IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL DESHON MATTHEWS #281752

Vs.

JOHN DAVIDS, Warden

LIST OF APPENDIX

The defendant certifies under the penalty of perjury pursuant to 28 USC §1746 that the below list of exhibits are true documents on file in the Michigan Court of Appeals:

Appendix A: State Court's Opinion and Order Denying Appeal

Appendix B: Federal Court's Opinion and Order Denying Habeas Petition

Appendix C: Federal Court's Opinion and Order Denying Petitioners Objection

Appendix D: Sixth Circuit Order Denying Certificate of Appealability

SUBMITTED BY:

MICHAEL DESHON MATTHEWS #281752
IONIA CORRECTIONAL FACILITY
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DATE: August 16, 2021

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL DESHON MATTHEWS #281752

Vs.

JOHN DAVIDS, Warden

APPENDIX-A

STATE COURT'S OPINION AND ORDER DENYING APPEAL

(People v. Matthews, 2018 Mich. App. Lexis 408 (unpublished)

Document: People v. Matthews, 2018 Mich. App. LEXIS 408

People v. Matthews, 2018 Mich. App. LEXIS 408

Copy Citation

Court of Appeals of Michigan

March 1, 2018, Decided

No. 336121

Reporter

2018 Mich. App. LEXIS 408 * | 2018 WL 1122065

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL DESHON MATTHEWS, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by People v. Matthews, 503 Mich. 860, 917 N.W.2d 66, 2018 Mich. LEXIS 1720 (Sept. 12, 2018)
Magistrate's recommendation at, Habeas corpus proceeding at Matthews v. Davids, 2020 U.S. Dist. LEXIS 207865 (W.D. Mich., May 7, 2020)

Prior History: **[*1]** Wayne Circuit Court. LC No. 15-010167-01-FC.

Core Terms

trial court, speedy trial right, restitution, letters, arrest, appointed, factual basis, articulate, delays, speedy trial, court costs, quotation, sentenced, evidentiary hearing, reasons, vacated, costs

Judges: Before: GLEICHER ▾, P.J., and BORRELLO ▾ and SWARTZLE ▾, JJ.

Opinion

PER CURIAM.

Defendant, Michael Deshon Matthews, appeals as of right his convictions and sentences, after a jury trial, of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On October 21, 2016, the trial court sentenced defendant to life without parole for murder, to be served consecutive to a two-year term of imprisonment for felony-firearm. We affirm defendant's convictions, but remand for a factual basis for the imposition of court costs and an evidentiary hearing as to the amount of restitution.

I. BACKGROUND

In the early morning hours of November 22, 2015, defendant and several other individuals went to a nightclub in Detroit. Although they were permitted to enter, defendant and one of these individuals, Joshua Simpson, were later forcibly removed from the club by security. Their subsequent efforts at reentry were rebuffed. Thereafter, defendant asked Simpson for Simpson's handgun. Defendant walked to the front door of the club and again asked to enter. When the door opened, defendant reached in and shot a security guard, Darryl Jeter, **[*2]** Jr., in the head, killing him. Most of these events were captured on surveillance footage taken by an exterior camera.

Defendant was arrested later that day, and Clifford Woodards II was appointed to represent him in this matter. Trial was initially scheduled to begin on April 20, 2016. However, trial was delayed for reasons that will be discussed later in this opinion, and did not begin until September 28, 2016. Between his arrest and trial, defendant sent multiple letters to the trial court. These letters generally had two themes: (1) that defendant was unhappy with Woodards and wanted a new attorney appointed to handle the case, and (2) that defendant believed his right to a speedy trial was being violated by the length of time he remained in custody before trial.

When the trial began, two juries were selected, one to decide the charges against defendant, and the other to decide the charges against Simpson. However, before the trial court began taking evidence, Simpson pleaded guilty to second-degree murder, MCL 750.317, and felony-firearm.[1] Defendant rejected the prosecutor's final plea offer, and his case proceeded before the jury. After hearing the evidence, the jury found defendant guilty **[*3]** of first-degree murder and felony-firearm.

The trial court sentenced defendant to the terms of imprisonment stated at the outset of this opinion. The trial court imposed court costs of $1,300, but did not articulate a factual basis for the imposition of these costs. The trial court also ordered defendant to pay $7,500 in restitution to Jeter's mother as reimbursement for Jeter's funeral expenses. The amount of these expenses was derived from defendant's presentence investigation report (PSIR), which

stated that the family had incurred funeral expenses in this amount, and that documentation would be provided at sentencing to support the figure. While no such documentation was presented at sentencing, defendant raised no objections to the restitution order, and never requested any documentation or other proof of the amount.

II ANALYSIS

On appeal, defendant raises four contentions of error: (1) that the trial court abused its discretion by failing to appoint substitute counsel, (2) that the trial court erred by refusing to dismiss the matter due to the length of time that transpired between defendant's arrest and trial, (3) that the trial court erred by failing to articulate a factual basis **[*4]** for the imposition of $1,300 in court costs, and (4) that the trial court erred by imposing restitution in the amount of $7,500.

A SUBSTITUTION OF COUNSEL

Defendant argues that the trial court abused its discretion when, at a final conference held on June 10, 2016, it rejected his request for substitute counsel without adequately exploring the factual bases for the request. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (quotation marks and citations omitted).

As this Court explained in *Strickland*:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. **[*5]** [*Id.* (quotation omitted).]

"When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *Id.* (quotation omitted). But ultimately, "It is a defendant's responsibility to seek a hearing." *People v Cetaways*, 156 Mich. App. 108, 118; 401 N.W.2d 327 (1986). "[W]hat is required . . . is that the trial court elicit testimony from the attorney and the defendant in order to assess any issues of fact. A full adversary proceeding, with counsel representing both the attorney and the defendant, is not required." 156 Mich. App. at 119. "Indeed, . . . questioning the attorney alone is sufficient in some circumstances, and . . . failure to explore [a] defendant's claim does not always require that the conviction be set aside." *Id.*

Through a number of letters sent to the trial court, defendant made several complaints regarding Woodards and asked that he be replaced. On appeal, defendant first notes that he made one such request in a letter dated February 18, 2016. In this letter, defendant claimed

that Woodards was working with the security guard Jeter and had a personal relationship **[*6]** with him. Defendant also alleged that Woodards was working with the prosecutor to sabotage defendant with a "fabricated video" and with "witnesses that can't place me at the scene." However, at a hearing held on March 11, 2016, the trial court questioned defendant and Woodards regarding this letter. The trial court asked defendant if everything had been "squared away" between him and Woodards, and defendant responded, "Yes." Woodards also confirmed that the two were working together at that point. Further, when Woodards asked defendant if he would consent to Woodards continuing to attempt to negotiate a plea with the prosecutor, defendant agreed to this course of action. Thus, based on the representations of defendant and Woodards at this hearing, whatever concerns existed at the time of the February 18, 2016 letter were resolved, leaving the trial court without any reason to remove Woodards at that point.

Defendant subsequently wrote several additional letters in which he stated various complaints regarding Woodards, and asked that he be given a new attorney. In one letter, dated May 25, 2016, defendant stated that Woodards had been ineffective, although he gave no further explanation. **[*7]** In a second letter dated the same day, defendant wrote that Woodards did not have defendant's "best int[e]rest in heart." Defendant stated that he wanted Woodards "put under investigation," and once again claimed Woodards was "hired by the victim[']s family[.]" Defendant wrote that Woodards was "a retained lawyer and I have not hired him [.]" Then, in a letter received by the trial court on June 9, 2016, defendant generally complained that Woodards had not responded to defendant's questions.

The trial court acknowledged receiving these letters at the June 10, 2016 final conference. The trial court asked to hear from Woodards. Woodards explained that he had presented the video evidence to defendant. On seeing this evidence, defendant claimed that the man who was with Simpson and appeared to have shot Jeter was not defendant. Woodards seemed to find this claim dubious, but nonetheless pursued the issue. Woodards asked defendant to explain who the man in the video was, if not defendant himself, so that Woodards could investigate the matter. At the hearing, defendant stated that he could not identify the man in the video. Woodards stated that he believed he and defendant could work out their **[*8]** apparent disagreement. The trial court denied defendant's request, explaining that it did not believe defendant had presented any reason to discharge Woodards.

On appeal, defendant claims this decision was an abuse of discretion. Defendant largely complains that the trial court "did nothing" to discover whether irreconcilable differences existed between defendant and Woodards. Upon receiving defendant's letters, the trial court heard from Woodards to obtain his perspective. Having heard from both defendant and Woodards, the trial court then made its decision. To the extent defendant believes more factual development was necessary, it was incumbent on him to request a hearing. *Cetaways*, 156 Mich App at 118. Defendant did not request any such hearing, and cannot now complain that the trial court failed to investigate the matter further.

