APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
Clerk

No. 21-60344

SEDRICK D. RUSSELL,

Petitioner—Appellee,

versus

J. DENMARK,

Respondent—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:14-cv-225

Before CLEMENT, DUNCAN, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

Sedrick Russell, Mississippi prisoner # 145868, was arrested on December 21, 2006.[1] Eight months later, he was indicted by a grand jury on charges of aggravated assault with a firearm and possession of a firearm by a convicted felon. In January 2009, he was tried in state court, and a jury found him guilty on both counts. Sentenced as a habitual offender, he received two

[1] The record contains several different spellings of Russell's first name, but he clarified in the district court that it is spelled "Sedrick." The Mississippi Department of Corrections spells his first name "Cedric."

concurrent life sentences without the possibility of parole. Russell unsuccessfully pursued post-conviction relief in state court. After exhausting state-court review, Russell filed a federal habeas petition, which the district court granted. The State now appeals that ruling.

In this appeal, we consider Russell's federal habeas claims that his conviction violated his right to a speedy trial, and that his public defenders provided ineffective assistance of counsel. While two state courts rejected these claims, the federal district court disagreed and held that relief was warranted. Because the district court "fail[ed] to accord required deference to the decision of a state court," *Harrington v. Richter*, 562 U.S. 86, 92 (2011), we reverse and render.

I.

On the evening of December 19, 2006, Michael Porter visited his girlfriend Lawanda Hawkins's home in Jackson, Mississippi. Hawkins's cousin, Sedrick Russell, was also there. Sometime between 9:00 and 11:00 p.m., Porter walked outside to retrieve a bottle of gin from his car. Russell, who had earlier been following Porter around the house, closely trailed him as he went outside. While Porter leaned down to reach into his car for the liquor, he was shot twice from behind in the leg with a 9mm pistol. No one saw who shot Porter. But witnesses saw Russell walk out of the house "right behind" Porter. And earlier that evening, Porter had noticed a 9mm pistol in Russell's pocket.

Russell denied that he shot Porter. Instead, Russell maintained that he had left the Hawkins home by the time Porter was shot, picked up by a friend known only as "Ron Ron."

Two days after the shooting, Russell was arrested for the crime. At his initial appearance, the state circuit court appointed the Hinds County Public Defender's Office to represent him. Russell was held without bail at

the Hinds County Detention Center. At his preliminary hearing in January 2007, public defender Beth Davis represented him.[2] In August 2007, he was indicted by a grand jury on two charges: aggravated assault and possession of a firearm by a convicted felon. Months before, though, Russell had begun filing pro se motions asserting that his right to a speedy trial was being violated.

Davis appeared on Russell's behalf only at his preliminary hearing. Sometime thereafter, Frank McWilliams, another Hinds County public defender, took over Russell's case. McWilliams filed two boilerplate requests for discovery, appeared for Russell at his arraignment in November 2007, and apparently later attempted to negotiate a plea agreement for Russell. There is no evidence in the record of any other actions taken by McWilliams on Russell's behalf.

At his arraignment, Russell's trial date was set for March 24, 2008. In December 2007, Russell filed a pro se motion to dismiss for lack of a speedy trial. The state trial court denied the motion, finding that Russell's scheduled trial date met state statutory requirements.[3] Nevertheless, "[i]n view of" Russell's motion, the court moved his trial date up to February 11, 2008. Unsatisfied, Russell filed several more motions objecting to the delay.

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[2] Russell contends that he told Davis about "Ron Ron," but she told him the conversation could wait until after the preliminary hearing.

[3] Mississippi law requires that "all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." MISS. CODE ANN. § 99-17-1. The statute includes a good-cause exception that applies when "a continuance [is] duly granted by the court." *Id.* Russell relied on this statutory 270-day requirement in his initial pro se motion. He does not reassert a state statutory speedy-trial claim here.

Russell's trial did not occur that February as scheduled.[4] Three days after the scheduled trial date, the court "relieved" the Hinds County Public Defender's Office of representing Russell and appointed attorney Don Boykin to represent him.[5] Russell and Boykin met two weeks later, and Boykin promptly filed several motions on Russell's behalf. Boykin also informed prosecutors of Russell's purported alibi witness "Ron Ron," whom Boykin was attempting to locate. Despite Boykin's appointment and subsequent efforts, Russell continued to file frequent pro se motions.

Not long after his appointment, Boykin requested a psychiatric exam for Russell. He contended that an exam was needed before the case could proceed because of a letter Russell allegedly sent to Porter, "say[ing] some very strange things about hearing voices[.]" Russell objected to the exam, arguing that he "believe[d] that the reason for the psychiatric examination by court order [was] to justify denying [his] right to a speedy trial." Nevertheless, the court granted the request, and the case was continued pending completion of the exam. In October 2008, Russell was examined and deemed competent to stand trial.

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[4] The trial court did not explain why Russell's trial did not commence then. The prosecution later stated that Russell "chose not to go forward" because he "complained of [his] Public Defender." Dan Boykin, Russell's court-appointed lawyer at trial, represented that "from the defense standpoint[,] neither the [public defender] nor Mr. Russell was prepared to go to trial at that time because he had not communicated with an attorney." Boykin also asserted that the public defender had not notified Russell of the February 11 date.

[5] The record is unclear about why the court substituted Russell's counsel. The court's order itself said it was in response to a motion filed by the public defender's office, which requested to withdraw due to a conflict between Russell and the office. No such motion appears in the record before us. Elsewhere, the prosecutor contended that Russell's change in counsel occurred because "Russell was complaining of his public defender and demanding new counsel."

Russell's trial commenced on January 27, 2009. Before the jury was brought into the courtroom, the trial court considered a motion from Boykin to set aside the court's previous denial of Russell's pro se speedy-trial claim. In this iteration, Boykin focused on Russell's Sixth Amendment right to a speedy trial rather than the state statutory guarantee. Russell testified that the 14-month delay that occurred while he was represented by public defenders prejudiced his defense. He stated that he "lost contact of" his purported alibi witness during the delay because he was imprisoned and received no assistance from his lawyers in locating "Ron Ron." The trial court denied the motion.

At trial, Russell testified on his own behalf, maintaining that "Ron Ron," who has never surfaced, picked him up from the Hawkins home before Porter was shot. Porter also testified at trial, as did Lawanda Hawkins, her sister Vicki, and three police officers. The jury found Russell guilty on both counts. Because he had four previous convictions,[6] he was sentenced as a habitual offender to two life sentences without the possibility of parole.

Following sentencing, Russell—still represented by Boykin—filed a direct appeal. *See Russell v. State*, 79 So. 3d 529 (Miss. Ct. App. 2011). Among other issues, Russell challenged the trial court's denial of his counsel's motion to set aside the denial of his pro se speedy trial motion. *See id.* at 534.

Evaluating that claim, the Mississippi Court of Appeals considered the speedy-trial factors articulated in *Barker v. Wingo*, 407 U.S. 514 (1972). First, it found that the length of delay was "presumptively prejudicial." 79 So. 3d at 537. As to the reasons for the delay, the court concluded that the

[6] Russell had been convicted of aggravated assault, possession of cocaine, possession of marijuana, and possession of a firearm by a convicted felon.

first fourteen months weighed against the prosecution, while the next eleven months weighed against the defense, so this factor was "neutral." *Id.* at 538. The court recognized that Russell had repeatedly asserted his right but determined that his assertion of prejudice "lack[ed] support." *Id.* Weighing these factors, the court held that "[a]lthough the circuit judge did not fully articulate his calculations regarding defense delay in his findings, . . . the circuit court's findings [were] supported by substantial evidence in the record." *Id.* at 539. Therefore, the appellate court concluded that Russell's speedy-trial claim was "without merit," *id.*, and affirmed Russell's conviction, *id.* at 545.

Russell petitioned the Mississippi Supreme Court for a writ of certiorari. In his pro se petition, he again urged that his right to a speedy trial had been violated. The court denied his petition without comment. *See Russell v. State*, 80 So. 3d 111 (Miss. 2012).

Russell subsequently filed a pro se state petition for post-conviction relief. In it, he raised his constitutional speedy-trial claim again, and he also asserted a claim of ineffective assistance of counsel.[7] He alleged that his public defenders had failed to contact him for over a year. He also alleged that Boykin had provided ineffective assistance at trial and on appeal. The Mississippi Supreme Court denied his petition. The court rejected his speedy-trial claim on res judicata grounds. And it held that his claims of ineffective assistance of counsel "fail[ed] to meet both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984)."

[7] Russell also challenged the timing of the State's motion to amend his indictment to allege that he was a habitual offender and the constitutionality of his prior conviction for possession of a firearm by a felon. He did not raise these issues in his federal habeas petition.

Russell, still pro se, then filed the instant federal habeas application, reasserting both his speedy-trial and ineffective-assistance claims. The magistrate judge recommended dismissal. Russell objected to the magistrate judge's report and recommendation. The district court determined that "the issues [the application] presents are significant not just to Mr. Russell, but to the very functioning of a minimally-adequate criminal justice system." Therefore, the district court appointed counsel to represent Russell.[8]

Russell's counsel then filed an amended objection to the magistrate judge's report and recommendation, arguing that Russell faced "a breakdown in the public defender system." Relying on *Vermont v. Brillon*, 556 U.S. 81, 86 (2009), Russell now urged that this breakdown required the delay in his underlying trial proceedings to weigh against the State, such that Russell's right to a speedy trial was clearly violated. The amended objection devoted little more than a page to Russell's ineffective-assistance claim, asserting only that the magistrate judge was wrong that Russell had failed to prove prejudice under *Strickland*.

The district court granted Russell's application for habeas relief. *Russell v. Denmark*, 528 F. Supp. 3d 482, 509 (S.D. Miss. 2021). The court found that Russell had faced "a systemic 'breakdown in the public defender system'" in Hinds County. *Id.* at 499 (quoting *Brillon*, 566 U.S. at 94). This finding was in turn the primary basis for the court's determination that the *Barker* factors supported Russell's speedy-trial claim. *Id.* at 505–06. Specifically, the court reasoned that the delay due to the appointment of successive counsel leading up to trial was attributable to the "systemic breakdown" and should be charged against the State. *Id.* at 498–99. The

[8] The court appointed Alysson Mills, who has continued to represent Russell on appeal. Consistent with his previous history, Russell also filed pro se motions with the district court even after Mills was appointed to represent him.

court concluded that the delay frustrated Russell's ability to locate "Ron Ron" and that finding the alibi witness would have had a "high probability" of "alter[ing] the outcome of the trial on the aggravated assault charge." *Id.* at 502. It followed that the Mississippi Court of Appeals "was objectively unreasonable not to find that Russell was prejudiced" by the delay in his trial. *Id.* at 504. The district court limited its speedy-trial ruling to Russell's aggravated-assault conviction; because "Ron Ron's testimony likely 'could not have altered the outcome of the trial' on the felon in possession charge," the court concluded that Russell "did not suffer actual prejudice on that charge." *Id.* at 504 (citing *Cowart v. Hargett*, 16 F.3d 642, 648 (5th Cir. 1994)).

The district court also granted habeas relief on Russell's ineffective-assistance-of-counsel claim. *Id.* at 509. The court read Russell's habeas complaint as alleging a claim under *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland*. *Id.* at 508. Concluding that Russell faced a "complete denial of counsel" under *Cronic* while he was represented by the public defenders, the court held that "the Mississippi Supreme Court's application of *Strickland* to this case [was] an erroneous and unreasonable application of the clearly established Supreme Court law set forth in *Cronic*." *Id.* at 507. While the district court's speedy-trial relief was limited only to one of Russell's convictions, its holding on Russell's ineffective-assistance claim applied to both because "*Cronic*'s presumption of prejudice applies to both the aggravated assault and felon in possession charges." *Id.* at 509.

The State timely appealed to this court. The district court stayed its ruling pending appeal. *Id.*

II.

In an appeal from a district court's grant of habeas relief, we review the court's findings of fact for clear error and its conclusions of law *de novo*. *Hughes v. Vannoy*, 7 F.4th 380, 386 (5th Cir. 2021).

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, federal courts review state court habeas decisions deferentially. *Id.* AEDPA permits a federal court to grant habeas relief only where a state court "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on 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 "difficult to meet," *Richter*, 562 U.S. at 102, because it requires that the state court's decision be "so lacking in justification" that the error is "beyond any possibility for fairminded disagreement," *id.* at 103.

Deference applies even when the state court decides an issue without fully explaining its reasoning. *See Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003); *accord Amos v. Thornton*, 646 F.3d 199, 205 (5th Cir. 2011) (per curiam) ("[D]eference due under section 2254(d)(1) is not diminished by the fact that the [state court] did not explain the reasons for its determination[.]"). This is "[b]ecause a federal habeas court only reviews the reasonableness of the state court's ultimate decision," "not the written opinion explaining that decision." *Schaetzle*, 343 F.3d at 443 (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam)). Thus, in reviewing a state court opinion, this court focuses on "the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal*, 286 F.3d at 246.

III.

First, we consider whether the district court erred in granting relief on Russell's speedy-trial claim. It did. Rather than deferentially considering whether the state court decision was "so lacking in justification" as to merit habeas relief, *Richter*, 562 U.S. at 103, the district court effectively reviewed the claim *de novo*, contravening AEDPA. Accordingly, we reverse and render judgment in favor of the State.

A.

We begin with the well-established analytical framework. For a half century, courts have analyzed speedy-trial claims using the four *Barker* factors:

(1) the length of delay,
(2) the reason for the delay,
(3) the defendant's assertion of his right to speedy trial, and
(4) prejudice to the defendant.

407 U.S. at 529–34.

In reviewing a state court's application of the *Barker* factors to a particular case, the "always-substantial deference" we afford to state courts in federal habeas review "is at an apex." *Amos*, 646 F.3d at 205. After all, the *Barker* factors are "a broad, general standard whose application 'to a specific case can demand a substantial element of judgment.'" *Id.* (citation omitted). Therefore, in habeas review of a state prisoner's speedy-trial claim, federal courts must "give the widest of latitude to a state court's conduct of its speedy-trial analysis." *Id.*

In applying that latitude, AEDPA limits habeas review to whether a state court's adjudication "resulted in a *decision*" that warrants relief under AEDPA's standard. 28 U.S.C. § 2254(d) (emphasis added). A reviewing

federal court's disagreement with the state court's weighing of individual *Barker* factors is thus not itself grounds for reversal. *Goodrum v. Quarterman*, 547 F.3d 249, 265–66 (5th Cir. 2008). Rather, under AEDPA, we may disagree with "some of the state court's preliminary conclusions" but will nonetheless deny relief so long as the state court's ultimate decision—here, that the balance of the four *Barker* factors did not merit relief—is objectively reasonable and not contrary to law. *Id.*; *see also id.* at 255–56.

As for which state court decision is our focus, "[u]nder AEDPA, 'we review the last reasoned state court decision.'" *Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014) (citation omitted). "Using the 'look through' doctrine, we 'ignore—and hence, look through—an unexplained state court denial and evaluate the last reasoned state court decision.'" *Id.* (citation omitted). In this case, that means we "look through" both the Mississippi Supreme Court's res judicata denial of Russell's speedy-trial habeas claim and its earlier, unexplained denial of certiorari in Russell's direct appeal to train our sights, as the parties do, on the speedy-trial decision by the Mississippi Court of Appeals during Russell's direct appeal.

B.

To be sure, the Mississippi Court of Appeals did not explicitly engage in a balancing of the *Barker* factors in deciding Russell's direct appeal. *See Russell v. State*, 79 So. 3d at 538–39. But as mentioned, "AEDPA does not require state courts to explain their reasoning . . . before benefitting from deference." *Divers v. Cain*, 698 F.3d 211, 216 (5th Cir. 2012) (citing *Richter*, 562 U.S. at 98). Yet the district court "appears to have treated [AEDPA's] unreasonableness question as a test of its confidence in the result it would reach under *de novo* review[.]" *Richter*, 562 U.S. at 102. In doing so, the district court's "analysis overlook[ed] arguments that would otherwise justify the state court's result," *id.*, and instead reweighed the *Barker* factors

afresh. This "lack of deference to the state court's determination" constituted "an improper intervention in state criminal processes," *id.* at 104, such that the district court erred in granting Russell's habeas application on the speedy-trial issue.

1.

While our focus is on "the result of the state court's balancing of the *Barker* factors[,] . . . we will conduct a limited review of the [Mississippi Court of Appeals]'s analysis of each *Barker* factor" as a way of "facilitat[ing] our evaluation of . . . the state court's decision." *Goodrum*, 547 F.3d at 257. The parties generally agree about *Barker* factors one and three, so we need not tarry on them. For factor one—the length of delay—the Mississippi Court of Appeals properly found that the 25-month delay in Russell's case weighed against the State, though not heavily. *Russell v. State*, 79 So. 3d at 537; *see Goodrum*, 547 F.3d at 257 (viewing a delay of one year or more as presumptively prejudicial); *cf. Amos*, 646 F.3d at 206–07 (requiring that the delay extend beyond two-and-a-half years to weigh heavily against the State). While the district court quibbled with aspects of the state court's analysis on this issue, *Russell*, 528 F. Supp. 3d at 496, it did not disagree with the upshot, i.e., that the length of delay weighed against the State, *id.* at 496–97. Because "a federal habeas court is authorized . . . to review only a state court's 'decision,'" *Schaetzle*, 343 F.3d at 443, we need not dwell further on this factor.

Similarly, on factor three—the defendant's assertion of the right—the parties correctly agree that Russell's "assertion of his speedy trial right receives strong evidentiary weight[.]" *Amos*, 646 F.3d at 207. The district court faulted the state court for failing to make an "express finding regarding this factor" and noted that our court has held under similar circumstances that the state court's failure to assign a strong weight in defendant's favor is

"contrary to clearly-established law." *Russell*, 528 F. Supp. 3d at 500 (quoting *Goodrum*, 547 F.3d at 249). True enough, but again, "our disagreement with some of the state court's preliminary conclusions," or, really, the lack of an express finding here, "does not provide grounds for reversal so long as we find *the ultimate decision* to be objectively reasonable" and not contrary to law. *Goodrum*, 547 F.3d at 265–66 (emphasis added); *see also id.* at 255–56. Assuming *arguendo* that the Mississippi Court of Appeals erred by failing explicitly to weight this factor strongly in Russell's favor, that error does not in itself fatally undermine the ultimate decision by the state court.

2.

The parties, like the state and district courts, sharply diverge on the second *Barker* factor, the reason for the delay. *See Barker*, 407 U.S. at 531. Courts look to the delay's causes to determine which party bears fault for the delay, and how heavily:

> At one extreme, a deliberate delay to disadvantage the defense is weighted heavily against the state.[9] At the other end of the spectrum, delays explained by valid reasons or attributable to the conduct of the defendant weigh in favor of the state. Between these two extremes fall unexplained or negligent delays, which weigh against the state, but not heavily.

Goodrum, 547 F.3d at 258 (internal quotations and citations omitted).

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[9] Russell's pro se federal habeas petition could be read to allege such a deliberate delay. The magistrate judge read his petition this way. She wrote, "Petitioner alleges that the state court wrongly attributed his change of counsel and mental evaluation to the defense when they were, in fact, attempts by the State, in conspiracy with his court appointed attorneys and the trial judge, to cover up his public defender's failures and obtain an impermissible and unfair advantage against the defense." Assuming *arguendo* that was Russell's contention, the record provides no support for it.

The state court "weigh[ed] this factor as neutral." *Russell v. State*, 79 So. 3d at 538. The court found that delay early in the case, while Russell was represented by public defenders, weighed against the State. *Id.* at 537. But later delays due to "withdrawal of the defendant's attorney" and the mental evaluation Russell's counsel requested weighed in the State's favor. *Id.* at 537–38.

