No. 11-9953

IN THE

Supreme Court of the United States

JONATHAN EDWARD BOYER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
THIRD CIRCUIT COURT OF APPEAL
OF THE STATE OF LOUISIANA

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes?

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JURISDICTIONAL STATEMENT

The Louisiana Third Circuit Court of Appeal denied Petitioner's appeal on February 2, 2011. The Louisiana Supreme Court denied Petitioner's petition for a writ of certiorari on January 20, 2012. The petition for a writ of certiorari was filed on April 19, 2012, and granted on October 5, 2012. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented implicates the following provisions of the United States Constitution:

> **AMEND. VI:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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

STATEMENT OF THE CASE

Indigent defendant, Jonathan Boyer, spent over seven years in custody awaiting trial, he spent the first five of those years awaiting an effective appointment[1] of counsel.

The five-year delay in the effective appointment of counsel and resulting delay in trial were caused by a systemic breakdown in the funding of indigent defense.

The state appellate court recognized the length and cause of delay but refused to recognize this delay as a violation of Mr. Boyer's speedy trial right, reasoning that the funding problems were a cause beyond the control of the local prosecuting authority.

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1. This phrase is not intended to refer to the rendering of ineffective assistance of counsel but instead refers to the State's obligation to make an appointment in more than name only. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (failure of the trial court "to make an effective appointment of counsel" violated Due Process). The unlawful and unfunded appointment of counsel that occurred in this case is clearly not an effective appointment.

In truth, the extraordinary delay in this case was entirely the fault of the State of Louisiana and its refusal to meet its fundamental Constitutional responsibility to provide counsel for the poor people it chooses to prosecute.

A. The crime and the investigation

On February 3, 2002, Super Bowl Sunday, Jennifer Jones was at her mother's house in Lake Charles, Louisiana. R. 704. Her boyfriend, *William Gallier*,[2] was drinking nearby at a bar called Nate's Place. *Id.* Later *Gallier* returned to the house and convinced Jones to leave town. *Id.* The next day, Jones and *Gallier* returned to their home in Houston. *Id.*

That same day, February 4, at about 7:15 a.m., the body of Bradlee Marsh was discovered at the dead end of Haffer Road, by a man who had come to check the oil well gauge at the end of the road. R. 696. Bradlee's body was discovered in his own pickup truck, shot three times at close range, with a fourth shot having blown out the driver's side window and the driver's side mirror. R. 695-96.

The early police investigation focused on retracing Bradlee Marsh's movements before his death. Investigators spoke to numerous witnesses including *Tammy Hunt*, who had spent part of Sunday with Mr. Marsh and had arranged to meet him after her shift at Bayou Babes. R. 698-99. Investigators also spoke to a woman named *Laura*

2. Witnesses who went missing or died during the period of delay in this case will be italicized to denote that they were unavailable for defense investigation or presentation at trial.

Wick, who had spent much of the evening with Mr. Marsh at the Roadhouse Bar and had last seen him following her in his vehicle, both on their way to Bayou Babes. R. 697-98. Marcus Sawyer provided a statement to the effect that when he and Mr. Marsh would do drugs they would go to Haffer Road to do so.[3] R. 5343.

On February 6, 2002 detectives received a Crimestoppers tip that Joshua Myer was talking about the murder of Bradlee Marsh. R. 701. Myer ultimately told the police that while at Nate's Bar he had spoken to *William Gallier* who had told him that Bradlee Marsh had been killed as a part of a drug rip off while trying to buy drugs from a dealer named Tracey in Carlyss. R. 701. *Gallier* described four shots as having been fired. R. 1955. *Gallier* had identified the killers as men named Upchurch and Walling. R. 701-02. Upon further investigation it was discovered that Upchurch had died a year earlier and Walling was able to provide an alibi. R. 701, 704.

It is apparent from the statements of Jennifer Jones and Joshua Myer that the conversation between Myer and *Gallier* must have taken place on the night of Sunday, February 3, 2002 as *Gallier* and Jones left Louisiana and drove to Houston on Monday, February 4, 2002. R. 704. Critically for Jonathan Boyer's defense, this means that *Gallier* was talking about the murder of Bradlee Marsh before his body was discovered and the crime publicized. There is absolutely no connection between Jonathan Boyer and *William Gallier*.

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3. The prosecution subsequently obtained a second statement from Mr. Sawyer in which he sought to retract this part of his statement.

On February 8, 2002, *Gallier* was arrested in Houston, Texas, and questioned about Marsh's murder. R. 702; *see also* R. 5343. He confirmed his conversation with Joshua Myer at Nates Bar, and admitted that he had given a false name to Myer. R. 1936-38. He explained that his brother, *Corey Marcenac*, had told him that he and Walling were delivering drugs to Mr. Marsh when Walling shot him and the two fled the scene. R. 702-03. *Gallier* later withdrew this version of events and claimed to have no knowledge of the murder. R. 5344. *Gallier* underwent a polygraph examination and his claims that he was not present at the murder and did not know about it were measured as false. R. 1655-56; *see also* R. 5344-46.[4]

The police then interviewed *Gallier*'s brother *Corey Marcenac*. R. 5343. *Marcenac* denied speaking with *Gallier* about the murder of Bradlee Marsh, but did confirm that he knew and had previously bought drugs from a woman named Tracey Watler (a known local drug dealer). *Id*. *Marcenac* underwent a polygraph exam which came back as inconclusive. R. 5350.