Nor did defendant's letters present good cause to discharge Woodards. Defendant seemed mostly to focus on a belief that Woodards had been retained by Jeter's family in this case. In this regard, defendant simply seems to have a misunderstanding regarding the retention of Woodards. Plainly, Woodards was appointed to represent defendant in this matter by the trial court; he was not retained **[*9]** by the victim's family.

Other than this claim, defendant alleged to have filed a grievance against Woodards, but gave no reason for the grievance. Defendant stated that Woodards was ineffective, but without any further elucidation. Defendant also generally complained that Woodards did not have his best interests at heart and did not respond to unspecified inquiries. As this Court has explained, "A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Strickland*, 293 Mich App at 398 (citations omitted). Defendant's complaints regarding Woodards "lacked specificity and did not involve a difference of opinion with regard to a fundamental trial tactic." *Id.* We note that "neither [defendant's] complaints nor his filing of a grievance established good cause for the appointment of new counsel." 293 Mich App at 397-398. As such, we have no basis for making a finding that defendant received ineffective assistance of counsel.

B SPEEDY TRIAL

Defendant argues that the trial court erred when, at the June 10, 2016 final conference, it denied his request for a dismissal of **[*10]** the charges due to a purported violation of his right to a speedy trial. Because defendant preserved his claim that his right to a speedy trial was violated, this Court "review[s] this constitutional issue de novo." *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999).

As this Court has explained:

> A defendant has the right to a speedy trial under the federal and Michigan constitutions, which the Michigan Legislature statutorily enforces. U.S. Const, Am VI; Const 1963, art 1 § 20; MCL 768.1. This right ensures that a guilty verdict results only from a valid foundation in fact. See *People v Eaton*, 184 Mich App 649, 655-656; 459 NW2d 86 (1990). But see *United States v MacDonald*, 456 U.S. 1, 8-9; 102 S Ct 1497; 71 L Ed 2d 696 (1982). Michigan courts apply the four-part balancing test articulated in *Barker v Wingo*, 407 U.S. 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972), to determine if a pretrial delay violated a defendant's right to a speedy trial. See *People v Collins*, 388 Mich 680; 202 NW2d 769 (1972). The test requires a court to consider "(1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." *People v Williams*, 163 Mich App 744, 755; 415 NW2d 301 (1987). This fourth element, prejudice, is critical to the analysis. A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice. *People v Taylor*, 110 Mich App 823, 828-829; 314 NW2d 498 (1981). However, a delay of eighteen months or more, as in this case, is presumed prejudicial and places a burden on the prosecutor to rebut that presumption. *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994). [*Cain*, 238 Mich App at 111-112.]

We begin with the last **[*11]** element, prejudice. Again, this is a "critical" part of the analysis. 238 Mich App at 112. Because the time between defendant's arrest and his trial was well under 18 months, 2 prejudice is not presumed, and the burden is on defendant to prove that he suffered prejudice. *Id.* There are two types of prejudice recognized in a speedy trial claim: "prejudice to the person and prejudice to the defense." *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997).

As our Supreme Court has explained, "[p]rejudice to the defense is the more serious concern, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *People v Williams*, 475 Mich 245, 264; 716 NW2d 208 (2006) (quotation marks and citations omitted). In this case, defendant does not even attempt to argue that he suffered prejudice to his defense, 3 nor is any such prejudice apparent from the record. There is no evidence that the roughly 10 months that passed between defendant's arrest and his trial caused any evidence to go missing, any witnesses to be lost, or otherwise affected defendant's ability to present a defense.

Defendant only argues that he suffered personal prejudice. He first cites a portion of the following passage from *United States v Marion*, 404 U.S. 307, 320; 92 S Ct 455; 30 L Ed 2d 468 (1971):

> It is apparent also that very little support for appellees' position emerges from a **[*12]** consideration of the purposes of the Sixth Amendment's speedy trial provision, a guarantee that this Court has termed an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an

> accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . . . So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer **[*13]** a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. [Quotation marks and citations omitted.]

Defendant then explains that his "repeated attempts to inform the trial court that he wanted to be brought to trial implicates the personal prejudice discussed in *Marion*. The fact that [defendant] had been assigned counsel and was compelled to write letters to the judge underscores this point."

"General allegations of prejudice are insufficient to establish that a defendant was denied the right to a speedy trial." *People v Walker*, 276 Mich App 528, 544-545; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich. 1059, 743 N.W.2d 914 (2008). All defendant has done is conclusively assert, without any basis in fact, that he suffered the type of prejudice discussed in *Marion*. His letters similarly raised only general concerns regarding his inability to be with his family while he was incarcerated. On this record we conclude that defendant has failed to demonstrate prejudice.

Even if we presume prejudice, the remaining factors do not demonstrate a violation of defendant's speedy trial rights. The first factor, the length of the delay, weighs against defendant. Again, no prejudice is presumed from a 10-month delay. *Cain*, 238 Mich App at 112.[4] A 10-month delay is not exceptionally **[*14]** long, and is far less of a delay than has ultimately been found not to result in a violation of the speedy trial right in other cases. See, e.g., *People v Holtzer*, 255 Mich App 478, 491-495; 660 NW2d 405 (2003) (finding a 19-month delay "somewhat lengthy," but ultimately not warranting dismissal); *Cain*, 238 Mich App at 112-113 (explaining that a 27-month delay was "longer than a routine period between arrest and trial[,]" but did "not approach the outer limits of other delays" that this Court has addressed).

The second factor, the reasons for the delay, further undercuts defendant's claim. "In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution." *People v Waclawski*, 286 Mich App 634, 666; 780 NW2d 321 (2009). Unexplained delays, as well as delays inherent in the legal system, such as docket congestion, are charged against the prosecution. *Id.* But while delays inherent in the legal system are technically charged to the prosecution, "they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id.* (quotation omitted).

Through counsel, defendant initially agreed to a trial date of April 20, 2016. However, it must be noted that the trial court initially attempted to set a trial date **[*15]** of March 23, 2016, and that Woodards asked for a different date due to his own schedule. This resulted in a trial date of April 20, 2016. Thus, were it not for defense counsel's schedule, trial would have initially been set a month earlier.

That said, trial did not begin until September 28, 2016. However, the reasons trial did not occur as scheduled were entirely reasonable, having essentially been caused by the need to sort out issues related to Simpson, who was to stand trial with defendant. On March 22, 2016, approximately a month before the date scheduled for trial, the trial court ordered Simpson to undergo a competency evaluation. This issue was not resolved until June 10, 2016, when the trial court found Simpson competent to stand trial. At the final conference held that same day, the trial court set trial for September 28, 2016. This date was selected because Simpson was scheduled to stand trial in an unrelated carjacking case, which would be completed on September 27, 2016. On the whole, while some routine delays might be attributable to the prosecution as a technical matter, it does not appear that any delays that

could be charged to the prosecutor were unreasonable. This **[*16]** factor weighs against finding a violation of the right to a speedy trial.[5]

The third factor is the assertion of the right to a speedy trial. *Cain*, 238 Mich App at 111-112. Defendant did assert his right to a speedy trial on multiple occasions, albeit somewhat informally. At least arguably, this factor weights in favor of defendant. However, this is the only factor that ultimately weighs in defendant's favor. We cannot conclude that defendant's right to a speedy trial was violated in this instance. To do so would essentially be a conclusion that defendant's right to a speedy trial was violated simply because he wrote several letters raising the issue, as that is the only factor weighing in his favor. The trial court correctly denied defendant's request for a dismissal of the case based on his claim that his right to a speedy trial had been violated.

C COURT COSTS

Defendant argues that the trial court erred by failing to articulate a factual basis for the imposition of $1,300 in court costs, and asks that the trial court's imposition of these costs be vacated. The prosecutor concedes that the trial court failed to articulate a factual basis for the imposition of these costs, but asks this Court to remand the matter **[*17]** to provide the trial court with the opportunity to articulate a factual basis for the imposition of costs rather than vacate the award. Having conceded error, we grant the request of the prosecutor and remand the matter to the trial court to articulate a factual basis for the imposition of costs. See, *People v Konopka*, 309 Mich. App. 345, 351-356; 869 N.W.2d 651 (2015); *People v Cunningham*, 496 Mich 145, 147, 154-155; 852 NW2d 118 (2014).

