

21-7216

IN THE

SUPREME COURT OF THE UNITED STATES

October TERM, 2022

ORIGINAL

Supreme Court, U.S.  
FILED

DEC 27 2021

OFFICE OF THE CLERK

CORY M. WELCH

*Petitioner.,*

VS.

MICHAEL MEISNER

*Respondent.*

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Petition for Writ of Certiorari to the  
United States Court of Appeals  
For the Federal Circuit

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Joshua L. Kaul

Attorney General of Wisconsin

John A. Blimling state Bar #1088372

Wisconsin Department of Corrections

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 267-3519

(608) 294-2907 (Fax)

[blimlingja@doj.state.wi.us](mailto:blimlingja@doj.state.wi.us)

CORY M. WELCH PRO SE

FOX LAKE CORRECTIONAL INST.

POST OFFICE BOX 200

FOX LAKE WI 53933

(920) 928-315

[appellate-or@law.com](mailto:appellate-or@law.com)

## **QUESTIONS PRESENTED**

### **I.**

**Did the state courts rely solely on a procedural bar? Also, the basis of this petition challenges the Wisconsin court of appeals jurisprudence pursuant to independent and adequate state procedural rule**

### **II.**

**Did the Wisconsin state courts omit deciding a constitutional claim of whether the petitioner was denied due process under the fifth and fourteenth amendments of the constitution**

**LIST OF PARTIES TO PROCEEDING  
PURSUANT TO RULES 14.1 (b) AND 29.1**

Pursuant to Supreme Court 14.1(b), Petitioner Cory Mandrel Welch certifies that the names of all parties to this proceeding appear in the caption of this petition for Writ of Certiorari.

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*Cardinale v. Louisiana* U.S. 43789 S.Ct. 116122L.Ed.2d 398 (1969).  
*U.S. v. Steve R. DACRI*, No. 92–CR–67 827 F.Supp 827 F.Supp. (1993).  
*Harris v. Reed* 1038103 L.Ed.2d 30857 USLW 4224 U.S. 255109 S.Ct ( 1989).  
*Coleman v. Thompson* U.S. 722111 S.Ct. 2546115L.Ed. .2d 64059 4789 (1991).  
*U.S. v. Marion*, 30792 S.Ct. 45530L.Ed.2d 468 (1971).  
*Nicholas v. U.S.*1921257 U.S. 7142 S.Ct. . 766 L.Ed. 133L( 1921).  
*States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977).  
*Wainwright v. Sykes* U.S. 7297 S.Ct. 249753L.Ed.2d (1977 ).  
*Johnson v. Lee* U.S. 1147136 S.Ct L.Ed.2d(2016).  
*United States v. Valona*, 834 F.2d 1334, 1339 (7th Cir.1987)  
*United States v. Williams*, 738 F.2d 172, 176 (7th Cir.1984)).  
*United States v. Antonio*, 830 F.2d 798, 805  
*Michigan v. Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3477, n. 7, 77 L.Ed.2d 1201  
*Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986),  
*Welch v. Thurmer*,2010AP2264,wis.ct. Fd. App. Dec 29,(2014)  
*Welch v. Hepp* App. Ct. No.14-1164 July 14, (7<sup>th</sup> cir.2015)

## REPORTED DECISIONS

The following decisions and opinions in this case directly relating to the question presented have been reported and are included in the designated appendices:

*Harris v. Reed* 1038103 L.Ed.2d 30857 U.S. S.Ct ( 1989).(most of petitioners allegations fell short of explicit reliance on state law ground because the court

went on to reach merits)(App. A, P.13, 14. ( App. B).

Coleman v. Thompson U.S. S.Ct. 2546115L.Ed. .2d (P. 13) (1991). (adequate

State ground Doctrine applies to bar federal habeas when state court

declined to address Petioners claims)(App. C,) Wainwright v. Sykes U.S. 7297

S.Ct. 249753L.Ed.2d (1977 ). (a procedural default Bars consideration on review of

a petitioners federal federal claims under "Plain Statement" rule) U.S. v. Marion,

30792 S.Ct. 45530L.Ed.2d 468 (1971). (38 month delay between The end of the

scheme charged in the indictment and the date the defendants Were indicted

did not extend beyond statute of limitations) (App. D, ) U.S v. Steve R. DACRI.

