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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 22-10280
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 15, 2023

Lyle W. Cayce
Clerk

RODNEY ADAM HURDSMAN,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-427

Before HIGGINBOTHAM, GRAVES, and HO, *Circuit Judges.*

PER CURIAM:*

A jury found Rodney Adam Hurdman, Texas prisoner # 02170782, guilty of theft of property valued at between \$20,000 and \$100,000 and, after finding the enhancement paragraphs alleging Hurdman had prior convictions were true, sentenced him to 75 years of imprisonment. His conviction was affirmed on direct appeal, and the Texas Court of Criminal

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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Appeals (TCCA) refused his petition for discretionary review. Hurdsmen then unsuccessfully sought state habeas relief.

Through counsel, Hurdsmen filed a 28 U.S.C. § 2254 petition. Relevant here, he argued that (1) his trial counsel was ineffective during the plea-bargaining process because he did not advise the State that Hurdsmen accepted the State's plea offer of 18 months of imprisonment and (2) he was denied counsel altogether during critical stages of the proceedings when retained attorneys withdrew from representation without giving notice to Hurdsmen. He also requested an evidentiary hearing. The district court rejected his arguments on their merits and denied a certificate of appealability (COA). This court granted a COA on the two issues presented.

When a district court denies a federal habeas petition that is governed by § 2254(d), "this Court reviews the district court's findings of fact for clear error and its conclusions of law de novo, 'applying the same standard of review to the state court's decision as the district court.'" *Anaya v. Lumpkin*, 976 F.3d 545, 550 (5th Cir. 2020) (quoting *Robertson v. Cain*, 324 F.3d 297, 301 (5th Cir. 2003)).

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state court's adjudication of an issue on the merits is entitled to deference. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011). Accordingly, relief under § 2254 shall not be granted unless the state court's adjudication of a claim on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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." § 2254(d)(1), (2).

Hurdsmen first argues that his original trial counsel rendered ineffective assistance by failing to convey his acceptance of the State's plea

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offer of 18 months imprisonment. To prevail on an ineffective assistance of counsel claim, an applicant must show “that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice under *Strickland*, a petitioner must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 694. In deciding ineffective assistance of counsel claims, the reviewing court need not address both prongs of *Strickland* but may dispose of such a claim based solely on a petitioner’s failure to meet either prong of the test. *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999).

The state habeas court’s rejection of this claim on the basis that the State made no 18-month offer and that Hurdsmen suffered no prejudice was neither contrary to nor an unreasonable application of *Strickland* nor based on an unreasonable determination of the facts. Put differently, given the record, the state court’s conclusion was not “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

Next, Hurdsmen claims that he was denied counsel altogether through critical stages of the pretrial proceedings when his retained attorneys were permitted to withdraw from representation without notification in October 2014. Over the next three years, Hurdsmen remained in other jurisdictions facing unrelated charges. Eventually, in July 2017, he was returned to Texas to face the charge of theft of property. He avers that this three-year period is critical because when his attorneys abandoned him without notice, vital investigation, protection of trial rights, and negotiation were effectively halted.

Under *United States v. Cronic*, 466 U.S. 648 (1984), prejudice is presumed in a very narrow spectrum of cases where the circumstances

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leading to counsel's ineffectiveness are so egregious that the defendant was, in effect, denied any meaningful assistance, *see Jackson v. Johnson*, 150 F.3d 520, 525 (5th Cir. 1998), such as where the defendant was completely denied counsel at a critical stage of the proceedings, *see United States v. Griffin*, 324 F.3d 330, 363 (5th Cir. 2003). Hurdsmen has failed to demonstrate that the state habeas court's rejection of this argument was contrary to or an unreasonable application of *Cronic*. Thus, the district court did not err in rejecting this claim. *See Richter*, 562 U.S. at 103.

Lastly, Hurdsmen argues that the district court erred in denying his motion for an evidentiary hearing regarding a recorded telephone conversation he avers supports his claim that the State offered an 18-month plea deal. However, even if the recorded call supports Hurdsmen's claim of deficient performance, the state court's conclusion he suffered no prejudice is not unreasonable. Thus, we need not reach this issue.

Accordingly, we AFFIRM the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RODNEY ADAM HURDSMAN,

§

Petitioner,

§

V.

§ NO. 4:21-CV-427-O

BOBBY LUMPKIN, DIRECTOR,

§

Respondent.

§

OPINION AND ORDER

Came on for consideration the petition of Rodney Adam Hurdsmen, Petitioner, under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. The Court, having considered the petition, the response, the reply, the record, and applicable authorities, finds that the petition should be denied.

I. BACKGROUND

Respondent has custody of Petitioner pursuant to a judgment and sentence under Cause No. CR17817 in the 271st District Court of Wise County, Texas, for theft of property valued between \$20,000 and \$100,000. Petitioner is serving a sentence of seventy-five years. Petitioner appealed and the Second Court of Appeals of Texas affirmed the judgment. *Hurdsmen v. State*, No. 02-17-00319-CR, 2018 WL 5832116 (Tex. App.—Fort Worth Nov. 8, 2018, pet. ref'd). The pertinent facts are set forth in the appellate opinion and need not be repeated here. The Court of Criminal Appeals of Texas refused his petition for discretionary review. *Id.*

Petitioner filed a state application for writ of habeas corpus, which was denied without written order on the findings of the trial court and upon independent review. Doc.¹ 18-58.² Petitioner timely filed his federal application. Doc. 1.

II. GROUNDS OF THE PETITION

Petitioner asserts five grounds in support of his petition, worded as follows:³

GROUND ONE: Applicant was denied his right to effective counsel during pretrial plea-bargaining in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution.

GROUND TWO: Applicant was denied counsel altogether during critical stages of the case in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution.

GROUND THREE: Applicant was denied the right to a speedy trial in violation of the Sixth Amendment to the U.S. Constitution.

GROUND FOUR: Applicant was denied due process and a fair trial in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution because he was shackled during trial.

GROUND FIVE: Applicant was denied the right to effective assistance on direct appeal as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution.

Doc. 1 at 6-7A.

III. APPLICABLE LEGAL STANDARDS

A. Section 2254

A writ of habeas corpus on behalf of a person in custody under a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court

¹ The "Doc. __" reference is to the number of the item on the docket in this action.