On February 15, 2002 detectives interviewed *Russell Clement* who stated that Bradlee Marsh was selling drugs for Marcus Chesson and stealing some of the drugs. R. 705. *Clement* also stated that two weeks prior to Christmas a woman named *Karina Bellard* had instructed *Clement* to take Bradlee Marsh to the oil wells, beat him up, take his truck and leave him on the road. *Id*. *Clement* refused. *Id*.

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4. Pursuant to a pre-trial Motion in Limine, Mr. Boyer was barred from introducing any evidence or mention of polygraph testing at trial. As a result, the trial transcript refers only to the "interview" conducted by Detective Chisholm.

On February 18, 2002 Detectives received information that *Alice Dassinger* believed that her grandson, Jonathan Boyer, had something to do with the killing. R. 706.

Detectives interviewed *Dassinger* and she stated that in the early hours of February 4, 2002 Jonathan Boyer had told her that he had done something terrible. R. 706. Detectives also took a statement from Jonathan's aunt, Susan Bland, who stated that Jonathan had told her when he came home that night that he had shot a man out by the oil wells and that his brother Anthony Boyer was outside burning the clothing they had worn. R. 706. Bland claimed that *Dassinger* was present for this conversation, however, their accounts of the conversation are inconsistent.

Detectives arrested Anthony Boyer for obstruction of justice after he asserted his right to counsel during an interview. R. 707-08. Anthony Boyer was held in custody and appointed counsel through the Calcasieu Parish Public Defender's Office. R. 2744. After nine months in custody Anthony Boyer negotiated a plea agreement involving his agreement to testify against Jonathan Boyer and was released on probation. R. 5000, 5020-22.

Detectives interviewed others, including *Elaine Newman*, who had spoken to Jonathan and Anthony Boyer and discovered that they had left for Florida with a cousin, Timothy Windham. R. 708.

Police obtained a warrant for second degree murder for Jonathan Boyer's arrest. R. 708.

On March 6, 2002 detectives travelled to Jacksonville, Florida to interview Timothy Windham, who had been arrested in a stolen car. R. 709-10. Windham admitted

that he had driven Jonathan Boyer to Florida and stated that Jonathan had said that he had shot someone.

On March 8, 2002 detectives made telephone contact with Jonathan Boyer and arranged for his surrender. R. 711. Before the Louisiana detectives could arrive at the surrender point, Florida detectives chased Jonathan Boyer and fired at him twice, claiming that he had produced a gun. *Id*. While a gun was recovered, it was not the gun used to kill Bradlee Marsh.

On March 8, 2002 Jonathan Boyer gave a tape-recorded interview with Louisiana detectives in which he admitted to killing Bradlee Marsh, claiming that it was an accidental shooting in the course of an armed robbery. R. 711-12. A number of Mr. Boyer's statements did not match the physical evidence: he described three shots instead of four and he described himself as shooting from the front passenger seat, R. 711, though the trajectory of the four shots and blood in the rear passenger area of the truck showed that the shots were fired from the rear. R. 4811.

Subsequent evidence tendered to the court established that Mr. Boyer had a tested I.Q. on the borderline of intellectual disability, and a history of mental and emotional instability. He also received special education services in school and shortly before his sixteenth birthday was assessed as reading at a third grade level. R. 2241-52. Following his arrest on the present charges he was found to be displaying symptoms of mental illness and suicidality by the Florida authorities. R. 2373.

Having made an arrest, the lead detective prepared his supplemental report on the investigation, which was later provided to defense counsel in discovery. The report

falsely stated that *Gallier* and *Marcenac* had passed their polygraph tests, thus giving the impression that they had been legitimately excluded as suspects in the case. R. 5344-51.

On May 10, 2002 Mr. Boyer was extradited to Louisiana and booked into the Calcasieu Parish Correctional Center.

B. The procedure for assignment of counsel to indigents in Louisiana at the time.

At the time of Mr. Boyer's arrest and indictment,[5] the Louisiana legislature had established a system of local Indigent Defender Boards (IDBs) for each of the state's judicial districts.[6] *State v. Citizen*, 04-1841 (La. 4/1/2005); 898 So. 2d 325, 330 (summarizing statutory scheme as it operated in 2002). The present case arose in Calcasieu Parish, in the 14th Judicial District.

Each IDB was required to select a procedure for providing counsel to indigent defendants in their district through volunteer attorneys, employment of a chief indigent defender, contracts with available attorneys, or

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5. This system was substantially reformed in August 2007 by the Louisiana Public Defender Act, however, this reform came three months after the charge against Mr. Boyer was reduced and had no direct effect on Mr. Boyer's case. Louisiana Public Defender Act, Acts 2007, No. 307 (codified as amended at La. Rev. Stat. §§ 15:141-184).

6. The members of the IDBs for each judicial district were selected by the bench of the district court and were a public body, created by state statute to perform a governmental function. La. Rev. Stat. § 15:144; *Denoux v. Bertel*, 96-0833 (La. App. 4 Cir. 10/9/96); 682 So. 2d 300, 301.

a combination of the above. La. Rev. Stat. § 15:145(B). A list of non-volunteer attorneys was to be maintained in the event that the volunteer list proved inadequate. *Id.* The IDB in the 14th JDC utilized a Public Defender's Office augmented by contract attorneys. Michael Kurth and Daryl Burckel, Defending the Indigent in Southwest Louisiana (July 2003).

In capital cases, the court was obliged to appoint two capitally certified counsel, at least one of whom was certified as lead counsel. La. Sup. Ct. R. XXXI(A)(1)(a). Lead counsel was required to have at least five years experience but counsel appointed to assist could have less experience. La. Code Crim. Pro. art. 512.