D. RESTITUTION

Finally, defendant contends that the trial court abused its discretion by imposing $7,500 in restitution, and asks that this portion of the judgment of sentence be vacated. The prosecutor agrees that defendant is entitled to some measure of relief, but asks that rather than vacate the restitution order, we remand the matter for an evidentiary hearing regarding the amount of restitution. We grant the request of the prosecutor and remand the matter for an evidentiary hearing regarding the amount of restitution in this matter.

Affirmed in part, and remanded for the trial court to state a factual basis for its order of court costs and if necessary, to conduct an evidentiary hearing regarding the amount of restitution. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Stephen L. Borrello

/s/ Brock A. Swartzle

Footnotes

[1] Simpson was sentenced pursuant to a plea agreement. His convictions and sentences are not at issue in this appeal.

2 "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Defendant was arrested on November 22, 2015, and his trial began on September 28, 2016, a period of approximately 10 months.

3 Rather, defendant attempts to argue that prejudice to the defense should not be given "undue emphasis . . . ." To this, we respond with this Court's observation that "[o]ur Supreme Court has repeatedly recognized in the context of lengthy pretrial incarcerations that the most significant concern is whether the defendant's ability to defend himself or herself has been prejudiced." *People v Waclawski*, 286 Mich App 634, 668-669; 780 NW2d 321 (2009).

4 Cf. *Williams*, 475 Mich at 262 (when examining the first *Barker* factor, noting that the delay was 19 months in that case, and thus, presumptively prejudicial).

5 It is also true that two adjournments occurred at defense counsel's request. However, we do not see either adjournment as particularly relevant. The first was an adjournment of what was to be a final conference from February 18, 2016, to March 11, 2016. This adjournment did not seem to affect what was expected to be the trial date at that time, April 20, 2016. Woodards did obtain another adjournment of a pretrial conference from May 16, 2016, to May 25, 2016. However, this was during the period that the issue of Simpson's competency was unresolved, and thus, this adjournment also seems to have had no effect on the date defendant's trial ultimately began.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL DESHON MATTHEWS #281752

Vs.

JOHN DAVIDS, Warden

APPENDIX-B

FEDERAL MAGISTRATE'S REPORT & RECOMMENDATION OPINION

(Matthews v. Davids, 2020 U.S. Dist. Lexis 207865) (unpublished)

Document: Matthews v. Davids, 2020 U.S. Dist. LEXIS 207865

Matthews v. Davids, 2020 U.S. Dist. LEXIS 207865

Copy Citation

United States District Court for the Western District of Michigan, Southern Division

May 7, 2020, Decided; May 7, 2020, Filed

Case No. 1:19-cv-310

Reporter

2020 U.S. Dist. LEXIS 207865 * | 2020 WL 7327612

MICHAEL DESHON MATTHEWS, Petitioner, v. JOHN DAVIDS, Respondent.

Subsequent History: Adopted by, Writ of habeas corpus denied, Certificate of appealability denied, Objection overruled by Matthews v. Davids, 2020 U.S. Dist. LEXIS 206978 (W.D. Mich., Nov. 5, 2020)

Prior History: People v. Matthews, 2018 Mich. App. LEXIS 408, 2018 WL 1122065 (Mich. Ct. App., Mar. 1, 2018)

Core Terms

court of appeals, trial court, restitution, allegations, substitute counsel, state court, good cause, appointed, letters, speedy trial, court costs, speedy trial right, certificate, pre-trial, custody, factors, grounds, delays, cognizable, recommend, arrest, fines, clearly established federal law, order to pay, incarcerated, quotation, courts, raises

Counsel: **[*1]** Michael Deshon Matthews #281752, petitioner, Pro se, Ionia, MI.

For John Davids, Warden, respondent: Andrea M. Christensen-Brown, Scott Robert Shimkus , MI Dept Attorney General (Appellate), Appellate Division, Lansing, MI.

Judges: SALLY J. BERENS, United States Magistrate Judge.

Opinion by: SALLY J. BERENS

Opinion

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Petitioner Michael Deshon Matthews is incarcerated with the Michigan Department of Corrections at the Ionia Correctional Facility (ICF) in Ionia, Ionia County, Michigan. Following a jury trial in the Wayne County Circuit Court, Petitioner was convicted of (1) first-degree murder, in violation of Mich. Comp. Laws § 750.316; and (2) possession of a firearm during the commission of a felony (felony firearm), in violation of Mich. Comp. Laws § 750.227b. On October 21, 2016, the court sentenced Petitioner to life imprisonment on the first-degree murder conviction, and two years' imprisonment on the felony firearm conviction, with the prison terms to be served consecutively.

On April 18, 2019, Petitioner filed his habeas corpus petition. The application is deemed filed when handed to prison authorities for mailing to the federal court. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Petitioner placed his petition in the **[*2]** prison mailing system on April 18, 2019. (Pet., ECF No. 1, PageID.11.)

The petition raises four grounds for relief, as follows:

> I. DID [THE] TRIAL COURT ERR IN DENYING [PETITIONER'S] MOTION FOR SUBSTITUTE COUNSEL IN VIOLATION OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS?
>
> II. WAS [PETITIONER] DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE HE WAS ARRESTED ON OR ABOUT NOVEMBER 22, 2015 AND TR[IA]L BEGAN ON SEPTEMBER 28, 2016?
>
> III. DID THE TRIAL COURT ERR IN ASSESSING [PETITIONER] $1,200 IN COURT COSTS? 1
>
> IV. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ORDERING $7,005[]IN RESTITUTION? 2

(Pet., ECF No. 1, PageID.5-6, 8-9.) Respondent has filed an answer to the petition (ECF No. 10), stating that the grounds should be denied because Petitioner has not exhausted state remedies for all grounds, the grounds are not cognizable, or the grounds lack merit. Upon review and applying the standards of the Antiterrorism and Effective Death Penalty Act of

1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), I find that the grounds are lacking in merit.

Accordingly, I recommend that the petition be denied.

Discussion

I. Factual allegations

In addressing Petitioner's appeal, the Michigan Court of Appeals summarized the basic underlying facts:

> In the **[*3]** early morning hours of November 22, 2015, [Petitioner] and several other individuals went to a nightclub in Detroit. Although they were permitted to enter, [Petitioner] and one of these individuals, Joshua Simpson, were later forcibly removed from the club by security. Their subsequent efforts at reentry were rebuffed. Thereafter, [Petitioner] asked Simpson for Simpson's handgun.
>
> [Petitioner] walked to the front door of the club and again asked to enter. When the door opened, [Petitioner] reached in and shot a security guard, Darryl Jeter, Jr., in the head, killing him. Most of these events were captured on surveillance footage taken by an exterior camera.
>
> [Petitioner] was arrested later that day, and Clifford Woodards II was appointed to represent him in this matter. Trial was initially scheduled to begin on April 20, 2016. However, trial was delayed for reasons that will be discussed later in this opinion, and did not begin until September 28, 2016. Between his arrest and trial, [Petitioner] sent multiple letters to the trial court. These letters generally had two themes: (1) that [Petitioner] was unhappy with Woodards and wanted a new attorney appointed to handle the case, and (2) **[*4]** that [Petitioner] believed his right to a speedy trial was being violated by the length of time he remained in custody before trial.
>
> When the trial began, two juries were selected, one to decide the charges against [Petitioner], and the other to decide the charges against Simpson. However, before the trial court began taking evidence, Simpson pleaded guilty to second-degree murder, MCL 750.317, and felony-firearm. [Petitioner] rejected the prosecutor's final plea offer, and his case proceeded before the jury. After hearing the evidence, the jury found [Petitioner] guilty of first-degree murder and felony-firearm.
>
> The trial court sentenced [Petitioner] to the terms of imprisonment stated at the outset of this opinion. The trial court imposed court costs of $1,300, but did not articulate a factual basis for the imposition of these costs. The trial court also ordered [Petitioner] to pay $7,500 in restitution to Jeter's mother as reimbursement for Jeter's funeral expenses. The amount of these expenses was derived from [Petitioner]'s presentence investigation report (PSIR), which stated that the family had incurred funeral expenses in this amount, and that documentation would be provided at sentencing **[*5]** to support the figure. While no such documentation was presented at sentencing, [Petitioner] raised no objections to the restitution order, and never requested any documentation or other proof of the amount.

People v. Matthews, No. 336121, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *1 (Mich. Ct. App. Mar. 1, 2018) (footnotes omitted).

Petitioner, with the assistance of counsel, appealed his conviction raising the same issues he raises in this Court. (Pet'r's Br., ECF No. 1-1, PageID.25.) The Michigan Court of Appeals affirmed the convictions but remanded to establish factual bases for the amount of restitution and court costs. 2018 Mich. App. LEXIS 408, [WL] at *7.