² The state court records are filed as item 18 on the docket. The records are so voluminous that item 18 has 76 sub-parts. Thus, the reference to "Doc. 18-58" is to subpart 58 of document 18.

³ Although he lists six grounds in the petition, Petitioner withdrew the sixth ground in his memorandum in support of the petition. Doc. 12 at 22.

proceedings unless the petitioner shows that the prior adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *see also Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state court decision will be an unreasonable application of clearly established precedent if it correctly identifies the applicable rule but applies it objectively unreasonably to the facts of the case. *Williams*, 529 U.S. at 407–09; *see also Neal v. Puckett*, 286 F.3d 230, 236, 244–46 (5th Cir. 2002)(*en banc*) (focus should be on the ultimate legal conclusion reached by the state court and not on whether that court considered and discussed every angle of the evidence). A determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to both express and implied factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Absent express findings, a federal court may imply fact findings consistent with the state court’s disposition. *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). Thus, when the Texas Court of Criminal Appeals denies relief without written order, such ruling is an adjudication on the merits that is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Hill*, 210

F.3d at 486.

In making its review, the Court is limited to the record that was before the state court. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

B. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, the petitioner must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Missouri v. Frye*, 566 U.S. 133, 147 (2012). “[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697; *see also United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000)(*per curiam*). “The likelihood of a different result must be substantial, not just conceivable,” *Harrington*, 562 U.S. at 112, and a petitioner must prove that counsel's errors “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Cullen*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at 686). Judicial scrutiny of this type of claim must be highly deferential and the petitioner must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

Where, as here, the state court adjudicated the ineffective assistance claims on the merits, this Court must review Petitioner's claims under the “doubly deferential” standards of both *Strickland* and § 2254(d). *Cullen*, 563 U.S. at 190. In such cases, the “pivotal question” for the Court is not “whether defense counsel's performance fell below *Strickland's* standard”; it is

“whether the state court’s application of the *Strickland* standard was unreasonable.” *Harrington*, 562 U.S. at 101, 105. In other words, the Court must afford “both the state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*, 571 U.S. 12, 15 (2013)(quoting *Cullen*, 563 U.S. at 190); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Simply making conclusory allegations of deficient performance and prejudice is not sufficient to meet the *Strickland* test. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000).

IV. ANALYSIS

Petitioner’s first and second grounds allege that he received ineffective assistance of counsel. In his first ground, he alleges that counsel failed to convey his acceptance of an 18-month plea offer. Doc. 1 at 6; Doc. 12 at 4–8. In his second ground, he alleges that he had no counsel at all during a critical stage of pretrial proceedings. Doc. 1 at 6; Doc. 12 at 9–11. Relief was denied in the state habeas proceedings on both of these grounds. To be entitled to proceed here, Petitioner must show by clear and convincing evidence that the state court’s fact findings were erroneous. 28 U.S.C. § 2254(e). This he has not done.

In support of his first ground, Petitioner alleges: Petitioner retained Jim Shaw to represent him in the underlying criminal case on April 24, 2014. Raymond Napolitan, Shaw’s associate, took the lead in representing Petitioner. On August 13, 2014, after a brief court appearance, Napolitan told him that he had negotiated an 18-month plea deal. Petitioner accepted the deal, but Napolitan failed to convey his acceptance to the State in

a timely manner. As a result of this failure, Petitioner was ultimately sentenced to 75 years' imprisonment. Doc. 12 at 4–6.

In assessing this claim in the state habeas proceedings, among other things, the trial court relied upon Napolitan's affidavit denying that such a plea deal had even been offered. Doc. 18-71 at 2–5. Petitioner says that the finding that an offer was not made is clearly erroneous because he proffered a recording of a conversation between him and Napolitan while Petitioner was confined in the Williamson County jail on June 3, 2015, in which Napolitan acknowledged the existence of an 18-month plea offer. In other words, he wants the Court to review *de novo* the trial court's fact findings and reach the opposite conclusion, that there was a plea offer. However, the Court "is not considering the issue on a clean slate." *Harper v. Lumpkin*, 19 F.4th 771, 786 (5th Cir. 2021). It has the trial court's findings and the state habeas conclusion that Petitioner was not entitled to relief on this ground. To prevail, Petitioner must show that the adjudication of the claim 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." 28 U.S.C. § 2254(d)(2). This he is not able to do.

Petitioner contends that his alleged recording establishes that a plea offer was made. He fails to consider that the state court was apparently not persuaded that the recording was authentic.⁴ Given Petitioner's behavior throughout the course of the

⁴ Contrary to Petitioner's wholly unsupported reference to the "state courts' inexplicable refusal to consider the recording," Doc. 20 at 4, the state habeas court denied relief based on the findings and conclusions of the trial court and its own independent review of the record. Doc. 18-58.

underlying case, it would not be surprising that anything he presented or any representation he made would not be considered credible. The recording is not transcribed or in the state habeas record transmitted in this case. Petitioner's own description of the recording does not establish his claim.⁵ Rather, Petitioner purports to have said, "18-months at first is what they offered," to which Napolitan replied, "Yah, then they added additional charges." Doc. 18-70 at 38.⁶ Petitioner does not contend that any further discussion took place, which is incredible if, indeed, Napolitan had failed to convey Petitioner's acceptance of a plea offer. Petitioner further argues that "Napolitan withdrew from the case while plea-bargain negotiations were still ongoing in the case," which is inconsistent with his argument here. *Id.* at 39. In any event, even if an offer had been made and accepted—and the trial court found that that was not the case—Petitioner failed to carry his burden to show prejudice.

The trial court found that Petitioner was charged with a third degree felony; his minimum term of imprisonment was two years; he was eligible to be enhanced as an habitual criminal and was ultimately so enhanced; and that, at the time of the alleged offer, the Wise County District Attorney did not typically reduce felonies in cases where the defendant was an habitual offender. Doc. 18-71 at 7–8. It concluded that Petitioner

⁵ The Court notes that Petitioner gave the state court two completely different descriptions of his alleged conversation with Napolitan. In a different filing, Petitioner represented that the phone conversation had taken place when Petitioner was an inmate in the Saline County Detention Facility in Benton, Arkansas, and that he had obtained a copy from the U.S. Attorney's office in Little Rock. Doc. 18-70 at 71–72. Despite Respondent having pointed out the inconsistencies in his response, Doc. 16 at 12 & n.4, Petitioner does not address the matter in his reply. Doc. 20.

