Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. Court of Claims No. MZ 17-000135-MZ

Court address
925 W. Ottawa St., P.O. Box 30185 Lansing, MI 48909

Court telephone no.
(517) 373-0807

Plaintiff's name(s), address(es), and telephone no(s).	v	Defendant's name(s), address(es), and telephone no(s).
DAVID A. MAPLES		STATE OF MICHIGAN
Plaintiff's attorney, bar no., address, and telephone no. MARK R. BENDURE (P23490) 15450 E. Jefferson Ave., Suite 110 Grosse Pointe Park, MI 48230		STATE OF MICHIGAN OFFICE OF ATTORNEY GENERAL 525 W. OTTAWA ST. LANSING, MI 48993

SUMMONS **NOTICE TO THE DEFENDANT**: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state). (MCR 2.111[C])
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued	This summons expires	Court clerk
5-17-2017	8-16-2017	Jerome W. Zimmer Jr.

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

COMPLAINT ***Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.***

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

Family Division Cases

☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

General Civil Cases

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

VENUE

Plaintiff(s) residence (include city, township, or village)	Defendant(s) residence (include city, township, or village)
29129 Sunnydale, Livonia, MI 48125	State of Michigan

Place where action arose or business conducted
Macomb County

05/16/2017
Date

Signature of attorney/plaintiff

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

MC 01 (5/15) **SUMMONS AND COMPLAINT** MCR 2.102(B)(11), MCR 2.104, MCR 2.105, MCR 2.107, MCR 2.113(C)(2)(a), (b), MCR 3.206(A)

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17-000135-MZ

SUMMONS AND COMPLAINT
Case No. Court of Claims No.

PROOF OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

☐ **OFFICER CERTIFICATE**
I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]), and that: (notarization not required)

OR

☐ **AFFIDAVIT OF PROCESS SERVER**
Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notarization required)

☐ I served personally a copy of the summons and complaint,
☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint, together with _____
List all documents served with the Summons and Complaint

_____

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare that the statements above are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Mileage fee	Total fee
$		$	$

_____
Signature

_____
Name (type or print)

_____
Title

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____ (Attachments)

_____ on _____ (Day, date, time)

_____ on behalf of _____.
Signature

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DAVID A. MAPLES,

Plaintiff,

vs.

STATE OF MICHIGAN,

Defendant.

Case No: 17-000135 -MZ
Talbot

2017 MAY 11 PM 1:40

MARK R. BENDURE (P23490)
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We Fight The Law, PLLC
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Southfield, MI 48075
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VERIFIED COMPLAINT

Plaintiff DAVID A. MAPLES, through his attorneys, BENDURE & THOMAS, PLC, and WE FIGHT THE LAW, PLLC, states by way of Complaint that:

Parties and Jurisdiction

1. This Complaint is brought pursuant to MCL 691.1751, et seq., the Wrongful Imprisonment Compensation Act ("the Act").
2. Pursuant to MCL 691.1753, this action is brought against the State in the Court of Claims.
3. Plaintiff is eligible for compensation under the Act because:

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(a) Plaintiff was convicted of 1 or more crimes under the law of this State, was sentenced to a term of imprisonment in a State correctional facility for the crime or crimes, and served at least part of the sentence.

(b) Plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty.

(c) New evidence demonstrates that the Plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction.

4. This action is timely under MCL 691.1757, as it is brought within 18 months of the effective date of the Act.

Count I – Recovery Under The Act

5. Plaintiff adopts and incorporates by reference the allegations of paragraphs 1 to 4, inclusive, of this Complaint, as if repeated verbatim.

6. On or about August 4, 1993, Plaintiff was arrested for delivery of cocaine and conspiracy to deliver cocaine in Macomb County [see Maples v Stegall, 427 F3d 1020, 1023 (6th Cir. 2005) (attached as Exhibit A and incorporated by reference)].

7. Two days later, on August 6, 1993, the Macomb County prosecutor filed formal charges against Plaintiff in Macomb County Circuit Court.

8. Plaintiff was not brought to trial until September 20, 1995.

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9. Between the time he was charged and the time of trial, Plaintiff contended that he was not guilty and, in addition, filed or concurred in motions to dismiss the criminal charges on grounds of entrapment and denial of his right to a speedy trial.

10. Due to the delay in scheduling his trial, Plaintiff was not able to obtain the testimony of two critical witnesses who would testify in support of Plaintiff in the defense of the charges [see Maples v Stegall, 427 F3d 1020, 1032-1034 (6th Cir. 2005) (Ex. A)].

11. Having been denied the ability to present the testimony of two critical defense witnesses, Plaintiff's attorney recommended that Plaintiff plead guilty, assuring Plaintiff, incorrectly, that Plaintiff would then be able to challenge on appeal the denial of his motions to dismiss on entrapment and speedy trial grounds.

12. As the Michigan Court of Appeals held by Opinion of November 4, 1997, the guilty plea was deemed, under Michigan law, to waive the right to challenge the denial of Plaintiff's dismissal motions.

13. Accordingly, the United States Court of Appeals for the Sixth Circuit held that Plaintiff had been denied effective assistance of counsel in being encouraged to plead guilty under the mistaken belief that his conviction could be reviewed and reversed on appeal despite the guilty plea [Maples v Stegall, 340 F3d 433 (6th Cir. 2003) (attached Ex. B, incorporated by reference)].

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14. It has been determined by the United States Court of Appeals for the Sixth Circuit that Plaintiff was denied a speedy trial and was prejudiced by the inability to present exculpatory evidence (Ex. A, Ex. B).

15. The charges against Plaintiff have been dismissed [see Ex. C, attached and incorporated by reference].

16. The dismissal arose from "new evidence" as that term is defined in Section 2(b) of the Act, MCL 691.1752(b): "any evidence that was not presented in the proceedings leading to plaintiff's conviction"; i.e. the exculpatory testimony that Plaintiff could not present due to the unconstitutional denial of his right to a speedy trial (see letter and Affidavits of James Murphy, attached as Exhibits D, E, and F and incorporated by reference.

17. As a result of the conviction, Plaintiff was imprisoned in state correctional facilities for a period of time known by Defendant, whose records are incorporated by reference, from approximately May 23, 1994 to March of 2003.

18. To summarize, and as shown by the allegations in this Complaint and the documents attached and incorporated by reference:

    (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.

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(b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the plaintiff was found to be not guilty.

(c) New evidence demonstrates that the plaintiff was not the perpetrator of the crime or crimes and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges, finding of not guilty, or gubernatorial pardon.

19. Plaintiff seeks judgment in the full amount recoverable under the Act, including $50,000 per year for each year imprisoned, reimbursement of any amount paid to the state, attorney fees and expenses.

WHEREFORE, Plaintiff prays that the Court enter judgment for him, against the State of Michigan, in the amount to which he is deemed entitled under the Act.

Verified:

David A. Maples

Dated: 4-20-17

2017 MAY -2 PM 2:34
COURT ST. CLAIRS
JEROME W. ZIMMER JR. CLERK

Respectfully Submitted,

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Exhibit A

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Caution
As of: February 16, 2017 9:10 AM EST

Maples v. Stegall

United States Court of Appeals for the Sixth Circuit

May 31, 2005, Argued ; October 25, 2005, Decided ; October 25, 2005, Filed

File Name: 05a0425p.06

No. 04-1880

Reporter
427 F.3d 1020 *; 2005 U.S. App. LEXIS 22996 **; 2005 FED App. 0425P (6th Cir.) ***

DAVID A. MAPLES, Petitioner-Appellant, v. JIMMY STEGALL, Warden, Respondent-Appellee.

Subsequent History: Subsequent civil proceeding at, Complaint dismissed at Maples v. Marlinga, 2007 U.S. Dist. LEXIS 95147 (E.D. Mich., Dec. 28, 2007)

Prior History: [**1] Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 00-71718. Victoria A. Roberts, District Judge.
Maples v. Stegall, 340 F.3d 433, 2003 U.S. App. LEXIS 16902 (6th Cir.) (6th Cir. Mich., 2003)

Core Terms

co-defendant, entrapment, speedy trial right, delays, joined, speedy trial, trial court, district court, weigh, speedy trial claim, trial date, sentence, motions, cases, unavailability, continuance, presumptively prejudicial, suggests, days, adjudicated, prejudiced, motion to dismiss, actual prejudice, circumstances, incarceration, impairment, pretrial, factors, argues, arrest

Case Summary

Procedural Posture
The case was before the court on a second appeal from the United States District Court for the Eastern District of Michigan which on remand denied petitioner inmate's petition for a writ of habeas corpus. Respondent warden opposed the petition.

Overview
The inmate and his co-defendant were arrested for delivery of and conspiracy to distribute cocaine. The inmate claimed he was denied effective assistance of counsel based on his counsel's failure to assert his Sixth Amendment speedy trial rights. The warden claimed that the inmate was partially responsible for the delay and that any delay caused by the state was not done in bad faith or for purposes of harassment and thus was not attributable to the state. The appellate court found that the inmate suffered a delay of 25 months, 22-24 months of which could be attributed to the state. The inmate repeatedly asserted his right to a speedy trial. The inmate suffered actual prejudice by the delay because his continued incarceration harmed his liberty interest in that he was denied a consecutive sentence under Mich. Comp. Laws § 333.7401(3) and he suffered anxiety and concern. The inmate was unable to present certain witnesses on behalf of his defense due to the delay. Because the inmate's speedy trial claim had merit, he was prejudiced by his counsel's deficient performance in advising him that he could simultaneously take the

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guilty plea and retain his speedy trial claim for appeal.

Outcome

The judgment was reversed, and the case was remanded to the district court with directions to issue the writ of habeas corpus and for further proceedings consistent with this opinion.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN1[] Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas court may grant an application for a writ of habeas corpus on behalf of a state prisoner only where a claim adjudicated on the merits in state court: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.S. § 2254(d).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

HN2[] Whether a habeas petitioner was deprived of his right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN3[] In determining whether a defendant was prejudiced by his counsel's ineffective assistance, a habeas court reviews the merits of his underlying claim.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN4[] In determining the merits of a speedy trial claim, an appellate court reviews questions of law de novo, and questions of fact under the clearly erroneous standard.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN5[] The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial. U.S. Const. amend. VI. The right to a speedy trial applies to the states through the Fourteenth Amendment.

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Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN6[] The United States Supreme Court has articulated four factors that must be considered in determining whether the right to a speedy trial has been violated: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant. No one of these factors constitutes 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.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN7[] With regard to a claim of violation of a defendant's right to a speedy trial, the length of the delay is a threshold requirement. If the length of the delay is not "uncommonly long," then judicial examination ends. The length of the delay is measured from the date of the indictment or the date of the arrest, whichever is earlier. A delay approaching one year is presumptively prejudicial and triggers application of the remaining three factors.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN8[] With regard to a claim of violation of a defendant's right to a speedy trial, the second factor that the United States Supreme Court advises courts to consider is the reason for the delay. In considering this factor, courts weigh some reasons more heavily than others. For instance, government delays motivated by bad faith, harassment, or attempts to seek a tactical advantage weigh heavily against the government, while "more neutral" reasons such as negligence or overcrowded dockets weigh against the state less heavily. The purpose of the inquiry is to determine whether the government or the criminal defendant is more to blame for the delay.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN9[] 18 U.S.C.S. § 3161(h)(7) holds excludable a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted. Under the Speedy Trial Act, one speedy trial clock governs co-defendants, so the excludable delay of one defendant is ascribed to that of all of his codefendants.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN10[] With regard to a defendant's right to a speedy trial, the United States Court of Appeals for the Sixth Circuit holds that under the statutory analysis, a co-defendant's interlocutory appeal disadvantages the defendants, as an exclusion applicable to one defendant applies to all co-defendants. In analyzing the constitutional claim, however, the second Barker factor, reason for the delay,

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does, however, favor the other defendants right to a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN11[] With regard to a defendant's right to a speedy trial, ultimately, the responsibility for countenancing a co-defendant's delays must rest with the trial court.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN12[] In deciding whether delay caused by a co-defendant's motion should count, the United States Court of Appeals for the Sixth Circuit will examine whether the defendant objected to the continuance, whether the defendant moved the trial court to comply with speedy trial requirements, whether the defendant moved for release, and whether the defendant's position and interests are aligned with the co-defendant.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN13[] With regard to a defendant's right to a speedy trial, although "negligence and overcrowded dockets" do not weigh as heavily against the state as does bad faith, the government must ultimately bear the responsibility for such circumstances.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN14[] A 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. The Sixth Circuit recognizes a request for bail as the functional equivalent of the request for a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Bail > Revocation & Remission

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN15[] In the Sixth Circuit, a request for reduction of bail is equivalent to a request for a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN16[] With regard to a defendant's right to a speedy trial, "presumptively prejudicial" for purposes of triggering the Barker four-factor inquiry is different from "presumptively prejudicial" for purposes of assessing the prejudice prong. The first only requires that the delay have approached one year. The latter concerns whether the delay was excessive.