On March 30, 2018, while awaiting a hearing in the trial court, Petitioner applied pro per for leave to appeal the court of appeals decision to the Michigan Supreme Court. (ECF No. 11-11, PageID.314.) In his application to the Michigan Supreme Court, Petitioner raised the same first three issues he raises in this Court. (*Id.*, PageID.316, 319, 322.) On September 12, 2018, the Michigan Supreme Court denied Petitioner's application for leave to appeal. (*Id.*, PageID.313.)

On November 15, 2018, after the state supreme court denied Petitioner's application, the trial court held a hearing to establish the factual bases for the court costs and restitution it had imposed with **[*6]** the conviction. (ECF No. 12-1, PageID.388.) The trial court affirmed the $1,300 in court costs but eliminated the $7,500 in restitution because it lacked detailed documentation to explain the figure.[3] (Post-conviction Hr'g Tr., ECF No. 12-1, PageID.390-392.)

II. AEDPA standard

The AEDPA "prevents federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316, 135 S. Ct. 1372, 191 L. Ed. 2d 464 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only **[*7]** the holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Williams*, 529 U.S. at 381-82; *Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37-38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting **[*8]** *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)). In other words, "[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue a state court made is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (en banc); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Substitute Counsel

Petitioner alleges that his right to counsel under the Sixth Amendment was violated because the trial court denied his request for substitute counsel without adequately establishing the factual bases for his request.

Petitioner wrote several letters to the trial court alleging several issues that he had with his counsel and requesting a substitution. In Petitioner's first letter dated February 18, 2016, he alleged that his counsel "had a personal relationship" with the victim and "was working with the prosecutor to sabotage [Petitioner] with a 'fabricated video' and with 'witnesses that can't place [Petitioner] at **[*9]** the scene.'" *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2. At a pre-trial hearing on March 11, 2016, when the trial court asked "if everything had been 'squared away' between [Petitioner] and [his counsel,]" Petitioner responded, "Yes." *Id.* Petitioner further consented to his counsel's efforts to negotiate a plea agreement. After the March 11, 2016 hearing, but before the final pre-trial conference, Petitioner wrote several more letters to the trial court complaining that his counsel did not respond to his questions, was "ineffective," and "did not have [Petitioner's] 'best int[e]rest in heart.'" 2018 Mich. App. LEXIS 408, [WL] at *3. Petitioner further alleged that his counsel was "'hired by the victim[']s family," claiming his counsel was "a retained lawyer" whom Petitioner had not hired. *Id.* At the final pre-trial conference, the trial court asked Petitioner's counsel to respond to the allegations. Petitioner's counsel explained to the trial court that he and Petitioner had difficulty resolving a disagreement about the identity of an individual in a security video, but Petitioner's counsel remained confident that they could work out any disagreement. After listening to counsel's explanation, the trial court explained to Petitioner that he had not provided any **[*10]** reason to substitute counsel. The court therefore denied Petitioner's request.

The Sixth Amendment provides a criminal defendant with the right "to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. One element of that right is the right to have counsel of one's choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). However, the right to counsel of choice is not without limits. *Id.* at 148; *United States v. Mooneyham*, 473 F.3d 280, 291 (6th Cir. 2007). "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 548 U.S. at 151 (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989)). "'An indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate "good cause" to warrant substitution of counsel.'" *Mooneyham*, 473 F.3d at 291 (quoting *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990)); *see also Caplin & Drysdale*, 491 U.S. at 624 ("[T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."). Thus, where a court is faced with a defendant's request to effect a change in his representation by way of a motion to substitute counsel, the court must determine whether there is good cause for the substitution by balancing "the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice." *United States v. Jennings*, 83 F.3d 145, 148 (6th Cir. 1996).

Although the Michigan Court of Appeals **[*11]** cited only Michigan cases in its analysis on this claim, the standard it applied inquired whether Petitioner had established that there was good cause to substitute counsel:

> "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v. Strickland*, 293 Mich. App. 393, 397, 810 N.W.2d 660; 293 Mich. App. 393, 810 N.W.2d 660 (2011) (quotation marks and citations omitted).
>
> As this Court explained in *Strickland*:
>
> > An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Id.* (quotation omitted).]

Matthews, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2.

On appeal, Petitioner alleged that the trial court abused its discretion because it "did nothing to determine whether . . . there were irreconcilable differences between **[*12]** [Petitioner] and his counsel." (Ex. 1 Supp. Pet., ECF No. 1-1, PageID.41.) The Michigan Court of Appeals found Petitioner's argument unpersuasive because the trial court heard from Petitioner through his multiple letters as well as from his counsel at pre-trial hearings. The court of appeals continued, "[t]o the extent [Petitioner] believes more factual development was necessary, it was incumbent on him to request a hearing. [Petitioner] did not request any such hearing, and cannot now complain that the trial court failed to investigate the matter further." *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *3. Indeed, Petitioner cannot demonstrate that the trial court should have inquired more extensively into Petitioner's request for substitute counsel because "the clearly established law does not indicate that the trial court had a duty to conduct a good cause inquiry before determining whether to grant or deny" Petitioner's request. *Brooks v. Lafler*, 454 F. App'x 449, 452 (6th Cir. 2012). Thus, this determination by the court of appeals was not unreasonable.

Likewise, Petitioner has not established that the court of appeals was unreasonable when it determined the allegations he made against his counsel failed to provide good cause for substitute counsel. The court of appeals determined **[*13]** that the allegations from Petitioner's letters failed to establish good cause for substitute counsel because the allegations either had been resolved, had been found to be factually false, or had been had been too general and unsupported.

The court of appeals' holding that Petitioner's earliest allegations—those before the March 11, 2016, hearing—had been resolved is not unreasonable. After making these early allegations, Petitioner later confirmed to the trial court they had been "squared away." *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2. Thus, the court of appeals was entirely reasonable in determining that the allegations before the March 11, 2016 hearing failed to establish good cause to warrant substitution of counsel.

Petitioner fares no better in his later allegations. Petitioner arguably alleged grounds to establish good cause for substitution of counsel when he asserted that his counsel had been retained on his behalf by the victim's family. However, the court of appeals found that Petitioner's counsel had been appointed not retained. *Id.* at *3. Petitioner does not challenge any of the facts relied upon by the Michigan Court of Appeals as beyond the record nor does he provide any new information to support his allegation. Thus, **[*14]** Petitioner fails to point to any evidence, much less clear and convincing evidence, to displace the State court's factual finding that his counsel had been appointed. *See* 28 U.S.C. § 2254(e)(1); *Davis*, 658 F.3d at 531. As a result, the court's finding was not unreasonable.

The Michigan Court of Appeals determined that Petitioner's remaining allegations were too general and/or were otherwise unsupported:

> Other than this claim, defendant alleged to have filed a grievance against Woodards, but gave no reason for the grievance. Defendant stated that

> Woodards was ineffective, but without any further elucidation. Defendant also generally complained that Woodards did not have his best interests at heart and did not respond to unspecified inquiries. As this Court has explained, "A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Strickland*, 293 Mich. App. at 398 (citations omitted). Defendant's complaints regarding Woodards "lacked specificity and did not involve a difference of opinion with regard to a fundamental trial tactic." *Id.* We note that "neither [defendant's] complaints nor **[*15]** his filing of a grievance established good cause for the appointment of new counsel." *Id.* at 397-398. As such, we have no basis for making a finding that defendant received ineffective assistance of counsel.

Matthews, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *3. Petitioner's allegations fail to demonstrate "a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict with [his] attorney in order to warrant substitution." *Morris v. Stewart*, No. 17-1478, 2017 WL 9248729, at *1 (6th Cir. Nov. 15, 2017) (citing *Henness v. Bagley*, 644 F.3d 308, 321 (6th Cir. 2011); *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985)). The Michigan Court of Appeals determination on these allegations was not unreasonable.

Thus, Petitioner has failed to show that the court's determination regarding denial of substitute counsel "was contrary to, or involved an unreasonable application of, clearly established Federal law" or that it resulted from "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). Consequently, Petitioner is not entitled to habeas relief on this ground.

IV. Speedy Trial

Petitioner alleges that he was deprived of his right to a speedy trial in violation of the Sixth Amendment because 10 months elapsed between his arrest and his trial. Petitioner's contention that his convictions were unconstitutional because of a "speedy trial" violation falls short under the AEDPA standard.