The IDBs were principally funded by a $35 costs assessment on criminal convictions (the majority of revenue being generated by traffic tickets). A state statutory body, the Louisiana Indigent Defense Assistance Board (LIDAB), was authorized to provide supplemental funds to IDBs when funds were appropriated by the legislature for that purpose.

The appointment of non-volunteer attorneys was lawful. However, responding to what had become in the 14th Judicial District an "institutionalized," "abusive extension" of counsel's professional obligations, the Louisiana Supreme Court barred uncompensated appointments of private attorneys. *State v. Wigley*, 624 So. 2d 425, 429 (La. 1993).

The Court held that any assignment of counsel must provide for reimbursement of overhead and out-of-pocket expenses. Further, a fee for services must be paid where

the assignment would involve more professional time than was reasonable to expect of a pro bono appointment. *Id.*

Importantly, the court held that it was the district court's obligation before appointing counsel to determine that sufficient funds for expenses and overhead were likely to be available and if such funds were not likely to be available, the court was not to appoint members of the private bar. *Id.*

C. The prosecution of Jonathan Boyer

Following his return to Louisiana, Mr. Boyer was determined to be indigent and initially assigned counsel from the Calcasieu Public Defender Office but due to their representation of his brother Anthony Boyer, it was determined that they were in a conflict of interest and could not represent Jonathan.

In the month following his arrest Jonathan Boyer was left without counsel and as a result did not make a bond application, forfeited his right to a preliminary examination,[7] and did not take any other step in the preparation of a defense.

On June 6, 2002 Jonathan Boyer was indicted on one count of first degree murder, a capital offense. La. Rev. Stat. § 14:30. JA 2; JA 352.

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7. A defendant in Louisiana loses the right to a preliminary examination once indicted by a grand jury. La. Code Crim. Pro. art. 292.

On June 10, 2002 Jonathan Boyer appeared without counsel for arraignment and the court appointed local practitioners Tom Lorenzi, as lead counsel for Mr. Boyer, and his law partner Walt Sanchez, as associate counsel, to assist Mr. Lorenzi. JA 3. Lorenzi and Sanchez were sent letters from the Clerk of Court informing them of the appointment. JA 354-59. The arraignment was reset for July 1, 2002. *Id.*

On July 1, 2002 Mr. Sanchez moved to withdraw, describing his extensive caseload, financial obligations and the fact that a year earlier he had caused his name to be removed from the list of counsel available to take capital appointments.[8] JA 359-66. The court permitted Mr. Sanchez to withdraw. JA 367.

At Mr. Boyer's September 9, 2002 arraignment, he entered a plea of not guilty and requested a trial by jury. JA 7. Associate counsel from the Louisiana Crisis Assistance Center (LCAC) was appointed to assist Mr. Lorenzi in place of Mr. Sanchez. *Id.* Trial was set for February 3, 2003. *Id.*

Thereafter, until the charge was reduced on May 21, 2007, the only matters that came before the trial court concerned efforts to identify a source of funding to allow Mr. Boyer to receive counsel or assertions of Mr. Boyer's statutory and constitutional speedy trial rights. JA 134; *see also* JA 8-86.

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8. Mr. Lorenzi's name had been removed from the list at the same time. R. 165-66.

D. Concurrent funding litigation in other capital cases in the 14th Judicial District

The appointment of Mr. Lorenzi without any available funding was made in direct violation of *Wigley* and represented an unconstitutional taking from Mr. Lorenzi under that decision.

The appointment occurred in the context of a broader failure to fund appointments of counsel in capital cases in the district, prompting extensive litigation. Funding litigation in several other cases in the 14th Judicial District proceeded parallel to Mr. Boyer's and numerous references are made in the record to the progress of the litigation in these other cases. Most significant for Mr. Boyer's case are:

State v. Langley: Represented by the Louisiana Crisis Assistance Center (LCAC) under contract with the local IDB, Mr. Langley was tried on one count of first degree murder and convicted only of second degree murder in 2003. In December 2004 the conviction was vacated on appeal and the case remanded for a new trial. *State v. Langley*, 04-269 (La. App. 3 Cir. 12/29/2004); 896 So. 2d 200.

State v. Smith; *State v. Turner*; *State v. Winfree*: Three unrelated cases with private counsel appointed by the court, consolidated for the purposes of funding hearings. Mr. Lorenzi had been appointed as lead counsel for Turner. A major funding hearing had been conducted in October 2001 confirming the unavailability of funding from the IDB or LIDAB but identifying a large surplus of funds in the hands of the Calcasieu Parish Police Jury

(CPPJ)[9] and in the Criminal Court Fund. *See Citizen*, 898 So. 2d at 327.

State v. Van Dyke: Originally indicted on a charge of first degree murder in 1996, Mr. Van Dyke was reindicted on second degree murder in September 2002. There were substantial funding difficulties in the case and a motion to quash on the basis of a violation of the defendant's speedy trial rights was heard in January 2003. The motion was granted and the indictment quashed but on review, the Louisiana Third Circuit Court of Appeal reversed the district court decision. *State v. Van Dyke*, 03-437 (La. App. 3 Cir. 10/1/2003); 856 So. 2d 187 (La. App. 3 Cir. 2003).

State v. Reeves: Indicted in December 2001 and funded by a contract between the IDB and a not-for-profit law office, the first trial resulted in a hung jury at guilt phase in November 2003. The IDB was unable to fund the second trial in the same fashion and, over objection, the case was reassigned to the chief public defender in March 2004 and tried later in the same year. Mr. Reeves was convicted and sentenced to death. *State v. Reeves*, 06-2419 (La. 5/5/2009); 11 So. 3d 1031.

