No. 22-1780

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Marcus Conner, Petitioner-Appellant, v. Dennis Reagle, Respondent-Appellee.	)	Appeal from the U.S. District Court for the Southern District of Indiana (Indianapolis) No. 21-cv-02188-SEB-MPB The Honorable Sarah Evans Barker

REPLY BRIEF OF APPELLANT

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I. Evasion Is The Hallmark of The Response Brief.

The Response should give the Court pause. The Opening Brief raised viable arguments, based in law and fact, of speedy trial and ineffective assistance violations. Conner's appellate contentions are an outgrowth of acknowledgements (albeit oblique) of a meritorious claim by the Indiana Court of Appeals, the district court, and the Seventh Circuit. The Response fails to slow this momentum, instead fueling it as the core of Conner's case goes virtually untouched. Facing formidable questions about a flawed state court analysis, the Respondent demurs. Nor does the Respondent say a word about the Indiana Court of Appeals' description of the "extraordinarily-and disconcertingly-long" delay of 1,034 days. *Conner v. State*, 59 N.E.3d 1100, ¶ 31 (Ind. Ct. App. 2016). The Respondent instead relies on the stock responses of deference to state courts and the high habeas hurdle. Typically, this would be enough to carry the day. But given the unique circumstances of this case, they cannot here. Finally, the Response compartmentalizes the failings of trial and habeas counsel. Such a stunted approach disregards the confluence of ineffective assistance and the totality of prejudice Conner sustained. The Response thus confirms the Sixth Amendment violations and concomitant need for habeas relief.

II. The Seven Flaws of The State Court Decision Outlined in The Opening Remain Standing.

Conner dissected the Indiana Court of Appeals' *Barker* analysis at pages 24-32 of the Opening. There, he set forth seven ways the state court misapplied Supreme Court law:

1. Neglecting the second half of the first factor of *Barker v. Wingo*, 407 U.S. 514 (1972), which required the court to ascribe some weight to the delay being triple the time required to find a "presumptively prejudicial" delay;

2. Ignoring the simplicity of this case. Needing 1,034 days to try a few controlled drug buys while Conner waited in jail is inexcusable. "The delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 530-31.

3. Of the nine delays, eight were the prosecution's responsibility. Conner faced a fierce apathy from his lawyers, the prosecution, and the court. And a busy docket is a factor that weighs against the prosecution. *Barker*, 407 U.S. at 531.

4. Blaming Conner for the delay due to the actions of his attorney. This defies *Barker*'s directive that courts "attach a different weight to a situation in which the defendant knowingly fails to object [to a delay in

trial] from a situation in which his attorney acquiesces in long delay without adequately informing his client." *See Barker*, 407 U.S. at 529.

5. Conner's intense interest in being timely tried distinguishes this from the typical speedy trial scenario. Conner's six objections should have held significant sway under *Barker*.

6. Attributing no weight to the prejudice arising from Conner's 1,034 days of pretrial detention.

7. Shouldering Conner with the burden of prejudice despite *Doggett*'s instruction that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *See Doggett v. United States*, 505 U.S. 647, 655 (1992).

These seven points encompass the heart of the Opening. Yet, the Response does not counter them. It instead clings to the deferential standard of review, seeking to insulate the Indiana Court of Appeals' decision from any meaningful review. Given the multiple ways in which the court contradicted and misconstrued clearly established federal law, the Respondent's ostrich-like approach is telling. Although principles of comity and the independence of state court are important, they do not totally immunize state court decisions from federal scrutiny.

III. The Contentions of The Response Brief Are Unpersuasive.

The first five-and-a-half pages of the Response's argument parrot black letter law principles. Response at 18-23. The Respondent claims that because the *Barker* test is multifactored, the state court has considerable discretion to reach a reasonable decision. Response at 21-22. It is true that the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. *See Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). But the fact a state court is asked to apply a general standard does not preclude habeas relief. Indeed, the Supreme Court has granted habeas relief even where the test applied by the state court is a highly general one, such as the ineffective assistance of counsel test of *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court in *Wiggins* granted habeas relief because the state court's "application of *Strickland*'s governing legal principles was objectively unreasonable." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Thus, even when a multifactor test is at issue, "state courts 'must reasonably apply the rules squarely established by Court's holdings to the facts of each case.'" *Gilbert v. McCullough*, 776 F.3d 487, 491-92 (7th Cir. 2015), *quoting White v. Woodall*, 572 U.S. 415, 426 (2014).

