. It might take me a month or more.
> THE COURT: All right.
> MR. GRUBER: Could I suggest May the 28th?

THE COURT: This is how it is. I'll start over. The transcript reads:

> "MR. GRUBER: Could I suggest the 28th of July, then? That's about 45 days."

Pursuant to Mr. Gruber's request, the case was continued to July 28th, 2016 and the order is marked on defendant's motion.

July 28th, 2016 a discussion was held regarding the age of the case and setting it for trial.

> "MR. GRUBER: Your Honor, we've hired the expert, and a large part of the delay was due to a divorce that arose out of this case. We've settled that and we are now obtaining money through the marital estate which had been frozen, so we have hired that expert. This is the first request for additional information that the expert has asked for, so I will need time for him to review it, and depending on what he finds, if he needs more, I may have to file a request for additional information.
> THE COURT: How much time do you think you'll need, Mr. Gruber?
> MR. GRUBER: September 15th."

Pursuant to Mr. Gruber's request, the case was continued to September 15, 2016, and the order is marked on defendant's motion.

March 16th, 2017 Ms. Caplan explained that they were in the process of receiving -- reviewing defendant's motion to quash the search warrant and suppress evidence which had previously

been filed for which the defendant was given months to obtain.
Ms. Caplan did ask for a continuance until April 17th, 2017 to hire an expert to review the defendant's expert's report. The defendant was given many months to hire an expert; so it's not unreasonable for the State to obtain an expert to prepare for defendant's motion to quash search warrant.
Ms. Caplan asked for April 17th, 2017, but Mr. Gruber asked for April 20th, 2017, and therefore the case was continued to April 20th, 2017. The order is marked continued on defendant's motion.

April 20th, 2017 Ms. Caplan indicated that they had found an expert, and she just needed more time to prepare his -- have his report prepared. The case was then continued to May 11th, 2017. Although it was Ms,- Caplan who asked for the continuance, it was still as a result of the actions of the defendant. The order is marked by agreement.

May 11, 2017 the case was continued then to June 1st, 2017 for status so that a hearing date could be set on defendant's motion. The order is marked by agreement.

On June 1st, 2017 a discussion was held regarding what date to set defendant's motion to quash search warrant and suppress evidence.

> "MR. GRUBER: I would like for something in
> the last week of July, meaning the 24th through
> the 28th."

Pursuant to Mr. Gruber's request, I continued the case to July 24th, 2017 for hearing on defendant's motion to quash search warrant. The order is marked on defendant's motion.

Again, the Court fails to see how these continuances are solely attributable to the State. The dates were either continued specifically at the defendant's request or they were continued as a result of the defendant's filing the motion to quash search warrant and notifying the State that they had an expert, therefore necessitating the State to respond to the defendant's motion. Therefore, the Court will make a finding that all of the above-referenced continuances tolled the speedy trial demand time period and are not solely attributable to the State.
Defendant's motion to dismiss is denied.

I believe that leaves us with one more motion, and that is the motion to allow the complaining witness to testify via closed-circuit TV, and I believe that the thought was that we were going to hear that motion shortly prior to the trial, if I recall correctly.
MS. CAPLAN: That's correct.
THE COURT: Okay. Are we still doing that? Is that still how you want to proceed, Mr. Gruber?
MR. GRUBER: That was my understanding, because it's my understanding that they needed to call the witness of either the victim or her father in support of that motion.
THE COURT: I believe that is correct. So we still have a trial date. We're still on
board for the trial date?
MR. GRUBER: We are.
THE COURT: You are my No. 1 priority, Mr. Gruber.
MR. GRUBER: Thank you.
THE COURT: Okay. I will see you all then on the final jury trial status date.
The final jury trial status date, Ms. Caplan, is
MS. CAPLAN: It's still February 8th, Judge.
THE COURT: February 8th.
So next Thursday at 1:30, Mr. Janusz, I'll see you back here then. Thank you.
MR. GRUBER: Thank you, your Honor.