State v. Citizen; *State v. Tonguis*: Private counsel was appointed as lead counsel in both cases. Mr. Tonguis had been indicted on April 11, 2002 and Mr. Citizen on October 10, 2002. Funding hearings were conducted in January and April 2004 resulting in a ruling requiring

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9. Louisiana is divided into 64 parishes with broad home rule authority and governed in most cases by a locally elected body known as a "police jury." The parishes then occupy 42 state judicial districts.

the CPPJ to fund the defense. This ruling was overturned by the Louisiana Supreme Court in 2005. *State v. Citizen*, 04-1841 (La. 4/1/2005); 898 So. 2d 325.

State v. Cisco: Originally convicted and sentenced to death, his conviction was reversed in December 2003 due to a conflict of interest on the part of his appointed attorney, who also represented the lead detective in the case. *State v. Cisco*, 01-2732 (La. 12/3/2003); 861 So. 2d 118. New counsel was appointed for the retrial and the funding hearing in his case was joined with that of Mr. Boyer.

E. Attempts to identify a source of funds for Mr. Boyer's defense

Aware from the *Turner* funding proceedings that no funding was, in fact, available, on November 12, 2002, Mr. Lorenzi responded to his appointment in Boyer by filing a *Motion to Determine Source of Funds*, asking the court to "determine a source of funds that will provide for competent and compensated defense counsel, expert witnesses and litigation assistance for Jonathan E. Boyer in this capital prosecution." JA 372-73.

In the motion, Mr. Lorenzi highlighted the plight of both Jonathan Boyer and Mr. Lorenzi's own practice and contrasted this with the funding available to the state:

> Lead counsel is entitled to reasonable compensation for defending Jonathan E. Boyer. The State and Parish have provided access to all fees and expenses for the prosecution, Clerk of Court, District Court and law enforcement to secure and carry out the death sentence

> of Jonathan E. Boyer. It is fundamentally unjust, unconstitutional and unconscionable to expect a small, private practice to shoulder the responsibility of defending Jonathan E. Boyer against the onslaught of the Government's financial and personnel resources while simultaneously rendering the services necessary to generate income to meet overhead expenses averaging approximately $40,000.00 per month, together with such additional amounts required to pay counsel's necessary living expenses.

JA 377-78.

The motion sought orders for funding against LIDAB, the IDB, the CPPJ, the Calcasieu District Attorney's Office and the State of Louisiana. JA 383. Representatives of these bodies, including the Attorney General and the Office of the State Budget Director were served with copies of the motion. R. 179.

On January 16, 2003, the motion to quash in the Van Dyke case was heard, including extensive evidence of the funding difficulties in the Parish. *Van Dyke*, 856 So. 2d at 198. Mr. Van Dyke's motion to quash on speedy trial grounds was granted (though later reversed on appeal). *Id.*

The hearing on the *Motion to Determine Source of Funds* in the Boyer proceedings was initially set for January 17, 2003 before Judge Painter. R. 192. The hearing was passed without date at the state's request due to the scheduling difficulties of the numerous parties necessary for such a hearing. JA 8; R. 192.

On February 3, 2003, on an unopposed defense motion, the trial date was refixed for September 29, 2003 due to the funding delay. JA 397-98.

On March 27, 2003, before the funding hearing in *State v. Boyer* resumed, Judge Savoie held a hearing on a motion to determine source of funds in *State v. Winfree*. R. 195.

Judge Painter directed Mr. Lorenzi to obtain a transcript of the *Winfree* hearing to determine whether it could be adopted in *Boyer*. *Id*. Accordingly, Mr. Lorenzi submitted a motion and order for the transcript which was signed on April 3, 2003. R. 195.

In *Winfree*, Judge Savoie had ruled that the motion to determine source of funds was premature as there had not yet been a denial of payment by the IDB, though the IDB advised that they had no funds to make any payments. JA 401-03.

Having reviewed the transcript and ruling in *Winfree*, Mr. Lorenzi submitted a statement for services rendered to the IDB, albeit without any real hope that the IDB would be able to pay. JA 401-03.

The funding hearing in *Boyer* was reset for August 15, 2003 but the meeting of the IDB at which the payment of Mr. Lorenzi's pending bill was expected to be considered was subsequently set for August 26, 2003. JA 399-400. As a result, Mr. Lorenzi moved to reset the hearing to await the IDB's decision. *Id*.

The funding hearing was reset to the next month but the IDB apparently did not resolve the issue at its August meeting, and so the defense moved to reset the funding hearing and trial date again. JA 404-07. The hearing was reset to December 17, 2003 and the trial date passed without action. JA 11-12.

As anticipated by Mr. Lorenzi, the IDB was not able to make any payments and it was once again clear that there was no money for the defense of Mr. Boyer.

The December 17, 2003 hearing date was next reset to January 16, 2004 at the request of Mr. Lorenzi to allow for affidavits to be prepared updating the previous testimony of the witnesses in order to efficiently present the matter to the court. JA 12-13.

The January 16, 2004 hearing was reset due to the unavailability of counsel for the CPPJ. JA 410-11. The hearing was next set for April 2, 2004.