No. 92-CR-67 827 F.Supp 827 F.Supp. (1993). (passage Of time and faded

memories is unsupported by any factual recitations)

Petitioner's state-court murder conviction was affirmed by the Appellate Court of Illinois on direct appeal, where petitioner challenged only the sufficiency of the evidence. The trial court then dismissed his petition for postconviction relief which alleged ineffective assistance by his trial counsel in several respects, including the failure to call alibi witnesses—and the Appellate Court again affirmed. Although referring to the "well-settled" Illinois principle that issues that could have been, but were not, presented on direct appeal are considered waived, and finding that, "except for the alibi witnesses," petitioner's ineffective-

assistance claim "could have been raised [on] direct appeal," the court nevertheless went on to consider and reject that claim on its merits. Petitioner then pursued the claim by filing a habeas corpus petition in the Federal District

court under 28 U.S.C. § 2254. While recognizing that, absent a showing of either “cause and prejudice” or a “miscarriage of justice,” Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 would have barred its consideration of the claim had the State Appellate Court held the claim waived under state law, the federal court determined that there had been no waiver holding, and went on to consider the claim in its entirety and to dismiss it on its merits. In affirming the dismissal, the Court of Appeals ruled that it was precluded from reviewing the claim’s merits because it believed the claim to be procedurally barred. Finding the state appellate court’s order to be “ambiguous” on the waiver question, the court nevertheless concluded that it was bound by the order’s “suggest[ed]” intention “to find all grounds waived except that pertaining to the alibi witnesses.”

Held:

1. The “ ‘plain statement’ rule” of Michigan v. Long, 463 U.S. 1032, 1042, and n. 7,
2. 103 S.Ct. 3469, 3477, and n. 7, 77 L.Ed.2d 1201 is not limited to cases on
3. direct review in this Court, but extends as well to cases on federal habeas
4. review. Pp. 1042–1044:
  - (a) Sykes’ procedural default rule is based on this Court’s longstanding
  - (b) “adequate and independent state ground” doctrine, whereby the Court
  - (c) will not consider a federal law issue on direct review from a state-court
  - (d) judgment if that judgment rests on a state-law ground that is both
  - (e) “independent” of the federal claim’s merits and an “adequate” basis for the
  - (f) court’s decision. The Long rule avoids the difficulties that arise \*256 under
  - (g) the doctrine when the state court’s reference to state law is ambiguous, by

- (h) permitting the Court to reach the federal question on direct review unless
- (i) the state court's opinion contains "a plain statement" that its decision rests
- (j) upon adequate and independent state grounds, whether substantive or procedural. P. 1042.

- (k) Since, as Sykes made clear, the adequate and independent state ground
- (l) doctrine applies on federal habeas, and since federal courts on habeas
- (m) review commonly face the same problem of ambiguity that was resolved by
- (n) Long, the "plain statement" rule is adopted for habeas cases. Thus, a
- (o) procedural default will not bar consideration of a federal claim on habeas
- (p) review unless the last state court rendering a judgment in the case clearly
- (q) and expressly states that its judgment rests on a state procedural bar.
- (r) P. 1043.

My second concern stems from the majority's references to our decisions in Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), and Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). In these decisions, the Court reaffirmed the holding of Wainwright v. Sykes, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977), that a state prisoner pursuing federal habeas remedies must show both "cause" for a procedural default and "prejudice" flowing from the alleged constitutional violation for a federal court to entertain his claim on the merits despite the existence of an otherwise preclusive state-law ground for decision. In Murray v. Carrier, the Court rejected "a

reworking of the cause and prejudice test ... to \*271 dispense with the requirement that the petitioner show cause and instead to focus exclusively on whether there has been a 'manifest injustice' or a denial of 'fundamental fairness.' " 477 U.S., at 493, 106 S.Ct., at 2648

### **STATEMENT OF JURISDICTION**

Cory Welch seeks review of an order of the Wisconsin Court of Appeals issued on August 17, 2021 see (App. P.4-8) ( The Wisconsin Court of Appeals denied Welch's appeal of the trial court's decision ruling that Welch was barred procedurally because he could have raised his due process claim in his direct appeal.

The Wisconsin Appeals Court affirmed that decision. Welch subsequently petitioned for review to the Wisconsin Supreme Court which consecutively denied review on November 17, 2021. See (App. P. 9)

The petitioner Cory Welch now petitions this court in desperate hopes and seeking review of the Wisconsin Court of Appeals decision by this Writ of Certiorari. The afore mentioned court had jurisdiction to grant relief.



## **Constitution Provisions**

U.S. Const. Amend.V.....passim

U.S. Const. Amend.VI.....

U.S. Const. Amend.XIV.....

## **STATUTES**

28 U.S.C. § 2254.....

## **BOOKS**

Federal Criminal Code and Rules (2010 Ed. 1985).....

The GEORGETOWN LAW JOURNAL Thirty-Ninth  
Annual Review of Criminal Procedure .....

BLACK'S LAW DICKTIONARY (10<sup>th</sup> Ed.).....