⁶ Petitioner admits that an additional state jail felony theft charge was brought in September 2014. Doc. 18-70 at 38.

had the burden to establish harm; he adduced no evidence beyond assertions to carry his burden; and, there was no credible evidence that Napolitan's performance prejudiced Petitioner. *Id.* at 9. Petitioner simply does not address the matter of prejudice other than to speculate that the plea would have been entered and the court would have accepted it and sentenced him to 18 months' imprisonment.

To support his second ground—that he was denied counsel at a critical stage—Petitioner relies upon the truth of his first ground, that a plea offer was pending when his counsel withdrew on October 7, 2014. The habeas court found that such an offer was not extended. But, even if it was, the alleged ineffective assistance took place before that date, when Napolitan allegedly failed to timely tell the State that Petitioner accepted the 18-month plea offer. As Petitioner admits, another charge was added in September 2014, before counsel withdrew. And, at the time counsel withdrew, Petitioner had absconded and been arrested in Louisiana on a bank robbery charge out of Arkansas. Doc. 18-14 at 12–14. He also spent time incarcerated in Saline County, Arkansas, and Williamson County, Texas. *See* Doc. 18-70 at 37, 71; Doc. 18-71 at 6, ¶¶ 3–7. His allegation of “languish[ing] in pretrial detention,” implying that he was in Wise County awaiting trial, from October 7, 2014, until July 2017 is spurious. Doc. 12 at 10. The trial court found that no substantive action was taken during that time period, except for the granting the motion to withdraw and issuing a writ of habeas corpus. Doc. 18-71 at 7. Moreover, even though Petitioner’s counsel had withdrawn, they posted five bonds on his behalf, continued to accept his calls and communicate with him, and assisted him following withdrawal. *Id.*

At no time prior to July 7, 2017, did Petitioner notify the trial court that he was indigent or wanted an attorney to be appointed to represent him. *Id.* His only argument is a conclusory one that the trial court's habeas findings were unsupported. He has not met his burden to show that the fact findings were clearly erroneous. Nor has he cited to any other case with similar facts and circumstances to show that the state court unreasonably applied clearly established federal law in concluding that Petitioner was represented at all critical stages of his case.

Petitioner's third ground—that his right to speedy trial was violated—was the subject of his state court appeal. *Hurdsman*, 2018 WL 5832116. The state court engaged in an extensive analysis and Petitioner has not shown that its adjudication of the claim resulted in a decision that was (1) contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court or (2) 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). Instead, he makes arguments that ignore the facts and cites cases that are inapposite. For example, he argues that the state court failed to consider that for almost three years he was not even aware that he was unrepresented and that there was no one safeguarding his right to speedy trial, Doc. 20 at 7, whereas the appellate court noted that Petitioner stated in an affidavit that he had repeatedly requested a speedy trial and complained that he was continuously incarcerated.⁷ *Hurdsman*, 2018

⁷ The affidavit was not offered into evidence; hence, the record showed that Petitioner did not raise the speedy trial complaint for almost three years. *Hurdsman*, 2018 WL 5832116, at *4. Had he made a demand for a speedy trial, the State would have been obligated to make a diligent, good faith effort to bring him back to Texas for trial. *Hopper v.*

WL 5832116, at *4. He overlooks that nothing in the record indicated that the State had acted in bad faith.⁸ *Id.* at *5. In citing *Russell v. Denmark*, 528 F. Supp. 3d 482 (S.D. Miss. 2021), *appeal docketed*, No. 21-60344 (5th Cir. Apr. 22, 2021), Petitioner overlooks that the defendant in that case had done nothing to interrupt his case, unlike Petitioner, who had absconded and been arrested and transferred several times in connection with other criminal activity. And, Petitioner fails to note that he is only entitled to a presumption of prejudice if the first three *Barker*⁹ factors weigh heavily in his favor, which they did not. *Amos v. Thornton*, 646 F.3d 199, 208 (5th Cir. 2011).

In his fourth ground, Petitioner complains about being shackled during trial. The Court of Criminal Appeals of Texas denied this ground based on its own independent review of the record. Petitioner has not shown that he is entitled to relief here. For all of the reasons discussed by Respondent, no violation of Petitioner's rights occurred. Doc. 16 at 27–31. In sum, Petitioner was not visibly shackled and he does not cite any Supreme Court case requiring a court to justify the use of non-visible restraints.¹⁰ Even if there was

State, 520 S.W.3d 915, 926 (Tex. Crim. App. 2017). By leaving Texas and committing crimes in other states, Petitioner created at least a modest impediment to prosecution here. *Id.* at 927. The longer Petitioner delayed in seeking a speedy trial, the more his inaction weighed against him. *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003).

⁸ Although the State bore the burden to argue and prove a valid reason for the delay, in the absence of proof, the court could presume neither a deliberate attempt by the State to prejudice Petitioner nor a valid reason for the delay. *McIntosh v. State*, 307 S.W.3d 360, 367–68 (Tex. App.—San Antonio 2009, pets. ref'd).

⁹ *Barker v. Wingo*, 407 U.S. 514 (1972).

¹⁰ The trial court ordered use of a knee restraint that would not be visible to the jury, explaining the reasons for doing so. Doc. 18-23 at 15–21. During a hearing outside the jury's presence, Petitioner claimed that one of the jurors had remarked about him walking funny during a recess. Neither the judge nor any of the attorneys, all of whom were in the courtroom, had heard such a remark. Doc. 18-20 at 226–27.

such authority, the trial court sufficiently justified use of the knee restraint. Doc. 18-23 at 15-21.

