

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERMAR JAMIE FULLER

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari to
The Court of Appeals for the Second
District of Texas Fort Worth

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The court of appeals determined that the delay caused by the State's failure to disclose exculpatory evidence did not weigh against the State under *speedy trial* analysis, was this an error?
2. Can a lengthy delay permit an inference of prejudice such that a defendant is absolved from the requirement to demonstrate particularized prejudice under *speedy trial* analysis?

PRIOR PROCEEDINGS

Texas Court of Criminal Appeals, PD-0526-21,
Jermar Jamie Fuller v. The State of Texas
Date of Judgment: September 15, 2021

Court of Appeals for the Second District of Texas Fort Worth,
No. 02-20-00101-CR,
Jermar Jamie Fuller v. The State of Texas
Date of Judgment: April 29, 2021
Date of Judgement after rehearing denied: June 3, 2021

The 30th District Court of Wichita County, Texas, No. 58,156-A,
The State of Texas v. Jermar Jamie Fuller
Date of Judgment: March 16, 2020

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
1. The court of appeals determined that the delay caused by the State’s failure to disclose exculpatory evidence did not weigh against the State under <i>speedy trial</i> analysis, was this an error?	ii
2. Can a lengthy delay permit an inference of prejudice such that a defendant is absolved from the requirement to demonstrate particularized prejudice under <i>speedy trial</i> analysis?	ii
PRIOR PROCEEDINGS	iii
TABLE OF AUTHORITIES	v
OPINIONS.....	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING REVIEW.....	11
QUESTION ONE	11
QUESTION TWO	15
CONCLUSION	17
APPENDICES “A – C”	attached

TABLE OF AUTHORITIES

Cases

<i>Barker v. Wingo</i> , 407 U.S. 514 (1972).....	passim
<i>Brady v. Maryland</i> , 372 U.S. 83 (1963).....	6
<i>Doggett v. United States</i> , 505 U.S. 647 (1992).....	passim
<i>Fuller v. State</i> , 624 S.W. 3d 855 (Tex. App.—Fort Worth, 2021, pet. ref'd)	passim
<i>United States v. Bagley</i> , 473 U.S. 667 (1985).....	6
<i>Vermont v. Brillon</i> , 556 U.S. 81(2009).....	12, 13, 14
<i>Watkins v. State</i> , 619 S.W. 3d 265 (Tex. Crim. App. 2021)	6

Statutes

Tex. Code Crim. Proc. Ann. art. 39.14	4, 6
---	------

Rules

Sup. Ct. R. 10.....	11, 16
---------------------	--------

Other Authorities

Kyle Therrian, <i>Significant Decisions Report</i> , 50, TCDLA Voice for the	
Defense 33, 42 (June 2021).....	15

OPINIONS

The opinion of the Texas' intermediate appellate court in this case, the Court of Appeals for the Second District of Texas Fort Worth appears at Appendix A is published at 624 S.W. 3d 855.

JURISDICTION

The subject of this petition is a judgment of the 30th District Court of Wichita County, Texas that was entered on March 16, 2020. (App. B) The judgment in question was affirmed by the Court of Appeals for the Second District of Texas, Fort Worth with a judgment that was entered on April 29, 2021. (App. A) The Court of Appeals for the Second District of Texas, Fort Worth denied Fuller's motion for rehearing and substituted its earlier opinion with a new opinion and judgment on June 3, 2021. (App. A) The Texas Court of Criminal Appeals denied Fuller's petition for discretionary review on September 15, 2021. (App. C)

The jurisdiction of this Court to review a final order or judgment of a state court is timely invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

STATEMENT OF THE CASE

On October 10, 2016, Fuller was taken into custody in Dalhart Texas after crashing his vehicle in an attempt to avoid being pulled over by law enforcement.¹ Officers at the scene recovered two cell phones, a 9mm Smith & Wesson pistol, and a 380. Cobra pistol.² The Cobra pistol had dried blood on its exterior.³

Based on questioning of Fuller and information gathered from searching his cell phones, authorities suspected he was involved in a double homicide that occurred in Wichita Falls Texas the previous

¹ RR 15: 96; 98; 100-01.