Next, the Respondent argues Conner does not identify "a rule applied by the state court that contradicted a rule handed down by the Supreme Court." Response at 19. That is incorrect. The Opening set forth how the Indiana

Court of Appeals' approach shuns *Doggett v. United States*, 505 U.S. 647 (1992), *United States v. MacDonald*, 456 U.S. 1 (1982), *Barker v. Wingo*, 407 U.S. 514 (1972), *Moore v. Arizona*, 414 U.S. 25 (1973), and *United States v. Marion*, 404 U.S. 307 (1971). These five cases similarly sink the Respondent's claim that Conner "has not proved an unreasonable application of federal constitutional law." Response at 20.

The Respondent cites three Seventh Circuit cases to support the state court's decision. Response at 23. Such cases are irrelevant to whether the state court unreasonably applied clearly established federal law as determined by the Supreme Court. *See Lewis v. Zatecky*, 993 F.3d 994, 1000 (7th Cir. 2021). Regardless, they are distinguishable.

First is *United States v. Robey*, 831 F.3d 857 (7th Cir. 2016). Robey argued that the 1,076 days between his appearance and trial violated the Sixth Amendment. 831 F.3d at 863. But because Robey did not raise this argument in the trial court, plain error review was applied. *Id*. The Court then found no Sixth Amendment violation as Robey bore "primary responsibility" for the delay because he filed a motion to suppress, sought ten ends-of-justice continuances, tangled with appointed counsel, and scuttled a plea agreement he entered. *Id*. at 864.

Second is *United States v. Patterson*, 872 F.3d 426 (7th Cir. 2017). The Court again found the defendant responsible for the delays. For two years,

Patterson litigated his competency, and also filed an interlocutory appeal. 872 F.3d at 435-36. Patterson also did not raise his speedy trial rights until after most of the delays occurred. *Id.*

Third is *O'Quinn v. Spiller*, 806 F.3d 974 (7th Cir. 2015). There were 28 continuances. 806 F.3d at 978. The continuances requested by O'Quinn's lawyer accounted for almost all of the pretrial delay, about 90% of the total. *Id*. This precluded O'Quinn's speedy trial claim.

The Respondent does invoke a Supreme Court case, *Vermont v. Brillon*, 556 U.S. 81 (2009). Response at 23. But *Brillon* is factually distinguishable. Brillon affirmatively delayed his own trial, including threats to kill his lawyer, necessitating a withdrawal on the eve of trial. *Brillon*, 556 U.S. at 86-87. Brillion also fired another attorney when he failed to obtain a continuance. *Id.* at 86. Moreover, the prosecution opposed continuance requests in *Brillon* and the state court denied them. *Id.* at 86. In contrast, the trial court, prosecution, and defense counsel colluded to multiple continuance, over Conner's objections. Thus, unlike the Respondent's reliance, Conner's 1,034-day delay occurred: (1) through no fault of his own, (2) in defiance of his express wishes, and (3) due to repeated collusion between bench and bar.

IV. The Respondent's Narrow Reading of *Barker*.

As for the first *Barker* factor, the length of the delay, the Respondent defends the state court decision because it "correctly observed that numerous cases with longer delays did not justify dismissal of a case." Response at 23. Conner dismantled this argument on page 25 of the Opening. The Respondent offers no counterpoint. Again, the "peculiar circumstances" of this case demonstrate the 1,034 days is too long because the meager evidence and witnesses for the three controlled buys were entirely in the State's control.

Moving to the second factor, the Respondent argues that Conner "points to no reason why it was unreasonable to consider the speedy-trial rights of other defendants when it came to scheduling his trial, and no clearly established law forbids such reasoning." Response at 24. The contrived concern for the speedy trial rights of other defendants aside, such rationale is nebulous, if not disingenuous. The Respondent cites no authority for the proposition that a defendant's fundamental rights are contingent on the fortuity of how crowded that particular docket happens to be. Similarly, the right to not sit in pretrial detention for years should not be a zero-sum game. It is the State's job to try defendants, not the defendants'.

The Respondent further implies that because two continuances were requested by Conner's counsel, his complaint *ipso facto* fails. This cannot be correct as a matter of logic or law. As a logical matter, under the Respondent's

theory, as long as defense counsel consents to every continuance, a defendant could be locked up in perpetuity. Indeed, the Supreme Court in *Barker* directed courts to "attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client." 407 U.S. at 529. Here, not only was Conner not informed about the continuances until after they were granted, but they were also obtained over his standing objection. Seeking continuances over a client's opposition is more problematic than doing so without informing him. The state court and the Respondent both ignore *Barker* on this point, just as they ignore the importance of Conner's repeated requests to stand trial.