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The following constitutional provision's and statutes are involved in this case:

### **United States Constitution, Fifth Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

### **United States Constitution, sixth Amendment**

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his

### **United States Constitution, fourteenth Amendment**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Habeas Corpus Pursuant to Act, 28 U.S.C. § 2254 (a)**

(a) Proceeding Under 28 U.S.C. § 2254. A petition for a writ of habeas corpus pursuant to §2254 may be filed by a prisoner in state custody who wishes to challenge the validity of his or

her state conviction or sentence on the ground that it violates the Constitution, federal statutes or treaties of the United States. See:

### **SATEMENT OF THE CASE**

The case underlying this petition is a an action to dismiss the criminal complaint. The basis of this petition challenges the Wisconsin state courts jurisprudence pursuant to independent and adequate state procedural rule.

On August 3, 2004, a criminal complaint and information pursuant to wis.Stats. 968.02 and 971.01. was filed in 2004CF004120<sup>1</sup> charging Welch with four charges: Conspiracy to commit armed robbery, fleeing and eluding an officer, and two counts of misdemeanor bail jumping (App. P. 10-20 ). Subsequently Welch had a preliminary hearing which bound him over for jury trial. Welch then requested a speedy trial pursuant to wis. Stat. 971.10, and the court granted that request. The 90-day speedy trial demand set the petitioners trial deadline date at November 8<sup>th</sup>, 2004<sup>2</sup>, four days before Welch's trial was to begin. The prosecutor moved to dismiss the original complaint in CF004120; The complaint was dismissed and a new criminal complaint and information was filed subsequently in case 2004CF006133( the current case). (App. P. 21-41).

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<sup>1</sup> This case in context involves two case records which was pivotal in regards to an adequate and meaningful appeal. The state Appeals court omitted addressing this issue.

<sup>2</sup> Dismissal in case 2004CF004120 to refile current and new charges in 2004CF006133 violated Welch's statutory speedy trial rights which was contrary to constitutional Protections also violating his due process rights.

¶ 2 In November 2004, an information charged Welch with ten counts of armed robbery, two counts of attempted armed robbery, conspiracy to commit armed robbery, fleeing an officer, and two counts of misdemeanor bail jumping.

On November 10, 2004, Welch's attorney filed a speedy trial demand. At a scheduling conference, counsel advised the court he would be unavailable between January 25 and March 2, 2005. To accommodate Welch's speedy trial request, the court attempted to calendar the case so that the trial could be completed by January 24, setting the trial to begin January 18, 2005.

7 In context, Welch has made one complete state round of review on direct appeal pursuant to wis. Stat. 809.30, as well as well as one complete state round of review on his collateral appeal pursuant to wis. Stat. 974.06, and the underlying appeal for review in this court as well as discretionary appeals. He now petitions This honorable court for review. Previously he has made one complete federal round of review pursuant to § 22.54 habeas review. See Welch v. Thurmer, 2010AP2264, wis.ct. Fd. App. Dec 29, (2014).

## SUMMARY OF ARGUMENT

The Wisconsin Court of Appeals omitted deciding constitutional claims of whether the petitioner was denied due process under the fifth and fourteenth amendments when petitioner's sixth amendment right to notice of charges and precharging delay was brought demonstrating cause for default under Wisconsin law.

Failure to consider claims resulted in a fundamental miscarriage of justice because Welch previously exhausted his 2254 habeas petition in 2014 which bars his current claims in the federal district court because petitioners are only entitled to only one direct round of federal habeas review and have a one-year time limitation to file that petition. See Welch v. Thurmer, 2010AP2264, wis.ct. Fd. App. Dec 29, (2014) Also the federal district court is precluded from reaching merits of claim on petition for writ of habeas corpus due to state appellate court clearly and expressly relying on procedural waiver as ground for rejecting Welch's due process and notification claims. See

Coleman v. Thompson U.S. 722111 S.Ct. 2546115 L.Ed.2d 64059 4789 (1991).

The Wisconsin Appeals court satisfied the "Plain Statement" rule in Wainwright v. Sykes U.S. 7297 S.Ct. 249753 L.Ed.2d 594 (1977) because the procedural default bars consideration on direct review of Welch's federal claims. IN Harris v. Reed 1038103 L.Ed.2d 30857 USLW 4224 U.S. 255109 S.Ct ( 1989), this court elaborated meticulously in it's decision stating :

- "State courts statement that most of petitioner's allegations could have been

raised on direct appeal fell short of explicit reliance on state law ground, Particularly in light of fact that state court went on to reach merits of federal claim raised by petitioner."

## **Reasons for Granting the Writ**

### **I.**

**Underlying this petition is constitutional grounds to dismiss the criminal complaint; did the state courts rely solely on a procedural bar? Also, the basis of this petition challenges the Wisconsin court of appeals jurisprudence pursuant to independent and adequate state procedural rule**

This court has repeatedly recognized the importance to defendants that a procedural default will not bar consideration of a federal claim on habeas review resolving questions of "Plain Statement." This question affects criminal defendants all across the country as well as the public at large. As this court noted in Wainwright v. Sykes U.S. 7297 S.Ct.L.Ed.2d, It recognized that a federal claimant's procedural default precludes federal review, like direct review only if the last state court rendering a judgment in the case rests it's judgment on the procedural default.