Constitutional Law > ... > Fundamental

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Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN17[] With regard to a defendant's right to a speedy trial, the United States Supreme Court holds that the accused need not point to "affirmative proof of particularized prejudice" in every case. Rather, the Supreme Court generally has recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN18[] With regard to a defendant's right to a speedy trial, presumption of prejudice is not automatically triggered in every case in which there is a delay. When the accused is unable to articulate the harm caused by the delay, the reason for the delay helps determine whether the delay was presumptively prejudicial. For example, where the delay is due to state negligence, the weight courts assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, a court's toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial. However, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN19[] With regard to a defendant's right to a speedy trial, presumptive prejudice is part of the mix of relevant facts, and its importance increases with the length of the delay.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN20[] With regard to a defendant's right to a speedy trial, in the Sixth Circuit, no presumption has been found where delay due to government fault is considerably less than that in Graham or in Brown, or where the government can persuasively rebut the presumption by showing that the delay did not impair the defendant's defense.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN21[] The United States Supreme Court has identified three defense interests a court should consider when determining actual prejudice in speedy trial cases: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; (3) the possibility that the defense will be impaired. 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. If witnesses die or disappear during a delay, the prejudice is obvious.

Criminal Law & Procedure > Sentencing > Consecutive Sentences

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HN22[↓] Under Michigan law, a consecutive sentence will only be required if the first term of imprisonment is for the commission of another felony. Mich. Comp. Laws § 333.7401(3) (1995).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN23[↓] With regard to a defendant's right to a speedy trial the frequency with which the defendant asserts his speedy trial right is probative indication of the prejudice he is suffering.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Criminal Process > Compulsory Process

HN24[↓] Governmental conduct which amounts to a substantial interference with a witness's free and unhampered determination to testify will violate due process. While a prosecutor can warn a potential defense witness about the consequences of perjury, a prosecutor cannot threaten to reinstate previous charges against that witness.

Counsel: ARGUED: Craig A. Daly, Detroit, Michigan, for Appellant.

Laura Graves Moody, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

ON BRIEF: Craig A. Daly, Detroit, Michigan, for Appellant.

Brad H. Beaver, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

Judges: Before: MOORE and COOK, Circuit Judges; GWIN, District Judge. *

Opinion by: James S. Gwin

Opinion

[*1022] **[***1]** GWIN, District Judge. This case comes before us on a second appeal, after we had earlier remanded the case to the district court to address a single issue: whether, as part of Petitioner David Maples's ineffective-assistance-of-counsel claim, his Sixth Amendment speedy trial claim had merit. In his initial habeas petition, Petitioner claimed a violation of his right to effective assistance of counsel. He complained that his trial counsel provided ineffective assistance by advising him that his guilty plea reserved his **[**2]** speedy trial claim for appeal, when in reality it did not. Maples claims that, but for his counsel's deficient advice, he would have insisted on going to trial rather than plead guilty.

[*2]** We earlier found that trial counsel's performance had indeed been deficient. We also found that Petitioner had satisfied his burden to show a reasonable probability that, but for counsel's erroneous advice, he would have gone to trial. *Maples v. Stegall*, 340 F.3d 433, 439-40 (6th Cir. 2003) (*Maples I*). As a result, we determined that "on the surface," Petitioner had satisfied the prejudice prong of the ineffective-assistance test outlined in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 **[*1023]** (1984); *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). We also noted, however, that *Hill* advised us to consider the merits of the underlying claim in fully adjudicating the prejudice inquiry. *Maples I*, 340 F.3d at 440. We therefore remanded to

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

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the district court to determine, in the first instance, the merits of Petitioner's speedy trial claim.

Upon remand, the district court ruled in favor of the Respondent, [**3] finding that Petitioner's speedy trial claim had no merit and thus that Petitioner had suffered no violation of his right to effective assistance of counsel. We now **REVERSE**.

I. BACKGROUND

Petitioner David Maples ("Maples") complains that Michigan violated his constitutional right to a speedy trial when it failed to bring him to trial until over two years after his arrest. The facts relevant to Petitioner's speedy trial claim are as follows:

A. Initial Delays and Entrapment Motion

On August 4, 1993, Petitioner and his co-defendant, James Murphy, were arrested for delivery of and conspiracy to distribute over 50 grams of cocaine. The Petitioner was detained and remained in state custody. On August 6, 1993, the state prosecutor filed the complaint and warrant. The state trial court set a trial date of October 19, 1993, but continued the trial until November trial call, at the request of co-defendant Murphy. Around this time, the court became aware that co-defendant Murphy was contemplating an entrapment defense. In its October 19, 1993 disposition continuing Maples's trial date, the court ordered Petitioner to file all motions within 10 days, and set co-defendant Murphy's entrapment [**4] hearing for the trial date.

On November 2, 1993, in preparation for trial, Petitioner Maples filed a pretrial motion for supplemental discovery and a motion in limine. The motion in limine sought to exclude Petitioner's prior criminal record on grounds that it would prejudice Petitioner, particularly as he planned to testify at trial. Nothing suggests this motion was complicated or presented any unique issue.

On December 9, 1993, the trial court continued the trial until January 11, 1994. [1] On January 10, 1994, Petitioner moved to continue the trial date because his attorney was unavailable. This resulted in a short delay of only 9 days, as the trial was re-set for January 19, 1994.

On January 19, 1994, the state trial court again continued the trial date until February 4, 1994, at the co-defendant's request [**5] to file motions. On February 3, 1994, the eve of trial, co-defendant Murphy filed his entrapment motion. [2] A hearing on the co-defendant's entrapment motion began on February 4, 1994, and continued on February 23-25, 1994, thereby delaying trial even further. The trial court then gave the state and co-defendant Murphy 30 days to file proposed [***3] findings of fact and conclusions of law. In contrast to Petitioner Maples, who remained in custody during this time, co-defendant Murphy was released on bond.

[*1024] After beginning the hearing on co-defendant Murphy's entrapment defense on February 4, 1994, and continuing it on February 23-25, 1994, the state trial court scheduled argument on the entrapment motion on March 16, 1994, and ordered that transcripts [**6] be prepared. The hearing concluded on April 11, 1994, on which date Petitioner testified in support of the entrapment motion. On April 29, 1994, Petitioner joined the motion and filed a brief in support. On June 3, 1994, the trial was continued again pending

[1] On December 9, 1993, Petitioner joined his co-defendant's motion for an alleged violation of the "12-day rule." Neither the record nor the parties' briefs explain what this 12-day rule refers to.

[2] Initially, Petitioner Maples did not join the motion. He only joined the motion on April 29, 1994, almost three months after co-defendant Murphy filed the motion and over six months after the court was aware that co-defendant was contemplating raising the defense.

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the court's decision on the entrapment motion. It appears the co-defendant did not file a brief in support of the motion until June 2, 1994. On July 14, 1994, the trial court finally issued an opinion denying the Petitioner's and co-defendant's motion. The Michigan state court thus delayed the trial over five months to decide an entrapment claim. Petitioner remained in custody during most of that period.

B. Petitioner's Motion for Release

In the meantime, on April 8, 1994, Petitioner filed a motion for release on personal bond, arguing that he had been incarcerated for 250 days without trial, well beyond the 180 days allowable under Michigan law. On April 11, 1994, the court ordered the prosecution to file a written response to the motion within 10 days. On April 29, 1994, Petitioner filed a motion for immediate release, noting that the prosecution had not yet filed its response. On May 5, 1994, the prosecutor filed an opposition **[**7]** to the motion for immediate release. On May 9, 1994, the court held a hearing and granted Petitioner's motion for immediate release. Petitioner, however, was sent directly to St. Clair County for a probation violation, and on May 23, 1994, was sentenced to 2 1/2 - 5 years in the Department of Corrections. Petitioner was re-incarcerated and spent the next seven months in the St. Clair County Jail.

C. Summer 1994 - Summer 1995

As mentioned, the state court adjourned the trial date of June 3, 1994, pending resolution of the entrapment motion, and finally ruled on that motion on July 14, 1994. On July 29, 1994, the trial was continued yet again. Although the record is somewhat unclear, it appears that Michigan caused this continuance by failing to transport Petitioner Maples from the correctional institution to the trial. After continuing the trial in July 1994, it is nowhere clear why the trial court failed to reschedule the case for trial in August, September, or October 1994.

On November 18, 1994, and again on December 7, 1994, co-defendant Murphy moved to adjourn the trial. Petitioner Maples did not join these motions to continue. Indeed, on December 24, 1994, Petitioner wrote a **[**8]** pro se letter to the trial court, requesting new counsel, and complaining that his counsel had not filed a speedy trial claim at the end of November. In early January 1995, Maples filed a pro se motion seeking dismissal for violations of the 180-day rule and his constitutional speedy trial right.

On April 28, 1995, the Court re-set Petitioner's trial for June 22, 1995, due to trial in another matter. On June 27, 1995, the court continued the trial once again until August 29, 1995, providing no reason. On August 22, 1995, Petitioner again filed a motion to dismiss for violations of the 180-day rule and his constitutional speedy trial right.

On August 29, 1995, the trial was again continued until September 19, 1995, because "plea negotiations failed." The Respondent admits that these plea negotiations involved co-defendant Murphy, not Maples. On September 19, 1995, co-defendant Murphy pled guilty. Also on September 19, 1995, the Court denied Petitioner's motion to dismiss. On September 20, **[*1025]** 1995, the date of Petitioner's trial, Petitioner reaffirmed his desire to reject the prosecution's plea offer. Petitioner also expressed his intention to call co-defendant Murphy as a witness. Thereafter, **[**9]** jury **[***4]** selection began. Before jury selection was complete, Petitioner again moved for dismissal based on a speedy-trial violation. Following jury selection, Petitioner pled guilty.

II. STANDARD OF REVIEW

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HN1[↑] Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas court may grant an application for a writ of habeas corpus on behalf of a state prisoner only where a claim adjudicated on the merits in state court:

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

28 U.S.C. § 2254(d) (1996).

In *Maples I*, we determined that our review of Maples's ineffective-assistance-of-counsel claim was not circumscribed by the state court's conclusion - as normally required by AEDPA - because the state court had not adjudicated the matter on the merits. *See Maples I*, 340 F.3d at 437 (citing *Wiggins v. Smith*, 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003)). **[**10]** We therefore reviewed the legal issue de novo.

This case is again before us on a charge of ineffective assistance of counsel, and for the same reasons as in *Maples I*, we are not bound by any state court conclusion. We therefore review Maples's claim de novo. *See Smith v. Hofbauer*, 312 F.3d 809 (6th Cir. 2003) ***HN2***[↑] ("Whether [Petitioner] was deprived of his right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo.") (citation omitted).

HN3[↑] In determining whether Petitioner was prejudiced by his counsel's ineffective assistance, we review the merits of his underlying claim. *See Maples I*, 340 F.3d at 440. ***HN4***[↑] In determining the merits of a speedy trial claim, we review questions of law de novo, and questions of fact under the clearly erroneous standard. *United States v. Schreane*, 331 F.3d 548, 553 (6th Cir. 2003).