On January 30, 2004 a joint hearing was held in the cases of Adrian Citizen and Benjamin Tonguis before Judge Gray. The Chief Public Defender for Calcasieu Parish, Ron Ware, testified that his office already owed $47,000 for capital defense and had outstanding funding commitments in existing capital cases of at least $150,000 (not including Boyer). *Citizen*, 898 So. 2d at 328. The CPPJ maintained that it had neither the obligation nor authority to provide funds for indigent defense from either its general fund or from the Criminal Court Fund, which ran at a surplus of hundreds of thousands of dollars every year. The court recessed the hearing in order to try to negotiate the release of funds with the district court judges and the District Attorney. *Citizen*, 898 So. 2d at 329.

On March 23, 2004 the funding hearing was held in *Reeves* at which it was determined that the IDB could not fund the defense in that case. Contracted counsel were removed and the Chief Public Defender was appointed as lead counsel, allowing the case to proceed. *State v. Reeves*, 06-2419 (La. 5/5/2009); 11 So. 3d 1031, 1048.

The funding hearing in Mr. Boyer's case, set for April 2, 2004, was continued without setting a new date on motion of the state – by this time, all eyes were on the *Citizen* and *Tonguis* litigation. JA 14-15.

On April 27, 2004 the hearing in *Citizen* and *Tonguis* resumed and the trial judge, having no success with the judges and district attorney, held that the Calcasieu Parish Police Jury was the only possible source of funding for the capital cases and ordered the Calcasieu Parish Police Jury to provide funds for the defense in the *Citizen* and *Tonguis* cases. *Citizen*, 898 So. 2d at 329.

The order of the district court in *Citizen* and *Tonguis* was stayed by the Louisiana Supreme Court pending consideration of the state's appeal of the district court's ruling. *Citizen*, 898 So. 2d at 329 n.6.

In the meantime, the funding hearing in *Boyer* had been reset to August 19, 2004. JA 16. The Calcasieu Parish Police Jury moved to continue this hearing due in part to a scheduling conflict but also due to the fact that all of the same funding issues were pending before the Louisiana Supreme Court in the *Citizen* case. JA 414-15; *see also* JA 412-13.

In December 2004 Judge Painter, who had presided over the Boyer case until then, left the district court

bench to assume his position on the Third Circuit Court of Appeal. In that position he authored the majority opinion affirming Mr. Boyer's conviction. Judge Painter's seat in the district court was taken by the District Attorney, Mr. Bryant and Mr. Boyer's case was realloted to Judge Ritchie. JA 17.

F. The Louisiana Supreme Court's Ruling in *Citizen*

On April 1, 2005 the Louisiana Supreme Court handed down its decision in *State v. Citizen*, 04-1841 (La. 4/1/2005); 898 So. 2d 325. In its decision, the court reviewed the large amounts of money held by the Calcasieu Parish Police Jury and the Criminal Court Fund and observed that:

> Whatever the problems elsewhere in the state, Calcasieu Parish appears to have secured ample funding of its criminal justice system with substantial monies in reserve

Citizen, 898 So. 2d at 328 n.5. The court acknowledged the temptation to order the Parish to pay when one compared the paucity of indigent defense funding with the routine surpluses in the Parish criminal justice fund. *Citizen*, 898 So. 2d at 335 n.11.

Nevertheless, the court reversed the district court's ruling, holding that the legislature had the constitutional authority to determine the source of funding for indigent defense and had limited that funding to the state and not the parishes. *Citizen*, 898 So. 2d at 335-36. The court held that even when the legislature was in breach of its duty to fund indigent defense, the district court could not order payment from parish funds. *Id.*

In a statement that applied equally to Mr. Boyer, who was indicted four months before Mr. Citizen, the Louisiana Supreme Court stated:

> In this case, Mr. Citizen, was indicted for first-degree murder on October 10, 2002, and he remains in jail with no funds available for the attorney appointed to represent him and, under current circumstances, may remain there indefinitely unless funds are provided for his defense. Mr. Tonguis, was indicted for the first-degree murder of his infant child on April 11, 2002, and though he is not incarcerated, no funds are available for the attorney appointed to represent him. Implicit in these defendants' constitutional right to assistance of counsel is the State's inability to proceed with their prosecution until it provides adequate funds for their defense. While La. R.S. 15:304 and 15:571.11 cannot be construed to force the CPPJ to pay for the costs of these indigents' defenses, nothing in those statutes prohibits the CPPJ from paying these expenses, and these funds may come from the Criminal Court Fund upon agreement of the legal entities responsible for its administration under La. R.S. 15:571.11.

Citizen, 898 So. 2d at 338 (footnotes omitted).

In order to assure timely representation, the court also modified the *Wigley* procedure by holding that the district court should appoint counsel first, before determining whether a source of funds was available. Counsel appointed could then choose to file a motion to

determine source of funds and the court would then be obliged to identify a source of funds. The Court also held that where the district court was unable to identify a source of funds it could, in its discretion, order a halt to the prosecution. *Citizen*, 898 So. 2d at 338-39.

Of course, in Mr. Boyer's case, counsel had been appointed before a funding source was determined and had already filed a motion to determine source of funds. Similarly, the prosecution was effectively halted as the state was not seeking to push forward with a trial in the absence of an effective appointment of counsel. The only effect of the *Citizen* opinion on the Boyer case was to place the money held by the Parish and in the Criminal Court Fund beyond reach of the defense unless the local authorities chose to release it, which they did not.

G. Funding litigation after the *Citizen* opinion

Back in the 14th Judicial District it was reported that the judges of the district court had determined that the pending retrial in *State v. Langley* was the highest priority case among those pending in the district. JA 438; JA 440-41; *see also* Defense Exhibit 1, introduced at March 27, 2006 hearing, included in the appellate record. Judge Carter, presiding in that case, first ordered and then recommended that the IDB pay some of its outstanding capital debts and then not pay any more capital bills until it had entirely paid for *Langley*. JA 438-41. The IDB declined to adopt this recommendation. JA 623-24.