In *Brown v. Romanowski*, 845 F.3d 703 (6th Cir. 2017), the Sixth Circuit reviewed the clearly established federal **[*16]** law with respect to the constitutional requirement for a speedy trial:

> The Sixth Amendment guarantees in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. These rights apply to the states through the Fourteenth Amendment. *Klopfler v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). The purpose of the speedy-trial guarantee is to protect the accused against oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that evidence will be lost or memories diminished. *Doggett v. United States*, 505 U.S. 647, 654, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); *United States v. Loud Hawk*, 474 U.S. 302, 312, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986); *United States v. MacDonald*, 456 U.S. 1, 7-8, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982); *Barker v. Wingo*, 407 U.S. 514, 532-33, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *United States v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966). The sole remedy for a violation of the speedy-trial right is dismissal of the charges. *See Strunk v. United States*, 412 U.S. 434, 439-40, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973); *United States v. Brown*, 169 F.3d 344, 348 (6th Cir. 1999).

> In *Barker*, the Supreme Court established a four-factor test for determining whether a defendant has been denied the constitutionally guaranteed right to a speedy trial. *Barker* held that a court must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. No one factor is dispositive. Rather, they are related factors that must be considered together with any other relevant circumstances. *Id.* at 533.

Brown, 845 F.3d at 712.

The Michigan Court of Appeals' analysis expressly applied the *Barker* four-factor test:

> We begin with the last element, **[*17]** prejudice. Again, this is a "critical" part of the analysis. [*People v. Cain*, 605 N.W.2d 28, 238 Mich. App. 95, 112 (1999).] Because the time between defendant's arrest and his trial was well under 18 months, prejudice is not presumed, and the burden is on defendant to prove that he suffered prejudice. *Id.* There are two types of prejudice recognized in a speedy trial claim: "prejudice to the person and prejudice to the defense." *People v Gilmore*, 222 Mich App 442, 461-462, 564 N.W.2d 158; 222 Mich. App. 442, 564 NW2d 158 (1997).
>
> As our Supreme Court has explained, "[p]rejudice to the defense is the more serious concern, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *People v Williams*, 475 Mich 245, 264, 716 N.W.2d 208; 475 Mich. 245, 716 NW2d 208 (2006) (quotation marks and citations omitted). In this case, defendant does not even attempt to argue that he suffered prejudice to his defense, nor is any such prejudice apparent from the record. There is no evidence that the roughly 10 months that passed between defendant's arrest and his trial caused any evidence to go missing, any witnesses to be lost, or otherwise affected defendant's ability to present a defense.
>
> Defendant only argues that he suffered personal prejudice. He first cites . . . from *United States v Marion*, 404 US 307, 320, 92 S. Ct. 455, 30 L. Ed. 2d 468; 404 U.S. 307, 92 S Ct 455, 30 L. Ed. 2d 468; 404 U.S. 307, 92 S. Ct. 455, 30 L Ed 2d 468 (1971)[.]
>
> * * *
>
> Defendant then explains that his "repeated attempts to inform the trial court that he wanted to be brought **[*18]** to trial implicates the personal prejudice discussed in *Marion*. The fact that [defendant] had been assigned counsel and was compelled to write letters to the judge underscores this point."
>
> "General allegations of prejudice are insufficient to establish that a defendant was denied the right to a speedy trial." *People v Walker*, 276 Mich App 528, 544-545, 741 N.W.2d 843; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). All defendant has done is conclusively assert, without any basis in fact, that he suffered the type of prejudice discussed in *Marion*. His letters similarly raised only general concerns regarding his inability to be with his family while he was incarcerated. On this record we conclude that defendant has failed to demonstrate prejudice.

Matthews, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *4-5 (footnotes omitted).

The Michigan Court of Appeals continued its analysis through each of the remaining *Barker* factors. Regarding the length of delay, the court of appeals determined that "[a] 10-month delay is not exceptionally long." 2018 Mich. App. LEXIS 408, [WL] at *6. As for the causes of the delays commencing Petitioner's trial, the court of appeals found that some of the delays were due to Petitioner's trial counsel, and of those "attributable to the prosecution as a technical matter, it does not appear that any delays that could be charged **[*19]** to the prosecutor were unreasonable." *Id.* The court of appeals held that both the length and cause of delay factors weighed against Petitioner. The court held that on *Barker*'s third factor,

Petitioner's assertion of his right to a speedy trial, the factor weighed in favor of Petitioner. Nonetheless, the court of appeals rejected Petitioner's speedy trial claim. *Id.*

In the Michigan state courts, the right to a speedy trial is guaranteed by the United States constitution, U.S. Const. amend VI; the Michigan constitution, Mich. Const. 1963 art.1, § 20; state statute, Mich. Comp. Laws § 768.1; and court rule, Mich. Ct. R. 6.004(D). *Cain*, 238 Mich. App. at 112; *People v. McLaughlin*, 258 Mich. App. 635, 672 N.W.2d 860, 867 (Mich. Ct. App. 2003). The Michigan state courts apply the *Barker* four-factor test "to determine if a pretrial delay violated a defendant's right to a speedy trial[,]" whether the speedy trial right at issue arises from federal or state law. *Cain*, 238 Mich. App. at 112 (citing *People v. Collins*, 388 Mich. 680, 202 N.W.2d 769 (Mich. 1972)).[4] Thus, it cannot be said that the state courts applied the wrong standard in evaluating Petitioner's "speedy trial" claim.

The *Barker* Court acknowledged that its test was a flexible balancing test and, thus, "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Barker*, 407 U.S. at 529-30. The flexibility of the test has significant implications for this Court's review under the AEDPA standard. **[*20]** "'The more general the rule at issue'—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'" *Renico v. Lett*, 559 U.S. 766. 776, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)).

The Michigan Court of Appeals' balancing of the four factors does not appear to be unreasonable. The length of delay in this instance was not remarkable. "[A] delay is presumptively prejudicial when it approaches one year." *United States v. Gardner*, 488 F. 3d 700, 719 (6th Cir. 2007). Delays of less than a year, on the other hand, might be so ordinary that they do not even trigger analysis of the other factors. *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Indeed, the Sixth Circuit has suggested that a "ten-month delay . . . is likely right at the line to trigger an analysis of the remaining factors." *United States v. Brown*, 498 F.3d 523, 530 (6th Cir. 2007). Certainly, the conclusion of the court of appeals that prejudice cannot be presumed from a ten-month delay is not unreasonable.

The Michigan Court of Appeals and trial court hearing transcripts indicate that the delays bringing Petitioner to trial were largely due either to the unavailability of Petitioner's counsel or to delays sorting out issues with Petitioner's co-defendant. Although "[a] deliberate attempt to hamper the defense should be weighted heavily against **[*21]** the government . . . , [a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily . . . ." *Barker*, 407 U.S. at 531. The court of appeals concluded that any delays in Petitioner's case attributable to the prosecution were not unreasonable. The court of appeals' determination is itself not unreasonable.

With regard to the third factor, the court of appeals determined that "[Petitioner] did assert his right to a speedy trial on multiple occasions, albeit somewhat informally." *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *6. Petitioner wrote multiple letters to the trial court informing how long he had been in custody, asking that his case be dismissed on speedy trial grounds, and that he should be brought to trial. The court of appeal determined that, "[a]t least arguably, this factor weights in favor of [Petitioner]." *Id.* The court of appeals' conclusion on the third factor was not unreasonable.

Finally, with respect to prejudice, the *Barker* Court identified three specific categories of harm that might accrue to a pretrial detainee because of undue delay in proceeding with trial: "(i) . . . oppressive pretrial incarceration; (ii) . . . anxiety and concern of the accused; and (iii) . . . the defense [could] be impaired." **[*22]** *Barker*, 407 U.S. at 532 (footnote omitted). The court of appeals acknowledged that Petitioner had remained detained for the 10 months leading up to his trial, and that he had made allusions and conclusory allegations relating to anxiety resulting from his detention. Nonetheless, the court of appeals also noted that Petitioner had failed to identify how his defense was impaired in any respect.

After balancing the factors, the court of appeals rejected Petitioner's speedy trial claim because holding otherwise would "be a conclusion that [Petitioner's] right to a speedy trial was violated simply because he wrote several letters raising the issue, as that is the only factor weighing in his favor." *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *6. Whether this Court would weigh the factors the same way is immaterial. All that matters

is whether Petitioner has shown that the court of appeals' determination was objectively unreasonable. He has failed to make that showing. To the contrary, the state court's factual determinations and its application of the *Barker* test, the clearly established federal law, were reasonable. As a consequence, Petitioner is not entitled to habeas relief on this ground.