² Id. at 106-08; 113; 118; 120; 137; SX 65.

³ RR 15: 110.

evening.⁴ Two deceased individuals, Rankin and Phillips, were discovered in a home in Wichita Falls on October 10, 2016.⁵ They went by the street names Wedo (Rankin) and Duke (Phillips) and apparently sold narcotics and had affiliations with local street gangs.⁶

After being questioned by detectives from the Wichita Falls Police Department a warrant was issued and Fuller was transported to Wichita County.⁷ All of the evidence recovered with Fuller was delivered to the Wichita Falls Police Department on October 14, 2016.⁸ It should be noted Wichita Falls Police had already recovered evidence, including a cell phone for one of the homicide victims, on October 10 2016.⁹

Fuller was indicted for capital murder on December 21, 2016.¹⁰ On December 29, 2016, after indictment and the State's announcement of *ready*, Fuller's counsel filed a request for compliance with Texas Code of

⁴ Id. at 145-46.

⁵ RR 14: 22-23.

⁶ RR 13: 99; 139; RR 15: 18-19.

⁷ Id. at 14-15; 63-64; 68-69; CR 14.

⁸ RR 15: 108.

⁹ RR 14: 197-98.

¹⁰ CR 13.

Criminal Procedure Ann. Article 39.14.¹¹ This triggered the State's duty to disclose evidence in its possession including any forensic images associated with cell phones held by the State.¹²

Fuller filed a motion for speedy trial on November 13, 2018.¹³ At a status conference held on February 1, 2019, the State informed the trial court that it did not have DNA evidence back from the lab.¹⁴ The attorney for the State also represented to the court that the State had not made a final determination on whether the death penalty would be sought against Fuller.¹⁵ If death was pursued then there would be additional procedural requirements that would cause a delay in the trial setting.¹⁶ Both sides agreed to a resetting of the trial date with this understanding.¹⁷ On February 8, 2019, the State filed a waiver as to

¹¹ Id. at 13, 29-30.

¹² See Tex. Code Crim. Proc. Ann. art. 39.14(a).

¹³ CR 128-30.

¹⁴ RR 2: 5-6. It is undisputed that the State had all the evidence under its control by October of 2016.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 6-7.

seeking the death penalty.¹⁸ On March 5, 2019, counsel for Fuller filed a re-assertion of the request for a speedy trial.¹⁹

The State's inability to obtain DNA evidence lab reports ultimately caused a 34 month trial delay.²⁰ These delays occurred even though the State's attorney acknowledged he did not need the DNA evidence to try the case.²¹ On September 6, 2019, supplemental DNA reports were provided to defense counsel.²²

The delays would continue. On August 30, 2019 (over one month before the fourth trial setting), Fuller's counsel filed a motion to appoint an expert to help with issues related to the cell phone data the State planned to use in the case.²³ On September 6, 2019, the expert informed Fuller's counsel that cell phone forensic images had not been provided by the State.²⁴ Counsel was alerted by the expert to the fact that

¹⁸ CR 135.

¹⁹ Id. at 138-39.

²⁰ *Fuller v. State*, 624 S.W. 3d 855, 864 (Tex. App.—Fort Worth, 2021, pet. ref'd)(the court found the 34 month delay was an unreasonable delay that weighed against the State for speedy trial purposes and Petitioner does not challenge that holding).

²¹ RR 3: 14.

²² CR 176.

²³ Id. at 155-58.

²⁴ Id. at 407. The State only provided the logical extractions for the cell phones. The forensic images may show deleted data that the logical extractions do not.

forensic images contain data that could prove that Fuller’s cell phone never communicated with the victims’ phones.²⁵ This fell squarely under purview of *Brady v. Maryland* as it tended to prove that Fuller had no contact with the victims.²⁶ The State had a duty to disclose this evidence.²⁷

It was determined that the police never delivered the images to the district attorney’s office and no reason was ever offered explaining the oversight.²⁸ Although it was known that the images were held by the police, the attorney for the State could not guarantee when the images would be provided to the defense.²⁹ This uncertainty forced the

²⁵ Id.