In his fifth ground, which is wholly conclusory, Petitioner says that he received ineffective assistance on appeal because the issue of illegal search and seizure was not raised. He admits, however, that the issue would have been difficult for appellate counsel to assess since the trial court did not conduct a hearing and make findings of fact and conclusions of law. Doc. 1 at 7A; Doc. 20 at 9-10. The state habeas court denied relief, finding that Petitioner did not receive ineffective assistance of appellate counsel. Petitioner's reply acknowledges that finding, but argues without support that the Court should consider the actions of the trial court *de novo*. Doc. 20 at 9-10. Even if it would be proper for the Court to do so and the Court found that the issue should have been raised, Petitioner has made no attempt to show that, but for ineffective assistance of appellate counsel, the outcome of the case would have been different. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

For the reasons discussed above, Petitioner is not entitled to a hearing. The cases upon which he relies are not controlling here. Doc. 12 at 22-24. In *Richards v. Quartermar*, 578 F. Supp. 2d 849 (N.D. Tex. 2008), *aff'd*, 566 F.3d 553 (5th Cir. 2009), the State did not argue that § 2254(e)(2) barred a hearing, as it does here. In *Banks v. Vannoy*, 708 F. App'x 795 (5th Cir. 2017), the record had not been fully developed. Petitioner's claims, having been adjudicated on the merits in state court, are subject to 28

U.S.C. § 2254(d) and he has not met his burden thereunder. Thus, the analysis is at an end. *Cullen*, 563 U.S. 170, 203 n.20 (2011).

VI. ORDER

The Court ORDERS that the relief sought by Petitioner in his petition under § 2254 be, and is hereby, **DENIED**.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts, and 28 U.S.C. § 2253(c)(2), for the reasons discussed herein, the court further ORDERS that a certificate of appealability be, and is hereby, denied, as Petitioner has not made a substantial showing of the denial of a constitutional right.

SO ORDERED on this 18th day of February, 2022.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

No. 22-10280

United States Court of Appeals

Fifth Circuit

FILED

October 21, 2022

RODNEY ADAM HURDSMAN,

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 4:21-CV-427

ORDER:

Rodney Adam Hurdman, Texas prisoner # 2170782, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his conviction for theft of property valued at between \$20,000 and \$100,000. He argues that (1) in light of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and its progeny, his trial counsel was ineffective during the plea-bargaining process because he failed to convey to the State Hurdman's acceptance of an 18-month plea offer; (2) he was deprived of counsel altogether during a critical stage of proceedings under *United States v. Cronic*, 466 U.S. 648 (1984), after his

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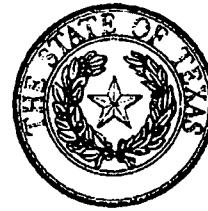
counsel withdrew without notice; (3) his right to a speedy trial was violated; (4) he was denied a fair trial when he was shackled during the trial; and (5) the district court erred in denying his request for an evidentiary hearing.

To obtain a COA, he must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). He may satisfy “this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA inquiry is a “threshold question [that] should be decided without full consideration of the factual or legal bases adduced in support of the claims.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted). Hurdzman has made the showing concerning his *Strickland*-based claim that his trial counsel was ineffective during the plea-bargaining process, as set forth above. He has also made the required showing on his *Cronic* claim. Accordingly, Hurdzman’s COA motion is GRANTED on claims (1) and (2), as set forth above. His motion is denied as to claims (3) and (4).

A COA is not required to appeal the denial of an evidentiary hearing. See *United States v. Davis*, 971 F.3d 524, 534 (5th Cir. 2020). This issue will be addressed in conjunction with the foregoing claim. Hurdzman’s COA motion is DENIED on his remaining claims.

/s/ James L. Dennis
JAMES L. DENNIS
United States Circuit Judge

APPENDIX D



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-17-00319-CR

RODNEY ADAM HURDSMAN, Appellant

V.

THE STATE OF TEXAS

**On Appeal from the 271st District Court
Wise County, Texas
Trial Court No. CR17817**

**Before Sudderth, C.J.; Meier and Gabriel, JJ.
Memorandum Opinion by Chief Justice Sudderth**

MEMORANDUM OPINION

I. Introduction

Appellant Rodney Adam Hurdsman appeals his conviction of theft of more than \$20,000 but less than \$100,000 of property, for which he was sentenced to 75 years' confinement. *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1234, § 21, 2011 Tex. Sess. Law Serv. 3309, 3310 (amended 2015, 2017) (current version at Tex. Penal Code Ann. § 31.03(e)(5) (West Supp. 2018)). In a single issue, Hurdsman argues that his Sixth Amendment right to a speedy trial was violated, complaining that the State made no attempt for three-and-a-half years to return him to Wise County for trial. We affirm.

II. Background

In February 2014, after various items were stolen from the Enbridge Energy Partners gas-processing plant, Hurdsman was arrested and released on bond. In June 2014, he was indicted.

The indictment alleged that Hurdsman had unlawfully appropriated catalysts, tools, and equipment. One of the witnesses described the catalysts used by the facility as large, round objects "made out of different kinds of precious metals," including platinum and titanium, which "take[] raw exhaust and . . . burn[] the raw exhaust so . . . emissions come out clean," similar to the way that a catalytic converter functions in an automobile. The indictment alleged that Hurdsman stole five catalysts, in

addition to various tools and equipment. The catalysts ranged in value from \$1,500 to \$8,245 each.

According to Hurdsmen, after he was arrested on September 29, 2014, he was “continuously incarcerated, and held on the arrest warrants and charges *in this case*, as a pre-trial inmate.” [Emphasis added.] But this contention is undermined by the motion to withdraw filed by his retained counsel, Jim Shaw, just days after Hurdsmen’s arrest. In that motion, Shaw represented to the court that Hurdsmen had been taken into federal custody.¹ The trial court allowed Shaw to withdraw on October 7, 2014.

Shaw died in December 2016. *See* Mitch Mitchell, *Fort Worth lawyer Jim Shaw fought cancer as hard as he fought for his clients*, Fort Worth Star-Telegram (Dec. 28, 2016, 9:48 PM), <https://www.star-telegram.com/news/local/obituaries/article123467179.html> (last visited Oct. 30, 2018).