V. Court Costs and Restitution

Petitioner challenges the trial court's **[*23]** assessment of court costs and restitution. However, Petitioner's final two claims are not cognizable on habeas review. In *Washington v. McQuiggin*, 529 F. App'x 766 (6th Cir. 2013), the Sixth Circuit Court of Appeals considered the limits of habeas jurisdiction with regard to orders to pay fines or restitution. The court explained that under Section 2254 subject matter jurisdiction exists only for claims that a person is "in custody" in violation of the Constitution or laws of the United States. *Washington*, 529 F. App'x at 772-773 (citing *Dickerson v. United States*, 530 U.S. 428, 439 n.3, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (quoting 28 U.S.C. § 2254(a)). Orders compelling the payment of fines or restitution, therefore, "fall outside the scope of the federal habeas statute because they do not satisfy the "in custody" requirement of a cognizable habeas claim." *Id.* at 773; *see also United States v. Watroba*, 56 F.3d 28 (6th Cir. 1995) (holding that Section 2255 does not grant subject matter jurisdiction over restitution orders); *Michaels v. Hackel*, 491 Fed. App'x 670, 671 (6th Cir. 2012) (stating that a fine is not cognizable under Section 2254 and citing *Watroba*, 56 F.3d at 29); *Kennedy v. Nagy*, No. 18-1463, 2018 U.S. App. LEXIS 36308, 2018 WL 3583212, at *2 (6th Cir. July 12, 2018) ("Kennedy argues that the trial court erred by ordering him to pay restitution, court costs, and attorney's fees without first considering his financial situation .... [T]hese claims are not cognizable in a federal habeas proceeding because noncustodial punishments do not satisfy the 'in custody' requirement of § 2254."). That a petitioner might be subject to a custodial penalty does **[*24]** not make available to him collateral relief from a noncustodial punishment such as an order to pay fines or restitution. *Washington*, 529 F. App'x at 773.

In addition to restitution, Petitioner has been ordered to pay court costs, which are neither restitution nor fees. In *Washington*, the noncustodial penalty at issue was not an order to pay fines or restitution either—it was an order to pay attorney's fees. That difference, however, did not make Washington's claim cognizable on habeas review:

> For habeas purposes, it is difficult to distinguish—and Washington does not attempt to distinguish—an order imposing attorney's fees from a fine or restitution order. Although the question of whether a claim satisfies the "in custody" requirement is to some extent one of degree, *Nelson v. Campbell*, 541 U.S. 637, 646, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004), a fee-repayment order falls outside of even "the margins of habeas," *id.*, because it is "not a serious restraint on . . . liberty as to warrant habeas relief." *Tinder*, 725 F.2d at 805; *Bailey*, 599 F.3d at 979 (quoting *Tinder*).

Washington, 529 F. App'x at 772-73. For the same reasons, Petitioner's habeas challenge to the costs imposed upon him is without merit because it is outside the scope of the federal habeas statute.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be **[*25]** granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of

appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). *Murphy*, 263 F.3d at 467. Consequently, I have examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

I find that reasonable jurists could not conclude that this Court's dismissal **[*26]** of Petitioner's claims would be debatable or wrong. Therefore, I recommend that the Court deny Petitioner a certificate of appealability.

Moreover, although I conclude that Petitioner has failed to demonstrate that he is in custody in violation of the constitution and has failed to make a substantial showing of a denial of a constitutional right, I would not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied. I further recommend that a certificate of appealability be denied. Finally, I recommend that the Court not certify that an appeal would not be taken in good faith.

Dated: May 7, 2020

/s/ Sally J. Berens

SALLY J. BERENS

U.S. Magistrate Judge

Footnotes

1 Other documents, including those Petitioner attached to his petition, suggest the trial court imposed court costs of $1,300 rather than $1,200. For the purposes of this report and recommendation, the amounts are inconsequential.

2 Likewise, other documents suggest that the trial court imposed restitution of $7,500 rather than $7,005.

3

The trial court left open an opportunity to reinstate the restitution upon submission of evidence justifying the amount. (*See* Post-conviction Hr'g Tr., ECF No. 12-1, PageID.391-392.) However, the record before this Court lacks any indication that the restitution was subsequently reinstated.

4

Although the state courts apply the clearly established federal law, the *Barker* test, to evaluate "speedy trial" claims, they apply it a little differently than the federal courts. The state courts shift the burden of proof with respect to prejudice based on the length of the delay, drawing the line at 18 months. *Cain*, 238 Mich. App. at 112. The federal courts, however, eschew such a "bright-line rule." *Brown*, 845 F.3d at 717. Instead, the federal "courts must conduct a functional analysis of the right in the particular contest of the case." *Id.* (quoting *United States v. Ferreira*, 665 F.3d 701, 709 (6th Cir. 2011) (quoting *Barker*, 407 U.S. at 522)) (internal quotation marks omitted). This is a difference between the federal and state applications of the test, but the difference does not render the state court's application unreasonable or contrary to *Barker*. *See, e.g., Brown v. Bobby*, 656 F.3d 325, 329-330 (6th Cir. 2011) (court concluded Ohio's use of a 270-day rule was not "contrary to" *Barker*).

sound, and the Court will order accordingly.

Therefore:

IT IS HEREBY ORDERED that the Objections (ECF No. **[*5]** 16) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 13) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (ECF No. 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted; however, the Court does not conclude that any issue Petitioner might raise on appeal would be frivolous.

Dated: November 5, 2020

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge

Footnotes

[1] In *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the Supreme Court established four factors for determining whether a defendant has been denied the Sixth Amendment right to a speedy trial. A court must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant (R&R, ECF No. 13 at PageID.404).

Matthews v. Davids, 2020 U.S. Dist. LEXIS 206978

Copy Citation

United States District Court for the Western District of Michigan, Southern Division

November 5, 2020, Decided; November 5, 2020, Filed

Case No. 1:19-cv-310

Reporter

2020 U.S. Dist. LEXIS 206978 * | 2020 WL 6498909

MICHAEL DESHON MATTHEWS, Petitioner, v. JOHN DAVIDS, Respondent.

Subsequent History: Habeas corpus proceeding at, Certificate of appealability denied, Request denied by, As moot Matthews v. Davids, 2021 U.S. App. LEXIS 20373 (6th Cir., July 8, 2021)
Appeal terminated, 07/08/2021

Prior History: Matthews v. Davids, 2020 U.S. Dist. LEXIS 207865, 2020 WL 7327612 (W.D. Mich., May 7, 2020)

Core Terms

Recommendation, certificate, assertions, courts, clearly established federal law, speedy trial, frivolous, objects, corpus

Counsel: **[*1]** Michael Deshon Matthews #281752, petitioner, Pro se, Ionia, MI.

For John Davids, Warden, respondent: Andrea M. Christensen-Brown, Scott Robert Shimkus, MI Dept Attorney General (Appellate), Lansing, MI.

Judges: HON. JANET T. NEFF, United States District Judge.

Opinion by: JANET T. NEFF

Opinion

OPINION AND ORDER

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R), recommending that this Court deny the petition as lacking in merit. The matter is presently before the Court on Petitioner's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED.R.CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order. The Court will also issue a Judgment in this § 2254 proceeding. *See Gillis v. United States*, 729 F.3d 641, 643 (6th Cir. 2013) (requiring a separate judgment in habeas proceedings).

First, Petitioner objects "to the denial of [his] first issue which is substitute of counsel" (Obj., ECF No. 16 at PageID.415). Petitioner gives a summary of the efforts he took to notify the courts of his dissatisfaction with his appointed counsel, and states **[*2]** that the courts are incorrect in saying he "didn't explain [him]self" (*id.* at PageID.416). He asserts that he was "taken advantage of" because he "didn't know what to do" and has "a learning disability and ADHD" (*id.*). Petitioner asks the Court to "grant [him] a fair trial and a fair life chance to defend [him]self" (*id.* at PageID.416). However, aside from Petitioner's assertions and disagreement with the Magistrate Judge's determination, he provides no argument to undermine the Magistrate Judge's thorough analysis of this issue or to warrant habeas relief (*id.*). The Magistrate Judge properly determined that Petitioner "failed to show that the court's determination regarding denial of substitute counsel 'was contrary to, or involved an unreasonable application of, clearly established Federal law' or that it resulted from 'unreasonable determination of the facts'" (R&R, ECF No. 13 at PageID.403, citing 28 U.S.C. § 2254(d)(1)-(2)). Therefore, the objection is denied.