²⁶ RR 6: 5. The forensic images showed that Fuller’s phone did not contact the victims and were subject to disclosure under both the Texas’s Michael Morton Act and *Brady v. Maryland*, 372 U.S. 83 (1963); Tex. Code of Crim. Pro. Ann. art. 39.14(h).

²⁷ Compare *United States v. Bagley*, 473 U.S. 667, 682 (1985)(favorable evidence subject to disclosure by the State must be material meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different) with *Watkins v. State*, 619 S.W. 3d 265, 269 (Tex. Crim. App. 2021)(material evidence under Code of Crim. Pro. Ann. art. 39.14 means evidence with “some logical connection to a consequential fact.”).

²⁸ CR 409; 282.

²⁹ No explanation was offered as to why it would take so long for the district attorney’s office to obtain the images from the police.

defense to file a motion for continuance on October 4, 2019.³⁰ In the motion defense counsel explained to the trial court that the continuance was needed to both recover the images and allow the expert to review them.³¹ This was needed to prepare for trial. The trial court granted the defense motion on October 21, 2019.³²

On February 11, 2020, Fuller filed a motion to dismiss that was heard on the same day.³³ During the hearing Fuller's attorney asked the court to consider a separately filed Written Argument in Support of Defendant's Motion to Dismiss: Speedy Trial.³⁴ Fuller's attorney requested the court take judicial notice of the State's attorney's prior testimony in relation to the speedy trial issues that were offered in prior hearings.³⁵

The State called the Wichita County Sheriff Office's jail administrator to testify that Fuller was being held in jail for a charge of capital murder, a forgery conviction, a capias pro fine for possession of

³⁰ RR 6: 8; CR 236.

³¹ RR 6: 7-8; CR 236.

³² RR 6: 14.

³³ CR 319.

³⁴ RR 8: 6-7; CR 331.

³⁵ RR 8: 7; 9.

marijuana under two ounces, and unlawful carrying of a weapon.³⁶

Although she understood Fuller received a six year prison sentence on the forgery conviction she admitted she could not speculate on whether he would have been granted parole by that point.³⁷

The court explained that it would take the motion under advisement along with the State's response.³⁸ On March 3, 2020, the trial court denied Fuller's motion to dismiss.³⁹ The case proceeded to trial on March 9, 2020.⁴⁰ During trial, counsel for Fuller made an additional request for a dismissal based on the speedy trial violation.⁴¹ It came to the attention of Fuller's counsel that a witness who saw a vehicle that did not match the description of Fuller's vehicle was seen speeding away from the murder scene shortly after gun shots were heard.⁴² After offering evidence of the witness's death and his probable testimony, the trial court denied the re-urged motion for dismissal.⁴³

³⁶ Id. at 11-12.

³⁷ Id. at 13.

³⁸ Id. at 15.

³⁹ CR 467.

⁴⁰ RR 11: 4.

⁴¹ RR 17: 67.

⁴² Id.; DX B.

⁴³ RR 17: 68-69.

Fuller was found guilty of capital murder and the trial court assessed his punishment as confinement for a term of life without parole.⁴⁴

Fuller's case went on direct appeal to the Court of Appeals for the Second District of Texas, Fort Worth. The sole issue on appeal was whether or not Fuller's right to a speedy trial was violated by the delays caused by the State.⁴⁵ In assessing whether or not the delays violated Fuller's right to a speedy trial the court of appeals purported to use the four part balancing test from *Barker v. Wingo*⁴⁶ that weighs (1) the length of the delay; (2) reason for the delay; (3) assertion of the right; and (4) prejudice to the accused.⁴⁷

In assessing factor two, the appeals court found the three year delay in DNA testing weighed against the State, but it determined, "[s]ix months weigh against neither Fuller nor the State because of the State's delayed production of the cell-phone images and Fuller's delayed request for a cell-phone expert."⁴⁸ The court of appeals found a majority

⁴⁴ CR 530.

⁴⁵ *Fuller*, 624 S.W. 3d at 863.

⁴⁶ 407 U.S. 514, 529 (1972).

⁴⁷ *Fuller*, 624 S.W. 3d at 863.