III. ANALYSIS

HN5[↑] The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial." U.S. Const. amend. VI. The right to a speedy trial applies to the states through the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967). **[**11]**

In *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972), ***HN6***[↑] the Supreme Court articulated four factors that must be considered in determining whether the right to a speedy trial has been violated: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant. No one of these factors constitutes a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

A. Length of the Delay

HN7[↑] The length of the delay is a threshold requirement. If the length of the delay is not "uncommonly long," then judicial examination ends. *Doggett v. United States*, 505 U.S. 647, 652, 120 L. Ed. 2d 520, 112 S. Ct. 2686 **[*1026]** (1992). The length of the delay is measured from the date of the indictment or the date of the arrest, whichever is earlier. *United States v. Marion*, 404 U.S. 307, 320, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); *Redd v. Sowders*, 809 F.2d 1266, 1269 **[***5]** (6th Cir. 1987). **[**12]** A delay approaching one year is presumptively prejudicial and triggers application of the remaining three factors.

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Doggett, 505 U.S. at 652 n.1. Here, Petitioner suffered a delay of approximately twenty-five (25) months between his arrest and the date of his trial and guilty plea. The Respondent does not dispute that this period meets the "uncommonly long" standard, particularly given the uncomplicated nature of the narcotics charge. We therefore proceed to examine the other three factors.

B. Reason for the Delay

HN8[] The second factor that *Barker* advises us to consider is the reason for the delay. In considering this factor, we weigh some reasons more heavily than others. For instance, government delays motivated by bad faith, harassment, or attempts to seek a tactical advantage weigh heavily against the government, while "more neutral" reasons such as negligence or overcrowded dockets weigh against the state less heavily. *United States v. Schreane*, 331 F.3d 548, 553-54 (6th Cir. 2003) (citing cases). The purpose of the inquiry is to determine "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett*, 505 U.S. at 651. **[**13]**

Here, Respondent Stegall contends that, of the 25-month delay, one-half was attributable to the Petitioner. Respondent further contends that the rest of the period, while not attributable to Petitioner, is also not attributable to the state, because the delay was motivated neither by bad faith nor harassment. Thus, at most, contends Respondent, this factor should be "neutral," weighing in neither party's favor. *See United States v. Schreane*, 331 F.3d 548, 554-55 (6th Cir. 2003) (finding that each of two roughly equal time periods favored a different party).

We are unconvinced by Respondent's arguments. The delay in the first 9-10 months is only minimally attributed to Maples, instead largely caused by a combination of co-defendant's requests for continuances and the Michigan trial court's unjustified delay in ruling on the entrapment motion. The remaining period is entirely attributable to the court's unexplained continuances.

The Respondent argues that Petitioner is accountable for the initial 9- to 10-month delay, including the time it took the court to adjudicate the co-defendant's entrapment motion, because Petitioner eventually joined in co-defendant Murphy's **[**14]** entrapment defense. However, co-defendant Murphy did not actually file his motion to dismiss based on entrapment until February 3, 1994. Although in October 1993, the court was aware that co-defendant Murphy intended to present an entrapment defense, the docket clearly reflects that the court did not adjudicate the motion until after it was filed. Moreover, once the motion was filed, the trial court had ample time to rule before Maples joined, and his joining added nothing substantive to the issues at stake. Co-defendant Murphy filed the entrapment motion on February 3, 1994, and a hearing was begun the next day (also scheduled as the trial date). The Petitioner only joined the motion on April 29, 1994, almost three months after the motion was filed. Yet the Michigan trial court took until July 18, 1994 to decide the motion. At most, Petitioner can be held responsible for the 2 1/2-month period between April 29, 1994 and July 18, 1994. [3]

[15]** **[*1027]** While in some cases the adjudication of pretrial motions justifies delay, in this case, there were very few motions, and nothing indicates that Defendant joined or filed them for purposes of delay. *Compare United*

[3] We do not decide under what circumstances one defendant who delays joining a codefendant's motion should be held responsible for the full amount of time taken in ruling on the motion. We leave that issue for another day. In this case, however, we find the delay substantial enough to attribute only the latter portion to Petitioner.

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States v. Schlei, 122 F.3d 944, 987 (11th Cir. 1997) (over 100 pretrial motions filed) and *United States v. O'Dell*, 247 F.3d 655, 668 (6th Cir. 2001) (parties' motions "all submitted to some strategic end"). Indeed, in the midst of the entrapment adjudication, Petitioner moved for personal bond, thus asserting his speedy trial right. This assertion, although also analyzed [***6] under a separate inquiry, functions as a factor in his favor during this time period. *See Schreane*, 331 F.3d at 555 (counting defendant's failure to assert speedy trial right a reason weighing against the defendant in balancing the second factor).

The Respondent further suggests that any delay caused by the co-defendant, including delays related to the adjudication of the entrapment motion, should be weighed against the Petitioner and in the state's favor. In contending that the Petitioner should be saddled with the delay occasioned by his co-defendant, [**16] Respondent relies on cases interpreting the Speedy Trial Act and argues that reasonable delay attributable to the co-defendant should be attributable to Petitioner. *See* ***HN9***[↑] 18 U.S.C. § 3161(h)(7) (holding excludable "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted"); *United States v. Cope*, 312 F.3d 757, 776-77 (6th Cir. 2002) (stating that, under Speedy Trial Act, one speedy trial clock governs co-defendants, so "the excludable delay of one defendant is ascribed to that of all of his codefendants") (citing *United States v. Culpepper*, 898 F.2d 65, 66-67 (6th Cir. 1990)).

We have found no cases that state definitively that the same principle should be applied in the context of a *constitutional* speedy trial claim. [4] A few cases addressing both the statutory and the constitutional claim simply seem to take for granted, with no forceful discussion, that the co-defendant's delays implicate the defendant in the constitutional analysis as well. *See, e.g., United States v. Vasquez*, 918 F.2d 329 (2d Cir. 1990) [**17] (after in-depth analysis of statutory requirement that defendant must move to sever before co-defendant's delays will be found unreasonable, concluding perfunctorily that reason for delay favored government in constitutional analysis, because "most of the 26 months at issue was consumed by consideration of defendants' various pretrial motions"); *United States v. Fuller*, 942 F.2d 454 (8th Cir. 1991) (failing to separately address constitutional claim after finding, under statutory analysis, that "any delay caused in this particular case was due in fact to the co-defendants' various motions before trial and was reasonable"); *Smith v. Richards*, 1992 U.S. App. LEXIS 3043 (7th Cir. 1992) (implicitly applying state statutory requirement that a defendant object to co-defendant's requests for continuance, in rejecting petitioner's [*1028] argument, under constitutional analysis, that continuances were not properly attributed to him).

[**18] Although the above-cited cases do contain a measure of logic, contrary authority in this circuit suggests a defendant is not necessarily responsible for his co-defendant's decisions. In *United States v. Holyfield*, 802 F.2d 846 (6th Cir. 1986), we concluded ***HN10***[↑] that under the *statutory* analysis, a co-defendant's interlocutory appeal disadvantaged the defendants, as "an

[4] The district court cited to *United States v. DeJesus*, 887 F.2d 114, 116 n.1 (6th Cir. 1989), reasoning that the statutory requirement extends to the constitutional analysis, because "a claim which passes muster under the Speedy Trial Act generally satisfies the requirements of the Sixth Amendment right to a speedy trial." J.A. 189. This general reasoning does not convince us that every requirement of the Speedy Trial Act applies as well to the constitutional analysis. Moreover, there is no indication here that the delay would in fact survive the Speedy Trial Act.

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exclusion applicable to one defendant applies to all co-defendants." *Id.* at 847 (quoting *United States v. Edwards*, 201 U.S. App. D.C. 1, 627 F.2d 460, 461 (D.C. Cir. 1980)). In analyzing the *constitutional* claim, however, we stated:

> The second [*Barker*] factor, reason for the delay, does, however, favor the Holyfields. The delay was caused by a codefendant's appeal and was not induced by them nor did it involve them. They could have been tried soon after the first indictment. The government, however, chose to wait.

Id. at 848; *see also United States v. Graham*, 128 F.3d 372, 374 (6th Cir. 1997) (faulting district court for delay due to appointing co-defendant's counsel, and holding government responsible for co-defendant's [**19] intervening state trial).

[***7] In the context of Petitioner Maples's case, we find the latter cases more persuasive. We decline to require Petitioner to carry the full burden of his co-defendant's delays, when the co-defendant, who was out on bond, had less incentive than Petitioner to resolve the case. In addition, nothing suggests that Petitioner induced or had anything to do with co-defendant's decisions to delay. Indeed, Petitioner effectively objected to the delay by asserting his speedy trial right before he even joined the entrapment motion.

HN11[↑] Ultimately, as in *Graham*, the responsibility for countenancing the co-defendant's delays in this case must rest with the trial court. For instance, the record reflects that co-defendant Murphy did not file his brief in support of the entrapment defense until June 2, 1994, the eve of the scheduled trial date, whereas Petitioner filed his brief on April 29, 1994. Particularly as Petitioner had moved for release from incarceration, the trial court should have been vigilant about the co-defendant's dilatory filing. As in *Graham*, the Michigan trial court "failed to assert itself in an attempt to move the process along." *United States v. Graham*, 128 F.3d 372, 373 (6th Cir. 1997). [**20] Considering the circumstances, we find that very little of the period before July 1994, including periods caused by co-defendant's delays, should be imputed to Petitioner. At most, Petitioner should be held responsible for three months of the delay. [5]

Once the entrapment motion was adjudicated, [**21] the ensuing delays were attributable to the state. The district court faulted Petitioner for the July 29, 1994 continuance, but Respondent does not dispute Petitioner's contention that this continuance was actually due to the state's failure to bring Petitioner in from custody. The November 1994 and December 1994 trial dates were continued at the request [*1029] of co-defendant Murphy. These delays cannot fairly be attributed to Petitioner Maples. Maples has produced evidence that he asked his counsel to raise a speedy trial issue at the November 18, 1994, proceeding. Also, Petitioner has produced evidence tending to show that he had asked his counsel to file for separate trials, which his counsel did not do. Given these indicia of discontent, we do not hold Petitioner accountable for the co-defendant's delays in November 1994 and December 1994. *See United States v. Holyfield*, 802 F.2d 846, 846-47 (6th Cir. 1986) (declining to attribute delay due to co-defendant's appeal to defendants).

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[5] We believe this determination to be circumstances-dependent and we do not find that delay associated with a co-defendant's motion to continue can never count against a defendant. In some circumstances, a defendant who late joins a co-defendant's motion for continuance could be found responsible for the time delay before he joined the motion. In other circumstances, not. ***HN12***[↑] In deciding whether delay caused by a co-defendant's motion should count, we will examine whether the defendant objected to the continuance, whether the defendant moved the trial court to comply with speedy trial requirements, whether the defendant moved for release, and whether the defendant's position and interests are aligned with the co-defendant.

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Finally, once Petitioner sought new counsel and moved for dismissal on speedy trial grounds, he could not be blamed for further delay. The court adjourned the matter several times during the spring [**22] of 1995, often without giving a reason. *HN13*[↑] Although "negligence and overcrowded dockets" do not weigh as heavily against the state as does bad faith, the government must ultimately bear the responsibility for such circumstances. *See Barker*, 407 U.S. at 531. The 14-month period between July 1994 and September 1995, then, is attributable to the state.

While Petitioner may be held responsible for some minimal part of the nine-month period before July 1994, when the twenty-five months are considered as a whole, the reason-for-delay factor tips strongly in Petitioner's favor.

C. Petitioner's Assertion of His Speedy Trial Rights

The third factor is Petitioner's assertion of his speedy trial rights. *HN14*[↑] A "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the [***8] defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. The Sixth Circuit recognizes a request for bail as the functional equivalent of the request for a speedy trial. *Redd v. Sowders*, 809 F.2d 1266, 1271 (6th Cir. 1987); *Cain v. Smith*, 686 F.2d 374, 384 (6th Cir. 1982).

Petitioner [**23] points to several instances in which he made clear his interest in a speedy trial. On April 8, 1994, and again on April 29, 1994, Petitioner moved for release on bond. In those motions, he cited a violation of Michigan's 180-day rule and asserted that the delays in bringing the case to trial were not attributable to him. [6] Next, on December 24, 1994, Petitioner wrote a pro se letter to the court, complaining that the 180-day rule had not been complied with after his re-incarceration and complaining that his attorney had not raised the issue in November 1994. In addition to the letter, on December 23, 1994, the Petitioner filed a pro se motion to dismiss, with brief in support, for violation of his speedy trial right. Finally, on August 22, 1995, and September 20, 1995, Petitioner moved again for dismissal on grounds of speedy trial violation.