I.

The state appellate court clearly and expressly relied on procedural waiver as ground for rejecting Welch's constitutional notification and precharging due process delay claims

A. The Wisconsin court of appeals rested its judgement on a procedural default which precluded Welch from federal review Harris v. Reed 1038103 L.Ed.2d 30857 USLW 4224 U.S. 255109 S.Ct ( 1989) and Coleman v. Thompson U.S. 722111 S.Ct. 2546115L.Ed. .2d 64059 4789 (1991); of constitutional notification and a precharging delay violating his due process rights U.S. v. Marion, 30792 S.Ct. 45530L.Ed.2d 468 (1971) and U.S. v. Steve R. DACRI. No. 92-CR-67. 827 F.Supp 827 F.Supp. (1993). Failure to review those claims precludes Welch from having them heard and adjudicated on habeas review in the federal district court because Welch had already pursued that avenue pursuant to 28 U.S.C. § 2254. In Harris v. Reed 1038103 L.Ed.2d 30857 USLW 4224 U.S. 255109 S.Ct ( 1989), this courts language in it's decision and opinion meticulously stated: "state courts statement that most of petitioners allegations could have been raised on direct appeal fell short of explicit reliance on state law ground, particularly in light of fact that state court went on to reach merits of federal claim raised by petitioner."

(e) In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause

for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

**B. The Wisconsin court of appeals decision is in direct conflict with this Court and the federal district courts precedents relating to**

Contrary to the decision in that case, in Welch's case the state appeals court declined to reach the merits, relying explicitly on the state procedural bar; and in doing so hinged on binding state supreme court precedent shown in State v. Escalona-Naranjo, 185 Wis. 2d 169, 178 (1994). The Wisconsin appeals court like in Wainwright v. Sykes U.S. 7297 S.Ct. 249753L.Ed.2d (1977), stated that Welch's constitutional notification and precharging delay issue could have been raised on direct appeal (App. P.4-8 ). for example, the Wisconsin court of appeals stated:

Here, Welch had an adequate remedy in the form of his direct appeal. Welch's supposed inability to locate alibi witnesses prior to his most recent filing does not constitute a sufficient reason for failing to raise his constitutional claims in a prior proceeding. Welch's concerns would have been known to him at the time of his direct appeal and could have been raised then. accordingly we agree with the circuit court that habeas relief is not available to Welch's claims." See (App. P.).



Contrary to Sykes the state court in Welch's case elaborated in the text of it's decision when explaining how Welch was procedurally barred (App. P.5-6 )

In federal system it is important that state courts be given first opportunity to consider applicability of state statutes in light of constitutional challenge Cardinale v. Louisiana U.S. 43789 S.Ct. 116122L.Ed.2d 398 (1969).

In Sykes, the district court stated: "We believe the adoption of the Frances rule in this situation will have the salutary effect of making the state trial on the merits the "Main event, "so to speak, rather than a "try out on the road "for what will later be the determinative federal habeas hearing.

The "Cause" -and- "Prejudice" exception of the Francis rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.

**C. Failure of this court to review the question of Welch's due process violation will result in a fundamental and grave miscarriage of justice**

In U.S v.Doerr,964-965 (1989). Prejudice for the purposes of this analysis is difficult to prove; the defendant must point quite specifically to how she was prejudiced, and the defendant's showing must be concrete, not speculative. "A defendant must do more than allege that a particular witness is no

longer available and that the witness's testimony would have helped the defense." United States v. Antonino, 830 F.2d 798, 805 (7th Cir.1987);

moreover, we shall only conclude that the death of a witness has prejudiced a defendant where we are " 'convinced that [the witness]

would have testified, that his testimony would have withstood cross-examination, and that the jury would have found [him] a credible

witness.' " United States v. Valona, 834 F.2d 1334, 1339 (7th Cir.1987) (quoting United States v. Williams, 738 F.2d 172, 176 (7th Cir.1984).