⁴⁸ *Id.* at 865.

of the delay weighed in favor of a finding that Fuller's speedy trial right was violated although the delay from DNA testing did not heavily weigh against the State.⁴⁹

In assessing the fourth factor, prejudice to the defense, the court of appeals found that Fuller could not establish prejudice solely based on the length of the delay.⁵⁰ The court rejected Fuller's contention based on *Doggett v. United States*⁵¹ that the length of delay alone could equate to the specific prejudice to the defense.⁵²

Fuller filed a petition for discretionary review with the Texas Court of Criminal Appeals on the following two issues:

1. In terms of speedy trial analysis, how heavily should it weigh against the State for causing a delay by failing to disclose properly requested exculpatory cell phone forensic images?
2. Does a lengthy delay cause presumptive prejudice that must be separately weighed under speedy trial analysis?

⁴⁹ *Id.*

⁵⁰ *Fuller*, 624 S.W. 3d at 867-68.

⁵¹ 505 U.S. 647 (1992).

⁵² *Fuller*, 624 S.W. 3d at 867-68.

The Texas Court of Criminal Appeals denied the petition on September 15, 2021.

REASONS FOR GRANTING REVIEW

QUESTION ONE

The court of appeals determined that the delay caused by the State's failure to disclose exculpatory evidence did not weigh against the State under speedy trial analysis, was this an error?

The Petitioner's first issue in this petition questions the propriety of the court of appeals analysis of *Barker v. Wingo* factor two—the reason for the delay. In this case the court of appeals ignored the dictates of this Court in conducting the balancing test propagated by *Barker v. Wingo*. The appeals court relieved the State of its burden to justify any delays by holding that the State's failure to disclose properly requested exculpatory evidence, thus necessitating a continuance, did not weigh against the State.⁵³ This writ should be granted because the

⁵³ See *Barker*, 407 U.S. at 531.
Petition for Writ of Certiorari

appeals court decided an important question of federal law in a way that conflicts with relevant decisions of this Court.⁵⁴

In assessing a speedy trial violation, reviewing courts independently weigh (1) the length of the delay; (2) reason for the delay; (3) assertion of the right; and (4) prejudice to the accused.⁵⁵ The burden is on the State to justify any delays.⁵⁶ Reviewing courts assign different weights to different reasons for delay and consider whether the State or defendant is more to blame.⁵⁷ Although deliberate delays by the State will weigh heavily in favor of a finding of a violation, negligent conduct creating a delay should also be considered.⁵⁸

On appeal Fuller argued that the delay caused by the failure to produce the forensic images was attributable to the State and should have a medium weight in favor of finding a speedy trial violation. In rejecting this contention the appeals court held that the delay did not

⁵⁴ See Sup. Ct. R. 10(c).

⁵⁵ See *Barker*, 407 U.S. at 530.

⁵⁶ *Id.* at 531 (ultimate responsibility for delay must rest with the government).

⁵⁷ *Vermont v. Brillon*, 556 U.S. 81, 91(2009)(quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)).

⁵⁸ *Barker*, 407 U.S. at 531.

weigh against the State at all.⁵⁹ Instead, the lower court held that the delay was partially caused by Fuller not requesting an expert soon enough.⁶⁰ The court of appeals reasoned that the defense should have realized sooner that the State withheld these images and made efforts to obtain them on an earlier date.⁶¹ The court essentially held that the State's failure to produce the properly requested evidence was cancelled out by Fuller's late request for an expert.⁶²

The appeals court's reasoning departs from pronouncements of this Court adopting the principle that in reviewing the second Barker factor courts consider "whether the government or the criminal defendant is more to blame for th[e] delay."⁶³ This was not a case where assigned counsel simply failed to move the case forward.⁶⁴ The court of

⁵⁹ *Fuller*, 624 S.W. 3d at 865. ("Six months weigh against neither Fuller nor the State because of the State's delayed production of the cell-phone images and Fuller's delayed request for a cell-phone expert.").

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See Brillon*, 556 U.S. at 91 (quoting *Doggett*, 505 U.S. at 651).