Approximately six months after Shaw’s death, Hurdsmen filed a declaration of inability to hire counsel, and the trial court appointed counsel for him. A month later, Hurdsmen invoked his right to self-representation when the trial court refused to

¹Shaw attached to his motion an article dated September 30, 2014, which stated that Hurdsmen and his wife had been arrested in Louisiana in connection with a June 2014 bank robbery in Arkansas. During one of his hearings, Hurdsmen admitted that he was arrested in Shreveport on September 29, 2014. According to Hurdsmen, he was detained for 30 days in Louisiana before being taken to Benton, Arkansas, where he spent five months. Hurdsmen stated that the Arkansas charges were dropped, but then he was charged and confined in Williamson County for 28 months before the Williamson County charges were dismissed.

substitute Hurdsman's preferred attorney as his appointed counsel.² The State filed a notice of enhancement five days later, seeking to enhance the offense's punishment range from the third-degree felony punishment range (two to ten years' confinement and up to a \$10,000 fine, *see Tex. Penal Code Ann. § 12.34 (West 2011)*), to that of a habitual felon under penal code section 12.42(d), based on three theft-related convictions from Tarrant County in 1997 and a 2002 federal conviction for bank robbery. *See id. § 12.42(d) (West Supp. 2018)* (providing for an enhanced punishment range of 25 to 99 years' confinement based on prior felony convictions).

On August 17, 2017, the trial court held a hearing and granted Hurdsmans pro se motion to approve funds for an investigator. During the hearing, Hurdsmans claimed that he had "kind of invoked [his] right to having a speedy trial" in 2014 prior to plea negotiations and before the "main investigator here caused [him] to be arrested in Shreveport, Louisiana." Hurdsmans stated that after that, Arkansas "g[ot] [him]," and then "Williamson County[, Texas] . . . put a charge on [him]." The trial judge told Hurdsmans that he would have a standby counsel and that Hurdsmans could ask the standby counsel to take over at any time. The trial court also heard Hurdsmans pro se motion to dismiss and denied it. During the hearing, Hurdsmans

²Hurdsmans had prior experience representing himself. *See Hurdsmans v. Mayo*, No. 02-17-00099-CV, 2018 WL 3060116, at *1 n.2 (Tex. App.—Fort Worth June 21, 2018, no pet.) (mem. op.) (listing several of Hurdsmans pro se civil cases brought in federal court).

expressed his desire for more time to complete discovery and have his investigator investigate the facts.

Within two weeks, Hurdzman again requested appointed counsel.³ The trial court held a hearing on August 29, 2017, and appointed counsel for him. On the record, the trial judge expressed his belief that Hurdzman's request for counsel was "only an attempt to manipulate and delay the trial"; Hurdzman assured the trial judge that he was not trying to delay the trial. During the August 29 hearing, Hurdzman's newly appointed counsel, who had previously been Hurdzman's standby counsel, informed the trial court that Hurdzman had asked that counsel request a motion for continuance "on the suppression issue." The trial court denied the request.

On September 7, 2017, Hurdzman's appointed counsel filed a supplemental motion to dismiss, renewing Hurdzman's speedy trial complaint and attaching Hurdzman's handwritten affidavit in which Hurdzman alleged that he had requested a speedy trial since his arrest. The motion was heard on September 11.

³In his new request for appointment of counsel, Hurdzman referred to an "incident" in the courtroom involving his previous appointed counsel. The incident was referenced at the August 29, 2017 hearing and at the pretrial hearing on September 11, 2017. At the August 29 hearing, the trial court stated that Hurdzman had alleged that his previous appointed counsel had assaulted him in the courtroom in front of 40 or 50 people on August 3. Hurdzman agreed that he had made this allegation and claimed that three of his family members in the courtroom had seen it.

At the September 11 pretrial hearing, when the trial court recollected that Hurdzman had accused his previous appointed counsel of assaulting him, Hurdzman interjected, "Your Honor, I -- there was no assault." The trial judge replied, "Well, I know there wasn't an assault . . . because I was here in the courtroom [when it would have allegedly happened]."

At the hearing Hurdsmans affidavit was not offered into evidence, but the prosecutor pointed out to the trial court that while Hurdsmans had been continually in custody since September 2014, Hurdsmans had been held “not on these charges but on charges that arose from crimes that were committed in Benton, Arkansas, and Round Rock, Texas.” The prosecutor further argued that prior to July 2017, Hurdsmans had not asserted any right to a speedy trial and pointed out that at a previous hearing, Hurdsmans had requested a continuance.⁴ The trial court denied Hurdsmans motion, and his trial began the next day.

A jury found Hurdsmans guilty, found the State’s enhancement and habitual allegations true, and assessed his punishment at seventy-five years’ confinement. The trial court sentenced him accordingly.

III. Speedy Trial

In reviewing the trial court’s ruling on an appellant’s speedy trial claim, we apply a bifurcated standard of review: an abuse of discretion standard for the factual components, and a de novo standard for the legal components. *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002); *Murphy v. State*, 280 S.W.3d 445, 452 (Tex. App.—Fort Worth 2009, pet. ref’d).

⁴At the August 17, 2017 hearing, the prosecutor stated that Hurdsmans had asked for a continuance “in open court” that morning, and the trial judge stated, “Yeah, I know he did. I mean, he didn’t ask for it, but I got the idea that he wanted one.” Later during the hearing, Hurdsmans expressed his desire for additional time for discovery.

In determining whether an accused has been denied his Sixth Amendment right to a speedy trial, we must use a balancing test in which the conduct of both the prosecution and the defendant are weighed. *Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)). The factors to be weighed include, but are not limited to

- the length of the delay,
- the State's reason for the delay,
- the defendant's assertion of his speedy trial right, and
- the prejudice to the defendant resulting from the delay.

Id. (citing *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192). Yet no single factor is necessary or sufficient to establish a violation of the right to a speedy trial. *Id.* (citing *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193); *see Hopper v. State*, 520 S.W.3d 915, 923–24 (Tex. Crim. App. 2017) (observing that the “speedy-trial right is amorphous, slippery, and necessarily relative” (quoting *Vermont v. Brillon*, 556 U.S. 81, 89, 129 S. Ct. 1283, 1290 (2009))).

A. Factors

The *Barker* balancing test also imposes dual burdens. The State has the burden of justifying the length of delay, while the defendant has the burden of proving the assertion of the right and showing prejudice. *See Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. The defendant's burden of proof varies inversely with the State's degree of

culpability for the delay. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008). Thus, the greater the State's bad faith or official negligence and the longer its actions delay a trial, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial. *Id.* at 280–81.