On the third factor, the Respondent contends that "Conner's claim to vigorously asserting the right can be doubted." Response at 25. But missing from the Respondent's vista is the principle that courts do not require a "*pro forma* objection." *Barker,* 407 U.S. at 531-32. More important is "the frequency and force" of less formal assertions of the right. *Id.* On this point, there can be no doubt. Constant and consistent, the incarcerated Conner's efforts to protect his rights when no one else would were commendable. The Respondent's disregard of this fact and "the frequency and force" principle undermines his third element analysis. Further plaguing his position is that the assertion of a speedy trial right "is entitled to strong evidentiary weight." *Barker*, 407 U.S.

at 531-32. Emphasized in the Opening (pages 21, 30), it is ignored in the Response (as well as in the state court decision).

Finally, the Respondent short circuits the prejudice element: "whatever prejudice from pretrial incarceration Conner endured, his inability to make a strong showing on the other *Barker* factors and lack of tangible prejudice doomed any potential Sixth Amendment claim." Response at 26-27. In other words, because the Respondent deems the other three factors weak, there is no prejudice. That is not the law. What is more, a defendant is not required to offer affirmative proof of particularized prejudice for a speedy trial claim. *Doggett*, 505 U.S. at 646. *Barker* echoed this point: "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown." *Id.* Moreover, as the delay persists, the importance of presumptive prejudice increases. *Id.*

Conner sat in jail for 1,034 days despite his repeated assertions to stand trial. The trial court disregarded these requests, as did the prosecutor and Conner's counsel. This impaired his opportunity to prepare for trial and subjected him to the host of harms imposed by pretrial detention. *See, e.g.*, *United States v. MacDonald,* 456 U.S. 1, 8 (1982) ("The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial."); *Moore v. Arizona,* 414 U.S. 25, 26-27 (1973); *Barker*, 407 U.S. at 519-20;

United States v. Marion, 404 U.S. 307, 320 (1971); *Smith v. Hooey*, 393 U.S. 374, 378-80 (1969). Under such circumstances, a *de novo* review of Conner's speedy trial claim compels the conclusion that the Sixth Amendment was violated.

After applying the four *Barker* factors, the Respondent goes on the offensive and lobs attacks at the Opening. None are effective. The Respondent asserts that "it is entirely unclear how the state court 'adopt[ed] a bright line rule' that any delay less than five years 'will not satisfy the first factor' as Conner argues. The state court did no such thing (and Conner fails to cite the opinion to show where), and only the most uncharitable reading of the opinion could concoct the creation of some bright-line rule." Response at 27. It is not a question of charity, but accuracy. The Opening's description accurately reflects what the state court did. Paragraph 16 of the opinion, which ostensibly applies the first *Barker* factor, speaks for itself. The court simply found 5 cases with longer delays and then called it a day. *See Conner v. State*, 146 N.E.3d 343, ¶ 16 (Ind. Ct. App. 2020). And while the Respondent objects to Conner's characterization, he offers none of his own. Impossible to mend, paragraph 16 is a microcosm of everything wrong with the decision—light on analysis, wrong on the law, and operating in a vacuum.

In the end, for the Respondent, Conner cannot prevail because "the delay was largely attributable to a busy court that was attempting to first-

come, first-serve in its management of its docket." Response at 30. This assertion ignores that overcrowded courts weigh against the prosecution. *See Barker*, 407 U.S. at 531. It also ignores that the State ultimately is responsible for the actual prosecution. The Respondent's position fails because constitutional rights cannot be subject to the bureaucratic whims of court personnel.

V. Trial Counsel Was Ineffective For Not Arguing The 1,034-Day Delay Violated Conner's Speedy Trial Rights Where A *Pro Se* Conner Repeatedly Notified Counsel of The Clear Constitutional Violation.

The speedy trial claim was "significant and obvious" thanks to Conner's protests. *Barker*'s test is straightforward and favors Conner. The speedy trial violation was the strongest issue as succeeding on it would mean dismissal of the conviction. Counsel's conduct was unreasonable as there was no legitimate reason to neglect the issue, reflected by the lawyers' meek responses as to why they abandoned the issue. In reply, the Respondent says nothing. The Court should thus find ineffective assistance of counsel exists.