[**24] Respondent argues that the motion for release on bond should not be considered an assertion of the speedy trial right, because it did not seek an advanced trial date, and in addition, was negated by Petitioner's joining the entrapment motion. Respondent further argues that the December 1994/January 1995 communications came five months after the entrapment motion was adjudicated and therefore was untimely.

[*1030] We disagree that these failings undermine Petitioner's assertions. As noted, this circuit has recognized a request for bail as an assertion of a speedy trial right. *Redd v. Sowders*, 809 F.2d 1266, 1271 (6th Cir. 1987) (*HN15*[↑] "[A] request for reduction of bail is equivalent to a request for a speedy trial."); *Cain v. Smith*, 686 F.2d 374, 384 (6th Cir. 1982). In this case, in his bond motions, Petitioner cited specifically to the Michigan rule requiring that the accused be brought to trial. As to the January 1995 motion to dismiss, Petitioner calculated his 180 days starting from May 23, 1994, when he was incarcerated for his parole violation, and determined that the period would be complete on November 22, 1994. According to his letter to the court, [**25] he asked counsel to raise the issue at the November 18, 1994, court proceeding.

[6] The trial court granted Maples's April 29, 1994 motion, but he was sent from Macomb County Jail to St. Clair County Jail to await a hearing on a charge of violating probation. The hearing was held on May 9, 1994, and he was re-incarcerated on May 23, 1994. Petitioner was released from prison on January 10, 1995.

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Just over a month later, he filed communication with the trial court. Considering the short gap of only one month, Petitioner was not untimely in filing the motion to dismiss at the beginning of January 1995.

Indeed, given how vigorously Petitioner asserted his right over the course of months from April 1994 to September 1995, we find that this factor weighs strongly in Petitioner's favor.

D. Prejudice

The fourth factor to be analyzed is whether Michigan's unreasonable delay caused prejudice to the defendant. Petitioner first argues that he need not show any actual prejudice, because the delay in his case was presumptively prejudicial. We note that ***HN16***[↑] "presumptively prejudicial" for purposes of triggering the *Barker* four-factor inquiry is different from "presumptively prejudicial" for purposes of assessing the prejudice prong. The first only requires that the delay have approached one year. The latter concerns whether the delay was excessive.

1. Presumptive Prejudice

HN17[↑] The Supreme Court has stated that the accused need not point to "affirmative proof of particularized prejudice" in every case. *Doggett v. United States*, 505 U.S. 647, 655, 120 L. Ed. 2d 520, 112 S. Ct. 2686 (1992). **[**26]** Rather, **[***9]** stated the Court, "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.*

HN18[↑] Presumption of prejudice is not automatically triggered, however, in every case in which there is a delay. *See United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000). When the accused is unable to articulate the harm caused by the delay, the reason for the delay helps determine whether the delay was presumptively prejudicial. For example, where, as here, the delay was due to state negligence,

> the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial. . . . [However,] to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice.

Doggett, 505 U.S. at 657 (citation omitted); *see also id.* at 655-56 **[**27]** (***HN19***[↑] "[Presumptive prejudice] is part of the mix of relevant facts, and its importance increases with the length of the delay."). In *Doggett*, the Court found sufficiently excessive a delay "six times as long as that generally sufficient to trigger judicial review." *Id.* at 658. In other cases, delays have been similarly long. *See United States v. Graham*, 128 F.3d 372, 376 (6th Cir. 1997) (8 **[*1031]** years); *United States v. Brown*, 169 F.3d 344, 351 (6th Cir. 1999) (5 1/2 years).

HN20[↑] In the Sixth Circuit, no presumption has been found where delay due to government fault is considerably less than that in *Graham* or in *Brown*, or where the government can persuasively rebut the presumption by showing that the delay did not impair the defendant's defense. *See, e.g., Darnell v. Berry,* 1999 U.S. App. LEXIS 15625 (6th Cir. 1999) (unpublished decision) (18-month delay not presumptively prejudicial); *United States v. Cook*, No. 98-5457, 1999 U.S. App. LEXIS 10645, at *3 (6th Cir. 1999) (unpublished decision) (16-month period attributable to government not presumptively prejudicial); *United States v. Love*, 1997 U.S. App. LEXIS 27928 (6th Cir. 1997) **[**28]**

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(unpublished decision) (17-19 month delay attributable to government - out of total 23 or 32 months - was significant but sufficiently rebutted because government proved delay did not impair defendant's defense); *United States v. Mundt*, 29 F.3d 233 (6th Cir. 1994) (although government responsible for one-half of 3 1/2-year delay, government's diligent efforts to locate and prosecute defendant favored government); *see also United States v. Mulligan*, 520 F.2d 1327 (6th Cir. 1975) (25-month total delay did not give rise to speedy trial violation where only part of the total delay was due to government, and defendant had not timely asserted his right); *United States v. Freeding*, 663 F.2d 1073 (6th Cir. 1981) (unpublished decision) (upholding denial of speedy trial claim where delay was 21 months); *Dean v. Marshall*, No. 88-3515, 880 F.2d 414, 1989 U.S. App. LEXIS 10755 (6th Cir. 1989) (unpublished decision) (in pre-*Doggett* case, requiring actual prejudice even where delay was 5 years); *United States v. Love*, 1999 U.S. App. LEXIS 2053 (6th Cir. 1999) (unpublished decision) (discussing only actual prejudice, **[**29]** even where delay was 21 months).

Here, Petitioner suffered a delay of 25 months, 22-24 months of which can be attributed to the state. Although this period is longer than that in the above-cited cases, we need not determine whether the delay here is presumptively prejudicial. We find the fourth factor favors Petitioner, because he has produced sufficient evidence to show that he suffered actual prejudice.

2. Actual Prejudice

HN21[↑] The Supreme Court has identified three defense interests a court should consider when determining actual prejudice in speedy trial cases: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; (3) the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. **[***10]** "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. If witnesses die or disappear during a delay, the prejudice is obvious." *Id. But see Doggett*, 505 U.S. at 659-62 (Thomas, J., dissenting) (noting contrary precedent stating that the *liberty* interests - and not the concern with impairment of the defense - are at the core of **[**30]** the speedy trial right).

In this case, Petitioner appears to have suffered all three forms of prejudice. As to the first, Petitioner was subject to pretrial incarceration twice: between August 1993 and May 1994, and again between May 1994 and January 1995. The district court suggests that the latter period was not particularly oppressive, since Petitioner served that sentence due to a prior parole violation and not because he was awaiting trial on the narcotics charge. Citing Michigan law, the district court wrote, "The sentence in this narcotics case would not have run concurrently to the sentence he was serving for another felony even if Petitioner had been tried and sentenced earlier." J.A. 193.

[*1032] As Petitioner points out, however, the relevant Michigan provision stated that ***HN22***[↑] a consecutive sentence would only have been required if the first term of imprisonment was for "the *commission* of another *felony*." Mich. Comp. Laws § 333.7401(3) (1995) (emphasis added). Here, Petitioner was in custody on a probation violation for receiving and concealing stolen property, not for commission of another felony. Thus, he was eligible to receive a concurrent sentence. **[**31]** We find that the incarceration harmed his liberty interest.

As to the second defense interest: Petitioner's repeated invocation of Michigan's 180-rule,

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requiring that the accused be tried within 180 days, suggests that he suffered "anxiety and concern." *See, e.g.,* David Maples, Letter to the Trial Court, December 24, 1994, J.A. 156; *see Barker*, 407 U.S. at 531 (***HN23***[↑] "The frequency with which the defendant asserts his speedy trial right is probative indication of the prejudice he is suffering."). In another letter to the court prior to sentencing, Maples stated:

> I have lost everything of any value, monetary, and all personal relationships regarding my Ex and my children. This has put more than a little stress and strain on all concerned. My mother, my wife, my children, and myself! I don't know how much I am to suffer for an offense I'm only guilty of being ignorant of Mr. Murphy's business adventures!!!

J.A. 108. It is clear that Petitioner suffered "anxiety and concern."

Finally, the third defense interest requires examination of impairment to Petitioner's defense. Petitioner alleges that two key witnesses were not available to testify, due to the **[**32]** delay in bringing him to trial: co-defendant James Murphy, and Larry Roberts. Roberts's case was dismissed at the preliminary examination for lack of evidence, and by September 1995, defense counsel could not locate him. Co-defendant Murphy was unavailable to testify because his plea agreement with the government required that he not testify on behalf of Petitioner. We discuss each below.

a. Inability To Locate Roberts

Larry Roberts was unavailable to testify because in September 1995 defense counsel was unable to locate and contact him. The value of Roberts's testimony - and thus how much his unavailability hurt Petitioner - is strongly disputed. In an affidavit dated January 27, 2004, Petitioner avers that Roberts visited him while Petitioner was at Macomb Regional Facility and told Petitioner he would testify on Petitioner's behalf. The record also includes a letter, written by co-defendant Murphy on August 9, 1993, indicating that Roberts was present at the scene and could attest to Petitioner's actions:

> [***11]
>
> I made arrangements to be met by my friend Dave Maples to discuss some upcoming roofing work we could both be involved in and to loan him some money so **[**33]** he could purchase a work truck. It is my understanding that [Maples] arranged for his friend Larry Roberts to give him a ride to the bar with the promise of gas money and a couple drinks. I now state that neither Roberts nor Maples gave me any controlled substance, nor did they aid me in the delivery of such to any other individual.

James Murphy, Letter, Aug. 9, 1993, J.A. 90; *see also* David Maples, Letter to Court Prior to Sentencing, J.A. 106-07 (describing incident, including interaction with Roberts).

Respondent claims that Roberts could not have provided any exculpatory testimony. Respondent states that when both men were in the police station after arrest, Roberts called out to Petitioner Maples, **[*1033]** saying, "Tell them I had nothing to do with it." Maples, purports Respondent, replied, "He didn't." Respondent's Br. at 12 (citing Pl. Br. in Opp. to Mot. to Dismiss, J.A. 168). From this, Respondent suggests, it is clear that Roberts never denied any wrongdoing by Petitioner, only as to himself. Respondent further suggests that we should infer from this statement that Petitioner must have been involved in the wrongdoing, otherwise he could not have known that Roberts **[**34]** was not involved. Respondent also argues - and the district court agreed - that Roberts's testimony was not guaranteed: Roberts' attorney

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apparently told the prosecutor that he would advise his client against testifying.

Respondent has provided no documentation of Roberts's purported statement at the police station, other than the state's own brief in opposition to the April 1994 motion for release. Petitioner, for his part, strongly disputes the state's version of the facts. In his January 2004 affidavit, he denies having responded, "He didn't." He avers that, instead, he stated, "Shut up," in response to Roberts's request.

Whether Petitioner said, "He didn't," or "Shut up," from this limited record, we decline to infer Petitioner's culpability or speculate as to what a jury might find. Because Roberts was apparently present at the scene, and was in contact with Petitioner at around the time of the crime, he could very well have provided beneficial testimony. *Cf. Redd v. Sowders*, 809 F.2d 1266, 1272 (6th Cir. 1987) ("Appellee was placed in a disadavantaged position in attempting to locate [favorable witnesses] to secure this testimony thirty-two months after his **[**35]** arrest . . . Appellee would have had a much better chance of locating the witnesses in 1981 than in 1983.").

While Petitioner has not presented the strongest evidence that Roberts would have appeared to testify on his behalf (Petitioner's affidavit was signed in January 2004), Respondent's evidence to the contrary is even weaker. The district court accorded significant weight to a letter, written by Roberts's attorney, stating that he would advise Roberts not to testify on behalf of Petitioner. As with Roberts's post-arrest statement, this letter is not before us. More importantly, however, such a communication provides limited probative value in determining whether Roberts would or would not have testified. As the state itself pointed out, Petitioner, too, was advised by his counsel not to testify on behalf of his co-defendant (in the entrapment hearing), yet he insisted on testifying anyway. *See* State's Resp. to Def. Mot. For Imm. Release, J.A. 141.