On July 1, 2005, without notice to the defense, the state refixed the funding motion hearing in Boyer for July 15, 2005. JA 18-19.

As discussed *infra*, on July 7, 2005 – more than three years after Mr. Boyer's indictment – the defense filed a motion to quash the indictment alleging a violation of Mr. Boyer's statutory and constitutional speedy trial rights. JA 418-32.

Also on July 7, 2005, Mr. Lorenzi filed a motion to continue the funding hearing to another date as the short setting did not allow sufficient time to issue subpoenas to the necessary witnesses and parties. JA 416-17.

The hearing was refixed for September 22, 2005, JA 20-21, however, on August 29, 2005 Hurricane Katrina made landfall, causing the evacuation and devastation of New Orleans where counsel from the LCAC assisting Mr. Lorenzi and at least one of the necessary witnesses were domiciled. As a result, the hearing was continued. JA 433-34.

On September 24, 2005 Hurricane Rita made landfall just west of the Texas-Louisiana border. The damage in Lake Charles caused the district court to close until October 11, 2005 and then to re-open on only a limited basis until November 25, 2005.[10]

On February 22, 2006 the hearing on the motion to determine source of funds in Mr. Boyer's case was set for March 27, 2006. JA 21-22.

On March 27, 2006 an evidentiary hearing was conducted on Mr. Boyer's *Motion to Determine Source of Funds*, combined with the hearing of a similar motion in *State v. Cisco*. JA 435-678; *see also* JA 22-24.

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10. Rita Order No. 3, 14th Judicial District Court (10/24/2005), at http://www.lasc.org/katrina_orders/14thJDC_Rita03.pdf.

The evidence in that hearing conclusively established that neither the local IDB nor LIDAB was then, nor had ever been able to fund the appointment of counsel for Mr. Boyer's capital defense. Local parish and court funds had been ruled off limits by the Louisiana Supreme Court in *Citizen* and no other viable source of funds was identified.[11] The situation was summed up succinctly in the following exchange between counsel for Mr. Cisco and Judge Ritchie:

> MS. MANN:
>
> I believe it's everyone's view that until this legislative session is over and we actually see what the legislature does, I mean, the bottom line of the testimony here today is that there is zero money anywhere.
>
> THE COURT:
>
> Right.
>
> MS. MANN:
>
> Today.
>
> THE COURT:
>
> Right.

JA 655-56. Mr. Lorenzi urged the court to rule on the availability of funding, pointing out that Mr. Boyer had

11. There was some discussion of the possibility of some witness expenses being met from the Witness and Juror Fund but without any resolution.

already been waiting four years and was awaiting a hearing date on his motion to quash:

> And, secondly, we've gone to the trouble of this hearing, and I would ask the Court to make a ruling as to whether there are, this is, in fact, a source of funds, rather than simply holding this open until we go through a legislative session. Because if you go through legislative session, assuming there is some additional money that's in House Bill 1, then it has to be approved, then it's got to go to LIDAB, then we have to have a budget, then we have to go on and on.
>
> Mr. Boyer has already been waiting four years. We know what the supreme court ruled in Citizen and Tonguis. And I don't think it's appropriate to simply hold this matter open for what could be, from what I heard earlier, the end of the year. In fact, we have a pending Motion to Quash in this matter which I'm going to move or ask the Court to provide us with dates when we can have the hearing.

JA 664.

Over Mr. Lorenzi's strenuous objection, the district court declined to rule on the *Motion to Determine Source of Funds*. JA 672-75. Mr. Lorenzi reurged the pending motion to quash and again requested a hearing. JA 675-76.

The district court never ruled on the *Motion to Determine Source of Funds* and no source of funds was ever identified to pay for the appointment of capitally

certified counsel or associated defense services in Mr. Boyer's capital prosecution. JA 24-86.

H. The motions to quash, the reduction of the charges and related pre-trial litigation

As noted above, on July 7, 2005 the defense filed a motion to quash alleging a violation of Mr. Boyer's statutory and constitutional speedy trial rights. JA 418-32. In response, the court ordered that the state show cause why the motion should not be granted on a date to be set by the court. JA 432. The motion was initially set for September 22, 2005 but continued due to the impact of Hurricane Katrina. JA 433-34.

On March 27, 2006 the defense again requested a hearing on the motion. JA 675.

On October 18, 2006 the defense again asked for the motion to quash to be set for hearing and the court set a hearing date of November 20, 2006. JA 679-80.

On November 20, 2006 the defense motion to quash due to violations of Mr. Boyer's statutory speedy trial rights was heard. JA 681-709. The defense dismissed without prejudice its motion to quash based on a violation of the constitutional speedy trial rights. JA 686. The defense maintained that there was a denial of the constitutional speedy trial right but stated that without funding they were unable to adequately investigate and present a case to meet their burden of showing prejudice.[12] *Id.*

12. Under Louisiana law, the most persuasive argument of prejudice is a showing that the defense is impaired which requires

During the hearing, the district court judge probed the prosecutor's choice to proceed capitally in light of the lack of funds available to support such a proceeding and the delays caused:

> Mr. Frey, let me just ask you. You know, I know what the charge is here. I don't know much about the facts of the case at this point. I know the basic facts, but I guess what the bottom line is, you know, we have, under the constitution we have a presumption of innocence, so just because we think he may be guilty of the crime, we can't just, you know, what if I mean, do we wait he's been in there four years, four and a half years, or he's been indicted four and a half years ago. Do we just wait and see if maybe ten years from now the legislature is going to appropriate the money? In other words, I mean, what is your intention as far as trying to move this case forward? I mean, he's got to have money, I mean, you've acknowledged that. They've got to have money to have a defense.