Review of the individual *Barker* factors necessarily involves fact determinations and legal conclusions, but the balancing test as a whole is a purely legal question. *Id.* at 282; *see also Henson v. State*, 407 S.W.3d 764, 769 (Tex. Crim. App. 2013) (observing that at least two of the *Barker* factors—the reason for the delay and the prejudice to the accused—are fact-specific inquiries), *cert. denied*, 571 U.S. 1141 (2014). Courts are directed to apply the balancing test with common sense and sensitivity to ensure that charges are dismissed only when the evidence shows that a defendant's actual and asserted interest in a speedy trial has been infringed. *Cantu*, 253 S.W.3d at 281. We must also be mindful that the constitutional right is that of a speedy trial, not dismissal of the charges. *Id.*

1. Length of the Delay

The length of the delay is measured from the time that the defendant is arrested or formally accused, and a speedy trial claim will not be heard until the passage of a period of time that is, on its face, unreasonable under the circumstances. *Dragoo*, 96 S.W.3d at 313–14. In general, the delay must approach a year to be unreasonable enough to trigger the inquiry. *Id.* at 314; *see also Hopper*, 520 S.W.3d at 924 (explaining that the length of delay is a double-inquiry: whether the delay is

sufficiently long to trigger further analysis and to what extent it stretches beyond the triggering length).

Hurdsman was arrested in February 2014 and was indicted for the offense in June 2014. His trial began on September 12, 2017, over three years later. Therefore, this factor weighs in favor of finding a violation of his speedy trial right. *Dragoo*, 96 S.W.3d at 314 (noting that the delay must stretch beyond the bare minimum needed to trigger judicial examination of the claim).

2. Reason for the Delay

When considering the reason for the delay, different weights should be assigned to different reasons because some reasons are valid and serve to justify appropriate delay. *Id.* While in the absence of an assigned reason for the delay a court may not presume either a deliberate attempt on the State's part to prejudice the defense or a valid reason for the delay, the court nevertheless must determine whether the State or the defendant is more to blame for the delay. *Id.*; *see Hopper*, 520 S.W.3d at 924. The State's deliberate delay to hamper the defense or to gain a tactical advantage in the defendant's case is weighed heavily against the State, while more neutral reasons, such as negligence or overcrowded courts, weigh against the State, but less heavily. *Hopper*, 520 S.W.3d at 924. Delay caused by the defense weighs against the defendant. *Id.*

The prosecution of a defendant on other charges may be a valid reason for a delay in bringing him to trial, but the State must offer argument and proof to sustain

its burden on this factor. *McIntosh v. State*, 307 S.W.3d 360, 367 (Tex. App.—San Antonio 2009, pets. ref'd) (mem. op.) (citing *Dragoo*, 96 S.W.3d at 314 n.4; *Easley v. State*, 564 S.W.2d 742, 745 (Tex. Crim. App. [Panel Op.] 1978)).⁵ Similarly, upon the demand of a federal prisoner facing state charges, “Texas ha[s] a constitutional duty to make a diligent, good-faith effort to bring him before the [state] court for trial.” *Smith v. Hooey*, 393 U.S. 374, 381–83, 89 S. Ct. 575, 578–79 (1969) (observing that upon the prisoner’s motion for a speedy trial, the State could have issued a writ of habeas corpus ad prosequendum for the federal bureau of prisons to make him available for prosecution). *But cf. Hopper*, 520 S.W.3d at 926–27 (holding that *Smith* was not on point when appellant made no demand for a speedy trial in his Texas case while he was incarcerated out-of-state, particularly when *Smith* preceded the Interstate Agreement on Detainers (IAD)).

Hurdsman alleges that the State deliberately delayed his prosecution, arguing that “the evidence and history of events strongly suggests that the State voluntarily elected to forestall prosecution in the instant matter pending resolution of other charges pending against [him].” Hurdsman also asserted in his handwritten affidavit attached to his attorney’s supplemental motion to dismiss that he had repeatedly requested a speedy trial since his arrest and complained that he was “continuously incarcerated” after his September 29, 2014 arrest. But his affidavit was not offered

⁵In *McIntosh*, the court noted that the State offered no proof regarding a pending felony charge and “did not attempt to explain how a pending case that was dismissed justified any delay.” 307 S.W.3d at 367–68.

into evidence at the hearing, and the record shows that he did not raise his speedy trial complaint until almost three years later, when his pro se motion to dismiss and his supplemental motion to dismiss were filed. *Cf. Smith*, 393 U.S. at 381–83, 89 S. Ct. at 578–79. At the hearing, Hurdsmann offered no testimony to contradict the record or the State's assertion that he did not raise his speedy trial request until 2017.

Beyond Hurdsmann's speculation that the State delayed bringing him to trial so that it could use the other pending charges against him, nothing on this record indicates that the State acted in bad faith.⁶ On the other hand, the State offered no

⁶In his affidavit, Hurdsmann asserted that the prosecutor had “stepped aside and allowed another jurisdiction in the State of Texas to try and prosecute criminal offenses against [him] that . . . were brought by indictment on May 19, 2015, almost a full year after the indictment in this case.” He complained that only after those cases were dismissed did the “Wise County District Attorney seek to hurry and bring [him] to trial on this case at this very late date.”

Hurdsmann provided nothing to show that the other cases had been dismissed and provided no other details to support his allegations of bad faith. He offered no evidence at the hearing to support this complaint or his assertion that he had initially been offered a plea deal of 18 months' confinement in state jail in 2014 and that the State's new plea offer was 40 years' confinement, other than the following dialogue during the hearing between his counsel and the trial judge:

[Defense counsel]: And I'll also point out that prior to his being picked up there was an 18-month offer, and he was prejudiced in that respect that he obviously is now facing 25 to life had this proceeded --

THE COURT: I presume he refused every offer that they made him because nothing has happened.

[Defense counsel]: Well, actually, your Honor, my understanding -- I'll represent to the Court I think he had intended to accept the offer, but then he picked up the additional charge --

argument or proof at the hearing on Hurdsmen's motion to sustain its burden of showing a valid reason for the delay. Although Hurdsmen was confined in federal prison instead of another state's prison, both parties had the equal ability to act to bring the case to a speedier resolution and accordingly are equally at fault. *See Hopper*, 520 S.W.3d at 918, 926–27 (holding that "because the defendant and the State had an equal ability to bring the case to a speedy resolution by invoking the IAD, both parties are equally at fault under the reasons-for-delay factor," which consequently did not weigh against either party). *But cf. McCain v. State*, No. 02-17-00210-CR, 2018 WL 3059964, at *10 (Tex. App.—Fort Worth June 21, 2018, no pet.) (mem. op., not designated for publication) ("McCain also relies on his lengthy pretrial confinement as evidence of prejudice. But as the State argues, the record shows that in October 2016, McCain was sentenced to five years' confinement in another case, indicating that he would have remained confined in any event.").