Based on the record before us, we think it sufficiently likely that Roberts would have testified on Petitioner's behalf that Petitioner's inability to contact Roberts in September 1995 prejudiced him.

b. Unavailability of Co-defendant **[**36]** James Murphy

In addition, Petitioner was prejudiced by the unavailability of co-defendant Murphy to testify at his trial. As mentioned, co-defendant Murphy was unavailable because his plea agreement required that he not testify on behalf of Maples: "Part of the [plea] agreement consisted of my not **[***12]** testifying at the criminal trial of, David Maples, in the above mentioned case. That if I choose [sic] to testify at that trial I would be facing a more severe sentence for doing so." J.A. 92. It is undisputed that Murphy's unavailability hurt Petitioner, as Murphy's testimony would have absolved Petitioner of any guilt. *See* Respondent's Br. 13 ("It may very well be that Murphy pleading guilty hurt Petitioner's chances at trial."); James Murphy, Letter, August 9, 1993 (stating facts supporting Petitioner's innocence - "I now state that neither Roberts nor Maples **[*1034]** gave me any controlled substance, nor did they aid me in the delivery of such to any other individual.").

Indeed, Murphy's plea condition may have violated Petitioner's right to compulsory process. We have previously stated that ***HN24***[↑] "governmental conduct which amounts to a substantial interference with a witness's **[**37]** free and unhampered determination to testify will violate due process." *United States v. Foster*, 128 F.3d 949, 953 (6th Cir. 1997). While a prosecutor can warn a potential defense witness about

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the consequences of perjury, a prosecutor cannot threaten to reinstate previous charges against that witness. *See, e.g., United States v Henricksen*, 564 F.2d 197 (5th Cir. 1977) (holding government violated due process when it told the co-defendant that his plea agreement would be void if he testified for a co-defendant); *United States v. Vavages*, 151 F.3d 1185, 1194 (9th Cir. 1998) (defendants' right to compulsory process violated when prosecutor threatened to prosecute defendant's wife for perjury or withdraw her plea agreement if she testified); *United States v. Golding*, 168 F.3d 700, 702-04 (4th Cir. 1999) (defendant's right to compulsory process violated when prosecutor threatened to initiate federal marijuana possession charges against defendant's wife if she testified on defendant's behalf). Petitioner was prepared to go to trial long before co-defendant Murphy entered a plea - and plea negotiations - prohibiting him **[**38]** from testifying on behalf of Petitioner. In addition, Murphy gave testimony that favored Petitioner at the entrapment hearing on February 24, 1994. Had the state tried Petitioner in a timely manner, blocking Murphy's testimony would likely have been no more imperative to the state than it had been in February 1994.

We therefore find that co-defendant Murphy's unavailability prejudiced Petitioner. Because we find that Petitioner was prejudiced both by the offense to his liberty interests as well as by impairment to his defense, this factor weighs in his favor.

To sum up our analysis under *Barker*, we find that (1) the delay was uncommonly long; (2) the reason for the delay weighs in favor of the Petitioner; (3) Petitioner's timely, repeated, and vigorous assertion of his speedy trial right weighs strongly in his favor; and (4) Petitioner was prejudiced by the delay. Considering all the factors together, we find that Petitioner was denied his right to a speedy trial.

Because we find that Petitioner's speedy trial right has merit, we find, under the analysis mandated by *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985), that he was indeed prejudiced by **[**39]** his counsel's deficient performance in advising him that he could simultaneously take the guilty plea and retain his speedy trial claim for appeal. *See Maples I,* 340 F.3d at 440-41. We thus find that Petitioner Maples suffered a Sixth Amendment violation of his right to effective assistance of counsel.

CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's decision and **REMAND** this matter to the district court with directions to issue the Writ of Habeas Corpus and for further proceedings consistent with this opinion.

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Exhibit B

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Maples v. Stegall

United States Court of Appeals for the Sixth Circuit

June 18, 2003, Submitted ; August 19, 2003, Decided ; August 19, 2003, Filed

No. 01-2727

Reporter
340 F.3d 433 *; 2003 U.S. App. LEXIS 16902 **; 2003 FED App. 0296P (6th Cir.) ***

DAVID MAPLES, Petitioner-Appellant, v. JIMMY STEGALL, Respondent-Appellee.

Subsequent History: Appeal after remand at, Remanded by Maples v. Stegall, 2005 U.S. App. LEXIS 22996 (6th Cir.) (6th Cir. Mich., 2005)

Prior History: [**1] Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 00-71718. Victoria A. Roberts, District Judge.
Maples v. Stegall, 175 F. Supp. 2d 918, 2001 U.S. Dist. LEXIS 19812 (E.D. Mich., 2001)

Disposition: VACATED AND REMANDED.

Core Terms

state court, prison, merits, days, guilty plea, ineffective-assistance-of-counsel, procedural default, district court, speedy-trial, Appeals, default, habeas petition, ineffective, assess, mailing, corpus, speedy, application for leave, federal court, external, novo

Case Summary

Procedural Posture
Petitioner inmate pled guilty in Michigan state court to one count of distributing cocaine. After the Michigan court system denied him any relief, either on direct appeal or in post-conviction proceedings, the inmate petitioned for federal habeas corpus relief pursuant to 28 U.S.C.S. § 2254. The United States District Court for the Eastern District of Michigan at Detroit denied the inmate's petition. The inmate appealed.

Overview
The district court granted the inmate a certificate of appealability on whether an error by the inmate's attorney denied him his Sixth Amendment right to assistance of counsel. The inmate pled guilty only after his attorney assured him, erroneously, that he would still be able to appeal an alleged violation of his speedy-trial rights. The Michigan Court of Appeals held on direct appeal that the inmate's plea agreement precluded him from subsequently raising that issue. The Michigan Supreme Court declined to review that decision because the inmate's application for review was untimely. The inmate, thus, had procedurally defaulted his ineffective assistance claim. However, "cause" excused that default; the inmate first submitted his application for review to the prison for mailing five days before the state's filing deadline, early enough for it to have been timely delivered in the normal course of events. Respondent custodian did not dispute that the default prejudiced the inmate. The inmate's attorney's error in misadvising the inmate clearly fell below an objective standard of reasonableness, but whether the inmate's speedy-trial rights were in fact violated remained unresolved.

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Outcome

The appeals court vacated the judgment of the district court and remanded the case with directions that the court assess the merits of defendant's speedy-trial argument as part of his ineffective-assistance-of-counsel claim.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

Criminal Law & Procedure > ... > Appeals > Standards of Review > General Overview

HN1[] The United States Court of Appeals for the Sixth Circuit applies de novo review to the decision of the district court in a habeas corpus proceeding.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN2[] 28 U.S.C.S. § 2254(d) provides in part that a federal court may grant a writ of habeas corpus with respect to a state-court judgment only where 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.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN3[] 28 U.S.C.S. § 2254(d) by its own terms is applicable only to habeas claims that were adjudicated on the merits in state court. Where the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under Antiterrorism and Effective Death Penalty Act of 1996, codified primarily at 28 U.S.C.S. § 2254(d), does not apply. Instead, the United States Court of Appeals for the Sixth Circuit reviews questions of law and mixed questions of law and fact de novo.

Governments > Courts > Judicial Precedent

HN4[] A panel of the United States Court of Appeals for the Sixth Circuit cannot overrule the decision of another panel.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN5[] Habeas review is not circumscribed by a state court conclusion with respect to prejudice where neither of the state courts below reached this prong of the Strickland analysis.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Governments > Courts > Judicial Precedent

HN6[] A prior decision of the United States Court of Appeals for the Sixth Circuit remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or the appeals court sitting en banc overrules the prior decision.

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Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > General Overview

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

HN7[] The right to the effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. A petitioner must satisfy a two-prong test to prevail on an ineffective-assistance-of-counsel claim. First, the petitioner must show that the performance of counsel fell "below an objective standard of reasonableness." In so doing, the petitioner must rebut the presumption that counsel's challenged action might be considered sound trial strategy. The second prong requires that the defendant show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Criminal Law & Procedure > ... > Procedural Defenses > Exhaustion of Remedies > General Overview

Criminal Law & Procedure > ... > Procedural Defenses > Exhaustion of Remedies > Satisfaction of Exhaustion

HN8[] Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. A habeas petitioner has not exhausted his claims in state court unless he has "properly presented" his claims to a state court of last resort.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN9[] The United States Court of Appeals for the Sixth Circuit will consider the merits of a procedurally defaulted claim in a habeas petition where the petitioner shows that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case. When a habeas petitioner fails to obtain consideration of a claim by a state court, either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review. A petitioner may avoid this procedural default only by showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General

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Overview

HN10[] "Cause" under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him; some objective factor external to the defense that impeded efforts to comply with the state's procedural rule.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN11[] Regarding the cause and prejudice standard for overcoming a procedural default, prison officials' inaction resulting in an application for leave to appeal being denied because it was filed in an untimely fashion presents an objective factor external to the defense that impeded efforts to comply with a state's procedural rule.

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

Criminal Law & Procedure > ... > Order & Timing of Petitions > Time Limitations > General Overview

HN12[] The "prison mailbox rule" established by Houston v. Lack is not binding on the State of Michigan. The Houston decision is not binding on state courts.

Civil Procedure > Parties > Pro Se Litigants > General Overview

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN13[] Where a pro se prisoner attempts to deliver his petition for mailing in sufficient time for it to arrive timely in the normal course of events, the "prison mailbox rule" is sufficient to excuse a procedural default based upon a late filing.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN14[] A federal court should assess the merits of a state habeas petitioner's procedurally defaulted claim when the petitioner has demonstrated cause and prejudice that excuses the default.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Defenses > General Overview

HN15[] In order to establish prejudice the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. However, in many guilty plea cases the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. The court must always analyze the substance of the petitioner's underlying claim, and this inquiry will be dispositive to the resolution of the habeas action "in many guilty plea cases."

Counsel: ON BRIEF: Brad H. Beaver,

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OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellee.

David A. Maples, New Haven, Michigan, Pro se.

Judges: Before: BOGGS and GILMAN, Circuit Judges; MARBLEY, District Judge. * GILMAN, J., delivered the opinion of the court, in which MARBLEY, D. J., joined. BOGGS, J., delivered a separate opinion concurring in part and dissenting in part.

Opinion by: RONALD LEE GILMAN

Opinion

[***2] [*434] RONALD LEE GILMAN, Circuit Judge. David Maples pled guilty in Michigan state court to one count of distributing cocaine. He did so only after receiving assurances from his attorney that he would subsequently be able to appeal an alleged violation of his speedy-trial rights. That advice turned out to be erroneous. The Michigan Court of Appeals held on direct appeal that Maples's plea agreement clearly precluded him from subsequently raising this issue.

After the Michigan [**2] court system denied him any relief, either on direct appeal or in post-conviction proceedings, Maples filed a petition for habeas corpus in the district court below. He raised, among other alleged errors, an ineffective-assistance-of-counsel claim. The district court denied the petition, but granted Maples a certificate of appealability solely with respect to the issue of ineffective assistance of counsel. For the reasons set forth below, we **VACATE** the judgment of the district court and **REMAND** the case with directions that the court assess the merits of Maples's speedy-trial argument as part of his ineffective-assistance-of-counsel claim.

[***3] I. BACKGROUND

Maples was charged in Michigan state court with delivery of more than 50 grams of cocaine and with being part of a conspiracy to so deliver, in violation of Michigan state law. He filed motions to dismiss the charges on the grounds that he was entrapped and that the state's 180-day speedy-trial rule was violated. The court denied both motions.

[*435] On the day scheduled for trial, Maples entered into a plea agreement, pursuant to which he pled guilty to the delivery charge and the state moved to dismiss the [**3] conspiracy charge. At the plea colloquy, the following exchange transpired between Daniel Feinberg, Maples's trial counsel, James Sullivan, the Assistant District Attorney, and the court:

> Feinberg: Also, your honor, I believe since it is a jurisdictional matter, this wouldn't affect [Maples's] rights preserved on appeal, 180 days and all that . . . .
>
> The Court: I am not going to make any comments on the 180-day rule. I can't remember whether it does or not. Do you recall?
>
> Sullivan: I am sure . . . I think he waived it.
>
> The Court: I can't comment on that. . . . I cannot tell you. You are going to have to advise your client in that regard on that; whether it is waived or not. I cannot make any comments on that. Frankly, I don't recall.