The district court agreed that the early delay weighed against the State. But it criticized the state court's findings regarding later delays. *Russell*, 528 F. Supp. 3d at 498–99.

We first consider the delay caused by defense counsel's request for a mental evaluation. The district court correctly noted that "the nearly seven-month delay caused by Russell's mental evaluation" would "ordinarily not [be] assessed against the state." *Id.* at 499. Nevertheless, the district court raised a concern: "[W]e have no record of why a mental examination was requested—or why one was granted." *Id.* The court answered that concern with a hypothesis, that the evaluation may have been "the easiest way to get Russell's case off the docket, or perhaps to keep him incarcerated for months more on end without the speedy trial clock running." *Id.* After conjecturing about "why the record is silent on such an important issue," the district court "set[] aside how the mental evaluation delay is construed." *Id.* Yet the district court's hypothesizing crystallizes the court's overarching error in this case: Rather than affording AEDPA deference to the state court, the district court substituted its own speculation about *Russell's* request for a mental evaluation to question the state court's weighing of this factor.

To reiterate, AEDPA demands that reviewing federal courts "determine what arguments or theories supported or . . . could have supported, the state court's decision," and then "ask whether it is possible fairminded jurists could" find those arguments reasonable and consistent

with Supreme Court precedent. *Richter*, 562 U.S. at 102. If so, end of analysis; the state court's determination should be upheld. By contrast, the district court here theorized points that could undermine the state court's decision and then contemplated whether "a neutral observer [w]ould be concerned[.]" 528 F. Supp. 3d at 499. This approach conflates "deference" with "*de novo*," turning AEDPA's framework on its head along the way.

Besides, the court's hypothesis does not hold water when tested against the record. The district court's theory about why the state trial court ordered a mental evaluation minimizes the fact that Russell's appointed counsel, Boykin, requested the evaluation—and later conceded that the delay "during the period of time that we were awaiting the evaluation . . . is not attributable to the State." It strains credulity to imagine that Russell's counsel requested the evaluation to help the state court cover its speedy-trial errors, especially given Boykin's zealous advocacy on Russell's behalf on the speedy-trial issue. Regardless, a delay caused by defense counsel is usually charged against the defendant, *Brillon*, 556 U.S. at 91, just as the Mississippi Court of Appeals concluded.

And the record provides ample justification for the evaluation. The state trial transcript describes a letter Russell wrote to Porter, the shooting victim, that included "some very strange things about hearing voices and from the Air Force and whatever." The trial judge explicitly stated that this letter was "part of the reason for which [Russell] was sent for a mental examination." Viewed through AEDPA's deferential lens, the state court's determination that the delay for Russell's mental evaluation weighed against him was not unreasonable or contrary to law.

As for the delay due to Russell's change in counsel, the district court found the state court's assessment, charging the delay to Russell, to be "contrary to . . . Supreme Court precedent." 528 F. Supp. 3d at 498. The

district court again misapplied the AEDPA standard of review. *See* 28 U.S.C § 2254(d)(1) (requiring that a state court decision be "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States").

"A state-court decision is 'contrary to' clearly established federal law only if it 'arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if' it resolves 'a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" *Langley v. Prince*, 926 F.3d 145, 155 (5th Cir. 2019) (en banc) (citing *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (alterations in original). To prevail, a defendant must point to "Supreme Court precedent that is 'opposite to' or 'materially indistinguishable' from this case." *Id.* at 155–56 (quoting *Williams*, 529 U.S. at 413). This is such a high bar that "in most AEDPA cases, the 'contrary to' prong does not apply." *Id.* at 156.

The district court's conclusion that the state court's charging this delay to Russell contravened Supreme Court precedent primarily rested on one line in *Brillon*: "Delay resulting from a systemic breakdown in the public defender system could be charged to the State." 556 U.S. at 94 (citation and quotation marks omitted), *quoted in Russell*, 528 F. Supp. 3d at 497. As a threshold matter, we are not convinced that this one line clearly establishes a "systemic breakdown" rule as expounded by the district court. Regardless, the district court otherwise failed to explain how *Brillon* is "'opposite to' or 'materially indistinguishable' from this case." *Langley*, 926 F.3d at 155 (quoting *Williams*, 529 U.S. at 413).[10] If anything, to the extent this case is

[10] In fact, to justify relief for Russell, the district court actually *distinguished* Russell's case from Brillon's (where relief was denied). *Russell*, 528 F. Supp. 3d at 498 (describing how Russell is "[u]nlike Brillon"). Thus, the district court itself seemed to reject the conclusion that this case is materially indistinguishable from *Brillon*.

"indistinguishable" from *Brillon*, it actually cuts *against* Russell: As his counsel conceded during oral argument, there is no "evidence in this record of a broad systemic breakdown." *Cf. Brillon*, 556 U.S. at 94 ("[T]he Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in Brillon's case.") (citations and quotations omitted). Russell's case alone cannot suffice to prove a *systemic* breakdown of the Hinds County public defender system. And without such evidence, we cannot conclude that the state court's decision was contrary to *Brillon*'s observation that a "systemic breakdown" could weigh against a state.

The district court secondarily reasoned that "[t]o the extent that the egregious lack of counsel was due to negligence," the state court decision was also contrary to *Barker* because responsibility for negligence in providing counsel "must rest with the government rather than the defendant." 528 F. Supp. 3d at 498 (quoting *Barker*, 407 U.S. at 531). But the court did not explain how the state court's ruling was legally "opposite to" or factually "materially indistinguishable" from *Barker*. *See Langley*, 926 F.3d at 156. "So here, as in most AEDPA cases, the 'contrary to' prong does not apply," *id.*, and the district court erred in concluding otherwise.

We recognize that the record is susceptible to different conclusions about *why* Russell received new counsel. *See supra* note 5. But under AEDPA, in the face of such ambiguity, we look to what arguments could *support* the state court's determination that this factor weighed against Russell. *See Richter*, 562 U.S. at 102. Had the district court done likewise, it would have readily found such support. On its face, the state trial court's order relieved Russell's public defenders after the defense so requested "on the grounds that a conflict of interest exist[ed] in this case between the Defendant and the office of the Hinds County Public Defender[.]" Elsewhere in the record, prosecutors asserted that Russell himself

"demand[ed] new counsel" in his numerous pro se motions "complaining of his public defender[.]" Whether counsel was substituted in response to the public defenders' motion or Russell's demands, or both, the resulting delay would properly weigh against Russell. *See Brillon*, 556 U.S. at 90–91 (citations, quotations, and brackets omitted) ("Because the attorney is the [defendant's] agent . . . , delay caused by the defendant's counsel is also charged against the defendant . . . whether counsel is privately retained or publicly assigned[.]"). We thus cannot conclude that the Mississippi Court of Appeals acted unreasonably or contrary to law in doing so.

3.

The parties also vigorously contest the fourth *Barker* factor, prejudice. The state court found no prejudice because Russell's mere assertions of mental anxiety and a lost alibi witness ("Ron Ron"), without further evidence, were insufficient. *Russell v. State*, 79 So. 3d at 538. The district court determined that Russell's assertions were sufficient to show prejudice as to his aggravated-assault charge, though not as to his felon-in-possession charge. *Russell v. Denmark*, 528 F. Supp. 3d at 504. We consider the competing conclusions and again conclude that the district court erred in failing to afford proper deference to the state court's decision.

First, Russell's anxiety. The state court rejected Russell's alleged mental anxiety as insufficient to show prejudice under Mississippi law. 79 So. 3d at 538 (citing *Jenkins v. State*, 947 So. 2d 270, 277 (Miss. 2006)). The district court held that conclusion to be "flatly contrary to federal law." 528 F. Supp. 3d at 503 (citing *Goodrum*, 547 F.3d at 262–63). We disagree.

Barker recognized "anxiety and concern of the accused as a type of cognizable harm that may result from a delayed trial[.]" *Goodrum*, 547 F.3d at 263. But a defendant must present more than "a minimal showing" of general anxiety to sustain a speedy-trial claim. *Id.*; *see also United States v.*

Frye, 489 F.3d 201, 213 (5th Cir. 2007) ("[B]ecause Frye offered no evidence beyond his own testimony that he suffered anxiety, Frye's anxiety does not justify finding a speedy trial violation."). Here, Russell offered nothing more than "generalized expressions of anxiety." *Goodrum*, 547 F.3d at 263. Moreover, the fact that Russell faced not one, but two, life sentences was in itself likely to cause anxiety, making it "unlikely" that trial delay was the true cause of any mental anxiety. *See id.*

Eliding these points, the district court concluded that the state court's analysis of Russell's alleged anxiety "disregard[ed] . . . evidence" of "oppressive pretrial incarceration and anxiety" in a way that was "contrary to longstanding federal law." 528 F. Supp. 3d at 504. Rather than citing any Supreme Court case contrary to the state court's decision though, the court cited two of its own opinions and a newspaper article to tie Russell's alleged anxiety to his prolonged detention at "a troubled jail." *Id.* at 503 (quoting *Patterson v. Hinds Cnty., Miss.*, No. 3:13-CV-432-CWR-FKB, 2016 WL 7177762, at *9 (S.D. Miss. June 10, 2016)); *see also id.* at n.24. In fact, our own search reveals no Supreme Court yardstick, based on "materially indistinguishable facts," by which to conclude that the state court "arrive[d] at a conclusion opposite to that reached by" the Court. *Langley*, 926 F.3d at 155–56 (emphasizing that "the 'contrary to' prong" of AEDPA is a demanding standard that in most cases "does not apply"). And to the extent that the district court's disagreement with the state court's view of the evidence drove its conclusion, AEDPA deference requires more than a resifting of the evidence: The state court's decision must have been "based on an *unreasonable determination* of the facts in light of *the evidence presented* in the State court proceeding." 28 U.S.C. § 2254(d)(2) (emphasis added); *cf. Russell*, 528 F. Supp. 3d at 503 n.24 (discussing evidence that was never presented to the state court). Given the record before it, the state court's rejection of Russell's assertion that his anxiety showed prejudice was neither

an unreasonable view of the evidence—or lack thereof—nor contrary to federal law.

Next, "Ron Ron." The state court rejected Russell's alleged lost alibi witness as a basis for prejudice because it "lack[ed] support" in the record. 79 So. 3d at 538. The court found Russell's account of an alibi witness to be vague and unspecific, as Russell did not even know his last name. *Id.* The district court disagreed, pointing to "the record evidence" of Russell's relationship with "Ron Ron" to conclude that the state court was "objectively unreasonable" for finding otherwise. 528 F. Supp. 3d at 501, 504. But the only evidence of the witness's existence came from Russell's own testimony, and Russell gave varying explanations over time for how he lost track of "Ron Ron." We have rejected similar prejudice claims relying only on vague, unspecific alibis. *See Cowart v. Hargett*, 16 F.3d 642, 648 (5th Cir. 1994) (viewing Cowart's alleged exculpatory witness "known only as 'Peanuts'" "with disfavor" because "the allegation [was] not supported by the production of the witness who allegedly would have altered the outcome of the trial"). Thus, reasonable jurists could reject Russell's unsupported, vague, and changing story about "Ron Ron," as the state court did here.

But even if Russell's allegations about "Ron Ron" were sufficiently concrete and substantiated, it was also reasonable for the state court to conclude that the witness's purported testimony would not have changed the outcome at trial. Despite the district court's assertion otherwise, 528 F. Supp. 3d at 502, Russell testified extensively during his trial about "Ron Ron." So the jury had an opportunity to consider Russell's alibi—and rejected it. Apparently, the jury found more persuasive the testimony of multiple witnesses who observed Russell immediately before Porter was shot. Assuming "Ron Ron" could have been located and might have testified, reasonable jurists could conclude that his testimony would not have changed

the jury's verdict, but only "transformed [Russell's] alibi from an incredibly tall tale to just a tall one." *Robinson v. Whitley*, 2 F.3d 562, 571 (5th Cir. 1993).

Accordingly, the district court erred in holding that the state court was "objectively unreasonable not to find that Russell was prejudiced" in preparing his alibi defense. 528 F. Supp. 3d at 504.[11] And the district court offered no clearly established law that the state court applied unreasonably. *Cf. Richter*, 562 U.S. at 101 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)) ("[I]t is not an unreasonable application of clearly established Federal law to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court."). Instead, the district court substituted its own view of the evidence and concluded, contra the state court, that "Ron Ron's" testimony would have made a difference. 528 F. Supp. 3d at 502–03. Such is the stuff of *de novo* review, not of a deferential inquiry under AEDPA.

IV.

A.

Claims of ineffective assistance of counsel are ordinarily evaluated under *Strickland v. Washington*'s two-part test, which requires (1) that "counsel's performance was deficient" and (2) that "the deficient performance prejudiced the defense." 466 U.S. at 687; *see also Childress v. Johnson*, 103 F.3d 1221, 1228 (5th Cir. 1997) ("The vast majority of [such] claims can be analyzed satisfactorily under the . . . test of *Strickland*."). However, on the same day it decided *Strickland*, the Supreme Court created

[11] It is unclear whether the district court meant that the state court's decision "involved an unreasonable application of" law, *see* 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts," *see id.* § 2254(d)(2). Whichever, the district court was in error.

a "a very limited exception to the application of *Strickland*'s two-part test" in *United States v. Cronic*, 466 U.S. 648 (1984). *Thomas v. Davis*, 968 F.3d 352, 355 (5th Cir. 2020) (quoting *Haynes v. Cain*, 298 F.3d 375, 380 (5th Cir. 2002)). *Cronic* applies when "the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." *United States v. Griffin*, 324 F.3d 330, 364 (5th Cir. 2003) (citing *Gochicoa v. Johnson*, 238 F.3d 278, 284 (5th Cir. 2000)); *see Bell v. Cone*, 535 U.S. 685, 695 (2002) (The "most obvious" time *Cronic* applies is when a criminal defendant suffers "the complete denial of counsel."). To sustain a *Cronic* claim, such denial of counsel must occur "at a critical stage" of a defendant's proceedings. 466 U.S. at 659; *see also Cone*, 535 U.S. at 695–96.

"[V]ery different results flow" from whether a defendant raises a *Strickland* or *Cronic* claim. *Black v. Davis*, 902 F.3d 541, 547 (5th Cir. 2018) (quoting *Woodard v. Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990)). A *Strickland* claim requires that the defendant prove prejudice, *see* 466 U.S. at 687, but under *Cronic*, prejudice is presumed, *see* 466 U.S. at 659. And while setting aside a conviction under *Strickland* "is made on a case by case basis," a successful *Cronic* claim "*requires* that [the] conviction be overturned[.]" *Black*, 902 F.3d at 547 (internal quotations omitted) (emphasis added).

The parties dispute whether Russell pled his ineffective-assistance claim in the state courts under *Strickland* or *Cronic*. The reviewing courts disagreed as well—the Mississippi Supreme Court addressed his claim under *Strickland*, but the district court discerned a *Cronic* claim, 528 F. Supp. 3d at 506–08. What Russell pled matters because AEDPA requires exhaustion, *see* 28 U.S.C. § 2254(b)(1)(A), meaning "that a state prisoner who does not fairly present a claim to a state habeas court—specifying both the legal and factual basis for the claim—may not raise that claim in a subsequent federal proceeding," *Lucio v. Lumpkin*, 987 F.3d 451, 464 (5th Cir. 2021) (en banc)

(plurality). "Whether a federal habeas petitioner has exhausted state remedies is a question of law reviewed *de novo*." *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (citations omitted).

Put simply: The law "require[s] a state prisoner to present the state courts with the *same claim* he urges upon the federal courts." *Lucio*, 987 F.3d at 464 (quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971)). In assessing whether a claim has been exhausted, we look to its substance. *Black*, 902 F.3d at 546 ("[T]he substance of the relief sought by a pro se pleading controls[.]") (alteration omitted). *Strickland* and *Cronic* claims are distinct for exhaustion purposes. *Id.* (quoting *Cone*, 535 U.S. at 697) ("[T]he distinction between 'the rule of *Strickland* and that of *Cronic* . . . is not of degree but of kind.'"). We thus look to Russell's state habeas petition to ascertain whether he "assert[ed] that he received incompetent counsel," a *Strickland* claim, "or none at all," a *Cronic* claim. *Id.* at 546–47 (quoting *Childress*, 103 F.3d at 1230). And if Russell did not assert a *Cronic* claim in state court, the district court was not at liberty to grant habeas relief based on *Cronic*. *See Nickleson v. Stephens*, 803 F.3d 748, 752 (5th Cir. 2015) ("[N]o habeas application may be granted unless the applicant has exhausted available remedies in state court.").

B.

Russell's state post-conviction petition is not completely clear; it mentions neither *Strickland* nor *Cronic*. To be sure, Russell's chief complaint—that he was "held in custody . . . without being contacted by an attorney until approximately (14) months after his arrest,"—could be read as alleging poor lawyer-client communication (under *Strickland*) or a complete denial of counsel (under *Cronic*). But Russell's petition twice labeled his counsel's performance "deficient." Indeed, his petition challenged not only his public defenders' performance, *but also Boykin's*. And he specifically and

repeatedly alleged prejudice from the deficient performance. Even with the liberal construction afforded pro se filings, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), we read Russell's state petition as alleging a *Strickland* claim, as the Mississippi Supreme Court did.

And Russell exhausted this *Strickland* claim because he alleged the same claim in federal court. His pro se federal habeas application again complained of "prejudice" due to the public defenders' "deficient" performance. Further, his amended objections to the magistrate judge's report and recommendation, filed by counsel appointed by the district court, did not dispute the magistrate judge's interpretation of his claim as arising under *Strickland*. Instead, counsel objected only that the magistrate judge "incorrectly determined that Russell's [public defenders'] deficient performance did not prejudice" him.

The district court's divining a *Cronic* claim—when not even counsel the district court appointed for Russell did—is thus problematic, for several reasons. Foremost, the district court erred by granting relief for a *Cronic* claim not raised in state court. *See* 28 U.S.C. § 2254(b)(1)(A). Doing so contravened AEDPA's exhaustion requirement and the underlying "policy of federal-state comity," that state courts must have "an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Anderson*, 338 F.3d at 386 (quoting *Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001)). Moreover, assuming the district court was correct in treating the claim as arising under *Cronic*, the court's analysis strayed from the exacting limitations our precedent requires, erroneously concluding that Russell's claim merited relief. Finally, by solely reviewing Russell's claim under *Cronic*, the district court neglected to analyze Russell's claim under the right framework—*Strickland*'s. Had it done so, *Strickland*'s standard would have yielded a ready conclusion that the Mississippi Supreme Court was within its AEDPA bounds to deny relief. We address each of these points in turn.

C.

To the extent that Russell's state habeas claim arose under *Strickland*, he failed to exhaust a denial-of-counsel claim, and the district court could not grant relief under *Cronic*. *See, e.g.*, *Lucio*, 987 F.3d at 464; *Nickleson*, 803 F.3d at 752. That should have ended the court's *Cronic* analysis, full stop.

But even ignoring the hallmarks of a classic *Strickland* claim contained in Russell's state and federal petitions and the explicit reliance on *Strickland* in his amended objections to the magistrate's report, his ineffective-assistance claim fails under *Cronic*'s rubric. Preliminarily, because nothing in the record indicates that the state court evaluated Russell's claim as a *Cronic* claim,[12] AEDPA's usual deferential standard of review would not apply; a reviewing federal court instead would "review such claims *de novo*[.]" *Carty v. Thaler*, 583 F.3d 244, 253 (5th Cir. 2009) (italics added) ("[T]he AEDPA-mandated deference to state-court decisions does not apply if the petitioner properly exhausted his claim by raising it in the state court, but the state court did not adjudicate that particular claim on the merits."). Regardless of the standard of review,[13] though, Russell's claim fails.