Further, even if we are convinced that an absent witness would have been a credible witness for the defendant, "we must still evaluate this testimony against the other trial evidence to determine if indeed its Introduction would affect the trial outcome." *Id.*

We cannot accept Ms. Christofalos' undue delay argument. She has failed to make the requisite showing of actual and substantial prejudice. She quite frankly admits that she has no "in-depth knowledge about what the vanished witnesses or the dead witnesses could say" and she does not state how exculpatory their testimony might be. She does not even know the \*965 names of many of the witnesses that she claims would have come to her aid had the indictment been brought in 1982. See Christofalos Br. at 18. We do not know whether these potential witnesses would in fact have testified, whether their testimony would have withstood cross-examination, or whether the jury would have found them credible.<sup>29</sup> Under these circumstances, Ms. Christofalos has

failed to establish prejudice.<sup>30</sup> See Valona, 834 F.2d at 1339; Antonino, 830 F.2d at 806. We therefore conclude that the district court did not err in refusing to dismiss the indictment because of impermissible pre-indictment delay.<sup>31</sup>

Although statutes of limitation provide the "primary guarantee" against prosecutorial delay, the Supreme Court has explained that "the Due Process clause has a limited role to play in protecting against oppressive delay." United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977). When considering whether the due process clause of the fifth amendment requires the dismissal of an indictment on the ground of undue pre-indictment delay, we must engage in a two-step inquiry. First, the defendant must prove that she suffered actual and substantial prejudice. Second, the court must weigh the actual prejudice to the defendant against the government's reasons for the delay.

This court ruled that the district court did not err in refusing to dismiss the indictment because of impermissible preindictment against Christofalos because she failed to establish prejudice. She did not even know the names of many of the witnesses that she claims would have come to her aid had the indictment been brought in 1982. Hence, this court stated further that:

"We do not know whether these potential witnesses would in fact have testified, whether their testimony would have withstood cross-examination, or whether the jury would have found them credible Under these circumstances.

Unlike in Christofalos, Welch's trial counsel Mark G. Lipscomb informed both the state and court at the pretrial hearing held on December 17, 2004, that he had in-fact intended to call approximately five alibi witnesses consisting of: Carl Welch, Latasha Brackett, Lance Black, Katy Kabha, Channel Brown, and the defendant Cory Welch in his own defense. Thus, these witnesses would have testified at Welch's November 8, 2004 jury trial. Hence, Carl Welch and Latasha Brackett were the only two of Welch's witnesses who testified at his future November 28, 2005 jury trial.

Lance Black and Katy Kabha was ready and prepared to testify at The Initial trial but, by the time Welch was tried they could not be located. See (App. P. 52-54 ). These witnesses testimony would have withstood cross-examination and the jury would have found them credible underlying the facts and circumstances because all of Welch's defense witnesses except Lance Black had no prior criminal history and wasn't subject to impeachment. While the states evidence is undermined with only minuscule circumstantial evidence; the only direct evidence placing Welch at the scene of the crime Welch was arrested for, was one accomplice witness Richard Bass who at the time of trial was a six time convicted felon. He was certainly subjected to impeachment. The witnesses would have testified to several armed robberies. The states case in chief as well as it's overall case was weak and rested on circumstantial evidence and conjecture.

Contrary to Christofalos Welch knows the names of all his witnesses that would have aided him had the prosecution brought the charges before November 8, 2004. Distinguished from Christofalos Welch has established prejudice on behalf of the states deliberate precharging delay and this court should grant certiorari review of Welch's claims otherwise failure to do so would result in a paramount miscarriage of justice.

## II.

**Welch was denied due process of law when he was not given constitutional notification of pending charges that resulted in precharging delay**

### STANDARD OF REVIEW

Prosecutorial delay in charging may violate due process if: (1) The delay in charging arose from an improper purpose, so as to afford the state a tactical advantage, and (2) The defendant suffered actual prejudice as a result of the delay. U.S. v. Marion, 30792 S.Ct. 45530L.Ed.2d 468 (1971). and U.S. v. Steve R. DACRI. No. 92-CR-67 827 F.Supp.827 F.Supp. (1993).

In Marion, neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was this event, therefore, that transformed the appellees into 'accused' defendants who are subject to the speedy trial

protections of the Sixth Amendment. IN The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations here. Appellees have not, of course, been able to claim undue delay pending trial, since the indictment was brought on April 21, 1970, and dismissed on June 8, 1970. Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.

In this case, Welch's criminal complaint and information in 2004CF004120 was not amended by the prosecutor, but instead dismissed without prejudice, he was still prejudiced by the dismissal and reissuance of charges in the second criminal complaint in CF6133. The reason the prosecutor did not want to amend the complaint and information and instead opted to dismiss it was because had he amended the complaint he still would have had to release the plaintiff because of his speedy trial demand. The prosecutor dismissed the complaint simply to keep from releasing Welch, also to obtain a statement from a key witness Samantha Green which was obtained 11-13-04, just 5 days after the plaintiffs trial was supposed to begin. The states investigation continued.

The plaintiff Welch had been in custody since 7-27-04 and the prosecutor Bruce W. Becker intentionally failed to give constitutional notice of the new charges until 11-4-04, four days before plaintiffs jury trial was set to begin. See (App. P. 42-46). The prosecutor had no intentions of providing the defendant petitioner with adequate constitutional notice of the new charges that he intended to file. Providing notice of these charges four days before Welch's jury trial was not adequate notice of the charges. The convictions cannot and shall not be legally sustained and the judgment of convictions, criminal complaints, and information must be dismissed. These actions by the prosecutor violated Welch's fifth, sixth, and fourteenth amendment rights to due process of law vested in our constitution.