Maples subsequently accepted the plea agreement. He did so because his counsel advised him that the plea agreement would not preclude him from arguing on appeal that his speedy-trial rights were violated.

Maples appealed his conviction to the Michigan Court of Appeals, claiming that the trial court erred in denying his motion to dismiss, which was based in part upon the

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

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alleged violation of his right to a speedy trial. [**4] In an unpublished per [***4] curiam opinion, the state appellate court affirmed the trial court's ruling. It held that "Defendant's unconditional guilty plea waives review of the claimed violation of the 180-day rule . . . and his claimed violation of his constitutional and statutory right to a speedy trial . . . ."

Proceeding pro se, Maples then filed an application for leave to appeal to the Michigan Supreme Court. He raised the same claims that he had raised before the Court of Appeals, as well as a claim that his trial counsel was constitutionally ineffective for failing to apprise Maples that he could not appeal the speedy-trial issue after accepting the guilty plea. The Michigan Supreme Court denied leave to appeal in a summary order.

Maples subsequently filed a motion for relief from judgment with the state trial court. He again raised the ineffective-assistance-of-counsel claim, and again the trial court denied relief. Maples then sought leave to appeal the trial court's ruling to the Michigan Court of Appeals, which denied the application on October 21, 1999.

Fifty-one days later, on December 11, 1999, Maples completed his application for leave to appeal to the Michigan [**5] Supreme Court. The application included a claim that his trial counsel was constitutionally ineffective. That day, Maples called the prison mailroom, per prison policy, to ascertain the cost of mailing his application. He was told to call back two days later.

On December 13, 1999, Maples was quoted the price to send his application. Although the record is unclear on this issue, it appears that Maples delivered his application to the prison mailroom either that day or the very next day, 53 or 54 days after the Michigan Court of Appeals denied leave to appeal.

The Michigan Supreme Court received Maples's application on December 17, 1999, 57 days after the Court of [***5] Appeals issued its ruling. This was untimely under Michigan law, which requires that such an application "be filed [no] more than 56 days after the Court of Appeals decision." MCR 7.302(C)(3). The Michigan Supreme Court therefore returned the application [*436] without filing it due to the procedural default.

Maples then filed a petition for habeas corpus in the district court below. Among other claims raised in support of collateral relief, Maples contended that his counsel was constitutionally ineffective for misadvising [**6] him about his ability to raise the speedy-trial issue after pleading guilty. The district court denied the petition, holding in pertinent part as follows:

> Petitioner was represented by counsel at his plea, and he indicated that his plea was voluntary and intelligent. Although his attorney asserted that the plea did not waive Petitioner's right to raise his speedy trial claim on appeal, the trial court stated that it could not comment on that issue. The plea was not conditioned on Petitioner's right to appeal the speedy trial issue. Therefore, Petitioner's guilty plea forecloses habeas review of his speedy trial claim.

The district court did not explicitly rule on the ineffective-assistance-of-counsel claim. Maples filed a motion for a certificate of appealability on this issue. The district court granted a certificate as to "whether Maples received ineffective assistance of counsel when his attorney advised Maples that he could plead guilty and still raise a speedy trial claim on appeal."

II. ANALYSIS

A. Standard of review

HN1[↑] "This court applies de novo review to

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the decision of the district court in a habeas corpus proceeding." *Harris v.* [***6] *Stovall*, 212 F.3d 940, 942 (6th Cir. 2000). [**7] Maples filed his federal habeas corpus petition after the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), codified principally at 28 U.S.C. § 2254(d). ***HN2***[↑] It provides in part that a federal court may grant a writ of habeas corpus with respect to a state-court judgment only where

> 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.

28 U.S.C. § 2254(d).

HN3[↑] This statute by its own terms is applicable only to habeas claims that were "adjudicated on the merits in State court . . . ." *Id.* Where, as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply. *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001) (applying pre-AEDPA standards to a habeas petition filed pursuant to § 2254 because "no [**8] state court reviewed the merits of [the] claim"). Instead, this court reviews questions of law and mixed questions of law and fact de novo. *Id.*

The case law in this circuit, however, has been less than consistent on this point, as indicated by the following statement:

> Several other circuits . . . found when a state court fails to address a petitioner's federal claim at all, the appellate court should apply the pre-AEDPA de novo standard of review. . . . Whether these courts' holdings are correct, however, is not for this panel to decide. In *Doan* [*v. Brigano*, 237 F.3d 722 (6th Cir. 2001)], the state court failed to mention, let alone adjudicate, the petitioner's [***7] federal claim. However, the *Doan* court still applied the AEDPA standard in reviewing the petitioner's claim. Even if the *Doan* court did not explain its reasoning for adopting its position, this panel is still bound by its decision.

[*437] *Clifford v. Chandler*, 333 F.3d 724, 730 (6th Cir. 2003) (internal citations omitted). Normally, this would end our inquiry, and we would proceed to apply AEDPA, because ***HN4***[↑] "[a] panel of this court cannot overrule the decision [**9] of another panel." *Hinchman v. Moore*, 312 F.3d 198, 203 (6th Cir. 2002). Both *Clifford* and *Doan*, however, were abrogated by *Wiggins v. Smith*, - U.S. -, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003), a Supreme Court opinion that was issued the day after *Clifford*.

The *Wiggins* Court held that the petitioner was entitled to a writ of habeas corpus on the basis of his ineffective-assistance-of-counsel claim. *Id.* at 2544. It applied AEDPA's "unreasonable-application" test to the state court's ruling on the first prong of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *Wiggins*, 123 S. Ct. at 2538 ("The Court of Appeals' assumption that the investigation was adequate thus reflected an unreasonable application of *Strickland*.") (internal citation omitted). The *Wiggins* Court, however, noted that because no state court analyzed the petitioner's claim for prejudice--the second prong of *Strickland*--its "review was not circumscribed by a state court conclusion." *Id.* at 2542 ("In this case, our ***HN5***[↑] review is not circumscribed by a state court conclusion with [**10] respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."). The Court therefore did not assess whether the state court's ruling

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"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," but rather conducted its review de novo. *Id.* at 2542-44. In light of this new Supreme Court precedent, we too must review Maples's ineffective-assistance-of-counsel claim de novo. *See Hinchman*, 312 F.3d at 203 ***HN6***[↑] ("[A] prior decision remains controlling authority unless an inconsistent decision [***8] of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.").

B. Maples's ineffective-assistance-of-counsel claim

HN7[↑] The right to the effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Roe v. Flores-Ortega*, 528 U.S. 470, 476, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000). A petitioner must satisfy a two-prong test to prevail on an ineffective-assistance-of-counsel [**11] claim. First, the petitioner must show that the performance of counsel fell "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In so doing, the petitioner must rebut the presumption that counsel's "challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). The second prong requires that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Procedural default

HN8[↑] "Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 839, 144 L. Ed. 2d 1, 119 S. Ct. 1728 (1999) (citing 28 U.S.C. § 2254(b)(1)). A habeas petitioner has not exhausted his claims in state court unless he has "properly presented" his claims to a state court of last resort. *Id.* at 848 (emphasis omitted). The state's sole argument [**12] in the [*438] present appeal is that because Maples failed to timely raise his ineffective-assistance-of-counsel claim before the Michigan Supreme Court, the federal courts are precluded from ruling on the merits of the claim.

HN9[↑] This court will consider the merits of a procedurally defaulted claim in a habeas petition, however, where the [***9] petitioner "shows that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case." *Lancaster v. Adams*, 324 F.3d 423, 436 (6th Cir. 2003). A fuller explanation of this principle was set forth in *Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000) (internal citations omitted), where the court stated:

> When a habeas petitioner fails to obtain consideration of a claim by a state court, either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered [**13] by the federal court on habeas review. A petitioner may avoid this procedural default only by showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case.

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The state contends that Maples has not shown cause for his procedural default. *HN10*[↑] "'Cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him[;] . . . some objective factor external to the defense [that] impeded . . . efforts to comply with the State's procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 753, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (emphasis in original). One of this court's opinions that on the surface appears similar to the case at bar is *Shorter v. Ohio Department of Rehabilitation & Corrections*, 180 F.3d 723 (6th Cir. 1999). There, Shorter raised a claim in his habeas petition that was not reviewed by the Ohio Supreme Court because his opening brief was filed two days late. *Id.* at 724. Shorter argued that there was "cause" for the procedural [**14] default because he had been assured by the United States Postal Service that his brief would be delivered to the Ohio Supreme Court no later than the last day that it would have been accepted for filing. *Id.* at 725-26. [***10]

In rejecting Shorter's argument, this court held that cause had not been demonstrated by entrusting the brief to the Postal Service, since counsel could have hand-delivered the brief to the clerk of the Ohio Supreme Court himself. *Id.* at 726. The key difference between the present case and *Shorter* is that the petitioner in *Shorter* was represented by counsel, whereas Maples was not. *Shorter* summarized its reasoning as follows: "Petitioner's . . . counsel elected not to drive the brief to the Ohio Supreme Court . . ., but rather relied upon the U.S. Postal Service. If such reliance constitutes 'cause,' then arguably, there is no hope for the concept of finality." *Id.* Maples, on the other hand, was proceeding pro se and, because he was incarcerated, he did not have the opportunity to hand-deliver his brief to the Michigan Supreme Court.

A case that we find much more on point is *Mohn v. Bock*, 208 F. Supp. 2d 796 (E.D. Mich. 2002). [**15] In *Mohn*, as here, the habeas petitioner raised a claim that was not reviewed by the Michigan Supreme Court because it arrived one day after the 56-day filing deadline. *Id.* at 801. Pursuant to prison policy, Mohn had presented [*439] his brief to his prison unit manager five days prior to the deadline. *Id.* at 802. But the brief was apparently not sent out promptly, which resulted in it being received one day late by the Michigan Supreme Court. The application for leave to appeal to the Michigan Supreme Court was therefore rejected as untimely. *Id.* at 801-02.

In the subsequent habeas action, the district court held that Mohn had demonstrated cause to excuse the procedural default because "the papers were no longer in his control" once he gave them to the prison officials five days prior to the deadline. *Id.* at 802. *Mohn* is obviously not binding precedent, but we fully agree with its result. Maples had completed his application for leave to appeal to the Michigan Supreme Court five days prior to the filing deadline, and he attempted to submit it to the prison officials at that time. Unlike in *Shorter*, he did not [**16] have the ability, through counsel, to deliver the papers personally to the state court, and was instead forced to rely on prison officials to do this for [***11] him. *HN11*[↑] The prison officials' inaction, which resulted in the application for leave to appeal being denied because it was filed in an untimely fashion, presents an "objective factor external to the defense [that] impeded . . . efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (internal quotation marks omitted).

This is not to say that *HN12*[↑] the "prison mailbox rule" established by *Houston v. Lack*, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988), is binding on the state of

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Michigan, which it is not. *See, e.g., Adams v. LeMaster*, 223 F.3d 1177, 1183 (10th Cir. 2000) (noting that "the *Houston* decision is not binding on state courts"). ***HN13***[↑] Where a pro se prisoner attempts to deliver his petition for mailing in sufficient time for it to arrive timely in the normal course of events, however, the rule is sufficient to excuse a procedural default based upon a late filing. If the prison had accepted and mailed Maples's petition when he first attempted [**17] to deliver it--five days before the state's deadline--we have no doubt that it would have been timely delivered in the normal course of events. Maples has therefore shown cause to excuse his procedural default.