To analyze a claim under *Cronic*, this court, like the district court, must determine whether a petitioner was effectively denied counsel, and if

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[12] Nothing suggests that the state court rejected a *Cronic* claim here "without expressly addressing that claim," so we do not "presume that the [*Cronic*] claim was adjudicated on the merits" by the state court for purposes of whether AEDPA deference applies. *Thomas*, 968 F.3d at 292 (5th Cir. 2020) (citation omitted); *see also Richter*, 562 U.S. at 99.

[13] The district court did not discuss this issue. Nor did the parties brief whether AEDPA or *de novo* review applies to Russell's claim, if viewed as one arising under *Cronic*. Even so, "[a] party cannot waive, concede, or abandon the applicable standard of review." *United States v. Vasquez*, 899 F.3d 363, 380 (5th Cir. 2018) (quoting *United States v. Escobar*, 866 F.3d 333, 339 (5th Cir. 2017) (per curiam)).

so, whether that denial occurred at a critical stage of the proceedings. *Cronic*, 466 U.S. at 659; *see also Griffin*, 324 F.3d at 364; *United States v. Pleitez*, 876 F.3d 150, 157–58 (5th Cir. 2017). We cannot say that Russell was "effect[ively] denied any meaningful assistance at all." *Griffin*, 324 F.3d at 364 (quoting *Gochicoa*, 238 F.3d at 284). The public defenders who initially represented him made appearances at his preliminary hearing and arraignment; filed discovery motions on his behalf; and engaged in apparent plea bargaining. To be sure, these efforts appear perfunctory. And nothing in the record shows that Russell's public defenders discharged their "duty to make reasonable investigations" in preparation for trial based on "information supplied by the defendant." *Strickland*, 466 U.S. at 691. But counsel's actions, even if inadequate or ineffectual, do not amount to the complete denial of counsel we have found to violate *Cronic*. *Cf. Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (en banc) (finding denial of counsel where lawyer slept through a significant portion of trial).[14]

Even assuming Russell was effectively denied counsel during the time the public defenders were counsel of record, that denial must have occurred during a "critical stage" of his proceedings. The district court broadly concluded that "the period between the appointment of counsel and the start of trial is indeed a 'critical stage' for Sixth Amendment purposes." 528 F. Supp. 3d at 506. Too broadly. Neither the Supreme Court nor this court has

[14] In holding otherwise, the district court relied on a trio of Fifth Circuit cases to conclude that the public defenders "should have been preparing for Russell's trial and securing the [alibi] witness." *Russell*, 528 F. Supp. 3d at 508 (citing *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994), *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985), and *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981)). But those cases did not involve *Cronic* claims. *Bryant* and *Nealy* are explicitly *Strickland* cases. *Washington* is pre-*Strickland* and *Cronic* but contains no discussion of a *Cronic*-like denial of counsel. So while these three cases may establish that the public defenders' representation of Russell was deficient, they do not establish that it was effectively nonexistent.

ever held that the *entire* pretrial period is a critical stage. *Cf. Estelle v. Smith*, 451 U.S. 454 (1981) (psychiatric interview was a critical stage); *United States v. Wade*, 388 U.S. 218 (1967) (post-indictment line-up was a critical stage); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (preliminary hearing was a critical stage); *Douglas v. California*, 372 U.S. 353 (1963) (direct appeal was a critical stage); *Pleitez*, 876 F.3d at 158 (sentencing was a critical stage); *Burdine*, 262 F.3d at 338 ("guilt-innocence phase" of trial was a critical stage). And we decline to do so here.

As these cases show, the Court has considered specific events as "critical stages"—a more granular approach than the blanket designation confected by the district court here. We must do likewise. Logically, if the district court's conclusion is correct that the entire pretrial period constitutes a "critical stage" in the *Cronic* analysis, then the more specific pretrial milestones identified in *Estelle* (psychiatric interview), *Wade* (post-indictment line-up), and *White* (preliminary hearing) would have been subsumed in an overarching "pretrial" stage. That they were not shows the overreach of the district court's holding. Further, we only find a critical stage where a denial of counsel was "of such significance that it ma[de] the adversary process itself unreliable." *Burdine*, 262 F.3d at 346 (quoting *United States v. Russell*, 205 F.3d 768, 771 (5th Cir. 2000)). The district court sidestepped this rigorous analysis in stretching the "critical stage" to cover the whole pretrial period.

"The federal courts of appeal, including this one, have repeatedly emphasized that constructive denial of counsel as described in *Cronic* affords only a narrow exception to the requirement that prejudice be proved." *Childress*, 103 F.3d at 1228–29; *see also Haynes*, 298 F.3d at 380 ("*Cronic* created a very limited exception to the application of *Strickland*'s two-part test[.]"). *Cronic* requires an effective denial of counsel, not mere ineffective counsel. And it requires that the denial occurred during a specific, critical

stage of the proceedings. Even if we assume he alleged a *Cronic* claim, Russell has failed to show either predicate.

D.

Finally, treating Russell's claim as arising under *Strickland*, as the district court should have, it quickly collapses. *Strickland*'s two-prong test requires both deficient performance and resulting prejudice to the defendant. *Strickland*, 466 U.S. at 687. Failure to prove either defeats the claim. *Id.* And in evaluating *Strickland* claims first decided in state habeas proceedings, AEDPA deference is heightened. "AEDPA review is 'doubly deferential' because counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (per curiam) (internal citations omitted). "[D]oubly deferential" means that we "afford 'both the state court and the defense attorney the benefit of the doubt.'" *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

The Mississippi Supreme Court summarily rejected Russell's claim because it "fail[ed] to meet both prongs of *Strickland*." The court did not explain or otherwise specify whether Russell's claim failed on prong one or prong two (or both). But even when a state court fails to "reveal[] which of the elements in a multipart claim it found insufficient," the defendant's "burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. Russell has not carried this burden.

Even if we assume deficient performance by the public defenders who initially represented Russell (i.e., that *Strickland*'s first prong is met), Russell fails to demonstrate prejudice as a result of counsel's lapses. To do so, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland*, 466 U.S. at 694. Here, Russell makes the same prejudice argument as for his speedy-trial claim: that, without the deficient assistance of counsel, his alibi witness "Ron Ron" would have testified favorably at trial. But this argument fails for the same reasons it does as to Russell's speedy-trial claim. *See supra* III.B.3.

Failure to prove either prong of *Strickland* is fatal to a defendant's claim. *Strickland*, 466 U.S. at 687. Russell thus cannot show that "there was no reasonable basis" for the Mississippi Supreme Court's denial of relief. *Richter*, 562 U.S. at 98. Giving the state court "the benefit of the doubt," *Woods*, 578 U.S. at 117, Russell's ineffective-assistance claim lacks merit.

V.

"When Congress supplies a constitutionally valid rule of decision, federal courts *must* follow it." *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022) (emphasis added). "In AEDPA, Congress announced such a rule." *Id.* Congress "designed [AEDPA] to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103. AEDPA's deference to state court decisions means *deference*, not *de novo*. Federal habeas review is "not a substitute for ordinary error correction through appeal." *Id.* at 102–03. "[I]f AEDPA makes winning habeas relief more difficult, it is because Congress adopted the law to do just that." *Davenport*, 142 S. Ct. at 1526.

The Mississippi courts' decisions in this case "required more deference than [they] received." *Richter*, 562 U.S. at 113. Therefore, we REVERSE the judgment of the district court and RENDER judgment in favor of the State on Russell's petition for federal habeas relief.

REVERSED and RENDERED.

No. 3:14-CV-225-CWR-LGI

SEDRICK D. RUSSELL,

Petitioner,

v.

J. DENMARK,

Respondent.

MEMORANDUM OPINION AND ORDER

Before CARLTON W. REEVES, *District Judge*.

Sedrick D. Russell was convicted in the Circuit Court of Hinds County, Mississippi, of one count of aggravated assault and one count of being a felon in possession of a weapon. The trial judge sentenced him as a habitual offender to serve two concurrent life terms, without the possibility of parole, in the custody of the Mississippi Department of Corrections. In this proceeding Russell seeks federal habeas relief under 28 U.S.C. § 2254.

On review, this Court finds that the Circuit Court of Hinds County denied Russell the speedy trial he was guaranteed by the Sixth Amendment. In addition, for more than a year, Russell was completely denied access to an attorney, in violation of his right to counsel. The state court's conclusions otherwise were contrary to federal law. The writ must therefore be granted.

I. Background

The below facts and proceedings are drawn from *Russell v. State*, 79 So. 3d 529 (Miss. Ct. App. 2011) [hereinafter *Russell I*], the Mississippi Supreme Court's unpublished Order denying Russell's state application for post-conviction relief, Docket No. 8-2 [hereinafter *Russell II*], and the record provided to this Court by the Mississippi Attorney General's Office.

A. The Crime and the Alibi

On December 19, 2006, a dark, winter night at about 11:00 PM, Michael Porter was shot twice in the leg at his then-girlfriend's house in Jackson, Mississippi. He heard four shots and felt two hit his leg, but he did not see who shot him, as the shooter was somewhere behind him. No one who testified at Sedrick Russell's eventual trial saw who fired the gun.

That day in Jackson, Porter had finished his day's work at the neighborhood car repair shop, went home "for a hot second," and then went to his then-girlfriend Lawanda Hawkins' house. Lawanda's father had died. Friends and family were gathering to pay their respects.

Sedrick Russell, Lawanda's cousin, was at the house. Testimony would later establish that Lawanda's father had "told

Cedric to look after the house because he knew that it was a lot of shooting and burglary going on."[1]

Russell wasn't acting in a threatening manner, said Porter, the victim. Docket No. 9-3 at 96. When Porter went to the back of the house to get a cup of ice, though, Russell followed. It made Porter uncomfortable. Russell followed Porter to the porch when Porter walked outside to get some gin from his car. Porter didn't understand why. He had never had a disagreement with Russell.

When Porter reached into the front door of the car to grab the gin from the back floorboard, he was shot in the leg. No one witnessed the shooting from outside or inside.

Porter crawled into the passenger seat and sat in the car for a minute, in case the shooter was going to come around the other side of the car. He waited there until he heard Lawanda's sister, Vicki Hawkins, call his name. People in the house told Porter to get inside. Porter crawled out of the vehicle, stood up, and walked back into the house, never seeing the shooter. Vicki went outside too. She didn't see Russell, and testified that she didn't know who shot Porter. Porter was taken by ambulance to the hospital where he was treated and released.

Porter initially testified that he told police everything that occurred prior to the shooting. On the witness stand, however, he admitted that he did not inform the police that he *also* had a 9mm pistol in his car when he was shot. Vicki testified that Porter always carried a gun in his car. She added that she saw

[1] The record also refers to Russell as "Cedrick." The Court defaults to the way his name appears on the docket sheet.

both Porter and Russell go outside, but did not see Russell when she went outside after hearing gun shots.

Russell testified in his own defense. He said that prior to the shooting, he went on the front porch to call his friend of several years, Ron Ron, to pick him up. He saw someone come by the house and ask if Porter was inside. Then Ron Ron came and picked him up. Russell was gone before any shots were fired. He learned about the shooting the next day when his family told him the police were looking for him.

Russell was arrested on December 21, 2006. He was charged with one count of aggravated assault and one count of possession of a firearm by a convicted felon.

Russell wished to bring an alibi defense. Normally, a defendant tells his attorney about his alibi, so the attorney can properly notify the prosecution. That did not happen here. Russell could not tell his defense attorney to call Ron Ron. He didn't have an attorney! The assistant public defender who came to his preliminary hearing brushed off Russell's request to get Ron Ron to testify, telling Russell "it was just a preliminary." She never came back. Russell wasn't appointed an attorney until more than a year later, well after his trial setting had come and gone. The Court had to postpone the trial and appoint new counsel to prepare the case.

Russell tried to coordinate an alibi defense by himself. He had the phone number of Ron Ron's girlfriend's house. While incarcerated at Hinds County Detention Center waiting for his trial, Russell called that number for approximately eight months to get Ron Ron on standby to testify. However, after eight or nine months, Ron Ron and his girlfriend broke up. Ron Ron was no longer reachable at that number.

Eventually the court appointed another lawyer to represent him. Donald Boykin was appointed on February 14, 2008. By then, Russell had been incarcerated a jaw-dropping 14 months before speaking with a lawyer.

As soon as Boykin arrived at Hinds County Detention Center, Russell told him about Ron Ron. He told him about the disconnected phone and provided Boykin with directions of where he had been with Ron Ron, more than a year ago at this point. But it was too late; Boykin could not find Ron Ron. Russell had no one to speak on his behalf at trial. The trial court also prevented him from telling the jury about his efforts to secure Ron Ron's testimony.

B. Procedural History

Russell had his preliminary hearing on January 8, 2007. Assistant Public Defender Beth Davis represented Russell at the hearing—"just a preliminary."[2] The court denied bond. Russell was returned to the Hinds County Detention Center.

Nothing happened for approximately four months. Russell did not hear from Davis or anyone else in the public defender's office. On May 2, acting *pro se*, Russell filed in the Circuit Court a "Motion for Right to a Speedy and Public Trial."

Three more months passed. On August 16, a Hinds County grand jury returned a two-count indictment against Russell. Later that month, Assistant Public Defender Frank

[2] Unfortunately, the record does not include of transcript of Russell's preliminary hearing. We do not know what showing of probable cause was made, whether any witnesses were cross-examined, or what arguments were presented in support of Russell's release. *See* Miss. R. Crim. P. 6.2.

McWilliams filed a boilerplate motion seeking discovery from the prosecution. McWilliams had never met nor spoken to Russell.

On October 2, nine months after his preliminary hearing and still with no contact with his lawyer, Russell filed another *pro se* motion regarding a speedy trial violation. He sought to dismiss the indictment.

Russell was arraigned on November 9. Nothing in the record indicates that he was represented by counsel that day. The same day, Assistant Public Defender McWilliams refiled the boilerplate motion for discovery, perhaps unaware that he had already filed one. Who knows? He may have filed it only after learning of Russell's motion, or to make it appear that he was working diligently on Russell's case. The court set Russell's trial date for March 24, 2008.

On November 15, 2007, Russell sent the court another handwritten request. This one, styled "Petition to Grievances the Government," stated "I've been held in (11) months… suffering from mental anxiety and concern from oppressive pretrial incarseration, [sic] and **a lawyer has not yet contacted me** and provided me with the legal repersentation [sic] I need to ensure me with due process and equal protection of the law." Docket No. 9-10 at 59 (emphasis added).

On December 21, 2007, the trial judge issued a written order denying Russell's *pro se* motion to dismiss.[3] In recognition of

[3] The trial court's order focused exclusively on Russell's statutory right to a speedy trial. "Defendant/Petitioner's trial date is clearly within the statutory time of 270 days from the date of arraignment," it concluded. Docket 9-1, at 19. Russell's motion was not so limited, however. Although he invoked the provision of the statutory 270 rule, he also asserted that the law

Russell's complaint, though, the court moved Russell's trial a month earlier, to February 11, 2008. Also on December 21, perhaps unaware of the Court's ruling, Russell filed another motion asking "to submit speedy trial argument." He noted his "mental anxiety and concern from the oppressive pretrial detention." He had likely mailed it before the Court issued its ruling, but as noted below he had not received the Court's order.

Russell was displeased with the denial of his speedy trial motion. He still had no lawyer to speak for him. On December 28, he filed a document complaining about the delay. On January 7, 2008, he objected to the trial court's ruling again and begged that court for habeas relief. The court took no action on these requests.

The February 11 trial date came and went without any proceeding or contact from an attorney. As Russell put it in a February 13, 2008, "Motion to Show Cause for Delay," he says he "didn't even go to court February 11, 2008, not have to mention actuelly [sic] going to trial on that date, nor have a lawyer has came to visit me since my arrest which denied me due process and equal protection of the law." He concluded, begging, "I request this court to show me the cause of delaying the February 11, 2008 trial date."

That filing got the court's attention. On February 14, the trial judge issued an order replacing the public defender's office

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"states for constitutional purposes, right to speedy trial attaches and time begins to run with arrest." *Id*. at 22-23. It is also noteworthy that the Court included Russell on the Certificate of Service, not his counsel. *Id* at 21. The implication is that the trial court at least perceived, but more likely acknowledged, that Russell's counsel was absent.

with local defense attorney Don Boykin. The court noted that the public defender's office had a "conflict of interest." Absent from the ruling was any analysis of the nature of the conflict, and to this day there has been no explanation of what the conflict was. Maybe the "conflict" was Russell's complaint that his lawyer had not met with him or talked to for more than a year while he languished in jail. Assistant Public Defender McWilliams obtained the order authorizing him to withdraw as counsel.

On February 28, 2008, 14 months after his first and only contact with an attorney, Russell had his first meeting with a committed defense attorney, Boykin. Russell immediately told Boykin about his alibi witness Ron Ron and that he had lost contact with him.

The District Attorney's Office did not immediately acknowledge that Russell had a new attorney. Five days after Boykin was appointed as counsel, the DA's Office sent its discovery responses—which had been requested in August and November 2007—not to Boykin, but to the public defender's office. It is not clear when those documents made their way to Boykin.

On March 10, the DA's Office filed a motion to amend the indictment to seek a habitual offender sentencing enhancement, stating that Russell had been previously convicted of two felony crimes, including a crime of violence. It is not clear why the prosecution added the enhancement at that time. What is clear is that Russell had been demanding a trial and an attorney.

On March 19, Boykin formally informed the prosecution that Russell intended to raise an alibi defense, in a notice

contending that at the time of the shooting, Russell was at 213 Delmar, Jackson, Mississippi.[4] Russell told Boykin he was at that house with Ron Ron. Boykin stated he had been attempting to locate Ron Ron.

On March 21, in the Response to Motion to Set Aside Order Denying Dismissal, Hinds County Assistant District Attorney Thomas Kesler conceded that the time period from Russell's arrest to February 11, 2008, should, under the *Barker* speedy trial factors, count against the state.

On March 27, three days after Russell's original trial date, Boykin filed a motion to set aside the court's speedy trial ruling, arguing that the court should dismiss the indictment for speedy trial violations.[5] He added that no attorney had communicated with Russell from the preliminary hearing of January 8, 2007, to February 28, 2008, when Boykin was able to meet Russell at Hinds County Detention Center.

Also on March 27, the court ordered a mental evaluation of Russell, based on an oral motion made by Boykin. The record contains no briefing and shows no hearing on this issue. Russell then filed a motion objecting to the exam, stating that the day he was supposed to go to trial, March 24, Boykin went to the judge and moved for a mental evaluation without consulting Russell. Russell also asserted ineffective assistance of counsel and speedy trial arguments. His objections were

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[4] Boykin noted that Russell did not provide the street number of the address, but had given Boykin directions to the house. The address provided is the street number for the house Russell directed Boykin to.

[5] Boykin's motion stated he represented "Jerome White," but it was filed in Russell's cause number and had facts corresponding to Russell's pretrial detention.

overruled without explanation. Russell would languish in jail for more than nine months waiting to be evaluated on October 6.[6]

On April 8, Russell filed another speedy trial motion. He argued that his "constitutional rights to a speedy trial had already been violated long before the attorney appointed to me by this court unreasonably motion and court order was granted for me to be mentally evaluated." He added, "of course I've suffered a great amount of anxiety and concern which is the main reason I filed 'Motion for Speedy Trial,'" and noted the unavailability of his alibi witness Ron Ron. Russell continued to file handwritten motions to assert that his rights to a speedy trial and effective assistance of counsel had been violated. Those were filed on April 14, May 6, May 27, and December 1, 2008, as well as on January 5, 2009.[7]

Russell's trial commenced on January 27, 2009. Russell arrived with his own views about how to defend himself. Boykin said his client "has done some extensive research" and

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[6] As the State explained on the first day of trial, the mental examination concluded that "[Russell] is prepared to go to trial, that he understands and can assist his lawyer, and that he was not M'Naughten insane at the time, and that he did understand right from wrong and appreciates the nature and consequences of his actions." Docket 9-2 at 8-9. Russell's prior filings clearly show a man who wanted at least three things: a speedy trial, his due process rights protected, and equal protection of law. If there was any doubt that Russell was suffering from a mental defect, that doubt was infinitesimal.