JA 694. The prosecutor indicated that he was giving serious consideration to reducing the charge. JA 694-95.

Ultimately, the district court denied the defense motion, finding that the filing of a motion to determine source of funds was a preliminary plea that tolled

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evidence both that the witness is unavailable and of what the witness would have said. *Van Dyke*, 856 So. 2d at 202. By contrast, no showing of prejudice is required for the statutory speedy trial claim.

Louisiana's prescriptive period for the commencement of trial. JA 700-03. The court also held that the delay caused by the lack of funding was "something that is beyond the control of the state through the D.A.'s office." JA 703.

The defense noticed its intention to seek review of the district court's decision but did not seek to stay the proceedings pending that review. JA 703-04.

On January 23, 2007 the defense filed its writ application in the Third Circuit Court of Appeal, seeking review of the denial of the motion to quash based upon statutory prescription. JA 291-310.

The state filed its opposition on February 5, 2007 noting that while the *Motion to Determine Source of Funds* had been heard in the trial court on March 27, 2006, "[i]t has not yet been ruled on, nor has a source of funding ever been located." JA 311-30. Acknowledging that the lack of funding was the cause of delay in the case, the state argued that it was beyond the control of the "State" – meaning the District Attorney's Office:

> In this case, because the defendant was without properly funded counsel for so long, the State simply could not ethically or legally bring him to trial. The indigent defense representation and funding situation is beyond the ability of the State to control.

JA 317. The state identified the lack of funding and the motions to determine a source of funds as the causes of delay:

> In this case, the delay in the defendant's trial was due to his motions and indigent defense funding, a factor which is completely outside the State's ability to control.
>
> * * * *
>
> In this case, the defendant's motion to secure funding has greatly affected the State's ability to try him, as it cannot proceed with the capital case against him until such funding has been located.

JA 322; JA 325.

On May 21, 2007, the state reduced the charge from first degree murder to second degree murder (a non-capital charge), removing the obstacle of lack of funding.[13] On the same date, the state filed a fresh bill of information charging one count of armed robbery with a firearm arising from the same incident as the murder charge. JA 30-32; *see also* R. 2707-17. When amending the indictment, ADA Killingsworth acknowledged that "everybody knows, we have a problem with indigent defense funding" and stated the indictment was being amended to allow the case to move forward. R. 2708-9. Trial was scheduled for October 29, 2007. JA 31. Mr. Lorenzi was relieved of his appointment by the trial court and (non-capital) counsel from the district conflict list was appointed in his stead.

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13. The need for two certified counsel and the cost of penalty phase preparation were removed. The IDB had existing contracts with local counsel to handle non-capital cases removing the need for additional funds.

JA 31. Ultimately, that attorney moved to be relieved of the appointment and associate counsel from the LCAC agreed to continue representing Mr. Boyer in his now non-capital case. JA 32-33.

On July 5, 2007 the Third Circuit Court of Appeal requested an updated status from the parties and any further argument. JA 331-32. The state filed a supplemental opposition, arguing that the amendment of the indictment mooted the speedy trial claim as it effectively restarted the prescription clock. JA 333-39. The defense filed an opposing brief. JA 340-51.

On July 26, 2007, the defense filed a set of motions in the district court, principally addressed to discovery issues. R. 247-357.

On August 22, 2007 the Third Circuit Court of Appeal issued its opinion denying the defense writ application from the district court's denial of the motion to quash. JA 287-90. The two judge majority held that:

> The State's decision to reduce the charge from first degree murder to second degree murder does not reset the time limitation for bringing Defendant to trial. However, the inability to prosecute Defendant because of the lack of funding was a "cause beyond the control" of the District Attorney's Office, and therefore the time limitation had been interrupted. La. Code Crim. P. art. 579(A)(2).
>
> Accordingly, there was no error with the trial court's ruling.

JA 287; *State v. Boyer*, 07-85 (La. App. 3 Cir. 8/22/2007).[14]

Writing separately, Judge Cooks rejected the notion that a motion to determine source of funds was a preliminary plea suspending the prescriptive period under the statute and then addressed the question of who bore responsibility for the delay caused by a lack of funding:

> Second, our supreme court has made it clear that the responsibility for funding of indigent defense cases rests with the State not the defense. Once an attorney is appointed to represent an indigent defendant it thereafter becomes the State's obligation to insure that adequate funds are available for the defense.
>
> Third, I disagree that the lack of funding in this case is "beyond the control of the State." The district court, the parish which instituted the prosecution and the district attorney are "the State" or State actors. Once the motion was filed, but not ruled upon, the defense attorney's hands were tied. He pursued the only legal remedy at his disposal, which was to file a motion to quash the indictment against his client. Whatever else may be said in this case, it is certainly true that none of the delay due to lack of funds was, in any way, attributable to the defense.

14. The effect under Louisiana law of holding that the lack of funding interrupted the statutory time limitation is that time does not run against the state while the defense is unfunded and that the state obtains the benefit of the full period for prosecution once funding is provided.

JA 288-89; *State v. Boyer*, 07-85 (La. App. 3 Cir. 8/22/2007) (Cooks, J., abstaining).