Second, Petitioner objects to "the denial of [his] speedy trial by the courts" (Obj., ECF No. 16 at PageID.416). Petitioner disagrees with the Michigan Court of Appeals' application of the *Barker* four-factor test in determining whether the length **[*3]** of delay deprived him of his right to a speedy trial in violation of the Sixth Amendment, again setting forth a summary of the facts and circumstances to essentially reargue this claim (*id.* at PageID.417).[1] Petitioner asserts that the length of his delay was eleven months, and the reason for the delay was to "satisfy the prosecutor to get my co-defendant to make up his mind and to finish his carjacking trial" (*id.*). Further, Petitioner contends that he asserted his rights by writing "letters stating the facts that [he] hasn't been to trial in 180 day[s] also 11 months," and as a result he suffered prejudice by losing witnesses, in addition to the delay "effect[ing] [sic] [his] rehabilitation ...," "lost [] time with [his] kids," "new mental health problems" and not being able to support himself while in prison (*id.*). However, Petitioner's assertions do not establish error in the Michigan Court of Appeals' or the Magistrate Judge's sound analysis of the *Barker* factors. The Magistrate Judge properly determined that "the state court's factual determinations and its application of the *Barker* test, the clearly established federal law, were reasonable" (R&R, ECF No. 13 at PageID.408). Therefore, the objection **[*4]** is denied.

Having determined Petitioner's objections lack merit, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. *See* RULES GOVERNING § 2254 CASES, Rule 11 (requiring the district court to "issue or deny a certificate of appealability when it enters a final order"). The Court must review the issues individually. *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

The Magistrate Judge set forth the applicable standards for a certificate of appealability, finding that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims would be debatable or wrong. The Magistrate Judge recommended that the Court deny Petitioner a certificate of appealability (R&R, ECF No. 13 at PageID.411). Moreover, although the Magistrate Judge concluded that Petitioner has failed to demonstrate that he is in custody in violation of the constitution and has failed to make a substantial showing of a denial of a constitutional right, the Magistrate Judge would not conclude that any issue Petitioner might raise on appeal would be frivolous (*id.*, citing *Coppedge v. United States*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)). The Magistrate Judge's recommendations are

sound, and the Court will order accordingly.

Therefore:

IT IS HEREBY ORDERED that the Objections (ECF No. **[*5]** 16) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 13) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (ECF No. 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted; however, the Court does not conclude that any issue Petitioner might raise on appeal would be frivolous.

Dated: November 5, 2020

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge

Footnotes

1 In *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the Supreme Court established four factors for determining whether a defendant has been denied the Sixth Amendment right to a speedy trial. A court must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant (R&R, ECF No. 13 at PageID.404).

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL DESHON MATTHEWS #281752

Vs.

JOHN DAVIDS, Warden

APPENDIX-D

SIXTH CIRCUIT ORDER DENYING APPEAL

(Matthews v. Davids, 2021 U.S. App.Lexis 20373) (unpublished)

Matthews v. Davids, 2021 U.S. App. LEXIS 20373

Copy Citation

United States Court of Appeals for the Sixth Circuit

July 8, 2021, Filed

No. 20-2216

Reporter

2021 U.S. App. LEXIS 20373 *

MICHAEL DESHON MATTHEWS, Petitioner-Appellant, v. JOHN DAVIDS, Warden, Respondent-Appellee.

Prior History: Matthews v. Davids, 2020 U.S. Dist. LEXIS 206978, 2020 WL 6498909 (W.D. Mich., Nov. 5, 2020)

Core Terms

trial court, state court of appeal, appointed, court of appeals, district court, letters, speedy trial, factors, jurists, substitute counsel, good cause, recommended, arrest

Counsel: **[*1]** For MICHAEL DESHON MATTHEWS, Petitioner - Appellant: Michael Deshon Matthews, Ionia Correctional Facility, Ionia, MI.

For JOHN DAVIDS, Warden, Respondent - Appellee: Andrea M. Christensen-Brown, Scott Robert Shimkus, Office of the Attorney General, Lansing, MI.

Judges: Before: SILER, Circuit Judge.

Opinion

ORDER

Michael Deshon Matthews, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This court construes Matthews's notice of appeal as an application for certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He requests leave to proceed in forma pauperis ("IFP").

Security forcibly removed Matthews and Joshua Simpson from a Detroit nightclub in the early morning of November 22, 2015. They tried to reenter but were rebuffed. So Matthews asked Simpson for his handgun. Simpson gave it to him. Matthews then went to the door and asked to enter. When the door opened, he shot a security guard in the head.

The jury convicted Matthews of first-degree murder and possession of a firearm during the commission of a felony. The trial court sentenced him to life without parole plus two years. On direct appeal, the state court of appeals affirmed his convictions **[*2]** but remanded on some matters not at issue now. *People v. Matthews*, No. 336121, 2018 Mich. App. LEXIS 408, 2018 WL 1122065 (Mich. Ct. App. Mar. 1, 2018), *perm. app. denied*, 503 Mich. 860, 917 N.W.2d 66 (2018). In 2019, Matthews filed a federal habeas corpus petition raising four claims: (1) the trial court erred in denying him substitute counsel; (2) the trial court denied Matthews his right to a speedy trial; (3) the trial court erred in assessing him $1,300 in court costs; and (4) the trial court abused its discretion in ordering $7,500 in restitution. The magistrate judge recommended denying the petition and a COA. Matthews objected, but only to the recommended disposition of Claims 1-2. He thereby forfeited any appeal of the recommended disposition of Claims 3-4. *See United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *see also Thomas v. Arn*, 474 U.S. 140, 142, 145, 147-48, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). The district court overruled the objections, approved and adopted the magistrate judge's report and recommendation, denied the petition, and denied a COA.

A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the habeas petition on the merits, the applicant must show 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 **[*3]** to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Matthews fails to meet this standard.

In Claim 1, Matthews argues that the trial court erred in denying him substitute counsel. On direct appeal, the state court of appeals held this claim meritless. *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2-3. The district court held that that decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent and did not result from an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

Reasonable jurists could not disagree.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. That right to counsel includes "the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

Matthews's counsel, however, *was* appointed. *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *3.

"[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 548 U.S. at 151. "The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).

Hence the state court of appeals directed **[*4]** its attention to the adequacy of Matthews's representation. *See Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2-3.

In judging it, the state court of appeals did not unreasonably apply clearly established Supreme Court precedent, *see* 28 U.S.C. § 2254(d)(1), for it did not apply any. It applied only state caselaw, which sets out these standards:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial

> process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.

Matthews, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2 (quoting *People v. Strickland*, 293 Mich. App. 393, 810 N.W.2d 660, 662-63 (Mich. Ct. App. 2011)).

That is not contrary to clearly established Supreme Court precedent. *See* § 2254(d)(1). This court itself applies comparable standards. (*See* below.) Nor did the state court of appeals apply its standards in a way contrary to clearly established Supreme Court precedent.

The court noted that Matthews had sent the trial judge several letters asking that trial counsel be replaced. In a letter dated February 18, **[*5]** 2016, Matthews had written that counsel (a) had worked with the victim and had had a personal relationship with him and (b) was working with the prosecutor to sabotage Matthews with a "fabricated" video of the crime and with "witnesses that can't place me at the scene." But

> at a hearing held on March 11, 2016, the trial court questioned defendant and [defense counsel] Woodards regarding this letter. The trial court asked defendant if everything had been "squared away" between him and Woodards, and defendant responded, "Yes." Woodards also confirmed that the two were working together at that point. Further, when Woodards asked defendant if he would consent to Woodards continuing to attempt to negotiate a plea with the prosecutor, defendant agreed to this course of action.

Matthews, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *2. The court of appeals concluded: "Thus, based on the representations of defendant and Woodards at this hearing, whatever concerns existed at the time of the February 18, 2016 letter were resolved, leaving the trial court without any reason to remove Woodards at that point." *Id.*

In the objections to the magistrate judge's report and recommendation, Matthews writes that, when the judge asked whether he and trial counsel **[*6]** were squared away, "I thought he meant I was getting a new lawyer[,] and when I seen he was still my lawyer, I told Judge Kenny I don't want to go to trial with M[r]. Woodards." Matthews did not present this argument to the state court of appeals, however. It is not contrary to clearly established Supreme Court precedent for a court not to consider an argument that is not advanced.

After the March 11th hearing, Matthews wrote the trial judge several more letters complaining about Woodards and asking for a new attorney. Matthews wrote that Woodards had been ineffective, that he did not have Matthews's best interests at heart, that he had been hired by the victim's family, that he had not responded to Matthews's questions, and that Matthews had written to the Attorney Grievance Commission about him. 2018 Mich. App. LEXIS 408, [WL] at *3.