[7] How many times does a defendant have to ask for, plead, demand, and beg the Court for enforcement of his constitutional right to a speedy trial? The answer, the Court supposes, is to never give up and to keep asking until the court grants you the relief for which you've prayed.

"is going to want to speak for himself." Docket No. 9-2 at 16-18.[8] Having received Russell's numerous complaints, however, the trial judge was not impressed and indeed appeared to have been aggravated. Eventually he said, "I want that clear. You are not to speak, say another word." Docket No. 9-2 at 17.

Russell's attorney renewed his motion to dismiss for a speedy trial violation. Recall that in December 2007, the judge had denied that motion because it was premature; not enough time had elapsed, he thought, for a speedy trial violation to have occurred.[9] Fourteen months later, though, the judge thought Russell had waited too long to raise a speedy trial problem. "Why are we waiting a year before bringing this up before the Court on the day of the trial?" Docket No. 9-2 at 24.

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[8] Based on a review of the various motions Russell presented to the trial court, it is clear to this Court that Russell was quite capable. His motions were crafted with sophistication particularly in explaining how his right to a speedy trial had been violated. He invoked both his statutory right to speedy trial and those right secured under our federal constitution. *See, e.g.*, Docket No. 9-1 at 27 (discussing the Sixth Amendment to United States Constitution and also directing the trial court the Mississippi's statutory right to speedy trial.) and 31-33 (same).

[9] The court clearly limited its focus on whether Russell had been denied his statutory right to a speedy trial. Citing Mississippi Code § 99-17-1, the judge concluded that Russell's trial date "is clearly within the statutory time of 270 days from the date of his arraignment." Docket No. 9-1, at 19. Though the court noted that its order was sparked by Russell's "Pro Se Motion to Dismiss for Lack of Speedy Trial," it made no mention of Russell's agonizing plea that his lawyer had not contacted him or provided him with the "legal representation I need to ensure me with due process and equal protection of the law." *Id.* at 59.

On the merits, Boykin argued that Russell had been denied a speedy trial between his December 2006 arrest and the end of February 2008, when he was provided with a functioning attorney—one who would meet and talk with him. Boykin said that the length of time was presumptively prejudicial, that his client had "experienced the anxiety and the oppressive incarceration which inmates obviously experience during their period of incarceration," and that the State had not met its burden to beat back the presumption of prejudice. At some point during this argument, the judge ordered Russell removed from the courtroom.

Boykin continued. He argued that, regarding prejudice, Russell was prepared to testify that "at one time he did have the name and phone number of a witness but that due to the length of time that he was without an attorney during the period of time, he either lost the telephone number, forgot the name." The court denied the motion.

Russell then made a proffer. He testified that he had the telephone number of his alibi witness Ron Ron, who had been staying at Ron Ron's girlfriend's house at the time of the shooting; that he had been communicating with Ron Ron at that number for eight or nine months while awaiting trial; and that "[w]e was waiting to hear from an attorney or the court to provide him with the information that he needed to do to represent me or testify in my behalf," but "after about eight or nine months of incarceration [Ron Ron] and his girlfriend broke up and the phone came disconnect. So I was unable to no longer contact Ron Ron through that phone. So I lost contact of him." Docket No. 9-2 at 55. Russell confirmed that Boykin "is the first attorney I talked to since that preliminary hearing" and that he had not been sent any court order in his

case during the time period he had no contact from an attorney.

The judge overruled Russell's arguments and submitted the case to the jury. The jury found him guilty on both counts in the indictment.

On January 30, 2009, during the sentencing portion of Russell's trial, the government again moved to amend the indictment to seek a sentence enhancement as a habitual offender. The judge permitted it.[10] The judge then sentenced Russell to two concurrent life terms without the possibility of parole.

Russell filed his direct appeal. While that was pending, he also asked the Mississippi Supreme Court for leave to proceed in the trial court with a motion for post-conviction relief. The Mississippi Supreme Court denied the application without prejudice for lack of jurisdiction. On August 16, 2011, the Mississippi Court of Appeals affirmed Russell's convictions and sentence. *See Russell I*, 79 So. 3d at 529. On July 27, 2012, Russell filed a second motion for post-conviction relief, which was denied by the Mississippi Supreme Court on February 13, 2014 in an unpublished order. *Russell II*.

Russell seeks federal habeas relief under 28 U.S.C. § 2254. The Magistrate Judge entered a Report and Recommendation proposing to deny relief. Deeply troubled about the perceived constitutional shortcomings meted out against Russell, this Court appointed Russell an attorney to review the record and

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[10] In its February 11, 2014, order denying post-conviction relief, the Mississippi Supreme Court held that this motion was not timely filed and should have been denied. However, the court found that the error was harmless, since the State's first motion to amend the indictment to allege that Russell was a habitual offender, dated March 10, 2008, was timely.

file an amended objection to the R&R. Oral argument was then held on October 19, 2017.

II. Standard of Review

The legal standard is codified at 28 U.S.C. § 2254, as part of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). This statute provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (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 on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d)-(e).

Under this statute, where the state court has adjudicated the petitioner's claim on the merits, this Court reviews questions of fact under § 2254(d)(2), and reviews questions of law or mixed questions of law and fact under § 2254(d)(1). Factual findings are presumed to be correct, and the reviewing court defers to the state court's factual determinations. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Under the first prong, the clauses "contrary to" and "unreasonable application of" are independent bases for granting habeas relief. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court's decision is "contrary to" federal law if it contradicts Supreme Court precedent or reaches a different result on materially indistinguishable facts. *Id.* Under the "unreasonable application" clause, a federal court may grant relief if the state court "correctly identifies the governing legal principle" but "unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002). The state court's decision must be objectively unreasonable, not merely erroneous or incorrect. *Wood v. Allen*, 558 U.S. 290, 301 (2010).

AEDPA's second prong requires that federal courts defer to a state court's factual determinations unless they are based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Morales v. Thaler*, 714 F.3d 295, 301 (5th Cir. 2013). "Even in the context of federal habeas," however, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was

unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.*; *cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (reversing state trial court's findings on direct appeal, despite the "great deference" those findings are ordinarily owed). AEDPA "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther." *Richter*, 562 U.S. at 102.

Courts should always be mindful that "habeas itself is based on important liberty interests." *Atkins v. Hooper*, 979 F.3d 1035, 1044 (5th Cir. 2020). The right to be brought to trial to face charges brought by the State is one such important liberty interest. So important that the framers of the Constitution enshrined it in the Sixth Amendment, between the right to due process and the right to be tried by a jury of one's peers.[11]

III. Analysis

A. Russell's Speedy Trial Claim

Russell was arrested on December 21, 2006; indicted on August 16, 2007; arraigned on November 9, 2007; and brought to trial on January 27, 2009. For these 768 days, Russell, cloaked with the presumption of innocence, remained jailed at the Hinds County Detention Center.

[11] The Sixth Amendment also provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Whether that portion of the Sixth Amendment was violated will be discussed following the discussion of the speedy trial claim.

A defendant's Sixth Amendment right to a speedy trial "attaches at the time of arrest or indictment, whichever comes first." *Dillingham v. United States*, 423 U.S. 64, 65 (1975). In *Barker v. Wingo*, the Supreme Court explained that this right serves three interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. 514, 532 (1972).

To determine whether a defendant's right to a speedy trial has been violated, courts balance four factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to speedy trial, and (4) the prejudice to the defendant." *Goodrum v. Quarterman*, 547 F.3d 249, 257 (5th Cir. 2008) (citing *Barker*, 407 U.S. at 530); *see also Leachman v. Stephens*, 581 F. App'x 390 (5th Cir. 2014)).

> We regard none of the four factors identified above as 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. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533.

"[O]rdinarily the burden is on the defendant to demonstrate prejudice. But where the first three factors together weigh heavily in the defendant's favor, we may conclude that they warrant a presumption of prejudice, relieving the defendant of his burden." *Amos v. Thornton*, 646 F.3d 199, 208 (5th Cir. 2011). "This four-factor balancing test eschews 'rigid rules' and 'mechanical factor-counting' in favor of 'a difficult and sensitive balancing process.'" *Id.* at 205. As the Supreme Court explained, the right to a speedy trial "is a more vague concept than other procedural rights," and it is "impossible to determine with precision when the right has been denied . . . . [A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker*, 407 U.S. at 521-22.

When a speedy trial claim is presented to a federal court on habeas review, AEDPA "requires us to give the widest of latitude to a state court's conduct of its speedy-trial analysis." *Amos*, 646 F.3d at 205.

1. *Barker*'s First Factor: Length of Delay

"The first *Barker* factor . . . consists of a two-part inquiry." *Goodrum*, 547 F.3d at 257. "First, the delay must be extensive enough to give rise to a presumption of prejudice that triggers examination of the remaining *Barker* factors." *Id.* Specifically, courts have decided that a 12-month delay is needed to trigger an analysis of the *Barker* factors.[12] *Id.* Second, if the petitioner shows that his delay exceeds this threshold, "the court must examine the extent to which the delay extends beyond

[12] There is no constitutional or statutory text establishing 12 months as the critical threshold. It appears to be a form of judicial triage.

the bare minimum required to trigger a *Barker* analysis, because 'the presumption that pretrial delay has prejudiced the accused intensifies over time.'" *Id.* at 258 (quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992)).

In this case, the Mississippi appellate court correctly found "that Russell's trial occurred a little more than two years after his arrest; therefore, the delay is presumptively prejudicial, and the remaining *Barker* factors must be considered." *Russell I*, 79 So. 3d at 537. The court did not, however, address the second function of this *Barker* factor: the extent of the delay. "The longer the delay between indictment and trial extends beyond the bare minimum, the heavier this factor weighs in a defendant's favor. *Speer v. Lumpkin*, 824 F. App'x 240, 245 (5th Cir. 2020) (citing *United States v. Molina-Solorio*, 577 F.3d 300, 305 (5th Cir. 2009)). According to the Fifth Circuit, "[a] delay must persist for at least eighteen months over and above that bare minimum"—*i.e.*, the delay must exceed two-and-a-half years—"for this factor to strongly favor the accused." *Amos*, 646 F.3d at 206-07. In *Leachman*, for example, a delay of either 24 or 27 months caused the first *Barker* factor to "weigh against the state, though not heavily." 581 F. App'x at 403.

In line with this precedent, the 25-month delay between Russell's arrest and trial makes this factor "weigh against the state, though not heavily." *Id.*[13] On direct appeal, the state

[13] A two-year delay may not seem harmful to judges tasked with the responsibility of overseeing a daily docket of many defendants, some of whom are guilty. But, one must always remember that those who are waiting on their day in court are presumed to be innocent. And, in fact, many are innocent. For this reason, this Court is disheartened that the courts have determined that a two-year delay weighs only slightly in favor of a defendant. As this Court has lamented, "We believe that innocent people

court did not explain how this factor should be considered. The correct conclusion is that this factor weighs against the state and slightly in Russell's favor. *See Laws v. Stephens*, 536 F. App'x 409, 412 (5th Cir. 2013) (holding that a delay of 23 months only weighs slightly in defendant's favor).

2. *Barker*'s Second Factor: Responsibility

The second *Barker* factor primarily considers "which party is more responsible for the delay." *Id.* at 413. The Fifth Circuit has stated:

> At one extreme, the deliberate delay to disadvantage the defense is weighted heavily against the state. At the other end of the spectrum, delays explained by valid reasons or attributable to the conduct of the defendant weigh in favor of the state. Between these extremes fall unexplained or negligent delays, which weigh against the state, "but not heavily."

Goodrum, 547 F.3d at 258 (citations and quotation marks omitted).

"*Barker* instructs that 'different weights should be assigned to different reasons,' and in applying *Barker*, we have asked 'whether the government or the criminal defendant is more to blame for th[e] delay." *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)

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should not be punished unless and until they are convicted of a crime. Forcing someone to stay in lengthy pretrial detentions is essentially punishment." *Patterson v. Hinds County, Miss.*, No. 3:13-CV-432-CWR-FKB, 2016 WL 7177762, at *2 (S.D. Miss. June 10, 2016) (quotation marks and citation omitted). The Supreme Court itself found that "[m]ost jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." *Barker*, 407 U.S. at 532-33.

(quoting *Barker*, 407 U.S. at 531 and *Doggett*, 505 U.S. at 651). While "[d]eliberate delay 'to hamper the defense' weighs heavily against the prosecution," *id.*, "[a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *Barker*, 407 U.S. at 531; *see Doggett*, 505 U.S. at 657 ("And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows."). Regarding systemic causes for delays, the Supreme Court has stated that "[d]elay resulting from a systemic 'breakdown in the public defender system,' could be charged to the State." *Brillon*, 556 U.S. at 94 (citation omitted).[14]

In this case, Russell's trial was initially set for March 24, 2008. On December 21, 2007, the state court denied Russell's *pro se* motion for speedy trial, but advanced the trial date to February 11, 2008. The trial did not occur on that date. Why? Because Russell advised the court that he had had zero contact with an attorney since his preliminary hearing in January 2007. That claim is not disputed. When Russell finally had his trial on January 27, 2009, the state court stated that "the trial did not commence [on February 11, 2008] as Russell was

[14] This is the worst form of a "breakdown" in the system. Here, the Court appointed the Hinds County Public Defender to represent Russell. And that lawyer failed to talk to, communicate with, visit, or have any contact with the defendant, and for months Russell wrote the court, but the court turned a deaf ear and blind eye to his pleas.

complaining of his Public Defender and demanding new counsel which he was given." Docket No. 9-2 at 42.

On direct appeal the state appellate court weighed this factor as "neutral." *Russell I*, 79 So. 3d at 538. It found that "Russell made the request for new counsel and also requested a mental evaluation, resulting in a delay of the trial date in order to accommodate these requests." *Id.* at 537.

The state court's reasoning on this factor runs contrary to two strands of Supreme Court precedent. To the extent that the egregious lack of counsel was due to negligence, *Barker* holds that "negligence or overcrowded courts" are circumstances where "the ultimate responsibility . . . must rest with the government rather than the defendant." *Barker*, 407 U.S. at 531. And in *Brillon*, the Supreme Court held "[t]he general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system' could be charged to the State." 556 U.S. at 94.

In *Brillon*, the defendant waited three years for trial. In that time, he had at least six lawyers. 556 U.S at 85. The Vermont Supreme Court vacated Brillon's conviction for lack of a speedy trial, attributing to the state delays caused by "the failure of several assigned counsel . . . to move his case forward." *Id.* at 91-92. The U.S. Supreme Court reversed the state court because, while delays due to "institutional breakdown" could be attributed to the state, *id.* at 86, 94, in Brillon's case the delays were caused by Brillon himself. Brillon fired his first lawyer on the eve of trial. His second lawyer withdrew due to a conflict. The third lawyer withdrew after Brillon threatened the lawyer's life. Brillon moved to dismiss the fourth lawyer; the fifth lawyer withdrew on his own; and the sixth lawyer

finally took Brillon's case to trial. 556 U.S. at 85-88. The Court held that the Vermont Supreme Court should have taken "into account the role of Brillon's disruptive behavior in the overall process." *Id.* at 92.

Unlike Brillon, Russell did nothing to interrupt his case; instead, the delays were entirely due to institutional breakdown. The Hinds County Public Defender's office left Russell without a lawyer for 14 months. Russell himself alerted the state court to the fact he had had no contact with a lawyer. *See* Docket No. 9-10 at 59.[15]

The state courts were wrong to characterize Russell's claim as if he had had a disagreement with his attorney—a factor which ordinarily can be held against a defendant. That isn't what happened here. Russell's November 2007 motion asserted that he had never seen or communicated with a lawyer since his preliminary hearing. *See* Docket No. 9-10 at 59 ("I've been held in (11) months of unconstitutional detention . . . and a lawyer has not yet contacted me and provided me with due process and legal representation [sic] I need"). The record instead shows that Russell had frequently begged the trial court for help.[16] The public defender failed to take any action. But, more importantly, the trial court failed to take any action.

A more difficult question arises from the nearly seven-month delay caused by Russell's mental evaluation. Delay caused by

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[15] The fact that the record does not reflect what the trial court did once being placed on notice that Russell's lawyer neglected him for so many months suggests that this was an institutional breakdown and not just incompetence or neglect by the lawyer.

[16] He begged for due process. He begged for equal protection of the law. He begged for a trial. *See, e.g.*, Docket No. 9-1 at 34, 44.

court-ordered mental evaluations is ordinarily not assessed against the state. This principle is for a good reason: defendants who may not be aware of what they did, or the nature of the proceedings, may lack the capacity to waive their speedy trial right for the pendency of the evaluation process. The Mississippi appellate court's general observations to this effect, *see Russell I*, 79 So. 3d at 537, were correct.

The problem in Russell's case specifically lies in the fact that we have no record of why a mental examination was requested—or why one was granted. Russell had no opportunity to weigh in or even be present while his mental health was being discussed. He objected to the examination at the first opportunity.

A more cynical observer might think that a mental examination was the easiest way to get Russell's case off the docket, or perhaps to keep him incarcerated for months more on end without the speedy trial clock running.[17] But even a neutral observer should be concerned with why the record is silent on such an important issue.

In any event, even setting aside how the mental evaluation delay is construed, the delay in this case during the 14-month period where Russell had no access to a lawyer falls squarely on the shoulders of the Hinds County Public Defender's office *and* the trial court. The complete absence of counsel constitutes "a systemic 'breakdown in the public defender system.'" *Brillon*, 556 U.S. at 94 It was objectively unreasonable for the

[17] It is well-known that Hinds County defendants face long delays in receiving a mental evaluation.

Mississippi Court of Appeals to weigh this factor as neutral. This factor should have been weighed against the state.

3. *Barker*'s Third Factor: Petitioner's Diligence

Barker's third factor instructs courts to look at the defendant's diligence in asserting his speedy trial rights.

"*Barker* instructs that '[t]he defendant's assertion of his speedy trial right . . . is entitled to *strong evidentiary weight* in determining whether the defendant is being deprived of the right.'" *Goodrum*, 547 F.3d at 259 (quoting *Baker*, 407 U.S. at 531-32) (emphasis in original). "This is because the vigorousness with which a defendant complains about the delay will often correspond to the seriousness of the deprivation."[18] *Goodrum*, 547 F.3d at 259 (citing *Baker*, 407 U.S. at 531-32). "[W]e have applied these clearly articulated principles from *Barker* and construed vigorous and timely assertions of the right to speedy trial as weighing strongly or heavily in the defendant's favor." *Id.*

As in *Goodrum*, the state court record shows that Russell "doggedly invoked his speedy trial right," 547 F.3d at 260. He first asserted his speedy trial right on May 2, 2007, and continued

[18] This is a dubious assumption. We know detainees come in all forms. Some detainees face psychological or intellectual difficulties in asserting their constitutional rights. Others may face hurdles getting their complaints through the prison mail system. But, these are reasons why they have counsel. Counsel is provided so that these rights are claimed and asserted. The courts are there to make sure these rights are safeguarded. Irrespective of the vigor in which a defendant pursues a speedy trial, the State should jealously guard the constitutional rights of those it seeks to bring to trial. But, the law is what it is.

to file motions seeking to obtain a speedy trial.[19] The timeliness of Russell's assertions should be notable, as the Fifth Circuit has stated, "'the point at which the defendant asserts his right is important because it may reflect the seriousness of the personal prejudice he is experiencing.'" *Robinson v. Whitley*, 2 F.3d 562, 569 (5th Cir. 1993) (quoting *United States v. Palmer*, 537 F.2d 1287, 1288 (5th Cir. 1976)).