⁶⁴ *See id.* at 92-93 (defendant's assigned counsel's unwillingness to move the case forward attributable to defendant under speedy trial analysis).

appeals completely failed to assess the State's role in "the chain of events that started all of this."⁶⁵

It is undisputed that the State was in control of all the evidence on October 14, 2016. There is no dispute that the forensic images were in the State's possession and were not delivered to defense counsel after a proper discovery request. Had the State correctly complied with its duties under both *Brady v. Maryland* and Texas State law there would have been no need for the defense to request a continuance.⁶⁶ Assessing no blame on the part of the State for this delay represents a clear departure from the dictates of this Court's prior decisions.⁶⁷

The reasoning of the court of appeals will provide a perverse incentive for the State to deliberately withhold evidence.⁶⁸ In cases where the State has delayed proceedings it could hold back some evidence and spring it on defense in order to prompt a continuance. The

⁶⁵ *See id.* at 93.

⁶⁶ *See id.* at 94 (absent defendant's deliberate efforts to force the withdrawal of his assigned attorneys, no speedy-trial issue would have arisen).

⁶⁷ *See Barker*, 407 U.S. at 531.

⁶⁸ *See Brillon*, 556 U.S. at 93 (attributing delay caused by assigned counsel against the State would create a perverse incentive for appointed counsel to delay proceedings).

defense could then be blamed for any delay. There should be no incentives created for the State to both withhold exculpatory evidence and delay trials.⁶⁹ In this case an additional six month delay was especially harsh considering the State delayed the case 34 months just to put a cherry on top of its prosecution.⁷⁰ This Court should take this opportunity to correct this misapplication of the law.

QUESTION TWO

Can a lengthy delay permit an inference of prejudice such that a defendant is absolved from the requirement to demonstrate particularized prejudice under speedy trial analysis?

The Petitioner’s second issue questions the analysis of the court of appeals regarding the fourth *Barker* factor—prejudice to the accused.⁷¹ In *Doggett v. United States* this Court recognized “that excessive delay presumptively compromises the reliability of a trial in ways that

⁶⁹ *See id.*

⁷⁰ RR 3: 14. (the attorney for the State acknowledged before the trial court that he did not need the DNA evidence to try the case); *also* Kyle Therrian, *Significant Decisions Report*, 50, TCDLA Voice for the Defense 33, 42 (June 2021)(commenting that need for DNA evidence was minimal or non-existent in *Fuller*).

⁷¹ *Barker*, 407 U.S. at 532.

neither party can prove or, for that matter, identity.”⁷² Under *Doggett*, as the length of a delay increases the delay itself requires an inference of particularized prejudice.⁷³

The court of appeals refused to even consider the holding of *Doggett* in its analysis. Instead the court of appeals found Fuller was conflating the first and fourth Barker factors and held that he failed to show specific prejudice.⁷⁴ In ruling this way the court of appeals erroneously ignored the dictates of this Court and, in so doing, decided an important question of federal law in a way that conflicts with relevant decisions of this Court.⁷⁵

There is a danger that Texas courts will begin misconstruing *Doggett* and limiting the right to a speedy trial. Lower courts should not be permitted to “read away” this Court’s binding precedents.⁷⁶ The appeals court’s reasoning makes enforcing the speedy trial right nearly impossible. Fuller was held for years for the flimsiest of reasons. This is

⁷² *Doggett*, 505 U.S. at 655-56.

⁷³ *See id.*

⁷⁴ *Fuller*, 624 S.W. 3d at 865.

⁷⁵ *See* Sup. Ct. R. 10(c).

⁷⁶ *See Fuller*, 624 S.W. 3d at 865 (citing *Doggett* and yet ignoring its holding).

the exact situation *Doggett* addresses. This case was worse than what Doggett faced because Fuller was detained the entire time whereas Doggett was never detained.⁷⁷ It was not clear if Doggett knew he was wanted by the government.⁷⁸

The speedy trial right should not be a procedural labyrinth where the right is lost with the wrong turn. The reasoning of the appeals court raises the question of what it would take to meaningfully enforce the right to a speedy trial. In this case the government deliberately delayed the case.⁷⁹ This Court should grant this writ and make sure there is no backsliding on enforcing of the right to a speedy trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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⁷⁷ See *Doggett*, 505 U.S. at 654 (Doggett was not subject to pretrial detention nor was he aware of the charges against him).

⁷⁸ *Id.*

⁷⁹ See *id.* at 657 (“while not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him”).

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