3. Defendant's Assertion of His Right

Although a defendant's failure to assert his speedy trial right does not amount to a waiver of that right, failure to assert the right makes it difficult for him to prove that he was denied a speedy trial because his lack of a timely demand indicates

THE COURT: Yeah, I know.

[Defense counsel]: -- and his attorney didn't do it.

THE COURT: Those kinds of things usually make a difference.

strongly that he did not really want a speedy trial and was accordingly not prejudiced by the lack of one. *Dragoo*, 96 S.W.3d at 314. And the longer the delay, the more a defendant's inaction weighs against him. *Id.*; see *Balderus v. State*, 517 S.W.3d 756, 771 (Tex. Crim. App. 2016) (observing that from 2009 to 2013, defense counsel consistently sought additional time for investigation and negotiation and did not assert the right to a speedy trial until after a jury had been selected in 2014), *cert. denied*, 137 S. Ct. 1207 (2017). Likewise, filing for a dismissal instead of a speedy trial generally weakens a speedy trial claim because it shows a desire to have no trial rather than a speedy one. *See Murphy*, 280 S.W.3d at 454. Thus, if a defendant fails to first seek a speedy trial before seeking dismissal of the charges, he should provide cogent reasons for this failure. *See id.*

Hurdsman elected to file a motion to dismiss rather than a motion for a speedy trial, and he did so without stating a reason—cogent or otherwise—for the choice he made. *See id.* Further, as acknowledged by the trial court at the September 2017 hearing on his motion, Hurdsman requested a continuance—or at least had requested more time—less than a month before his trial date. Accordingly, this factor weighs against finding a violation of Hurdsman's speedy trial right.

4. Prejudice to Defendant Resulting from the Delay

We must assess this factor in light of the interests that the speedy trial right was designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of the accused's anxiety and concern; and (3) limitation of the

possibility that the accused's defense will be impaired. *Dragoo*, 96 S.W.3d at 315. The last item is the most serious because a defendant's inability to adequately prepare his case skews the fairness of the entire system. *Id.* But because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove—or for that matter, identify—affirmative proof of particularized prejudice is not essential to every speedy trial claim. *Id.* However, this “presumption of prejudice” diminishes when the defendant acquiesces in the delay. *Id.*

Hurdsman argues that the delay (1) deprived him of his choice of counsel because his counsel died during the case's pendency, (2) caused his pretrial incarceration to exceed the State's initial plea-bargain offer, (3) allowed one of his co-defendants, James Capers, to relocate “to somewhere in Arkansas” and thus become “no longer available to be interviewed and testify,” (4) prevented him from locating one of the State's investigators, and (5) allowed the State to lose crime scene photographs taken of the stolen property.⁷

First, the record reflects that Shaw, Hurdsman's retained counsel, withdrew on October 7, 2014, after Hurdsman was taken into federal custody in Louisiana on an unrelated bank robbery charge. Accordingly, Shaw's unfortunate death over two years

⁷Hurdsman argues on appeal that the delay caused him severe anxiety, caused him to miss the birth of his son, caused him to be denied treatment for mental health issues—schizophrenia, depression, and anti-social disorder—during his 35 months of incarceration, and deprived him of the ability to financially support his family while incarcerated. But these assertions are found only in Hurdsman's affidavit, which was attached to his supplemental motion but not offered into evidence at the hearing.

later, in December 2016, could not have deprived Hurdsmen of his choice of counsel, particularly when Hurdsmen did not seek any appointment of counsel for two years after Shaw's withdrawal and for several months after Shaw's death.

And while Hurdsmen complains that during the delay, Capers "relocated to somewhere in Arkansas," rendering Capers unavailable for interview and testimony, the record during the punishment phase of trial reveals that Capers was actually "relocated" to a federal penitentiary for bank robbery. Furthermore, Hurdsmen fails to explain why Capers's absence from the state would have prevented Capers from testifying—telephonically or otherwise—in the instant trial, or what Capers's testimony would have been.

With regard to his allegation of prejudice caused by the inability to locate John Pettit, a state investigator, Hurdsmen did not specify at the speedy trial hearing what Pettit's testimony would have been. Nor did he recite or describe any due diligence used in attempting to locate Pettit. *See Phipps v. State*, 630 S.W.2d 942, 947 (Tex. Crim. App. [Panel Op.] 1982) (stating that before the contention that undue delay made defendant unable to locate witnesses will amount to "some showing of prejudice," defendant must "show that the witnesses were unavailable, that their testimony might be material and relevant to his case, and that he has exercised due diligence in his attempt to find them and produce them for trial"); *Harrison v. State*, 282 S.W.3d 718, 722 (Tex. App.—Amarillo 2009, no pet.) ("To establish particularized prejudice based on an unavailable witness, a defendant must present proof both of the efforts made to

locate the witness and that the witness would have benefitted his defense.”). *But cf. Puckett v. State*, 279 S.W.3d 434, 441 (Tex. App.—Texarkana 2009, no pet.) (holding that appellant showed prejudice associated with the delay when he “provided testimony about the loss of witnesses who could apparently, from their contemporaneous reports to the police, have provided testimony substantially at odds with the State’s theory of the assault”).

As to Hurdsmans argument that evidence was lost as a result of the delay, Hurdsmans fails to demonstrate that the loss of the photographs he complains of actually hindered, rather than aided, the defense. At trial, Hurdsmans counsel used the lack of photographic evidence to raise the issue of value by questioning whether the stolen catalysts had been new or refurbished.