On direct appeal, the state court made no express finding regarding this factor. This is contrary to Supreme Court precedent. "Under the Supreme Court's precedent in *Barker*, [defendant]'s persistent invocation of the right must weigh strongly in his favor and hence, the state court's failure to accord due weight to this factor is contrary to clearly-established law." *Goodrum*, 547 F.3d at 260.

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[19] Russell wrote on November 15, 2007, in a motion that "I have been held in (11) months of unconstitutional detention as an innocent accused without bond, suffering from mental anxiety and concern from oppressive pretrial incarceration, and a lawyer has not yet contacted me and provided me with the legal representation [sic] I need." Docket No. 9-10 at 59. On December 21, 2007, Russell wrote in a motion that he had been held in custody without bond for a year and "I'm suffering mental anxiety and concern from the oppressive pretrial detention." Docket No. 9-1 at 22. On January 7, 2008, Russell wrote that he was "deprived from the 6th amend [sic] right to speedy trial and the effective assistance of counsel." *Id.* at 35. On February 13, 2008, Russell wrote "I didn't even go to court Febuary [sic] 11, 2008, not haveing [sic] to mention actuelly [sic] going to trial on that date, nor have a lawyer has come to visit me since my arrest." *Id.* at 44. Very few things should get a trial court's attention more than a jailed criminal defendant's plea that he has not seen or spoken with his attorney. Such a shocking statement should not be one the court is accustomed to hearing.

4. *Barker*'s Fourth Factor: Prejudice

The fourth and final element asks whether Russell was prejudiced by the delay. The state court found this issue "without merit." *Russell I*, 79 So. 3d at 539. But what does the Supreme Court say?

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Barker, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Speer*, 824 F. App'x at 245 (citing *Barker*, 407 U.S. at 532). "If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall events of distant past accurately. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532.

The Court will analyze whether Russell was actually prejudiced regarding the aggravated assault charge first, and then the felon in possession charge.

a. Aggravated Assault Charge

The "heart of the prejudice inquiry" is whether the delay impaired the defense. *Speer*, 824 F. App'x at 246. Here, the government's failure to provide Russell with an attorney and a timely trial impaired his ability to present his alibi defense on

the aggravated assault charge. The delay caused Russell to lose contact with an exculpatory witness. "This is exactly the type of prejudice the Supreme Court was most concerned with in *Barker*." *United States v. Frye*, 489 F.3d 201, 213 (5th Cir. 2007).

This is a case where no one saw the actual aggravated assault. Russell only had one person who could help him adequately prepare his case: the man who took him away from the scene before the shooting.[20] Russell explained in the proffer that that man, Ron Ron, would have testified "[t]hat he came and picked me up from the same location the victim is supposed to have got shot from a minute before he got shot. . . . When he came and picked me up wasn't nobody shot from that location." Docket No. 9-2 at 55. This is not a "general allegation of loss of witnesses," *United States v. Zane*, 489 F.2d 269, 270 (5th Cir. 1973), but a specific assertion of a particular, specified and named lost witness made under oath.

Russell took all the steps available to him while incarcerated in Hinds County Detention Center, with no assistance or visit from an attorney in 14 months: he diligently called the number of Ron Ron's then-girlfriend's home, testifying that he knew how to contact Ron Ron at the time of arrest: "I had his girl's home number. And after about eight or nine months of incarceration him and his girlfriend broke up and the phone came disconnect. So I was unable to no longer contact Ron Ron through that phone. So I lost contact of him." Docket No. 9-2 at 55. Russell also disclosed his witness immediately upon obtaining counsel, showing the proper diligence we should

[20] Technically, there was another who could help him: his attorney. But that person did not exist.

expect from persons raising an alibi defense. By that time, though, it was too late.[21]

This is also not a case where the evidence of guilt was abundant. *See, e.g.*, *United States v. Hendricks*, 661 F.2d 38, 42 (5th Cir. 1981). None of the government's witnesses, including the victim himself, identified Russell as the perpetrator. The only evidence linking Russell to the crime of aggravated assault was that he was at the same gathering as the victim; the victim claimed Russell carried a 9mm in his waistband—the same type of gun that the *victim* always had in his car—which Russell denied; and walked outside around the same time as the victim. No ballistics tests were done linking the shell casings at the scene to Russell.

The Mississippi Court of Appeals dismissed Russell's claim of prejudice in two cursory sentences, stating "the record supports the State's argument that Russell admitted on cross-examination that he never knew Ron Ron's last name.[22] We find Russell's claim of prejudice to lack support." Docket No. 8-1 at 9. The court claimed to draw support from two cases, *Birkley v. State*, 750 So. 2d 1245, 1252 (Miss. 1999) and *Perry v. State*,

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[21] This is the exact concern the *Barker* Court spoke about: "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defenses." 470 U.S. at 533.

[22] In contrast, the trial court accepted testimony from the prosecution's witnesses who referred to people by nicknames. The victim, Michael Porter, did not know the name of his then-girlfriend's mother—another person at the scene—stating "I'm used to calling her mama." Docket No. 9-3 at 92. Vicki Hawkins referred to the victim by his nickname "Fox." *Id.* at 124.

637 So. 2d 871, 876 (Miss. 1994). Neither case is a speedy trial case involving a claim of prejudice due to a missing witness.

In the briefing in this matter, the government contends that Russell "fails to demonstrate that this mysterious 'alibi witness' would actually provide an alibi as he claims." Docket No. 25 at 8. The argument doesn't acknowledge the record evidence: that Russell knew Ron Ron for five years, that Russell was able to contact him for eight months while incarcerated, that Russell could specifically state the contents of Ron Ron's testimony, that Russell did so immediately upon obtaining counsel; and that Russell was able to provide a nickname, a telephone number, and directions to an identifiable residence. The government also does not acknowledge that the trial court prevented Russell from explaining to the jury that Ron Ron was on standby to be a witness, but that Russell lost contact with him when he was incarcerated for 14 months without access to a lawyer. *See* Docket No. 9-4 at 36.

The government then speculates about the impact Ron Ron's testimony would have had in the trial, stating "the testimony presented by other witnesses at trial called into question Russell's alibi such that the only effect of any testimony presented by 'Ron Ron [no last name]' would have transformed Russell's alibi from an incredibly tall tale to just a tall one." Docket No. 25 at 8.[23] The government cites *Cowart v. Hargett*, 16 F.3d

[23] It's bad enough that the government failed to bring the defendant to trial within a constitutionally permissible time frame, but here, in its habeas arguments, it proposes to act as a jury too. The State's conjecture fails to recognize that had Russell received his speedy trial, Ron Ron may have testified at trial. The *jury* could have weighed his testimony with and against the other witnesses. The jury could have concluded that it was the other witnesses who were telling an incredibly tall tale. The task of

642, 648 (5th Cir. 1994) as support for this claim. There, the Fifth Circuit found that the petitioner did not experience actual prejudice due to a missing witness named "Peanuts" because the "failure of Peanuts's testimony could not have altered the outcome of the trial and [thus] could not have resulted in actual prejudice to Cowart." *Id.* at 648.

The case is plainly inapposite. In *Cowart*, the petitioner alleged that Peanuts would have testified that he and the petitioner did not go to the victims' home with the intention of committing a crime. But "[t]heir purpose for going to the [victims'] house, however, is immaterial to the crimes that transpired upon arrival." *Id.* at 648. Additionally, the Fifth Circuit found that even if Peanuts' testimony was material, it was not likely to have impacted the outcome of the trial in light of the overwhelming evidence at trial. *Id.* at 648. This evidence included positive identification of the petitioner by the victims, who testified that they had known the petitioner for several years and easily identified him as the assailant. Brief of Respondents/Appellants at *9, *Cowart v. Hargett*, 16 F.3d 642 (5th Cir. 1994) (No. 92-7804) At trial, the defense rested its case without presenting any witnesses. *Id.*

In contrast, the record in this case reveals a high probability that Ron Ron's testimony would have altered the outcome of the trial on the aggravated assault charge. As discussed above, Russell's conviction rested on no eyewitness testimony. Unlike in *Cowart*, not a single witness saw Russell shoot the victim—not even the victim himself. According to

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determining what evidence to believe and not to believe is left to the jury, not for the prosecution to offer utter speculation in defense of these woefully inadequate trial proceedings.

only the victim, Russell may have been carrying the same type of gun that was used in the shooting, a fact that might incriminate him for the felon-in-possession charge. But the victim was also carrying this type of gun. Ron Ron's testimony would have established that Ron Ron picked Russell up before the shooting occurred, making it impossible for Russell to have committed the aggravated assault. Not only did Russell not have Ron Ron to provide an alibi, at his trial, Russell was prevented from explaining to the jury that his alibi witness was on standby to testify, but that he lost contact with him after eight months of calling because he was incarcerated without access to a lawyer for 14 months. *See* Docket No. 9-2 at 36.

The government then claims support from *Tarver v. Banks*, 541 F. App'x 434, 437 (5th Cir. 2013). In *Tarver*, the petitioner admitted that he did not know how his two allegedly missing witnesses would have impacted the case. *Id.* at 437. The petitioner also did not know the names of the potential witnesses. *Id.* Russell's testimony indicates that he does know how Ron Ron would have impacted the case. Additionally, as stated above, Russell was able to provide a name, a telephone number, and directions to a known place of residence.

Finally, Russell was timely in seeking out his alibi witness and has shown the alibi witness would have aided his defense, unlike in *Robinson v. Whitley*, 2 F.3d 562, 571 (5th Cir. 1993), another case relied upon by the government. In *Robinson*, the defendant waited for years to try to locate alibi witnesses, and his alibi defense was destroyed by the defendant's own testimony. As discussed above, Russell made all the attempts he could from his incarcerated position to secure Ron Ron as a witness: he called diligently for months and alerted his public

defender at the preliminary hearing, who brushed him off and never contacted him again. The record reflects that Russell's later attorney Boykin tried to find Ron Ron, but it was too late.

The prejudice inquiry also asks about more subjective harms to a defendant. The Court now turns to these.

The record is full of Russell's motions attesting to anxiety and concern.

"I have been held in (11) months of unconstitutional detention as an innocent accused without bond, suffering from mental anxiety and concern from oppressive pretrial incarceration, and a lawyer has not yet contacted me and provided me with the legal representation [sic] I need," Russell wrote on November 15, 2007. Docket No. 9-10 at 59. On December 21, 2007, Russell told the court that he had been held in custody without bond for a year and "I'm suffering mental anxiety and concern." Docket No. 9-1 at 22. A month later, he said that he had been "deprived from the 6th amend [sic] right to speedy trial and the effective assistance of counsel." *Id.* at 35. Then, on February 13, 2008, Russell explained that he "didn't even go to court Febuary [sic] 11, 2008, not haveing [sic] to mention actuelly [sic] going to trial on that date, nor have a lawyer has come to visit me since my arrest." *Id.* at 44.

The Mississippi Court of Appeals dismissed Russell's assertion that he "suffered mental anxiety" by citing *Jenkins v. State*, 947 So. 2d 270 (Miss. 2006). In that case, the court held that "a defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal." *Id.* at 277. Just prior to that sentence, the Mississippi Supreme Court also stated, "Mississippi case law

does not recognize as prejudice the negative emotional, social, and economic impacts that accompany incarceration." *Id.* Yet that is flatly contrary to federal law. In *Goodrum*, the Fifth Circuit said it had "already noted *Barker's* recognition of anxiety and concern of the accused as a type of **cognizable harm** that may result from a delayed trial **and other cases stress its independence from whatever impact the delay may or may not have on the defense**." 547 F.3d at 262-63 (emphasis added). The Fifth Circuit found unreasonable the state court's rejection of the defendant's anxiety and concern as probative of prejudice. *Id.* at 263. The same conclusion is warranted here.

The context of Russell's detention also should not be overlooked. Russell was imprisoned for 25 months at a facility known as "a troubled jail," one known for "rampant prisoner-on-prisoner violence, . . . homicide[,] and a remarkable volume of contraband." *Patterson v. Hinds Cty., Miss.*, No. 3:13-CV-432-CWR-FKB, 2016 WL 7177762, at *9 (S.D. Miss. June 10, 2016) (quoting U.S. Dep't of Justice, Justice Department Finds That Hinds County Mississippi, Fails to Protect Prisoners from Harm and Detains Prisoners Beyond Court-Ordered Release Dates (May 21, 2015)).[24] It is little wonder that Russell wrote motion after motion pleading for an attorney.

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[24] *See also United States v. Hinds County*, No. 3:16-CV-489-CWR-JCG (S.D. Miss. Jan. 16, 2020) [Docket No. 60] ("Regretfully, despite more than three years having passed, Hinds County has yet to reach compliance with the Consent Decree [with the Department of Justice approved by this Court]."); Mollie Bryant, *Jailed without trial*, THE CLARION-LEDGER, Oct. 29, 2016 (describing Hinds County Detention Center as "a jail that has become notorious for its abysmal conditions").

In sum, Russell suffered actual prejudice. The government's delay in bringing his case to trial caused Russell to lose his alibi witness on the aggravated assault charge and experience oppressive pretrial incarceration and anxiety. The Mississippi appellate court's disregard for that evidence was contrary to longstanding federal law. Thus, it was objectively unreasonable not to find that Russell was prejudiced.

b. Felon in Possession Charge

In contrast to the aggravated assault charge, there is not sufficient evidence of actual prejudice for the felon in possession charge. While Russell experienced the same anxiety from being incarcerated for an extended period without counsel, Russell's defense for the felon in possession charge was not prejudiced by the delay like the aggravated assault charge. At trial, there was more evidence for the felon in possession charge: it was not contested that Russell was a convicted felon, and there was eyewitness testimony indicating that Russell was carrying a firearm. *See* Docket No. 9-3 at 94-95, Docket No. 9-6 at 15. Ron Ron was only described as an alibi witness for the aggravated assault charge. Like in *Cowart*, Ron Ron's testimony likely "could not have altered the outcome of the trial" on the felon in possession charge, and thus Russell's defense did not suffer actual prejudice on that charge. 16 F.3d at 648.

5. Balancing the *Barker* factors

"We now come to the determinative question: whether the state court unreasonably concluded that the balance of all four *Barker* factors in this case does not establish a violation of the speedy trial right." *Goodrum*, 547 F.3d at 266.

The Supreme Court in *Barker* said that none of the four factors are "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 might be relevant**." *Barker*, 407 U.S. at 533 (emphasis added). "The speedy trial inquiry therefore involves a 'difficult and sensitive' balancing of these factors under the particular circumstances of a given case" *Goodrum*, 547 F.3d at 257.

In the present case, standing alone, the 25-month delay between Russell's arrest and trial would not be considered an outlier worthy of relief in light of Supreme Court and Fifth Circuit precedent excusing delays as long as five and seven years. *See Barker v. Wingo*, 407 U.S. 514 (1972) (five years); *Boyer v. Vannoy*, 863 F.3d 428 (5th Cir. 2017) (seven years). However, the inquiry must not end there. "What is acceptable in one case . . . may not be so in another; much depends on the complexity of the case." *Gray v. King*, 724 F.2d 1199, 1202 (5th Cir. 1984). Notably, in *Barker*, the Supreme Court stated in a footnote, "[f]or example, the First Circuit thought **a delay of nine months** overly long, absent a good reason, **in a case that depended on eyewitness testimony**." 407 U.S. at 531 n.31 (citing *United States v. Butler*, 426 F.2d 1275, 1277 (1st Cir. 1970)) (emphasis added).

The circumstances of this case can be summed up as follows. The 25-month delay between Russell's arrest and trial weighs against the state, though not heavily. The responsibility for the majority of that delay falls on the state, as the government failed to provide Russell with an attorney for more than a year. Russell diligently and repeatedly invoked his speedy trial right—a factor that provides strong evidentiary support

for speedy trial claimants. And most importantly, the delay prejudiced not only Russell's mental health, but severely impaired his aggravated assault defense, as he lost an alibi witness in a case otherwise based entirely on circumstantial evidence.

The Mississippi Court of Appeals did not explicitly balance the *Barker* factors. Instead, in a cursory fashion, it stated that,

> The record reflects that the circuit judge carefully considered Russell's claims and applied the appropriate judicial tests. Although the circuit judge did not fully articulate his calculations regarding defense delay in his findings, the record shows that the circuit judge spoke to the issue of prejudice and the *Barker* factors; thus, we find that the circuit court's findings are supported by substantial evidence in the record.

Russell I, 79 So. 3d at 538-39. The Court of Appeals was mistaken. At trial, the judge discussed only the second *Barker* factor and, regarding that factor, the judge said "this Court should hold this factor to favor **Murray**."[25] Docket No. 9-2 at 37 (emphasis added). The judge then went on to conclude,

> The Court is of the opinion considering all aspects of this case, and particularly the motion, and considering the history, the timeline, the Barker factors, arguments of counsel this morning, briefs of counsel previously submitted to the Court is of the opinion that the [speedy trial]

[25] That is not a typo. The judge was mistaken about which defendant was before him.

> motion is not well taken and should be and is hereby denied.

Docket No. 9-2 at 43.

The text and structure of AEDPA requires federal deference to state-court findings. Here, though, it is difficult to review such bare-bones findings. It is not apparent that the state court engaged in the delicate and sensitive balancing process that *Barker* requires.

The Supreme Court says "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker*, 407 U.S. at 527. Yet, the State in this case instead argued "statutorily and constitutionally due process matters not." Docket No. 9-2 at 31.

Reading the record as a whole, and giving weight to those factors that the state courts considered following Supreme Court precedent, this is a case where there is a "nexus between the reason for the delay, the delay, and the prejudice," which the Fifth Circuit has held creates a speedy trial violation. *See Frye*, 489 F.3d at 212 (citing *Arrant*, 468 F.2d at 682-84). The delay of 25 months resulted in the actual prejudice of a missing critical witness. The reason for the delay, during the critical time period of 14 months after the arrest, was "a breakdown in the public defender system," reasons which the Supreme Court has held may be charged to the state. *Brillon*, 556 U.S. at 86. When considered together as they must, these factors show that Russell was deprived the fundamental fairness required in our criminal justice system.

As the Supreme Court has instructed, "because we are dealing with a fundamental right of the accused, this process must

be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Barker*, 407 U.S. at 533. The state courts, at trial and on direct appeal, acted objectively unreasonably in not considering the state's responsibility for the actual prejudice Russell faced on the aggravated assault charge, prejudice which both undermined the fairness of the system and condemned Russell to a conviction for a shooting no one saw him commit. Thus, for the aggravated assault charge, Russell's speedy trial petition is granted.

However, for the felon in possession charge, the *Barker* factors do not balance in Russell's favor, as he did not suffer actual prejudice. The state court was not unreasonable in rejecting Russell's claim on that charge.

B. Russell's Ineffective Assistance of Counsel Claim

Ordinarily, to succeed on an ineffective assistance of counsel claim, the defendant must satisfy the two-part test identified by the Supreme Court in *Strickland v. Washington*: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that that the deficient performance prejudiced the defense." 466 U.S. 668, 687 (1984).

However, the Supreme Court's decision in *United States v. Cronic* created a limited *Strickland* exception in situations that "are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." 466 U.S. 648, 658 (1984). The Court has identified three situations that fit this limited exception. *Bell*, 535 U.S. at 695-96. In each of them, courts will presume that the defendant has been prejudiced. *Id.*

"First and '[m]ost obvious' [is] the 'complete denial of counsel.'" *Id.* at 695 (quoting *Cronic*, 466 U.S. at 659). "A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at 'a critical stage.'" *Id.* (quoting *Cronic*, 466 U.S. at 659, 662). Second are situations in which a defendant is represented by counsel at trial, but his or her counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* (quoting *Cronic*, 466 U.S. at 659). Finally, prejudice is presumed when the circumstances surrounding a trial prevent a defendant's attorney from rendering effective assistance of counsel. *Bell*, 535 U.S. at 696 (citing *Powell v. Alabama*, 287 U.S. 45, 57–58 (1932)).