Even after Welch's arrest on 7-27-04, the Milwaukee Police Department continued an investigation that lasted approximately four months. Marcus Turner was arrested and interviewed on 8-24-04, Justin Spencer was also arrested on 7-26-04, and Marques Stephens who was already in custody in connection with the 7-27-04 incident but, was again interviewed on 9-4-04. Police also, interviewed Ms. Samantha Green on 11-13-04, and received reports from firearms expert Mark Simonson, and Reginald Templin on 8-6-04, 8-25-04, and 8-27-04. Janice Maly a DNA Analyst who prosecutor also received reports from was not named or listed in the information filed in case CF4120 or CF6133. Also the material witness Samantha Green had not been documented in the information see (app. p.21-41).

#### **A. The Delay In Charging Arose From An Improper Purpose**

Welch's due process rights were violated when the court allowed the prosecutor to dismiss without prejudice case CF4120 and file a new criminal complaint and information just days before Welch's jury trial on 11-4-04 violating his right to constitutional notification of the charges against him. This late filing was improper because the prosecutions notification came more Than two months after the defendant was prepared for trial. Failure to notify him adequately of these charges in 2004CF006133 hurt his defense.

This was a tactical advantage to keep the petitioner in custody while it broadened its investigation. Due process rights apply to time delays occurring within the preaccusation, investigatory Period prior to the commencement of formal criminal proceedings. State v. Blanck Sr., 249wis. 2d 364(2001). All of the codefendants implicated Welch in other crimes, and the police forwarded that information including charges to the Milwaukee County District Attorneys' Office for processing. See (App. Pg.1-33). The DA Bruce W. Becker, 04XF7522 Has been aware of the charges since late August, but delayed charging to buy more time for its investigation. Welch's' preliminaryhearing in 2004CF004120 was held in August of 2004, and he requested a speedytrial which prompted a trial to be held by 11-8-04. As the defendant approachedtrial in November, the state moved the court for a motion to dismiss case CF4120 without prejudice and, the court granted the states motion to dismiss the original case without prejudice, and file a new complaint and information in 2004CF006133. Subsequently he was bound over



for trial on 11-10-04, two days after his trial was supposed to begin. And because the prosecutor had achieved his goal in getting the original case dismissed, this was an improper purpose that afforded the state a technical advantage because, by allowing the state to dismiss the initial complaint and refile a new complaint approximately 60+ plus days after the original preliminary hearing, which was too late into the prosecution and violated the defendants right to proper notification of the charges pursuant to the Constitution. The prosecutor delayed charges simply to prolong time for a case that it clearly wasn't ready to proceed with. Welch should have had a trial on or before 11-8-04, or should have been released. Wis. Stat.971.10 (2) Provides:

**"The trial of a defendant charged with a felony shall commence within 90 days From the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.**

- (4) Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.**

This precharging delay by the prosecution allowed the state to continue it's Investigation by obtaining evidence even after the defendant's trial date was nullified for which he should have been tried, November 8<sup>th</sup> 2004. On November 13, 2004 Detective Michael Simonis interviewed Samantha Green who was a

material witness tied to several firearms including the one recovered at the scene on 07-27-04. See (app. P. 46-49). If Welch's trial began on 11-08-04, the prosecutor would not have had this key evidence at trial. Furthermore the evidence of Ms. Green was not drafted in the information or in either criminal complaint 2004CF004120 or 2004CF006133. Welch was notified on the morning of 11-04-04 (app. P.42). The circuit courts order allowing the prosecution to dismiss and reissue charges violated due process because it was imposed contrary to constitutional protections.

**B. Welch Suffered Actual and Substantial Prejudice As Result Of Precharging Delay Violating His Due Process**

971.01(2). This was a tactical advantage to extend its investigation without releasing Welch. The prosecutor never moved the court for an order to amend the complaint or to amend such information in CF4120 for cause. Notice of the latest complaint and information was never known or verbally mentioned to the defense at any time before 11-4-04, Welch became aware of the new charges on the date above. This was a tactic to prolong filing and avoid the consequences of implicating Welch's speedy trial under wis. Stat. 971.10.<sup>3</sup> (2)(4). Furthermore the latest complaint and information was filed way outside the scope of the 30-day deadline pursuant to wis. Stat.971.01 (1), after the preliminary hearing was held. This action gave the prosecutor a clear advantage

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<sup>3</sup> State statutes and state precedents are cited in this petition as references to the state violations that directly implicates the violation of Welch's federal constitutional rights and not cited as authority for any other purpose.

over the defendant. During a hearing held on 11-29-04 (App. p.42-46) the court stated: "This is a reissued case. The case in it's original iteration had fewer counts. The case now has sixteen count's." The late dismissal of the original complaint and the late filing of the subsequent complaint was a subversion of Welch's speedy trial because he wasn't released from custody or given a trial on or before 11-8-04, violating statute 971.10(2)(4), and due process of law. The state was also afforded a tactical advantage when it was allowed to sever four counts in the latest complaint CF6133 and use "Other Act's" evidence. Welch couldn't defend. The prosecutor submitted to the defense in a letter dated August 31, 2004, that it intended to use other acts as proof in its case-in-chief. (app. p.47).