The prejudice resulting from the procedural default is that the Michigan Supreme Court refused to consider Maples's claim of ineffective assistance of counsel. Moreover, as the state admits, Maples "no longer has any procedure available to present his claim to the Michigan Supreme Court." The state does not contest that the procedural default prejudiced Maples. We thus will turn to the merits of Maples's claim. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000) ***HN14***[↑] (recognizing that a federal court should assess the merits of a state habeas petitioner's procedurally defaulted claim when the petitioner has demonstrated cause and prejudice that excuses the default). [***12]

2. The merits of Maples's ineffective-assistance-of-counsel claim

Maples's trial counsel provided legal advice that, as the Michigan Court of Appeals held, was patently erroneous. Contrary to his counsel's representation, Maples's [**18] guilty plea precluded him from appealing his speedy-trial claim. Such advice certainly falls below an "objective standard of reasonableness" and cannot possibly be considered "sound trial strategy."

Furthermore, Maples has stated that he would have insisted on proceeding to trial, rather than plead guilty, but for his counsel's erroneous advice. The state has not challenged Maples's assertion, thus removing [*440] this factor as a contested issue in this case. On the surface, at least, this satisfies the prejudice standard as articulated in *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985), which applied *Strickland* to instances where the defendant pleads guilty. The Court in *Hill* stated that ***HN15***[↑] in order to establish prejudice "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

Hill goes on to state, however, that "in many guilty plea cases . . . the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.* There are two plausible interpretations [**19] of the preceding quotation. One reading of *Hill* is that a court should sometimes, but not always, analyze the merits of the underlying claim (e.g., whether there was in fact a speedy-trial violation) in order to assess whether the petitioner suffered prejudice. *See id.* (stating that a substantive inquiry should occur "in many guilty plea cases," implying that such an inquiry is not necessary in all such cases). A second interpretation of *Hill* is that the court must always analyze the substance of the petitioner's underlying claim, and that this inquiry will be dispositive to [***13] the resolution of the habeas action "in many guilty plea cases."

We believe that the second interpretation of *Hill* is preferable for two reasons. First, it is more in line with this court's analysis of an ineffective-assistance-of-counsel claim under

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Strickland, which inevitably engages in a substantive inquiry into the petitioner's claims. *E.g., Carter v. Bell*, 218 F.3d 581, 597-600 (6th Cir. 2000) (holding that the habeas petitioner had demonstrated prejudice stemming from his counsel's ineffective assistance after analyzing the merits of petitioner's underlying [**20] claim). Second, *Hill*, like the case before us, involved a situation where the petitioner's ineffective-assistance-of-counsel claim stemmed from trial counsel's affirmative misrepresentation to the defendant who subsequently pled guilty. *Id.* at 54 (describing how petitioner's counsel misrepresented the amount of time that the petitioner would be required to serve in prison before he was eligible for parole).

We acknowledge that the Supreme Court in *Hill* did not itself inquire into the substance of the petitioner's claim, but this was only because Hill did not clear the first hurdle of stating that he would have proceeded to trial but for his counsel's errors. *Id.* at 60 ("Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial."). Presumably, the Court in *Hill* discussed the importance of inquiring into the merits of a petitioner's underlying claim because it intended for lower courts to conduct such an analysis where, as here, the petitioner's counsel made an affirmative misrepresentation upon which the petitioner reasonably relied [**21] in deciding to plead guilty.

Because we adopt this interpretation of *Hill*, we must remand this action to the district court to assess whether [*441] Maples's speedy-trial rights were in fact violated. The [***14] substance of the speedy-trial issue has neither been addressed by any court nor briefed for this appeal.

III. CONCLUSION

For all of the reasons set forth above, we **VACATE** the judgment of the district court and **REMAND** the case with directions that the court assess the merits of Maples's speedy-trial argument as part of his ineffective-assistance-of-counsel claim.

Concur by: BOGGS (In Part)

Dissent by: BOGGS (In Part)

Dissent

[***15] BOGGS, Circuit Judge, concurring in part and dissenting in part. Michigan has adopted a 56-day rule for application to its Supreme Court for leave to appeal from a decision of the court of appeals. As far as any precedent in any federal court holds, Michigan would be free to set this limit as 46 days or 66 days or 36 days.

Given this leeway, and given the court's holding that Michigan is not obliged to adopt the federal "prison mail box rule", I do not see how the failure by Maples to file on time is from a cause "external to the petitioner. [**22] " *Coleman v. Thompson*, 501 U.S. 722, 753, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991).

There is no indication that Maples was prevented from submitting his petition to prison authorities in sufficient time that the normal course of the mails (with some leeway for safety) would have delivered it to the Michigan Supreme Court on time. The fact that Maples says he delayed because he did not know the postage amount is unpersuasive. He could have ascertained that amount at a much earlier time. Indeed, there is no indication that knowledge of the exact amount was a prerequisite for submitting his document to the prison authorities for mailing; for all that appears, the proper amount, whatever it was, would have been deducted from his prison account.

Under these circumstances, to hold that petitioner's failure is from a reason "external" to him is no more persuasive then saying that the 56-day limit was too stringent.

I therefore respectfully dissent from the court's holding that petitioner's claim was not procedurally defaulted. To the extent that the court surmounts this hurdle, I agree with the remainder of its decision.

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Exhibit C

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

File No. 93-2380-FH

-vs-

Hon.

DAVID MAPLES,

Defendant.

ORDER VACATING AND SETTING ASIDE JUDGMENT OF CONVICTION AND SENTENCE

At a session of said court, held in the courthouse in the City of Mt. Clemens, Macomb County Michigan

on JAN 11 2006

PRESIDING: HON. RICHARD L. CARETTI
Macomb Circuit Court Judge

The United States District Court, Eastern District of Michigan, Southern Division having entered a JUDGMENT on October 28, 2003 granting an unconditional writ of habeas corpus, the Honorable Victoria A. Roberts, presiding, Docket No. 00-CV-71718-DT,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence entered on June 20, 1996 in the above entitled matter is hereby **VACATED AND SET ASIDE.**

RICHARD L. CARETTI
CIRCUIT JUDGE

JAN 11 2006

MACOMB COUNTY CIRCUIT COURT JUDGE

IT IS STIPULATED THAT THE COURT MAY ENTER THE ABOVE ORDER.

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY Court Clerk

CRAIG A. DALY, P.C. (P27539)
Attorney for Petitioner
28 E. Adams, Suite 900
Detroit, Michigan 48226
(313) 963-1455

BRAD H. BEAVER (P48649)
Assistant Attorney General's Office
Habeas Corpus Division
720 Law Building, 525 W. Ottawa
Lansing, Michigan 48909
(517) 373-4875

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Exhibit D

4 AUGUST 1943

TO WHOM IT MAY CONCERN:

ON WEDNESDAY AUGUST 4TH, 1943, I JAMES MURPHY WAS ARRESTED BY C.O.I.C.E.T. FOR DELIVERY OF A CONTROLLED SUBSTANCE AT ABOUT 6:00 P.M. IN THE CLUB E.T. ON GRATIOT AVENUE NORTH OF FRAZHO ROAD. I HAD BEEN IN THIS CLUB FOR 6 HOURS EXCEPT FOR 2 OR 3 5-10 MINUTE PERIODS. DURING THIS TIME I MADE ARRANGEMENTS TO BE MET BY MY FRIEND DAVE MAPLES TO DISCUSS SOME UPCOMING ROOFING WORK WE COULD BOTH BE INVOLVED IN AND TO LOAN HIM SOME MONEY SO HE COULD PURCHASE A WORK TRUCK. IT IS MY UNDERSTANDING THAT HE ARRANGED FOR HIS FRIEND LARRY ROBERTS TO GIVE HIM A RIDE TO THE BAR WITH THE PROMISE OF GAS MONEY AND A COUPLE DRINKS. I NOW STATE THAT NEITHER ROBERTS OR MAPLES GAVE ME ANY CONTROLLED SUBSTANCE, NOR DID THEY AID ME IN THE DELIVERY OF SUCH TO ANY OTHER INDIVIDUAL.

James Murphy

WITNESSED BY

(8-4-43) [illegible]

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Exhibit E

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EXHIBIT "A"

STATE OF MICHIGAN
IN THE MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

COA# 196975
LC# 93-02380-FH

-vs-

HONORABLE RAYMOND CASHEN

DAVID ANDREW MAPLES
_____/

AFFIDAVIT OF JAMES MICHAEL MURPHY

I, JAMES MICHAEL MURPHY, declare that if called as a witness I will testify truthfully concerning the following subject to the penalty of perjury.

1. That I would be willing to answer truthfully all questions concerning an affidavit I filled out on August 9, 1993. (See attached affidavit)

2. This affidavit concerns a criminal charge against, David Andrew Maples, lower court #93-02380-FH.

3. My purpose for writing this affidavit was to absolve Mr. Maples of any wrongdoing in the aforementioned criminal charges.

4. That the copy of the attached affidavit is a true copy of the original, filled out by me on the above date.

5. When I testified at an entrapment hearing held on February 24, 1994, my testimony was consistent with this affidavit.

6. That this testimony exonerated Mr. Maples from any wrongdoing in the above mentioned criminal case.

7. Subsequent to these happenings, the prosecutor in my felony case approached me with a plea agreement, which I accepted.

EXHIBIT

7

8. Part of the agreement consisted of my not testifying at the criminal trial of, David Maples, in the above mentioned case.

9. That if I choose to testify at that trial I would be facing a more severe sentence for doing so.

10. I did explain the nature of this plea agreement to Mr. Maples trial attorney, Daniel P. Feinberg.

11. I am willing to testify truthfully to all information contained herein, and any other issues related to this matter.

Further, I say not.

I, JAMES MICHAEL MURPHY, declare under penalty of perjury that the above facts and averments are true to the best of my knowledge, information, and belief.

James Michael Murphy

Dated:

Subscribed and sworn before me this 30th day of April, 1997

DEBORAH J. RUTHERFORD
NOTARY PUBLIC - EATON COUNTY, MI
ACTING IN MONTCALM CO., MI
MY COMMISSION EXPIRES 07/22/99

Deborah J. Rutherford
NOTARY PUBLIC

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Exhibit F

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IN THE
STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,
ON BEHALF OF: DAVID A. MAPLES,

Plaintiff,

- vs -

CARL MARLINGA, JAMES SULLIVAN,
AND DANIEL P. FEINBERG,

Defendants',
_____/

STATE OF MICHIGAN)
) - ss –
COUNTY OF ST. CLAIR)

AFFIDAVIT OF:
JAMES MICHAEL MURPHY

I, JAMES MICHAEL MURPHY, declare, that if called as a witness I will testify to the best of my knowledge, information and belief, subject to the penalties under perjury, to the following:

1. That I would be willing to testify and or answer truthfully all questions concerning an affidavit I filled out on April 30, 1997. (See attached affidavit).

2. That the affidavit referenced above concerned my testimony exonerating David Andrew Maples in his criminal case no. 93-2380-FH.

3. The purpose of writing that affidavit was to absolve David of any wrong doing in the above mentioned criminal case as well as my testimony during my entrapment hearing in my criminal case no. 93-2381-FH, which also clearly exonerated David of any wrong doing whatsoever.

4. That prosecuting attorney James Sullivan, approached me just before our schedule trial date a with plea offer, which I did except under threat & duress.

5. Part of the agreement consisted of me not testifying on behalf of David A. Maples, at his criminal trial and that if I did choose to testify, prosecuting attorney James Sullivan assured me I would receive a more severer penalty, a 40 to 80 year sentence for doing so.

6. That prosecuting attorney James Sullivan, informed me that I was not threatened or harassed, coerced or anything else in the form of intimidation to except his offer. That if I revealed this to anyone I would receive a more sever sentence for doing so this included my Plea in open Court dated September 19, 1995, in my criminal case no. 93-2381-FH.

7. I did explain the part of my plea agreement to David's trial attorney Daniel P. Feinberg, as it related to David, but nothing more out of fear.

8. I am willing to testify truthfully to the information contained here, and any other issue related to this matter.

I, JAMES MICHAEL MURPHY, declare, under the penalty of perjury that the above facts and averments are true to the best of my knowledge, information and belief.