The first *Cronic* situation applies here. "[B]ecause our system of justice deems essential the assistance of counsel, 'a trial is unfair if the accused is denied counsel at a critical stage of his trial.'" *Id.* at 345 (quoting *Cronic*, 466 U.S. at 659). "[A]bsence of counsel at critical stages of a defendant's trial undermines the fairness of the proceeding and therefore requires a presumption that the defendant was prejudiced by such deficiency." *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001).

In the present case, Russell was without an attorney for 14 months while incarcerated pretrial. Several Supreme Court cases demonstrate that the period between the appointment of counsel and the start of trial is indeed a "critical stage" for Sixth Amendment purposes. The *Powell* Court described the pre-trial period as "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." 287 U.S. at 57. The Court held that a defendant must be provided counsel at "every step in the proceedings

against him." *Id.* at 69. *Bell* confirmed that the "critical stage[s]" at which counsel must be present are not limited to formal appearances before a judge. 535 U.S. at 696 n.3.

The pretrial period constitutes a "critical period" because it encompasses counsel's constitutionally-imposed duty to investigate the case. The Supreme Court has explicitly found that trial counsel has a "duty to investigate" and that to discharge that duty, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The Court also recognized that without pretrial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* The Court went on to emphasize further the significance of the defendant's input into trial counsel's investigation:

> In particular, what investigation decisions are reasonable depends critically on such information [provided by defendant]. . . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. Because the Supreme Court has made clear that there is a duty incumbent on trial counsel to conduct some pre-trial investigation, it necessarily follows that trial counsel cannot

discharge this duty if he or she fails to consult with his or her client.[26]

The Sixth Circuit's decision in *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003) is illustrative. There, Mitchell's counsel did not hold a private meeting with Mitchell during the seven-month period of his representation; Mitchell had only six minutes of contact with his attorney before his trial. 325 F.3d at 744. He was never visited by his counsel while incarcerated pretrial. *Id.* at 746. The Michigan Supreme Court rejected Mitchell's claim for ineffective assistance of counsel, evaluating it under the *Strickland* standard. *Id.* at 741. In doing so, the Sixth Circuit said, "the Michigan Supreme Court erroneously and unreasonably applied clearly established Supreme Court law in *Cronic*." *Id.* Thus, the Sixth Circuit found that the state court's rejection of Mitchell's ineffective assistance of counsel claim was both contrary to and an unreasonable application of clearly established law. *Id.* at 741.

As in *Mitchell*, the Mississippi Supreme Court's application of *Strickland* to this case is an erroneous and unreasonable application of the clearly established Supreme Court law set forth in *Cronic*. It is well-established that the "complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (citing *Cronic*, 466 U.S. at 659). Because Russell was completely denied counsel during the critical

[26] Communicating with the client will aid counsel in not only getting the trust of his client, but those communications and consultations may help counsel determine how he may advise his client on whether he should testify or offer evidence in his trial.

pretrial stage, Russell's claims should be evaluated under *Cronic*. *Id.* at 742.

The record bears out Russell's allegations of complete denial of counsel. Russell's ineffective assistance of counsel claim concerns Frank McWilliams, the public defender who Russell never met, and who was eventually removed by the trial court after Russell had been incarcerated for 14 months. During the period of McWilliams' "representation," from January 8, 2007 until February 28, 2008, Russell was constructively denied counsel. This denial of counsel occurred prior to Russell's scheduled February 11, 2008 trial, which did not occur only because McWilliams never met with Russell.

The fact that Russell technically had appointed counsel—McWilliams—from January 8, 2007 until February 28, 2009 is not a persuasive reason to excuse the constitutional violation. "Assistance begins with the appointment of counsel, it does not end there." *Cronic*, 466 U.S. at 654 n.11. Russell received no assistance during those critical months, even though he had a trial scheduled for February 11, 2008. "The Sixth Amendment guarantees more than a pro forma encounter between the accused and his counsel," *Mitchell*, 325 F.3d at 744, and Russell did not even have a single encounter.

Russell's case does differ from *Mitchell* in that, after 14 months of being completely abandoned by counsel, the trial court finally replaced McWilliams and appointed Boykin, a competent attorney, to represent Russell. But the constitutional violation was cured only in part. Russell lost contact with his alibi

witness.[27] Having been without counsel for this extended period of time "affected—and contaminated—the entire criminal proceeding." *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988).

Fifth Circuit law plainly held that during this period, McWilliams should have been preparing for Russell's trial and securing the witness. "[A]n attorney must engage in a reasonable amount of pretrial investigation and "at a minimum, . . . interview potential witnesses and . . . make an independent investigation of the facts and circumstances in the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985). Furthermore, "when alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and 'ascertain whether their testimony would aid the defense.'" *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (citation omitted). "Informed evaluations of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981) (citation omitted). Yet, McWilliams never had a single conversation with Russell. That was constitutional error. *See Towns v. Smith*, 395 F.3d 251, 258-60 (6th Cir. 2005) (recognizing that counsel's failure to conduct reasonable investigation into "known and potentially important alibi witness" was ineffective assistance because investigation would have produced reasonable probability of defendant's acquittal).

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[27] The trial court even denied Russell's request to explain to the jury why his alibi witness was not there and that he had been without a lawyer for 14 months. Docket No. 9-4, at 36.

While the loss of Russell's alibi witness more greatly hindered Russell's defense for the aggravated assault charge,[28] as discussed in the above speedy trial section, *Cronic*'s presumption of prejudice applies to both the aggravated assault and felon in possession charges. In *Cronic* cases, the defendant is not required to establish that the presence of an attorney at a critical stage "did in fact have an adverse impact on his own fortune or that the presence of his attorney would have improved his chances of an acquittal." *Burdine*, 262 F.3d at 348. "Such a standard would require that the defendant, in effect, prove prejudice in order to receive a presumption of prejudice." *Id.* "That **was not** the standard announced in *Cronic*." *Id* (emphasis added). The Fifth Circuit emphasized:

> To justify a particular stage as "critical," the Court has not required the defendant to explain how having counsel would have altered the outcome of his specific case. Rather, the Court has looked to whether "the substantial rights of **a defendant** may be affected" during that type of proceeding.

Id. at 347 (quoting *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991) (emphasis added). "[T]he overarching legal question of whether a particular proceeding is a "critical stage" of the trial should focus not only on the specific case . . ., but the general question of whether such a stage is 'critical.'" *United*

[28] Russell stated that his alibi witness Ron Ron would have testified that Ron Ron picked Russell up before the shooting occurred, thereby making it impossible for Russell to have been the one who shot the victim Porter. It is unclear from the record if Ron Ron would have also testified that Russell did not have a gun. The victim was the only witness to testify that Russell possessed a gun, which Russell denied.

States v. Robles, 445 F. App'x 771, 779 (5th Cir. 2011) (quoting *Van v. Jones*, 475 F.3d 292, 313–14 (6th Cir. 2007)). Thus, the determination that Russell was denied counsel at a critical stage applies to both of Russell's charges. At the critical stage in his case, Russell was left to fight for himself, but like any other defendant without an attorney, Russell "lack[ed] both the skill and knowledge adequately to prepare his defense." *Powell*, 287 U.S. at 69.

Because the record establishes a total absence of counsel during a critical period, the Mississippi Supreme Court should have applied *Cronic*, rather than *Strickland*, to Russell's claim. The application of *Cronic* results in finding a constitutional violation sufficient to vacate Russell's convictions. The Mississippi Supreme Court's holding was contrary to and an unreasonable application of clearly established law.

One final word. The Court takes this opportunity to thank counsel for accepting the appointment and for zealously representing Mr. Russell. Counsel has demonstrated all that Russell lacked for more than a year after the criminal proceedings were initiated.

IV. Conclusion

The petition is granted. This ruling is stayed pending the State's anticipated appeal.

SO ORDERED, this the 24th day of March, 2021.

s/ CARLTON W. REEVES
United States District Judge

Serial: 187624

IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-M-01623

CEDRIC D. RUSSELL a/k/a SEDRICK RUSSELL ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

ORDER

This matter came before the Court en banc on Cedric D. Russell's pro se "Motion for Leave to File for Post-Conviction," "Motion to Prove by Preponderance of the Evidence that the Petitioner is Entitled to Relief," "Motion to Correct Motion to Prove by a Preponderance of the Evidence . . . ," "Motion to Submit Supporting Affidavit . . . ," "Motion for Mandamus," and "Motion for Ex Parte Pursuant to the Petitioner's Speedy Trial Issue." The State of Mississippi has filed a response in opposition to Russell's motions seeking post-conviction collateral relief and Russell has filed a reply to that response. Russell's convictions and sentences were affirmed by the Court of Appeals of the State of Mississippi by decision entered on August 16, 2011, and the mandate issued on March 1, 2012. ***Russell v. State***, 79 So. 3d 529 (Miss. Ct. App. 2011).[1]

After due consideration, the Court finds that the State's second motion to amend Russell's indictment to allege that he was a habitual offender was not filed until after

[1] Circuit Court of the First Judicial District of Hinds County, Mississippi, cause number 07-673 CR(Y). Supreme Court Clerk's docket number 2009-CT-01628.

conviction and on the morning of the sentencing hearing. The motion was not timely filed and should have been denied. ***Boyd v. State***, 113 So. 3d 1252, 1254-56 (Miss. 2013) (citing ***Gowdy v. State***, 56 So. 3d 540 (Miss. 2010); URCCC 7.09). But the State's first motion to amend Russell's indictment to allege that he was a habitual offender, filed ten months before Russell's trial, was timely. Because the documentation submitted by the State showed that Russell had served more than one year for aggravated assault in cause number 98-2-018-00 and separately served one year for possession of cocaine in cause number 2444, arising out of separate incidents at different times, the evidence was sufficient to support the trial court's finding beyond a reasonable doubt that Russell was a habitual offender under Mississippi Code Section 99-19-83 (Rev. 2007).

The Court further finds that Russell's claims that he received constitutionally ineffective assistance of counsel fail to meet both prongs of ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Court finds that Russell's claims that his right to a speedy trial was violated are barred by the doctrine of res judicata. Miss. Code Ann. § 99-39-21(3) (Rev. 2007). The Court finds that Russell's claim regarding his Second Amendment rights is without merit. The Court finds that Russell's motion for a writ of mandamus should be dismissed as moot.

IT IS THEREFORE ORDERED that Cedric D. Russell's pro se "Motion for Leave to File for Post-Conviction," "Motion to Prove by Preponderance of the Evidence that the Petitioner is Entitled to Relief," "Motion to Correct Motion to Prove by a Preponderance of

the Evidence . . . ," "Motion to Submit Supporting Affidavit . . . ," and "Motion for Ex Parte Pursuant to the Petitioner's Speedy Trial Issue" are denied.

IT IS FURTHER ORDERED that Russell's pro se "Motion for Mandamus" is dismissed as moot.

SO ORDERED, this the 11th day of February, 2014.

DAVID ANTHONY CHANDLER, JUSTICE
FOR THE COURT

DICKINSON, P.J., AND KITCHENS, J., DISAGREE.

Serial: 174762

IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CT-01628-SCT

CEDRIC D. RUSSELL

v.

STATE OF MISSISSIPPI

FILED

FEB 0 9 2012

SUPREME COURT CLERK

ORDER

This matter is before the Court en banc on the Petition for Writ of Certiorari filed by Cedric D. Russell, pro se. After due consideration, the Court finds that the petition should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari filed by Cedric D. Russell is hereby denied.

SO ORDERED, this the 9th day of February, 2012.

Ann H. Lamar

ANN H. LAMAR, JUSTICE
FOR THE COURT

TO DENY: WALLER, C.J., CARLSON, P.J., RANDOLPH, LAMAR, PIERCE AND KING, JJ.

TO GRANT: DICKINSON, P.J., KITCHENS AND CHANDLER, JJ.

Serial: 172980

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2009-KA-01628-COA

CEDRIC D. RUSSELL ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

ORDER

This matter is before the Court upon the motions for rehearing. The Court finds that the motions are not well taken and should be denied.

IT IS THEREFORE ORDERED that the motions for rehearing are denied.

SO ORDERED, this the 4th day of October, 2011.

L. JOSEPH LEE, CHIEF JUDGE

b

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-01628-COA

CEDRIC D. RUSSELL **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	01/30/2009
TRIAL JUDGE:	HON. W. SWAN YERGER
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DONALD W. BOYKIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	ROBERT SHULER SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF COUNT I, AGGRAVATED ASSAULT, AND COUNT II, POSSESSION OF A FIREARM BY A CONVICTED FELON, AND SENTENCED AS A HABITUAL OFFENDER TO LIFE FOR EACH COUNT, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITHOUT ELIGIBILITY FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED - 08/16/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., MYERS AND CARLTON, JJ.

CARLTON, J., FOR THE COURT:

¶1. Cedric Russell appeals his conviction in the Hinds County Circuit Court of one count of aggravated assault and one count of possession of a firearm by a convicted felon and his sentence, as a habitual offender, to two terms of life in the custody of the Mississippi

Department of Corrections (MDOC) without the possibility of parole or probation. On appeal, Russell asserts the following issues as assignments of error: (1) the indictment should have been dismissed for failure to provide a speedy trial; (2) the amended motion to amend the indictment to allege sentence enhancement as a habitual offender should not have been granted due to prosecutorial vindictiveness; (3) the State committed a discovery violation; therefore, Russell should not have been sentenced as a habitual offender; (4) the evidence was insufficient to sentence Russell as a habitual offender; (5) Russell was improperly sentenced as a habitual offender; (6) Russell was denied a fair and impartial trial; and (7) the circuit court erred in denying Russell's *Batson* objection regarding the State's use of peremptory challenges. Finding no error, we affirm the circuit court's judgment.

FACTS

¶2. On December 19, 2006, Michael Porter arrived at his girlfriend's house at approximately 5:00 or 6:00 p.m. Porter's girlfriend, Lawanda Hawkins, her sister, their mother, children, and Russell were all present in the home.

¶3. At trial, Porter stated that he left the house to get a bottle of gin from his car, which was parked in the driveway. Porter testified that Russell followed him outside. Porter opened his car, leaned over the front seat, and reached over to get the gin from the back floorboard. While he was in the car, Porter was shot twice in the leg. Porter crawled out of the vehicle, stood up, and walked back into the house. Officers from the Jackson Police Department arrived on the scene, and Porter was taken to University of Mississippi Medical Center. Police officers found 9mm shell casings in the front of the house.

¶4. On December 21, 2006, police officers arrested Russell, and he was subsequently

indicted on August 16, 2007, for aggravated assault and for possession of a firearm as a convicted felon. On March 10, 2008, the Hinds County District Attorney's Office filed its motion to amend the indictment to sentence Russell as a habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2007), stating that Russell had two prior felony convictions, including a crime of violence.

¶5. At trial, Porter testified that he told police everything that occurred prior to the shooting, but he admitted that he failed to inform the police that he had a 9mm pistol in his car when he was shot. Vicki Hawkins, Lawanda's sister, testified that Porter always carried a gun in his car. She stated that she observed both Porter and Russell go outside, but she testified that when she went outside later, she did not see Russell. Vicki and Lawanda both testified that they did not see who had fired the shots.

¶6. Porter testified that he noticed that Russell had a pistol in his pocket while they were inside Hawkins's home, but he did not say anything about it to Russell. However, Porter admitted at trial that he never told the police that he had seen a pistol in Russell's pocket. Porter also testified that he did not see Russell shoot the pistol.

¶7. Russell testified that prior to the shooting, he went on the front porch of the house to call a friend to pick him up. He stated that someone came by the house while he was outside and asked if Porter was inside the house. Russell testified that one of his friends arrived and picked him up before any shots were fired. Russell denied shooting Porter.

¶8. After a trial held on January 27-30, 2009, Russell was found guilty of one count of aggravated assault and one count of possession of a firearm by a convicted felon. Prior to sentencing, the State submitted its amended motion to amend the indictment to sentence

Russell as an habitual offender, seeking to add two additional felony convictions for consideration in support of sentencing Russell under section 99-19-83. The addition of the two convictions resulted in four prior convictions in support of habitual offender sentencing. The motion was stamped "filed," but the circuit clerk did not sign the motion, nor does it appear on the circuit court docket. On January 30, 2010, the circuit court sentenced Russell to life in the custody of the MDOC without parole or probation, with the two counts to be served concurrently.

¶9. Russell filed a motion for judgment notwithstanding the verdict (JNOV), or, in the alternative, for a new trial. The circuit court denied both of these post-trial motions. Russell now appeals.

DISCUSSION

I. Speedy Trial

¶10. On the day of trial, during the hearing on pretrial motions, the defense presented its motion to set aside the order denying the pro se motion to dismiss for lack of a speedy trial. The prosecution, in responding to this motion, sufficiently showed that Russell had suffered no statutory or constitutional violation:

> . . . I think the facts are clear, your Honor, that the defendant was arrested December 26, 2006. He was indicted August 26, 2007, arraigned November 9, 2007. And his case was set for trial March 24, 2008.
>
> All of these offenses of which indictments are presented to this Court were supposed to be tried within 270 days according to the [sic] 99-17-1 of the Mississippi Code. And his trial was certainly set within that time.
>
> And your Honor, the reason that case was delayed was because the defendant asked for it. I mean, any delay that we have after that goes against the defendant. And I mean, I understand that [Russell's attorney] Mr. Boykin

needed to get him evaluated. That's not the issue. I understand why he did what he did. But certainly the delay is on the defense because he wanted a mental evaluation. And he got one.

And as soon as he got one, at least within the next term, if not the second term of court, he's set for trial and we're ready to go today. There is no issue there. And number two is, Judge, what prejudice is he served – I mean, has come to him. You know, there is no prejudice whatsoever. He has no witnesses that aren't available anymore. There's nothing that's missing.

I mean, regardless, we are within the timeframe as constitutionally and statutorily provided. And I would note, your Honor, that he asked for the speedy trial before he was even indicted.

So regardless, we're within the statutory and constitutional confines of the speedy trial. Secondly, he's shown absolutely no prejudice whatsoever as to the delay. And thirdly, I'd say any delay that's happened is mostly because of the defendant.

¶11. Upon hearing and considering the motion, the circuit court ruled that "the motion is not well taken and should be and hereby is denied. So that relates to both the statutory claim and the constitutional claim of the defendant," and then the circuit court further ruled that it found no prejudice resulting from the delay.

¶12. On appeal, Russell nonetheless asserts that the delay in his trial date violates both his statutory right to a trial within 270 days of his arraignment under Mississippi Code Annotated section 99-17-1 (Rev. 2007) and his constitutional right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article 3, section 26 of the Mississippi Constitution. Russell argues that his indictment should have been dismissed for failure to provide him with a speedy trial. Russell claims that 571 days passed between his date of arrest and his trial. Russell attributes this delay to the State, claiming that the State gave no reason for this delay. Russell asserts that such a lengthy delay prejudiced

him by causing him to lose contact with a critical witness named "Ron Ron," who could not be located prior to the trial.

¶13. Our standard of review when addressing the claims of speedy-trial violations is as follows:

> Review of a speedy[-]trial claim involves a question of fact: whether the trial delay arose from good cause. We will uphold the trial court's finding of good cause if that decision is supported by substantial, credible evidence. However, if no probative evidence supports the trial court's findings, we must reverse the decision and dismiss the charge. The State bears the burden of proving good cause for the speedy trial delay, and thus bears the risk of non-persuasion. Good cause is a factual finding which is not different from any other finding of fact, and thus[,] an appellate court should not disturb the finding when it is based upon substantial evidence identified from the record.