Trial should have been held no later than 11-8-04, he could not locate and obtain the presence of these witnesses due to the prosecutors deliberate subversion of Welch's right to a speedy trial wis. Stat. 971.10(2)(4). Katy Kabha, and Lance Black could not be located at the time of trial and therefore prejudiced this defendant's defense. These two witnesses testimony was vital to his defense and to disprove the states purpose of this evidence and would have countered and contested the unproven charges because this testimony gives doubt to the intent element of the conspiracy to commit armed robbery charge. Welch was elsewhere at the time the other acts where committed. Also, the substance of Katy Kabha's testimony would have been that, Welch and her went for a walk in the park on May 22, 2004 and could not have committed the robberies he's convicted of. Also, Lance

Black would have testified that he went by Cory Welch and Samantha Green's apartment on January 9, 2003 at 9314 W. Sheridan Ave and hung out at approximately 5:15pm to about 6:50 pm and Welch could not have committed this crime without him being aware because they were together at the time that the crime was committed.

And finally, the testimony in his own defense would have been that he was by Chanel Brown's house on both May 17, 2004 and June 6, 2004. We were at the restaurant "Denny's" and could not have committed the armed robberies alleged on these dates. See affidavits ( App., p.52-54) The prosecutions motion to use the severed and unproven charges towards the intent element of the conspiracy charge that must be proven to convict. these witnesses although several years after his trials have been located and submitted affidavits to the fact that Welch was elsewhere at the time the other acts were committed. also, Welch could not locate another witness by the name of Lance Black to testify that he was elsewhere at the time of the crime committed on 1-9-03 that the state also intended to use as "Other Acts," at the 11-8-04 jury trial see (app. P. ). ( states letter dated 8-31,04.).

Although the charges in the second criminal complaint<sup>4</sup> were some of the same, and related to the facts filed in the first criminal complaint, because Welch did not receive adequate notice of the new charges he was prejudiced by this late

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<sup>4</sup> It is a fact that the severance of charges does not occur until January 18, 2005. Welch's due process rights violation occurs November 4, 2004, and more than two months prior to the severance.

notification on the morning of 11-4-04, and therefore, prosecution cannot be sustained State v. Neudorff August 19, 1992 170 wis. 2d 608 489 N.W.2d 689.

also, Welch was prejudiced by the dismissal of the first complaint. Filing of the second complaint violated his speedy trial rights 971.10(2)(4). Sixth amendment of the constitution.

Not only can the petitioner demonstrate prejudice, but can demonstrate actual prejudice. Welch demonstrates actual prejudice because with the late notification he could not defend against the charges against him due to the loss of his defense witnesses: Lance Black, and Katy Kabha. Also I intended to testify in my own defense as to my whereabouts on May 17, and June 6, 2004. See witness affidavits (app. P.50-52). This evidence was vital to refute the charges against him. On or before 11-08-04 Welch had no felony convictions, but by the time he was tried he was a 2 time convicted felon calling into question his credibility. He didn't testify.

Welch's speedy trial demand was put into effect on approximately August 7<sup>th</sup> of 2004, to avoid the very thing that has transpired in his case, impairment of a defense. The speedy trial right was designed to protect against prejudicial acts such as these demonstrated by the prosecutor. The delayed notification and precharging delay was a tactic to avoid releasing the defendant because of his speedy trial demand. Also, the prosecutors motive was to obtain a statement from a material witness Ms. Samantha Green (App. p.48-51) extending it's investigation on current and delayed charges. This was an improper device

imposed by prosecutor. Had trial began on the 8<sup>th</sup> the prosecutor would not have had the evidence of Samantha Green (app. P.48-51). Dismissal and reissuance was imposed contrary to constitutional protections violating Welch's Due Process rights.

Had the prosecutor released Welch from custody or given him a trial on or before 11-08-04 and notified him of it's intent to bring charges against him there would not have been a due process violation. But because he wasn't adequately notified, this failure to promptly notify him of his intent to file charges before his trial, he could not defend against those charges because of the loss of his witnesses and did not receive a speedy trial because of the delayed charges. As such, this demonstrates actual prejudice.