The trial judge addressed these complaints at the final conference, held on June 10, 2016. He acknowledged receiving the letters, then asked to hear from Woodards. Woodards said that he had shown Matthews the video of the incident and that Matthews had denied being the man in the video who apparently did the shooting and was with Simpson. Woodards said he had then asked who the man **[*7]** was, if not Matthews, so that Woodards could investigate the matter. At the hearing itself, Matthews said that he did not know who the man was. Woodards then told the trial court that he and Matthews could work out their disagreement. The judge denied the request for substitute counsel. He explained that he "did not believe defendant had presented any reason to discharge Woodards." *Id.*

On appeal, Matthews complained that the trial court "did nothing to determine whether or not there were irreconcilable differences between Mr. Matthews and his counsel." The court of appeals disagreed: The trial judge had read Matthews's letters. At the final conference, he asked Woodards for his perspective. "Having heard from both defendant and Woodards, the trial court then made its decision." *Id.* To the extent Matthews thought more factual development necessary, it was his burden to request a hearing. *Id.* (citing state caselaw). He did not and so now can not complain that the trial court did not investigate further. *Id.* None of that is contrary to clearly established Supreme Court precedent.

To the charge that Woodards had been hired by the victim's family, the court of appeals responded that "defendant **[*8]** simply seems to have a misunderstanding regarding the retention of Woodards. Plainly, Woodards was appointed to represent defendant in this matter by the trial court; he was not retained by the victim's family." *Id.* Matthews points to no evidence to the contrary and, thus, has not clearly and convincingly shown that factfinding wrong. Hence it must be accepted. *See* 28 U.S.C. § 2254(e)(1).

As for the other complaints in the letters, the court of appeals held this: None involved a difference of

opinion on a fundamental trial tactic. And all lacked specificity. Matthews did not explain how Woodards had been ineffective, what reasons Matthews had given for the grievance he had allegedly filed against Woodards, or what questions Woodards had not responded to. Matthews just generally complained that Woodards did not have his best interests at heart. The court of appeals concluded that mere allegations

unsupported by substantial reasons did not establish good cause to appoint new counsel. *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *3.

Again, none of that is contrary to clearly established Supreme Court precedent. Reasonable jurists could not disagree.

In the interests of justice, whether good cause was shown under this court's caselaw will also be considered. **[*9]** An indigent defendant "must show good cause such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict with his attorney in order to warrant substitution" of counsel. *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985); *accord Henness v. Bagley*, 644 F.3d 308, 321 (6th Cir. 2011). When evaluating a trial court's denial of a request to substitute counsel, a reviewing court considers the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint, and whether the conflict between the attorney and the defendant was so great that it resulted in a total lack of communication preventing an adequate defense. *Henness*, 644 F.3d at 321.

There was no conflict of interest. Woodards was appointed by the court, not retained by the victim's family. Nor was there a complete breakdown in communication or an irreconcilable conflict between attorney and client. Finally, the trial court's inquiry into all of this was adequate. The judge received information from both Matthews and Woodards, then made a decision. If Matthews thought a full-blown hearing was called for, he could have requested one.

This claim is not adequate to deserve encouragement to proceed further. Reasonable jurists could not disagree.

In Claim 2, Matthews argues that the trial court denied **[*10]** him his right to a speedy trial. On direct appeal, the state court of appeals held this claim meritless. *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *3-6. The district court held that that decision reasonably applied clearly established Supreme Court precedent and reasonably determined the facts.

Matthews "was arrested on November 22, 2015, and his trial began on September 28, 2016, a period of approximately 10 months." 2018 Mich. App. LEXIS 408, [WL] at *4 n.2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. This right applies to the states via the Fourteenth Amendment's Due Process Clause. *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). The Supreme Court listed these as some of the factors courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). None of these four factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533.

Length of delay serves dual purposes. At first, it is a trigger. "Until there is some delay which is presumptively prejudicial, **[*11]** there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530. "[I]n this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

If the accused makes this threshold showing of presumptive prejudice, the full *Barker* enquiry begins, and length of delay becomes just one among the many factors that the court considers. *See id.* at 652.

In accord with state law, the state court of appeals applied *Barker*'s four-part balancing test to the claim. *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *4-6. This means that the state court was in effect finding, at the threshold stage, that the ten-month delay between arrest and start of trial was presumptively prejudicial. *Cf. United States v. Brown*, 498 F.3d 523, 530 (6th Cir. 2007) (finding a nearly ten-month delay "likely right at the line to trigger an analysis of the remaining factors").

Length of delay. But under Michigan law, a delay that is under 18 months requires a defendant to prove he suffered prejudice. *Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *4. Hence the state court of appeals presumed no prejudice from Matthews's ten-month delay and weighed this factor against him. 2018 Mich. App. LEXIS 408, [WL] at *5. *Cf. United States v. Schreane*, 331 F.3d 548, 559 (6th Cir. 2003) (explaining 13 1/2-month delay does **[*12]** not give rise to a presumption of prejudice); *Fleming v. United States*, 378 F.2d 502, 503-04 (1st Cir. 1967) (explaining 11-month delay between indictment and trial is "very short"); *United States v. Ducharme*, 505 F.2d 691, 693 (9th Cir. 1974) (per curiam) (holding that appellant had not shown any prejudice as a result of a claimed delay of 11 months

from indictment to trial—thus putting the burden on him to *show* prejudice).

Reason for delay. The first half of the ten-month period—the roughly five months from November 22, 2015 (arrest) until April 20, 2016—the court of appeals did not count against the State because

Matthews's counsel agreed to that April 20th trial date. Besides, the trial court tried to set an even earlier trial date (March 23, 2016), but Matthews's counsel "asked for a different date due to his own schedule." *See Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *6. That left slightly more than five months from April 20th until September 28, 2016 (the actual start of trial). The court of appeals thought that delay "entirely reasonable, having essentially been caused by the need to sort out issues related to Simpson, who was to stand trial with defendant."

> On March 22, 2016, approximately a month before the date scheduled for trial, the trial court ordered Simpson to undergo a competency evaluation. This issue was not resolved until June **[*13]** 10, 2016, when the trial court found Simpson competent to stand trial. At the final conference held that same day, the trial court set trial for September 28, 2016. This date was selected because Simpson was scheduled to stand trial in an unrelated carjacking case, which would be completed on September 27, 2016.

Id. The appellate court concluded that, "while some routine delays might be attributable to the prosecution as a technical matter, it does not appear that any delays that could be charged to the prosecutor were unreasonable. This factor weighs against finding a violation of the right to a speedy trial." *Id.*

The district court agreed. *Barker* itself said that "a valid reason, such as a missing witness, should serve to justify appropriate delay." 407 U.S. at 531. An unavailable codefendant who is scheduled to be tried with defendant seems an equally valid reason.

Defendant's assertion of his right. The state court of appeals weighed this factor in Matthews's favor. *See Matthews*, 2018 Mich. App. LEXIS 408, 2018 WL 1122065, at *6.

Prejudice. Again, because the time between arrest and trial was under 18 months, the state court of appeals did not presume prejudice but placed the burden of proving it on Matthews. 2018 Mich. App. LEXIS 408, [WL] at *4. The court of appeals held that Matthews had **[*14]** not suffered any prejudice to his ability to present his defense, because he "does not even attempt to argue" that he had,

> nor is any such prejudice apparent from the record. There is no evidence that the roughly 10 months that passed between defendant's arrest and his trial caused any evidence to go missing, any witnesses to be lost, or otherwise affected defendant's ability to present a defense.

Id. (footnote omitted).

Matthews now claims that the delay did cause him to lose witnesses. But Matthews cannot expect the state court of appeals to consider an argument he did not advance then.

The court did consider whether Matthews had suffered personal prejudice. 2018 Mich. App. LEXIS 408, [WL] at *4-5. The court noted that he had been detained continuously for the ten months leading up to his trial and that he had made conclusory allegations about the anxiety that detention had produced. The state court of appeals added that "[h]is letters [that he sent to the trial court] similarly raised only general concerns regarding his inability to be with his family while he was incarcerated." 2018 Mich. App. LEXIS 408, [WL] at *5. The state court of appeals held that these general and conclusory assertions failed to demonstrate prejudice. *Id.*

Finally, the state court of appeals **[*15]** held that, on balance, it could not grant relief. "To do so would essentially be a conclusion that defendant's right to a speedy trial was violated simply because he wrote several letters raising the issue, as that is the only factor weighing in his favor." 2018 Mich. App. LEXIS 408, [WL] at *6.

The district court determined that the state courts' resolution of Matthews's claims was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent or based on an unreasonable determination of the facts in light of the evidence presented. Reasonable jurists could not debate it.

Matthews has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his application for a COA is **DENIED**, and his motion to proceed IFP is **DENIED** as moot.

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