Carr v. State, 966 So. 2d 197, 200 (¶5) (Miss. Ct. App. 2007) (internal citations omitted). We will affirm a trial court's findings where they are supported by substantial, credible evidence. *McBride v. State*, 61 So. 3d 138, 147 (¶34) (Miss. 2011).

¶14. Regarding Russell's statutory right to a speedy trial, section 99-17-1 states: "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." Any delay as a result of action by the State that is not supported by good cause will cause that time to be counted against the State. *Wiley v. State*, 582 So. 2d 1008, 1011 (Miss. 1991). However, a delay caused by the actions of the defendant, such as a continuance, will toll the running of the time period for that length of time, and correspondingly, this time is subtracted from the total amount of the delay. *Id.*

¶15. The record shows that Russell was arrested on December 21, 2006, indicted on August 16, 2007, and arraigned on November 9, 2007. Russell's trial was initially set for March 24,

2008, which was clearly within the statutory time of 270 days from his arraignment. We note that Russell filed a pro se motion to dismiss for lack of a speedy trial on May 2, 2007, prior to his indictment, which was denied due to no violation of section 99-17-1, but it resulted in his trial date being moved up on the trial docket to February 11, 2008.

¶16. However, Russell complained about his public defender, and he was subsequently appointed new counsel in February 2008, resulting in his trial date being returned to March 24, 2008. Russell claimed that he had not spoken to his initially appointed counsel in over a year. Russell's new counsel then requested a mental evaluation on March 24, 2008. The trial transcript explains that the doctor performing the evaluation was booked until October 2008. The evaluation was performed on October 5, 2008, and the report explaining the results of the evaluation was issued the following day. After the defense-requested evaluation, the record reflects that Russell's counsel asked that Russell's case be put back on the trial docket, but the record shows that his counsel failed to ask for a trial setting. The Mississippi Supreme Court has held that while a defendant has no duty to bring himself to trial, he does have a responsibility to assert his right to a speedy trial. *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990). Russell's trial finally began on January 27, 2009. However, as explained above, much of that time is attributable to defense delay.

¶17. In its pretrial motion, the State argued that Russell was arrested on December 26, 2006, and indicted on August 26, 2007, with the arraignment on November 9, 2007. The State asserted the case was set for trial on March 24, 2008, and the State submitted that the trial date was delayed because of the defendant's request for new counsel and also for a mental evaluation. The State asserted that as soon as Russell obtained his mental evaluation,

he received a trial setting within 270 days. The State argued that the time from March 24, 2008, the original trial date and also the date of Russell's oral motion requesting a mental evaluation, to January 27, 2009, the date of trial, constituted a delay attributable to the defense, due to the request for the mental examination. The trial transcript also reflects that during the pretrial motions, the defense agreed that the period of time when Russell was awaiting the evaluation should not be attributable to the State.

¶18. The circuit judge addressed the accountability of the delay in ruling upon pretrial motions, stating:

> On 12-21-06 initially arrested, 8-16-07 indictment, 11-9-07 arraignment, trial set for March 24, 2008, 12-21-07 the court denies motion to dismiss for lack of speedy trial. 2-11-08 trial date. No trial as defendant complained of public defender.
>
> On 3-10-08 the State moves to amend indictment to allege violent habitual offender, 3-21-08 defendant moves to set aside 12-21-07 order, 3-24-08 jury selection and commencement of trial to begin. And then there was substantial argument made by Mr. Kessler [assistant district attorney] in his brief in response to the motion to set aside the court's order.
>
> This court notes in this brief filed by Mr. Kessler that on December 21, 2007 this court denied a motion to dismiss filed pro se by Russell but moved his case for trial to February 11, 2008. That trial did not commence as Russell was complaining of his public defender and demanding new counsel, which he was given.
>
> This court, argued by Mr. Kessler, said it should attribute this delay to Russell, and therefore does not count this period of delay against the State. In total, this Court should find that all but the last 42 days of delay are attributable to the State, albeit with limited weight given the absence of evidence indicating intentional delay, again, argued by Mr. Kessler as that delay exceeds the presumptively prejudicial threshold of eight months, this Court should hold this factor to favor [Russell].

¶19. As stated, the circuit judge concluded that he found "all but the last 42 days of delay

are attributable to the State, albeit with limited weight given the absence of evidence indicating intentional delay." The circuit judge also explained that he considered "all aspects of this case, and particularly the motion, and consider[ed] the history, the timeline, the *Barker* factors, arguments of counsel . . ., [and] briefs of counsel previously submitted to the court" when denying the motion to dismiss. As our supreme court requested in *State v. Ferguson*, 576 So. 2d 1252, 1255 (Miss. 1991), when examining a defendant's assertion of a speedy-trial violation, "it would be extremely helpful if the [c]ircuit [c]ourts . . . would provide us with an articulated statement of their findings of evidentiary fact made and the reasons for the decision to grant [or deny] the motion." In the present case, we find the circuit court's findings are supported by substantial, credible evidence; thus, we find no violation of Russell's statutory right to a speedy trial.

¶20. We now address Russell's constitutional concerns. Regarding Russell's constitutional right to a speedy trial, the United States Supreme Court established a four-part balancing test to determine the parameters of a speedy trial were, and to determine when an accused's right to a speedy trial had been violated, stating: "(1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 529-34 (1972). The Mississippi Supreme Court has adopted the *Barker* analysis as applicable to the state constitutional speedy trial right. *See Skaggs v. State*, 676 So. 2d 897, 900 (Miss. 1996).

¶21. In examining the first factor, the length of delay, we note that the constitutional right to a speedy trial, unlike the statutory right created by section 99-17-1, attaches when a person has been effectively accused of a crime. *Jenkins v. State*, 947 So. 2d 270, 276 (¶14) (Miss.

2006). In addition, this "first factor has been called a triggering mechanism because until there is some delay which is presumptively prejudicial, there is no need for an inquiry into the other balancing test factors." *Carr*, 966 So. 2d at 201(¶8) (citing *Barker*, 407 U.S. at 531-32). "[T]here must first be a finding of a 'presumptively prejudicial' delay or our inquiry on the issue ends." *Id.* Here, the record reflects that Russell's trial finally began on January 27, 2009. Additionally, "[a]n eight-month delay between arrest and trial has been found to be presumptively prejudicial." *Id.* (citing *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989)). We note that Russell's trial occurred a little more than two years after his arrest; therefore, the delay is therefore presumptively prejudicial, and the remaining *Barker* factors must be considered.

¶22. The second factor considers whether the delay was justified, and the burden shifts to the State to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of the reasons. *Carr*, 966 So. 2d at 201 (¶9). "Delays caused by the defense, such as requests for continuances, will toll the running of the speedy trial clock for that length of time attributable to the continuance." *Hersick v. State*, 904 So. 2d 116, 121 (¶8) (Miss. 2004) (citation omitted). Although the circuit judge's ruling in the present case does not explicitly calculate all days attributable to defense delay, the circuit judge did, as previously noted, explain that he found all but the last forty-two days of delay to be attributable to the State. The circuit judge gave limited weight to the delay by the State, however, due to the absence of evidence indicating intentional delay. The record reflects that Russell made the request for new counsel and also requested a mental evaluation, resulting in a delay of the trial date in order to accommodate these requests. The Mississippi Supreme Court has held that the

defendant is responsible for delays resulting from psychiatric, mental, physical, and IQ examinations requested by the defense. *Thorson v. State,* 653 So. 2d 876, 891 (Miss. 1994). Additionally, in *Magnusen v. State*, 741 So. 2d 282, 289 (¶24) (Miss. Ct. App. 1998), this Court explained that a delay caused by the withdrawal of the defendant's attorney cannot be weight against the State because such delay is beyond the State's control. We further note that the doctor selected by the defense for the examination was unable to conduct Russell's mental evaluation until nearly seven months after Russell's request. Therefore, we will weigh this factor as neutral.

¶23. In turning to the third factor, we examine Russell's assertion of his right to a speedy trial. This Court has stated:

> Though the State has the burden to provide a speedy trial, a defendant attains more points under this factor of the *Barker* test if he has asserted his right to a speedy trial. Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Muise v. State, 997 So. 2d 248, 253 (¶15) (Miss. Ct. App. 2008) (internal citations and quotations omitted). The record reflects that Russell filed a motion for right to a speedy trial on May 2, 2007, which was prior to his indictment. The circuit judge dismissed Russell's motion, but re-scheduled his trial for an earlier date.

¶24. The record also shows that Russell filed various additional motions in relation to his speedy trial request – including a motion to set aside the order denying the motion to dismiss for lack of speedy trial, a motion to show cause for delay, and a motion to dismiss the indictment for failure to provide a speedy trial.

¶25. In considering the final factor of whether Russell was prejudiced by the delay, we

must look to the three interests for which the speedy-trial right was designed: to prevent oppressive pretrial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defense will be impaired. *Bonds v. State*, 938 So. 2d 352, 358 (¶16) (Miss. Ct. App. 2006). In *Jenkins*, 947 So. 2d at 277 (¶21) (internal citations and quotations omitted), the supreme court held that "[g]enerally, proof of prejudice entails the loss of evidence, the death of witnesses, or the staleness of an investigation." Additionally, we note that the defendant bears the responsibility of showing prejudice in order to weight this factor in his favor. *See Birkley v. State*, 750 So. 2d 1245, 1252 (Miss. 1999); *Perry v. State*, 637 So. 2d 871, 876 (Miss. 1994). In his motion to dismiss, Russell asserts that he was "suffering mental anxiety" while being held without bond. However, the supreme court has held that "a defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal." *Jenkins*, 947 So. 2d at 277 (¶21).

¶26. Russell claims that he was prejudiced by the delay in his trial date since he lost contact with Ron Ron, who Russell submits to be a "critical" witness. Russell alleges that Ron Ron would testify that he picked up Russell from Hawkins's house prior to the shooting. However, the record supports the State's argument that Russell admitted on cross-examination that he never knew Ron Ron's last name. We find Russell's claim of prejudice to lack support. *See Birkley*, 750 So. 2d at 1252; *Perry*, 637 So. 2d at 876. We further find that the circuit court was within its discretion in determining that the length of time between Russell's arrest and trial did not violate either his statutory or his constitutional right to a speedy trial. *See Alexander v. State*, 841 So. 2d 1138, 1144, 1146 (¶¶15, 24) (Miss. Ct. App. 2002) (explaining analysis for courts to utilize when reviewing possible violations of a

defendant's constitutional and statutory right to a speedy trial). The record reflects that the circuit judge carefully considered Russell's claims and applied the appropriate judicial tests. Although the circuit judge did not fully articulate his calculations regarding defense delay in his findings, the record shows that the circuit judge spoke to the issue of prejudice and the *Barker* factors; thus, we find that the circuit court's findings are supported by substantial evidence in the record. *See Ferguson*, 576 So. 2d at 1255. Finding no error by the circuit court, we find that this issue is without merit.

II. Prosecutorial Vindictiveness

¶27. Russell next argues that the amended motion to amend the indictment to charge him as a habitual offender should not have been granted due to prosecutorial vindictiveness. Russell alleges that the State made a plea offer to him prior to trial and told him that if he rejected the plea offer, the indictment would be amended to allege that he was a habitual offender under section 99-19-83. Russell claims that the State's action of filing its amended motion to amend the indictment after the trial had ended but prior to sentencing, alleging that Russell had four prior convictions, one of which was a crime of violence, constituted prosecutorial vindictiveness.

¶28. "The doctrine of prosecutorial vindictiveness 'precludes action by a prosecutor that is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution.'" *Garlotte v. State*, 915 So. 2d 460, 467 (¶23) (Miss. Ct. App. 2005) (citations omitted). "Where there is a 'reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority,' there is a presumption of prosecutorial vindictiveness." *Moore v. State*, 938 So.

2d 1254, 1264 (¶30) (Miss. Ct. App. 2006) (citing *Alabama v. Smith*, 490 U.S. 794, 799 (1989)). "However, when no such likelihood exists, it is the defendant's burden to prove actual vindictiveness." *Id.* (citing *Alabama*, 490 U.S. at 799-800).

¶29. In *Baskin v. State*, 986 So. 2d 338, 344 (¶19) (Miss. Ct. App. 2008), Keith Baskin, like Russell, argued that the circuit court erred in allowing the State to amend the indictment after the verdict, but prior to sentencing. The court found no merit in Baskin's claims of prosecutorial vindictiveness, noting that the prosecutor offered the plea bargain in the presence of both Baskin and his counsel, that Baskin "was advised, prior to trial, of the consequences of going to trial and receiving a guilty verdict in light of his past criminal history," and that Baskin "was free to accept or reject the plea bargain at issue." *Id.* at (¶¶19-20).

¶30. In the present case, the trial transcript and Russell's brief allude to a document that the State sent to Russell's counsel on February 14, 2008, making Russell a plea offer as a non-habitual offender, which stated that "if he refused this offer, we'll amend indictment to big H.O. on both counts" and was signed by an assistant district attorney.[1] We therefore find that Russell was aware of the terms of the plea agreement. In ruling on Russell's objection to amending the indictment, the circuit judge stated:

> The current state of the law is they can do what they did. And that's the opinion of the Court. . . . And probably what they have done is try to make an offer, plea bargain, which is obviously common in this Court, this state, all over the country. It's done every day hundreds if not thousands of times, what they've done in this case, made an offer saying if you – this is our offer, plea bargain. If you don't take it it's off the table, we're going for the maximum, or we're going to amend to enhance the penalty.

[1] This document does not appear in the record.

¶31. The *Baskin* court also noted that Mississippi law holds that "prior offenses used to charge the defendant as [a] habitual offender are not substantive elements of the offense charged"; thus, the State is allowed to amend a defendant's indictment after the verdict, but prior to sentencing. *Id.* at (¶19) (citing *Shumaker v. State*, 956 So. 2d 1078, 1087 (¶26) (Miss. Ct. App. 2007)). Thus, we cannot find that the circuit court erred in allowing the State to amend its indictment prior to sentencing, but after conviction. This issue is without merit.

III. Discovery Violation

¶32. Russell claims that due to a discovery violation by the State, he should not have been sentenced as a habitual offender pursuant to Mississippi Code Annotated section 99-19-83. He argues that after he was found guilty but prior to sentencing, the State provided him with documents relating to his four prior convictions. Russell claims that the length of time he served for two of the convictions was in dispute. Russell states that the documentation provided by the State showed that he had served exactly one year, which marks the difference between him being sentenced under Mississippi Code Annotated section 99-18-81 (Rev. 2007) as opposed to section 99-19-83. Russell claims that he did not have the opportunity to investigate adequately the length of the sentences he had served, and the circuit court failed to give him a continuance to allow him to do so.

¶33. For a discovery violation to require reversal, this Court has established that there must be a showing of prejudice, and the non-disclosed material must be more than simply "cumulative." *McCoy v. State*, 811 So. 2d 482, 484 (¶15) (Miss. Ct. App. 2002). The State argues that Russell had actual knowledge of his prior convictions, since he was convicted and served time. The State further argues that convictions three and four were served

concurrently as convictions one and two, so if Russell had no problem with the computation of the time served for the first two convictions, he should not have a problem with the third and fourth convictions, either; therefore, he cannot show any prejudice.

¶34. The record reflects that the State called Evelyn Dixon, a special-projects officer at the MDOC who also serves as the records custodian, to testify that two time sheets existed regarding Russell's prior convictions – "one for each incarceration, which we have two charges on each time sheet." Russell's counsel admitted that he had time to examine the documents, although he clarified that he was not confirming their accuracy as to the computation of time served. After hearing testimony from Dixon and Lieutenant Tammy Gaines, who works at the Hinds County Sheriff's Office detention center in Raymond, Mississippi, the circuit judge found that "the State has now complied with the habitual[-]offender statute, section 99-19-83 . . . by proving four previous felony convictions prior to the conviction of [Russell], one of which was a violent crime. Actually two, an aggravated assault and felon in possession of a firearm." The circuit judge then clarified that he made these findings "beyond a reasonable doubt."

¶35. In this case, we find no discovery violations and also no showing of prejudice. *Id.* Any discovery violation that might have occurred was harmless error.

IV. Insufficient Evidence

¶36. Russell's fourth and fifth assignments of error relate to his habitual offender status and subsequent sentencing; thus, we will address these two assignments of error together.

¶37. Russell calls into question the circuit court's finding beyond a reasonable doubt that he had four prior convictions, and one of the prior convictions was for a crime of violence.

He also claims that the circuit court could not find, beyond a reasonable doubt, that he had served sentences of one year or more for two of the sentences. Russell alleges that the evidence presented at trial was insufficient to sentence him as a habitual offender to life without parole or probation, pursuant to section 99-19-83. Instead, Russell claims that the documents provided by the MDOC in support of his habitual offender status only proved that one of his sentences had been served for one year or more. Russell states that the discharge certificate was only dated one year after the sentence had begun, but it did not state Russell's actual release date.

¶38. We note that the State must prove a defendant's habitual-offender status beyond a reasonable doubt. *Gilbert v. State*, 48 So. 3d 516, 524-25 (¶35) (Miss. 2010). The record reflects that the State called Dixon to testify as to the language in Russell's inmate time sheets as well as to the terms of Russell's incarceration. On direct examination, the prosecutor inquired about Russell's convictions and incarcerations and established the following:

> Q: Ms. Dixon, I'm going to call your attention to a possession of cocaine and possession of marijuana, less than once ounce, to distribute conviction that was rendered in the Circuit Court of Madison County on October 27, 1995[,] in which the defendant was sentenced to two years in the Department of Corrections.
>
> Do you have any records that reflect whether or not this defendant was held in custody by the Department of Corrections on those two charges?
>
> A: Yes, sir.
>
> Q: And were those charges run consecutively or concurrently?
>
> A: They're run concurrent.

Q: Okay. And how much time did the Cedric Russell that's reflected in your records serve on those two concurrent charges?

A: He was sentenced to serve two years. He served one year that run concurrent. So he served one year.

Q: Okay. From what date to what date?

A: Begin date April 10, 1995, and released April 10, 1996.

. . . .

Q: I'm now going to call your attention to a possession[-]of[-]firearm[-]by[-]a[-]convicted[-]felon conviction from the Circuit Court of Madison County, cause number 99-0067, count three, in which the defendant, Cedric Russell, was sentenced to one year in the Department of Corrections on February 29 of 2000.

Do you have any records that reflect that a Cedric Russell was received into custody by the Department of Corrections on that charge?

A: Yes, sir.

Q: And what do your records reflect that that Cedric Russell served in custody on that charge? How much time?

A: His sentence began on March 15, 1999, and was released on June 2, 2000.

. . . .

Q: And he was sentenced to one year?

A: Yes sir. He was sentenced to one year on the possession of a weapon as a felon, and one year, two months, 19 days on the aggravated assault.

Q: Okay.

A: And those two run concurrent.

Q: And aggravated assault cause number 98-2-018 out of the first judicial district of Hinds County, Mississippi, the defendant was sentenced on May 9 of 2000. I believe you've already stated, is that the conviction you were talking about, the aggravated assault?

A: Yes, sir.

Q: And how much time did he serve on that?

A: He served 445 days.

Q: That is in excess of one year?

A: Yes, sir.

¶39. On cross-examination, Dixon also affirmed that she could tell the court, beyond a reasonable doubt, that Russell did indeed serve one year on two of the charges. As stated above, the circuit judge found, beyond a reasonable doubt, that "the State has now complied with the habitual[-]offender statute, section 99-19-83 . . . by proving four previous felony convictions prior to the conviction of [Russell], one of which was a violent crime. Actually two, an aggravated assault and felon in possession of a firearm."

¶40. We find from the record before us that the circuit court did not err in finding that the State had presented sufficient evidence showing that Russell had met the requirements of section 99-19-83. *See Gilbert*, 48 So. 3d 516 at 525 (¶¶37-38). Therefore, the circuit court did not err in sentencing Gilbert as a habitual offender under section 99-19-83. We find no merit to Russell's fourth and fifth assignments of error.