Wise County deputies had photographed the property that was recovered before returning the property to Enbridge, but the photographs were no longer available because a computer virus had infected the Sheriff’s office computers, affecting multiple cases. Accordingly, the State was forced to rely on witness testimony and related documents to prove the value of the stolen property.⁸

It was undisputed that on February 24, 2014, Enbridge employee Darrell Jacobson reported the theft and gave former Wise County Sheriff’s Deputy Christopher Hodges, the responding patrol officer, a list of the items that were

⁸Hurdsmans was charged with committing theft of property worth \$20,000 to under \$100,000.

missing and his approximations of their value. Sergeant James Mayo, an investigator in the Wise County Sheriff's Office Criminal Investigations Division and the primary investigator on the Enbridge theft, testified that he made no effort to ascertain the stolen items' value beyond what Jacobson had told him.

Jacobson testified that the station did not maintain a written inventory, that he had made the list from memory rather than consulting Enbridge's invoices for the items, and that to the best of his knowledge, all of the catalysts that had been listed as stolen had been new. But Jacobson also testified that after 2014, Enbridge had started buying refurbished catalysts⁹—catalysts that had been washed out—if they were still good, although he could not say whether a refurbished catalyst would be less expensive than a new one. But he did testify that refurbished catalysts were not returned in boxes, and that all of the catalysts that had been returned to Enbridge after the theft had been in boxes, signifying to him that they were new rather than refurbished.

Shane Stoff, an area service manager for the company formerly known as Exterran—Hurdsman's employer at the time of the theft—testified that some refurbishing companies returned washed catalysts in boxes. He also expressed the

⁹On the other hand, Randall Buckner, Enbridge's systems supervisor and Jacobson's supervisor, said that the practice of refurbishing catalysts did not start until 2015 or 2016, and to his knowledge, the practice had not started at the time of the offense in February 2014.

opinion that a washed catalyst could hold the same value as a new catalyst, depending on the precious metals it contained.

Jacobson also testified that, in hindsight, some of the catalyst sizes he had listed in the information that he gave to the Sheriff's office had been incorrect and the value numbers for some of them had not been entirely correct because he had been listing them from memory and not on the basis of written records. And he agreed that three-and-a-half years after the fact, he could not provide a more accurate list and that the prices he had given were estimates for replacement value and not the catalysts' fair market value or what they would have been worth after refurbishment. Buckner, who approved the invoices for ordering catalysts, corrected some of the values in the Jacobson list during his testimony.

The trial court admitted the Jacobson list into evidence over Hurdsman's objection. The trial court also admitted into evidence the inventory list of property that was returned to Enbridge by the Sheriff's office.

While it may be fairly argued that the delay in trying Hurdsman allowed a computer virus to destroy photographs of the stolen property, it is not so apparent that the loss of the photographs hindered Hurdsman's defense. It could be equally argued that the situation worked to Hurdsman's advantage. Because of the computer virus and corresponding absence of photographs of the stolen property, his counsel was able to more vigorously cross-examine the State's witnesses about the property's value and, during closing arguments, to highlight the deficiencies in their

testimonies,¹⁰ impugn the efficacy of the theft investigation, and argue for a verdict on the lesser-included offense of theft of property worth \$1,500 to under \$20,000.¹¹ To the extent that Hurdzman suffered any prejudice from the loss of the photographic evidence, however, this factor weighs slightly in his favor. *See Dragoo*, 96 S.W.3d at 315.

As to Hurdzman's observation that loss of the photographic evidence led to his plea offer being increased from eighteen months' confinement to forty years' confinement,¹² the record does not support indulgence in such speculation. Outside of Hurdzman's handwritten affidavit, which was not admitted into evidence, the record provides no insight into the circumstances surrounding the State's plea offers. And because the record reflects other convictions that preceded this 2014 theft by at least a decade, it is equally plausible that the alleged increase in the State's plea offer

¹⁰During closing argument, Hurdzman's counsel argued that while there were voluminous exhibits, "what we don't have, obviously, is one good picture of any one of those catalysts that was taken," criticized the police work as "a little bit sloppy," argued that the witnesses testifying about the catalysts' value over three years before was "their best guess" rather than proof, and lambasted Sergeant Mayo for not backing up the digital photos.

¹¹Hurdzman does not challenge the values given for the non-catalyst stolen property, which totaled \$9,977, nor does he challenge the sufficiency of the evidence to support his conviction.

¹²In his brief, Hurdzman complains, "When the State had the pictures it offered eighteen (18) months[] when the pictures were no longer available the offer rose to thirty (30), then forty (40) years."

could have been based on Hurdsman's criminal record rather than the absence of photographs of the stolen evidence.

Finally, because the evidence at trial conclusively showed that Hurdsman had committed the theft, Hurdsman's claim that his defense was impaired by the delay becomes further attenuated. *See id.* Surveillance camera photos of the theft that showed Hurdsman perpetrate the offense at the Enbridge facility were admitted into evidence and published to the jury, and Hurdsman's confession, given a few days after his arrest in February 2014, was also admitted into evidence and published to the jury. In the 13-minute recording, Hurdsman attempted to cut a deal by seeking to work off his anticipated sentence by flipping on other thieves in the area, admitted that everything found on the trailer attached to his truck had been stolen, and explained that he had forgotten that there were cameras at the Enbridge facility.

B. Analysis

The weight of the four factors, when balanced together, is against finding a violation of the right to a speedy trial. While the delay may have been excessive, Hurdsman could have urged the State to bring him to trial sooner, but his focus was on dismissal, not a speedy trial. Moreover, the record and his reply brief in this court demonstrate his acquiescence in the delay by reflecting that he did not assert his right to a speedy trial until his transfer to Wise County in 2017—three years after he was indicted. And the record does not reflect such prejudice from the delay that his defense was impaired. We overrule Hurdsman's sole issue.

IV. Conclusion

Having overruled Hurdman's sole issue, we affirm the trial court's judgment.

/s/ Bonnie Sudderth

Bonnie Sudderth
Chief Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: November 8, 2018

APPENDIX E

United States Court of Appeals
for the Fifth Circuit

No. 22-10280

RODNEY ADAM HURDSMAN,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-427

ORDER:

IT IS ORDERED that Appellant's motion for leave to file petition
for rehearing en banc out of time is DENIED.

/s/ James E. Graves, Jr.
JAMES E. GRAVES, JR.
United States Circuit Judge

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

**LYLE W. CAYCE
CLERK**

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 07, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: Mary Frances Yeager, Deputy Clerk
504-310-7686

Ms. Lori Denise Brodbeck
Mr. Rodney Adam Hurdzman