VI. The Exceptional Circumstances of An Attorney Admitting To Preventing A Timely Filing Warrant Equitable Tolling.

The Respondent, as he must, downplays the second issue as nothing more than a "counsel's miscalculation." Response at 11. Framing it this way enables the Respondent to place the case largely out of reach of the equitable

tolling doctrine. *See Holland v. Florida*, 560 U.S. 631, 651-52. (2010). The problem for the Respondent is that this case does not present the "garden variety" type of error that typically eludes equitable relief. Response at 12. Indeed, the Opening spent 5 pages explaining why this case was extraordinary. Opening at 37-41.

As for the controlling *Holland*, the Respondent says it "is nothing like" the case at bar. Response at 14. The reason is that *Holland*'s attorney "did not merely miscalculate a deadline, he wholly ignored any communication with his client." Response at 14. But this is a distinction without a difference. Conner's counsel affirmatively told Conner to stand down—in effect, "do not interfere with us, we have it under control, you can file your *pro se* petition when we tell you to." How is this different from (*Holland*) a lawyer who says, "I will handle everything, do not worry," and then does nothing? The Response never says. All the Respondent can do is feebly point to a phone call between Conner and counsel to show his attorney at least kept Conner apprised of developments, unlike the radio silence from the *Holland* lawyer. Nor does the Response provide any case law where something like that at bar transpired. The absence of anything similar is the very definition of "extraordinary."

As asserted in the Opening, like *Holland*, Conner's counsel "violated fundamental canons of professional responsibility," including the duty "to perform reasonably competent legal work." *See* 560 U.S. at 652. And like

Holland, counsel jeopardized Conner's "single opportunity for federal habeas review of the lawfulness of his imprisonment." *See* 560 U.S. at 653. These actions exceeded the range of behavior that reasonably could be expected by a client. The Respondent is silence in response.

The Respondent does attempt to distinguish three cases mentioned in the Opening and cited by the Supreme Court in *Holland*. The bases to do so are unconvincing. Response at 15. First, *Baldayaque v. United States*, because it involved a privately retained lawyer, unlike Conner's counsel whose salary was covered by the taxpayers. *Baldayaque v. United States*, 338 F.3d 145, 152-53 (2d Cir. 2003). Second, *Spitsyn v. Moore*, because the lawyer kept the physical file while Conner had his. *Spitsyn v. Moore*, 345 F.3d 796, 800-802 (9th Cir. 2003). Third, *Calderon v. United States District Court*, because that lawyer transferred jobs while Conner's counsel stayed at the public defender's office. *Calderon v. United States District Court*, 128 F.3d 1283, 1289 (9th Cir. 1997).

These distinctions do nothing to change the fact that Conner's counsel provided an affidavit in which he admitted that he "prevented Mr. Conner from timely filing a habeas petition." Doc. 12, pg. 5 at ¶ 15. And that Conner would not be in his predicament "had I told him not to wait." *Id*. Yet the affidavit is never discussed in the Response. In fact, there is only an isolated, muted reference that counsel owning up to his errors "says nothing about

whether that error was extraordinary." Response at 16. In the same breath, the Respondent chides Conner for "inflating the facts" when he claimed counsel foiled a filing. Response at 16. The Respondent engages in projection. Conner accurately portrays what occurred; it is the Respondent's position that is belied by the record. And this is the consequence of the Respondent's inability to address the affidavit. Once again: "I prevented Mr. Conner from timely filing a habeas petition." Doc. 12, pg. 5 at ¶ 15.

In sum, counsel intentionally intervened to cause Conner to delay the filing. This despite never checking the law, not representing Conner in the habeas proceedings, and having no intention of working on the habeas litigation. Such an extraordinary sequence of events warrants equitable tolling.

CONCLUSION

The Respondent does not defend the seven ways the Indiana Court of Appeals unreasonably applied controlling Supreme Court law. Entire swathes of the Opening are thus ceded. The arguments the Respondent does assert concern peripheral points which draw no blood. Despite the deference shown to state courts, the Indiana Court of Appeals' decision strays beyond the bounds of established federal law. Marcus Conner should be freed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULES 32(a)(7) & 32(g), and CIRCUIT RULE 32(c)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a monospaced font. The length of this brief is 3,191 words according to the Microsoft word count function.

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PROOF OF SERVICE

The undersigned, counsel of record for the Appellant, certifies he has served a copy of the Appellant's Reply Brief upon all counsel of record through the Court's electronic filing system on January 6, 2023.

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