V. Voir Dire

¶41. Russell next argues that the voir dire process prejudiced the jury against him, which denied him a fair and impartial trial. Specifically, Russell claims that the circuit judge refused to allow Russell to ask the venire that "if they were in the minority, and after their deliberations had ended, would they change their vote merely to go home, or merely to go along with the majority." Russell claims that the circuit judge also improperly denied his

challenges for cause for the three veniremen who stated that when they entered the courtroom, they wondered "what Russell had done, not merely what he had been charged with." Russell submits that one of those veniremen said he wondered what Russell did based on the fact that he was a young, black male.

¶42. Generally, a voir dire is presumed sufficient to ensure a fair and impartial jury. *Ross v. State*, 954 So. 2d 968, 988 (¶31) (Miss. 2007). In order to overcome the presumption of fairness and impartiality, "a party must present evidence indicating that the jury was not fair and impartial and show that prejudice resulted from the circuit court's handling of the voir dire." *Id.* (citing *Manning v. State*, 735 So. 2d 323, 336 (¶19) (Miss. 1999)). Additionally, "[a] trial court's finding that an impartial jury was impaneled will not be reversed unless the court abused its discretion." *Id.* (citing *Holland v. State*, 705 So. 2d 307, 336 (¶97) (Miss. 1997)).

¶43. Regarding Russell's claim that the circuit judge refused to allow Russell to ask the venire that "if they were in the minority, and after their deliberations had ended, would they change their vote merely to go home, or merely to go along with the majority," we note that "judicial rules prohibit a party from asking venire members hypothetical questions or attempting to elicit a pledge to vote a certain way if a certain set of circumstances are shown." *Id.* at 989 (¶35). Additionally, our supreme court "has held that a defendant fails to show the necessary prejudice where the defense counsel fails to question jurors about an inappropriate comment, and the venire members have made general declarations that they could set aside their prejudices and reach a decision based on the evidence." *Id.* at 988 (¶32) (citing *Holland*, 705 So. 2d at 339-40 (¶¶121-23); *West v. State*, 463 So. 2d 1048, 1054

(Miss. 1985). Thus, we find that the circuit court's ruling in the present case was within its discretion.

¶44. Turning next to Russell's claim regarding his challenges for cause, the record reflects that during the jury-selection conference, defense counsel challenged for cause the three jurors who Russell submits "wondered what he did." After hearing arguments from the prosecutor and defense counsel, the circuit judge refused to remove these jurors for cause. The circuit judge explained his decision, stating that:

> the court asked if everybody could be fair and impartial, and if anyone couldn't let us know. Those weren't the exact words, but certainly it was not stated explicitly, inclusively. And the court went over and over the fact that this man is innocent at this time and repeated what the court advised them earlier. So the court believes they were properly advised about the innocence of this man at this time. And so the court does not believe there's been a showing for cause for those ones.

The record shows that the circuit judge also previously explained to the veniremen that they were entitled to their first impression of Russell, but clarified that "the fact that an indictment has been returned against [Russell] is no indication of guilty whatsoever." Eventually, the defense counsel exercised peremptory challenges on each of the three jurors at issue, and as a result, none of these challenged jurors sat on the trial jury. Thus, we find this issue is without merit. *Tapper v. State*, 47 So. 3d 95, 98-99 (¶¶11-15) (Miss. 2010).

¶45. In *Christmas v. State*, 10 So. 3d 413, 423 (¶¶46-47) (Miss. 2009), the supreme court refused to address the merits of the defendant's claim that the circuit court erred by denying his challenge for cause against a juror who did not actually sit on the jury, based on comments that juror made during voir dire examination. The supreme court cited its previous decision in *Mettetal v. State*, 615 So. 2d 600, 603 (Miss. 1993), wherein the court held that:

> So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his constitutional rights. *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80, 90 (1988). This Court has explained that a prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his peremptory challenges and that the incompetent juror was forced by the trial court's erroneous ruling to sit on the jury. *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988).

¶46. This issue is without merit.

VII. Batson Challenge

¶47. In his final assignment of error, Russell argues that the circuit court erred in denying his *Batson* objection regarding the State's use of peremptory challenges against African American venirepersons without adequate, race-neutral justification. Russell points to the fact that all twelve of the State's peremptory challenges were of African American people, and for some challenges, the State failed to give race-neutral reasons.

¶48. This Court employs a well-established standard of review when considering *Batson* challenges. *Camper v. State*, 24 So. 3d 1072, 1074 (¶12) (Miss. Ct. App. 2010). "This Court reviews a trial court's ruling on a *Batson* challenge with great deference and will not overturn the trial court's ruling unless it is clearly erroneous or against the overwhelming weight of the evidence." *Id.* at 1074-75 (¶12) (quoting *Pruitt v. State*, 986 So. 2d 940, 942 (¶8) (Miss. 2008)). We accord great deference in the findings of the circuit court because "the trial judge is in the best position to evaluate the demeanor and credibility of the attorney offering the gender/race-neutral explanation." *Id.* at 1075 (¶12) (quoting *Perry v. State*, 949 So. 2d 764, 767 (¶7) (Miss. Ct. App. 2006)).

¶49. The Equal Protection Clause of the Fourteenth Amendment of the United States

Constitution prohibits parties from exercising peremptory challenges against jurors "solely based on their race." *Johnson v. State,* 529 So. 2d 577, 583 (Miss. 1988) (citing *Batson v. Kentucky,* 476 U.S. 79, 89 (1986)). When a party asserts that a discriminatory purpose for the peremptory challenge exists, qualifying it as a *Batson* challenge, a trial court should employ the following three-step procedure:

> (1) the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; (2) once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible, race-neutral justifications for the strikes; and (3) if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. The burden remains on the opponent of the strike to show that the race-neutral explanation given is merely a pretext for racial discrimination.

Pruitt, 986 So. 2d at 942-43 (¶8).

¶50. Turning to the facts of the case at bar, we will review each of Russell's strikes individually that are at issue on appeal. Russell specifically names Shirley Banks, Sheila Williams, Mary Ashmore, and Emma Lee Boone, and asserts that the State failed to provide a race-neutral reason for striking these venirepersons.

¶51. In reviewing the record, we note that Russell objected to the State's peremptory strikes on the grounds that all twelve strikes were African American venirepersons, and he contended that there were no race-neutral reasons for those strikes. The State proceeded to explain the race-neutral reasons for each of its strikes. Beginning with Banks, the State explained that it struck her due to the fact that she had a class starting at 6:00 p.m., and she informed the court during voir dire that "she didn't want to be here past 5:30." The State also noted that Banks wears glasses, but she did not bring them with her that day, although she

stated that she would bring her glasses if chosen for the jury. Next, the State explained that when the venire was asked whether they would make the State prove motive, Williams nodded her head affirmatively. The State stated that it struck Williams due to the indication that she would make the State prove motive when motive may not be necessary to prove. The State next explained that it struck Ashmore due to her late work schedule, which may affect her ability to remain attentive during trial, as well as the fact that she has a brother-in-law who works at Oakley Training School, which may cause her to have some sympathy for Russell. Finally, the State explained that it struck Boone due to her employment at the Mississippi State Hospital at Whitfield. The State explained its concern that Boone:

> may at some point during this trial speculate as to the mental abilities if that were to come up. Even with no motive, especially her being sympathetic in that regard . . . I think we have the right to strike somebody that works at a mental institution, especially in this case.

¶52. After listening to the State's race-neutral reasons for its peremptory strikes, the circuit judge overruled Russell's objection, finding that the State had provided sufficient race-neutral justifications for each of its strikes. We note that precedent requires that we give great deference to the circuit court's findings of whether or not a peremptory challenge was race neutral, *see Manning*, 765 So.2d at 519 (¶8); *Booker*, 5 So. 3d at 358 (¶3). Additionally, we acknowledge that the supreme court has accepted the following as race-neutral reasons for the exercise of peremptory challenges: living in a "high[-]crime" area, body language, demeanor, prosecutor's distrust of the juror, inconsistency between oral responses and juror's card, criminal history of juror or relative, social work and other types of employment, and religious beliefs, and inattentiveness. *Hicks v. State*, 973 So. 2d 211, 220 (¶¶27-28) (Miss.

2007) (internal citations omitted). The record demonstrates that the circuit court properly made a sincere effort to weigh and examine the race-neutral reasons provided by the State. Nothing in the record before us reveals that the circuit court abused its discretion in finding that the State had provided sufficient race-neutral reasons for its peremptory strikes. Thus, we find no merit to this issue.

¶53. **THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I, AGGRAVATED ASSAULT, AND COUNT II, POSSESSION OF A FIREARM BY A CONVICTED FELON, AND SENTENCE AS A HABITUAL OFFENDER OF LIFE FOR EACH COUNT, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITHOUT ELIGIBILITY FOR PAROLE OR PROBATION, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., MYERS, ISHEE, ROBERTS AND RUSSELL, JJ., CONCUR. BARNES AND MAXWELL, JJ., CONCUR IN PART AND IN THE RESULT.

IN THE C UIT COURT OF THE FIRST JUDI , DISTRICT
OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

FILED
JAN 30 2009
BARBARA DUNN, CIRCUIT CLERK
BY D.C.

CAUSE NUMBER 07-0-673-01 WSY

CEDRIC RUSSELL
A/K/A:

SSNO: 428-41-8284
B/M DOB: 6/28/76

SENTENCING OF THE DEFENDANT BY THE COURT - HABITUAL OFFENDER

NOW COMES the Defendant, CEDRIC RUSSELL, in his own proper person in custody and by counsel, for sentencing for his crime of GUN AGG ASSAULT 97-3-7(2)B of which he was duly found guilty by a jury at former day of this Court.

And on this day, the Court finding that the Defendant, CEDRIC RUSSELL, is an habitual criminal as defined by 99-19-83, Mississippi Code, 1972, doth hereby order and adjudge that the Defendant, CEDRIC RUSSELL, for such his crime of GUN AGG ASSAULT 97-3-7(2)B of which he has been found guilty, be and he is hereby sentenced to serve a term of LIFE WITHOUT PAROLE in the custody of the Mississippi Department of Corrections as an habitual criminal, without parole, probation, reduction or suspension of sentence pursuant to Sections 99-19-83, Mississippi Code, 1972, as amended.

and further;

HE IS SENTENCED TO LIFE WITHOUT PAROLE. THIS CAUSE IS TO RUN CONCURRENT WITH 07-0-673 COUNT 2.

Unless otherwise specified herein, this sentence is to run consecutive to any other sentences imposed upon this defendant by any Court; and to pay all costs of Court, assessments, and taxes, except as relieved by law for indigents.

The defendant is indigent.

ORDERED AND ADJUDGED, this the 30TH day of JANUARY, 2009.

W. SWAN YERGER/ CIRCUIT JUDGE

DONALD W. BOYKIN, Attorney for Defendant

SCOTT E ROGILLIO, Assistant District Attorney

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CCTJVSH

BOOK 651 PAGE 500

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

CEDRIC RUSSELL
A/K/A:

FILED
JAN 30 2009
BARBARA DUNN, CIRCUIT CLERK
BY _____ D.C.

CAUSE NUMBER 07-0-673-02 WSY

SSNO: 428-41-8284
B/M DOB: 6/28/76

SENTENCING OF THE DEFENDANT
BY THE COURT - HABITUAL OFFENDER

NOW COMES the Defendant, CEDRIC RUSSELL, in his own proper person in custody and by counsel, for sentencing for his crime of GUN CONV FELON W/GUN 97-37-5 of which he was duly found guilty by a jury at former day of this Court.

And on this day, the Court finding that the Defendant, CEDRIC RUSSELL, is an habitual criminal as defined by 99-19-83, Mississippi Code, 1972, doth hereby order and adjudge that the Defendant, CEDRIC RUSSELL, for such his crime of GUN CONV FELON W/GUN 97-37-5 of which he has been found guilty, be and he is hereby sentenced to serve a term of LIFE WITHOUT PAROLE in the custody of the Mississippi Department of Corrections as an habitual criminal, without parole, probation, reduction or suspension of sentence pursuant to Sections 99-19-83, Mississippi Code, 1972, as amended.

and further;

HE IS SENTENCED TO LIFE WITHOUT PAROLE. THIS CAUSE IS TO RUN CONCURRENT WITH 07-0-673 COUNT 1.

Unless otherwise specified herein, this sentence is to run consecutive to any other sentences imposed upon this defendant by any Court; and to pay all costs of Court, assessments, and taxes, except as relieved by law for indigents.

The defendant is indigent.

ORDERED AND ADJUDGED, this the 30TH day of JANUARY, 2009.

W. SWAN YERGER, CIRCUIT JUDGE

DONALD W. BOYKIN, Attorney for Defendant

SCOTT E ROGILLIO, Assistant District Attorney

BOOK 651 PAGE 501

CCTJVSH

ORIGINAL

IN THE MISSISSIPPI SUPREME COURT

FILED

JUL 27 2012

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Sedrick D. Russell Petitioner

V.

State OF Mississippi Circuit Court NO. 07-673-CRY

Respondent

2009-M-1623

MOTION FOR LEAVE TO FILE FOR POST-CONVICTION

The pro se Petitioner Sedrick D. Russell, was trialed and convicted by the Hinds County Circuit Court for aggrivated assault and firearm-by convicted felony, in the above styled Circuit Court NO. and sentence to life in the Custody of M.D.O.C. without being eligible for parol on both counts in the indictment. On January 27th 2009.

RECEIVED
JUL 27 2012
By

REASON FOR LEAVE MOTION# 2012 2039

REASON-ONE: The petitioner was denied the EFFECTIVE ASSISTANCE OF COUNSEL, and he is asking for leave to file post conviction in the trial court, to have a evidentiary hearing, Whereby, the petitioner had been held in pretrial incarceration without bond for (25) months following his arrest, Without being contacted by his original court appointed attorney, the one whom recieved an order to withdraw as counsel, that caused the petitioner to lose a critical witness

The petitioner, has motion filed with the Circuit Court indicating that he was never contacted by the original court appointed attorney that recieved an order to withdraw as the petitioner counsel, and such counsel recieved an order to withdraw for a reason unknown to the petitioner.

The second court appointed attorney, presented the issue of not being contacted by the original court appointed attorney at the speedy trial hearing, and the trial court failed to provide evidence on why the original court appointed attorney recieved an order to with-draw, or why he failed to contacted

the petitioner.

The petitioner contends that [redacted] the records indicates that he was never contacted by the Original Court appo-inted attorney named Frank McWilliam.

This court should found it to be deficient, when a Court appointed attorney failed to contact the defendant [redacted] he's assigned to represent.

This court should found prejudice to defendant, when a defendant has been held in custody without bond for (25) months following his arrest and trial, without being contacted by an attorney until approximately (14) months after his arrest when he was contacted by the Second court appointed attorney named Donald W. Boykin.

The petitioner testified at his speedy trial hearing, that he had been prejudice by the original court appointed attorney being deficient, by failing to contact the defendant/petitioner, in the nature of being greatly, and oppressively hindered in the ability to defend him self, while being held without bond.

The petitioner further show prejudice, whereby he testified that he lost contact with his witness name Ron, that could've testified that he know he picked [redacted] the petitioner up before any one was shot at the location the victam was shot at.

In trial, the victam him self testified that he didn't see the petitioner fire the shots that strucked him, and all the state witness testified that they don't know who fired the shots.
So, theres no evidence that the petitioner testimony [redacted] was inconceivable, about some one picked the defendant up before the victam was shot at that location.

The petitioner contends that this court should hold the fact that the petitioner/defendant was not contacted by the original/first court Appointed attorney to be more prejudicial to the defendant, because he was held without bond, and oppressively hindered in the ability to secure his witness named Ron.

The Second court appointed attorney has also conspired in the InEffective Assistance of Counsel, whereby the the Second court Appointed named Donald W. Boykin failed to argue Ineffective Assistance of counsel against the Original/first court appointed who failed to contacted the defendant, nor provided the defendant of a notice of the motion for him to withdraw as counsel.

The second court appointed was also Ineffective where-by after raising the issue of never being contacted by the original court appointed, he failed to make the obvious ob-jection at the speedy trial hearing that the trial court lied or made untruthful accusation that the defend-ant requested for new counsel, that caused futher delay in bringing the defendant to trial, Where by court appointed attorney argued that the defendant had not been Contacted by the original court appointed attorney, It should've in his professional conduct of a common Sence to object to the trial court false accusation, about the defendant requested for new counsel, as well as not being contacted by the original court appointed attorney. whereby there's no evidence in the records of a request,

Court Appointed Attorney Donald W. Boykin was Ineffective Assistance, Whereby in the Court Of Appeals Opinion, pursuant to the speedy trial issue, held in the opinion that the record reflects that the defendant requested for new counsel caused the futher delay of trial, Whereby it's holding that the defend-ant requested for new counsel is contrary to the Public Defender's

office motion to withdraw counsel that was granted by the trial court on Feb. 14th 2008, after the Feb. 11th 2008 trial delay

Whereby, it's prejudice to the defendant, to grant the public defender's office, "motion to withdraw counsel" without issueing some type of notice of such motion, that would have notified the defendant of the motion to withdraw, So if the defendant wish to object to such motion to withdraw, he could have.

There's no way that the defendant could be responsible for a motion to withdraw drawn by the Public Defenders Office, that he had notice of motion to withdraw, ~~so that he could object to~~. whereby the petitioner had no way to object.

The Miss. Rules of Criminal procedural withdrawl of counsel is to be considered by giving notice of the withdrawl of Counsel to the defendant.

The defendant contends that he was never contacted by the original Court Appointed Attorney Mr. Frank McWilliams by motion filed in the circuit court, So, the allegation is substai-ntial by the record, So it's substained by the records that the defendant never recieved a notice of the motion for withdraw drawed or filed by the public defenders office,

The "motion to withdraw" filed by the Public Defender's Office, has been a secrete from the defendant.

These allegations has hidden the evidence of the defendant not being contacted by an attorney until well over the (8) months presumptive prejudicial time period in bring him to trial,

The above allegations is evidence that the defendant recieved ineffective assistance of counsel.

So, therefore, the defendant request this court to grant leave to file in the trial court, for an evidentiary hearing to determin-e evidence of whom caused the original Court Appointed attorney to withdraw, after not being contacted by such attorney, which is evidence of INEFFECTIVE ASSISTANCE.

REASON TWO: The trial court Violated the defendant constitutional and statutory right to a speedy trial as well as his right to due precess and equal protection of the law that's gauranteed by the 6th and 14th amend. of the U.S. Const. that resulted in denying the defendant the right to fundalmental fairness. the prejudice the defendant.

There was a (15) months delay between the defendant-s arrest on December 21st 2006 and only motion for a continuence on March 24th 2008, that resulted in the defendant not being contacted by an attorney for approximately (14) months following his arrest

The trial court failed to produce evidence identified by the records a reason or good cause for the (15) months delay.

REASON THREE: Where the Mississippi Supreme Court held it to be illegal under Gowdy v. State of Mississippi, 56 So.3d 540 (2010). That the trial court amended the petitioner Indictment following guilty verdict.

REASON FOUR: The petitioner has been intimidated of his Second amendment right to bear arms, when he was charged with convicted felony with fire arm, because the Miss. statute require for the state or federal to particularly have federal or State juridiction of the prior state or federal conviction.

Whereby the defendant contends that there was no particular Federal or State juridiction of the defendant's prior conviction. at time he was charged with Convicted felony with a firearm.

Certificate Of Service

The prose petitioner Sedrick D. Russell hereby certify mailing this motion to Leave to file in the trial court to the Mississippi Supreme Court and the Attorney General by placing it in the hands of the Legal assistance program to be mailed out on the 25th day of July 2012