DATED: 12/1/07

James M. Murphy
JAMES MICHAEL MURPHY

Subscribed and sworn to before me,
A Notary Public, this 1st day of December, 2007

Chantal M
NOTARY PUBLIC

SEAL

2/10/08
MY COMMISSION EXPIRES ON

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Exhibit G

State of Michigan

John Engler, *Governor*

Department of Corrections

Bill Martin, *Director*

"Expecting Excellence Every Day"

November 12, 2002

RE: VERIFICATION OF INCARCERATION

TO WHOM IT MAY CONCERN:

Maples, David Andrew 237382 is currently incarcerated at the MACOMB CORRECTIONAL FACILITY and is currently serving the following sentence(s):

Controlled Substance 10yrs to 20yrs

Rec Stolen Property 2yrs 6mos to 5yrs (Terminated 6/30/97)

His incarceration date was: 5-23-1994.

His earliest parole eligibility: 11-15-2004.

Paroled 9-27-1995 Returned 8-2-1996

If you have any questions or require further information, please contact me at (586) 749-4900 ext. 109

Sincerely,

Leon Schroer/DH

Leon Schroer
Records Office Supervisor
Macomb Correctional Facility

cc: File

Macomb Correctional Facility • 34625 26-Mile Road • New Haven, Michigan 48048-09999
(810) 749-4900 • TDD (810) 749-7230

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Exhibit H

(313) 383-0276
VT 303
D. Scott

MICHIGAN DEPARTMENT OF CORRECTIONS
PAROLE BOARD ORDER FOR PAROLE

CB-661 CA-PAGE/001 4835-1120

The Parole Board hereby orders the parole of the person named below in accordance with the particulars appearing on the face of this certificate and the conditions stated on the reverse side.

NAME	NUMBER	INST	PAROLE DATE	TERM	EXPIRATION DATE
MAPLES DAVID ANDREW	A 237382	MRF	03/26/2003	24M D	03/26/2005

RESIDE WITH	DAWN VALDEZ & CHRIS VALDEZ		18291 MERIDIAN DRIVE.		
	GROSS ILE		PH. 671-1333		
REPORT TO	DENISE L. SCOTT	PLI 1186	OFFICE (313)	HOME	(248)
	1534 W. FORT ST	LINCOLN PARK 48146	383-0276	543-3946	

SOCIAL SECURITY NUMBER	DATE OF BIRTH	FBI NUMBER	SID NUMBER	SEX	RACE	HEIGHT	WEIGHT
[redacted]	08/01/68	705478EA6	1367897J	M	W	5'11"	194

HAIR	EYES	BUILD	COMPLEXION	MARKS AND SCARS
BRN	BRN	MED	MED	TAT R ARM, SC HEAD

AGENCIES		
		ND

RELEASE INSTRUCTIONS

TELEPHONE THE PAROLE OFFICE UPON ARRIVAL

PURSUANT TO MCL 791.236A AS AMENDED BY PUBLIC ACT 104 OF 1993, YOU MUST PAY A SUPERVISION FEE OF $ 960.00. THE FEE IS PAYABLE WHEN THE PAROLE ORDER IS ENTERED, BUT THE FEE MAY BE PAID IN MONTHLY INSTALLMENTS TO BE DETERMINED BY THE FIELD AGENT. YOU WILL NOT BE REQUIRED TO PAY A SUPERVISION FEE TO MICHIGAN WHEN YOU ARE BEING SUPERVISED IN ANOTHER STATE UNDER THE PROVISIONS OF THE INTERSTATE PROBATION AND PAROLE COMPACT, PURSUANT TO MCL 798.103.

PURSUANT TO MCL 791.236 AND PUBLIC ACT 87 OF 1985 AS AMENDED, YOU MUST PAY RESTITUTION OF $ 230.00 AS ORDERED BY THE SENTENCING COURT AS INDICATED ON THE JUDGEMENT OF SENTENCE. RESTITUTION IS PAYABLE WHEN THE PAROLE ORDER IS ENTERED, BUT MAY BE PAID IN MONTHLY INSTALLMENTS TO BE DETERMINED BY THE FIELD AGENT.

PURSANT TO MCL 780.905 YOU MUST PAY THECRIME VICTIMS ASSESSMENT OF $ 70.00 AS ORDERED BY THE SENTENCING COURT AS INDICATED ON THE JUDGMENT OF SENTENCE. THE CRIME VICTIMS ASSESSMENT IS PAYABLE WHEN THE PAROLE ORDER IS ENTERED, BUT MAY BE PAID IN MONTHLY INSTALLMENTS TO BE DETERMINED BY THE FIELD AGENT.

****************** SPECIAL CONDITIONS ******************

CONTINUED ON NEW PAGE.

ATTEST

DATE

03/24/03

MICHIGAN PAROLE BOARD

NOTE: Parole violation(s) may result in the loss of good time or disciplinary credits.

DISTRIBUTION: White - Paralee; White - Field Operations Central Office; White - Parole Agent

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MICHIGAN DEPARTMENT OF CORRECTIONS
PAROLE BOARD ORDER FOR PAROLE

CB-661 CAFAGE/002
4835-1120

The Parole Board hereby orders the parole of the person named below in accordance with the particulars appearing on the face of this certificate and the conditions stated on the reverse side.

NAME	NUMBER	INST	PAROLE DATE	TERM	EXPIRATION DATE
MAPLES DAVID ANDREW	A 237382	MRF	03/28/2003	24M D	03/28/2005

RESIDE WITH DAWN VALDEZ & CHRIS VALDEZ 18291 MERIDIAN DRIVE
GROSS ILE PH. 671-1333

REPORT TO		OFFICE	HOME
DENISE L. SCOTT	FLI 1186	(313)	(248)
1534 W. FORT ST	LINCOLN PARK 48146	383-0276	543-3948

SOCIAL SECURITY NUMBER	DATE OF BIRTH	FBI NUMBER	SID NUMBER	SEX	RACE	HEIGHT	WEIGHT
[redacted]	08/01/68	705478EA6	1367897J	M	W	5'11"	194

HAIR	EYES	BUILD	COMPLEXION	MARKS AND SCARS
BRN	BRN	MED	MED	TAT R ARM, SC HEAD

AGENCIES: ND

RELEASE INSTRUCTIONS

CONTINUED FROM PREVIOUS PAGE

2.0 YOU MUST NOT USE OR POSSESS ALCOHOLIC BEVERAGES OR OTHER INTOXICANTS. YOU MUST NOT ENTER BARS OR OTHER PLACES WHERE THE PRIMARY PURPOSE IS TO SERVE ALCOHOLIC BEVERAGES FOR DRINKING ON SITE, UNLESS THE FIELD AGENT HAS FIRST GIVEN YOU WRITTEN PERMISSION FOR YOUR EMPLOYMENT AT A SPECIFIC LOCATION.

7.1 YOU MUST PAY THE COST OF YOUR TREATMENT PROGRAM ACCORDING TO YOUR ABILITY AS DETERMINED BY THE TREATMENT PROGRAM.

4.16 YOU MUST OBEY ALL COURT ORDERS.

4.4 YOU MUST BE IN YOUR APPROVED RESIDENCE BETWEEN THE HOURS OF 11PM TO 6AM UNLESS EXCUSED BY FIRST GETTING WRITTEN PERMISSION FROM THE FIELD AGENT.

ATTEST

DATE
03/24/03

MICHIGAN PAROLE BOARD

John Rabaiotti

NOTE: Parole violation(s) may result in the loss of good time or disciplinary credits.

DISTRIBUTION: White - Parolee; White - Field Operations Central Office; White - Parole Agent

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PAROLE CONDITIONS

Parole supervision is intended to protect the public while providing assistance and guidance to facilitate the parolee's transition from confinement to free society. To meet these goals, minimum conditions are established which may be enhanced by special individual conditions. A parolee's failure to comply with ***any*** condition may result in revocation and return to confinement.

(1) REPORTS: You must contact the field agent as instructed no later than the first business day following release. Thereafter, you must report truthfully as often as the field agent requires. You must report any arrest or police contact or loss of employment to the field agent within 24 hours, weekends and holidays excepted.

(2) RESIDENCE: You must not change residence without prior permission of the field agent.

(3) TRAVEL: You must not leave the state without prior written permission.

(4) CONDUCT: You must not engage in any behavior that constitutes a violation of any criminal law of any unit of government. You must not engage in assaultive, abusive, threatening or intimidating behavior. You must not use or possess controlled substances or drug paraphernalia or be with anyone you know to possess these items.

(5) TESTING: You must comply with the requirements of alcohol and drug testing ordered by the field agent or law enforcement at the request of the field agent. You must not make any attempt to submit fraudulent or adulterated samples for testing. You must not hinder, obstruct, tamper, or otherwise interfere with the testing procedure.

(6) ASSOCIATION: You must not have verbal, written, electronic, or physical contact with anyone you know to have a felony record without permission of the field agent. You must not have verbal, written, electronic, or physical contact with anyone you know to be engaged in any behavior that constitutes a violation of any criminal law of any unit of government.

(7) WEAPONS: You must not use any object as a weapon. You must not own, use, or have under your control or area of control a weapon of any type or any imitation of a weapon, any ammunition, or any firearm parts, or be in the company of anyone you know to possess these items.

(8) EMPLOYMENT: You must make earnest efforts to find and maintain legitimate employment, unless engaged in an alternative program approved by the field agent. You must not voluntarily change employment or alternative program without the prior permission of the field agent.

(9) SPECIAL CONDITIONS: You must comply with special conditions imposed by the parole board and with written or verbal orders made by the field agent.

WAIVER OF EXTRADITION: I hereby waive extradition to the state of Michigan from any jurisdiction in or outside the United States where I may be found and also agree that I will not contest any effort to return me to the state of Michigan.

AGREEMENT OF PAROLE: I have read or heard the parole conditions and special conditions and have received a copy. I understand that failure to comply with any of the conditions or special conditions may result in revocation of parole and return to confinement. I understand and agree to comply with the parole conditions and special conditions.

SIGNED: _____ (PAROLEE)

DATED: 3-26-05

SIGNED: _____ (WITNESS)

RELEASED BY: _____ DATED: 3-26-05

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PAROLE CONDITIONS

Parole supervision is intended to protect the public while providing assistance and guidance to facilitate the parolee's transition from confinement to free society. To meet these goals, minimum conditions are established which may be enhanced by special individual conditions. A parolee's failure to comply with *any* condition may result in revocation and return to confinement.

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(3) TRAVEL: You must not leave the state without prior written permission.

(4) CONDUCT: You must not engage in any behavior that constitutes a violation of any criminal law of any unit of government. You must not engage in assaultive, abusive, threatening or intimidating behavior. You must not use or possess controlled substances or drug paraphernalia or be with anyone you know to possess these items.

(5) TESTING: You must comply with the requirements of alcohol and drug testing ordered by the field agent or law enforcement at the request of the field agent. You must not make any attempt to submit fraudulent or adulterated samples for testing. You must not hinder, obstruct, tamper, or otherwise interfere with the testing procedure.

(6) ASSOCIATION: You must not have verbal, written, electronic, or physical contact with anyone you know to have a felony record without permission of the field agent. You must not have verbal, written, electronic, or physical contact with anyone you know to be engaged in any behavior that constitutes a violation of any criminal law of any unit of government.

(7) WEAPONS: You must not use any object as a weapon. You must not own, use, or have under your control or area of control a weapon of any type or any imitation of a weapon, any ammunition, or any firearm parts, or be in the company of anyone you know to possess these items.

(8) EMPLOYMENT: You must make earnest efforts to find and maintain legitimate employment, unless engaged in an alternative program approved by the field agent. You must not voluntarily change employment or alternative program without the prior permission of the field agent.

(9) SPECIAL CONDITIONS: You must comply with special conditions imposed by the parole board and with written or verbal orders made by the field agent.

WAIVER OF EXTRADITION: I hereby waive extradition to the state of Michigan from any jurisdiction in or outside the United States where I may be found and also agree that I will not contest any effort to return me to the state of Michigan.

AGREEMENT OF PAROLE: I have read or heard the parole conditions and special conditions and have received a copy. I understand that failure to comply with any of the conditions or special conditions may result in revocation of parole and return to confinement. I understand and agree to comply with the parole conditions and special conditions.

SIGNED: _____ (PAROLEE)

DATED: 3-26-05

SIGNED: _____ (WITNESS)

RELEASED BY: _____ DATED: 3-26-05