### **C. Why Criminal Complaint And Information Must Be Dismissed**

pre-indictment delay will amount to a due process violation only if "(1) the delay caused 'actual and substantial prejudice' to the defendant's right to a fair trial; and (2) the government delayed the indictment for tactical advantage or some other impermissible reason." *Anagnostou*, 974 F.2d at 941 (citing United States v. Ashford, 924 F.2d 1416, 1419-20 (7th Cir.), cert. denied, 502 U.S. 828, 112 S.Ct. 98, 116 L.Ed.2d 69 (1991)). required to prove the existence of both of the factors identified above—actual and substantial prejudice and that the delay was motivated by bad faith on the part of the government. \*553 *Pharm v. Hatcher*, 984 F.2d 783, 786 (7th Cir.1993) (citing Anagnostou, 974 F.2d at 941). Under a second line of cases, after the defendant shows actual and substantial prejudice,

the burden shifts to the government to show that the delay was necessary.

Pharm, 984 F.2d at 786, (citing United States v. King, 593 F.2d 269, 272 (7th Cir.1979). If the government meets its burden, the prejudice from the delay is balanced with the reasons for the delay. Pharm, 984 F.2d at 786-787. The presence of the two standards is not significant in my determination, however, because I agree with the magistrate judge's finding that Mr. Dacri has failed to show actual and substantial prejudice.

Also failure to give adequate notification of the charges he could not prepare and present other defenses to the remaining charges. The trial courts order was erroneous when allowing the prosecutor to dismiss initial criminal complaint 4 days before trial then refile a second complaint. The reissuance of the charges in the second complaint violated Welch's speedy trial right's, and his right to due process of law and right to defend against the charges when he lost many of his defense witnesses. (app. P.51-53).

Instances where the existence of probable cause has been fully litigated, where the proceedings have culminated in a final order dismissing the first complaint, and where no additional evidence was adduced to support a different result. See

Wittke v. State ex rel. Smith 80 wis. 2d 332, 259N.W. 2d 515 (1997). A second criminal complaint cannot be issued where existence of probable cause has been

fully litigated, proceedings have been culminated in a final order dismissing first complaint, and there is no additional evidence to support a different result.

Wis. Stat. 970.04 second examination.

Welch had a preliminary hearing on August 7, 2004 in case 2004CF004120 for which probable cause had been established. Welch then demanded a speedy trial which prompted the Nov 8<sup>th</sup> 2004, jury trial date. On Nov 4<sup>th</sup> 2004, (App. p.42-46). The prosecutor filed new charges. The defense objected to the filing on a couple of factors: one being that, filing a new criminal complaint after dismissal would violate Welch's speedy trial, and two being that the prosecution has already been aware of the charges since late August.

### Indictments and Charging Instruments

For purposes of obtaining dismissal on grounds of preindictment delay that violates due process, allegations of prejudice must be specific, concrete, and supported by evidence; vague, speculative or conclusory allegations will not suffice. U.S.C.A. Const. Amends. 5, 14.

Although the petitioners criminal complaint and information in CF004120 was not amended by the prosecutor, but instead dismissed without prejudice, he was still prejudiced by the dismissal and reissuance of charges in the second criminal complaint in CF6133. The reason the prosecutor did not want to amend the complaint and information but, instead opted to dismiss it is because had he amended the complaint he still would have had to release



Welch because of his speedy trial demand. The prosecutor dismissed the complaint simply to keep from releasing Welch, also to obtain a statement from a key witness Samantha Green which was obtained 11-13-04, just 5 days after the plaintiffs trial was supposed to begin, extending its investigation.

The plaintiff Welch had been in custody since 7-27-04 and the prosecutor Bruce W. Becker intentionally failed to give constitutional notice of the new charges until 11-4-04, four days before plaintiffs jury trial was set to begin. The prosecutor had no intentions of providing the Defendant-Welch with adequate constitutional notice of the new charges that he intended to file. Providing notice of these charges four days before Welch's jury trial was not adequate notice of charges, and therefore his convictions cannot and shall not be legally sustained and the judgment of convictions, criminal complaints and information must be dismissed. The prosecutors disregard of the Defendant-petitioners fundamental rights cannot be overlooked and he has met his burden of proof by demonstrating that his 5<sup>th</sup>, 14<sup>th</sup>, amendments to the constitution was violated and that his detention is illegal.

In the instant writ Welch submits substantial erroneous issues warranting Relief and granting a hearing and, adherence to immediately discharging him from custody.

## CONCLUSION

For the foregoing reasons mentions above the petitioner requests that this court would issue a writ ordering the state of Wisconsin to respond to the petitioners assertions, and also grant his request for certiorari and dismiss the underlying criminal complaint.

Dated this 26 day of Dec 2021.

Cory Mandrel Welch #481266

Fox Lake Correctional Institution

P.O. Box 200

Fox Lake, WI 53933