Judge Cooks then identified that the present case formed part of a pattern of cases in which the state had failed to heed its obligation to provide funds for the defense of indigents:

> This is yet another case that will no doubt arrive at the steps of our supreme court. The judiciary has for years grappled with the problem of funding for capital indigent defendants. What has occurred in this case is a consequence of the State's failure to heed its obligation to provide funds for the defense of indigents. This case presents a quagmire for the judiciary. On the one hand, judges have a sworn duty to apply the law regardless of the consequences; on the other hand, in the public's eye, judges serve as the last line of defense between them and violent criminals who, if released by technicalities, may cause further harm.

JA 289-90; *State v. Boyer*, 07-85 (La. App. 3 Cir. 8/22/2007) (Cooks, J., abstaining).

Ultimately, Judge Cooks recognized her duty to dissent from the majority holding but tortured by the consequences of granting speedy trial relief to a potentially guilty defendant, abstained from voting. JA 288-90; *State v. Boyer*, 07-85 (La. App. 3 Cir. 8/22/2007) (Cooks, J., abstaining).

On September 21, 2007 Mr. Boyer filed a writ application in the Louisiana Supreme Court, seeking review of the Third Circuit's ruling. JA 216.

Meanwhile, in the trial court, the defense had successfully moved for the recusal of Judge Ritchie on September 7, 2007 but a stay in proceedings had been entered at the request of the state. JA 34-36. The state's writ from the recusal decision was denied by the Third Circuit Court of Appeal on October 24, 2007. R. 387. However, the state had requested a stay until a ruling was issued by the Louisiana Supreme Court. During the period of this stay, the previously set trial date of October 29, 2007 passed. JA 34-36.

On November 16, 2007, the Louisiana Supreme Court denied the defense writ application challenging the Third Circuit's speedy trial ruling.[15] JA 215. However, a stay of proceedings remained in effect in the trial court pending consideration of the state's writ application on the recusal issue.

On November 21, 2007 the state filed its writ application in the Louisiana Supreme Court on the recusal issue. The Louisiana Supreme Court issued a bare writ denial on December 5, 2007. R. 390. As a result, the stay in the trial court was vacated and the case was realloted to Judge Canaday.

The state set the trial for February 11, 2008. JA 37. This date was only a few weeks after Mr. Boyer's counsel,

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15. This bare denial does not constitute a ruling on the merits, merely representing a refusal to exercise the court's discretionary power of review. *State v. Fontenot*, 550 So. 2d 179 (La. 1989).

Christine Lehmann, was due to give birth. R. 1282-85. The defense moved to continue this trial date and also to substitute counsel Ms. Rachel Jones in place of Ms. Lehmann.[16] *Id.*

On January 22, 2008 the defense filed its *Motion to Quash Indictment and Bill of Information Due to Violation of Speedy Trial Right*. JA 710-35. The motion specifically alleged a violation of Mr. Boyer's federal constitutional speedy trial rights and was brought solely on the basis of his constitutional rights, rather than the statutory scheme. This motion was filed a little over a month after the stay of proceedings was lifted and after the defendant's efforts to secure speedy trial relief under the Louisiana statute had failed.

Also on January 22, 2008, the defense filed a *Renewed Motion to Quash Due to Prescription*, re-urging the statutory speedy trial grounds. JA 736.

On January 28, 2008 the defense motions were heard before Judge Canaday. JA 37-47. The defense expressly requested an evidentiary hearing on its constitutional speedy trial motion, as Mr. Boyer, now with funded counsel, was finally in a position to support his claims with evidence. R. 2873-74. The state argued that the motion was frivolous and that given the prior court rulings the matter was *res judicata*. R. 2874-76. The defense pointed out that the prior rulings dealt with statutory prescription and that the present motion was a constitutional speedy trial claim. R. 2876-77. The court ordered the state to provide a response in writing. JA 43.

16. Ms. Lehmann, Ms. Jones (later referred to as Mr. Connor following her marriage) and Mr. Bourke were all staff of the LCAC.

The February 11, 2008 trial date was continued to May 19, 2008. JA 46.

On February 15, 2008 the state filed its combined opposition to the defense motions to quash due to the speedy trial violation and the renewed prescription motion. JA 740. The state argued that the constitutional speedy trial claim had been argued all the way to the Louisiana Supreme Court and that further consideration of the claim was barred by the doctrines of *res judicata* and law of the case. JA 741.

At the motions hearing on April 29, 2008 the matter was submitted to the court on the previously filed pleadings and argument. JA 53. The district court accepted the state's submission that the matter was *res judicata* and denied the motion to quash on procedural grounds, stating:

> It appears to be the exact same issue that was put directly before the Court, and this Court finds no reason to deviate from that prior decision, sees no reason to renew or revisit the motion to quash and would basically deny the motion, not making a substantive ruling, because that would be a review of it, but procedurally I do not find that it is appropriate for this Court to revisit an issue that was properly taken up the legal chain.

R. 3020.

On May 19, 2008, as a result of new information provided in discovery by the state and in order to have

more time to try to find the now-missing witnesses, the defense moved to continue the trial. JA 60. Finding that the case was not ready for trial, the court reset the trial date to September 29, 2008. *Id.*

Over the previous six and one-half years, however, Mr. Boyer's mental condition had deteriorated considerably, rendering him psychotic before the September 29, 2008 trial date could be reached. A sanity commission was appointed to determine his competency to stand trial. JA 61-63.

On August 6, 2008, after a hearing on Mr. Boyer's sanity, the district court found by clear and convincing evidence that Mr. Boyer was not competent to stand trial. JA 65-68. The scheduled trial date was vacated and all pending motions were stayed until his competency was restored.

On April 15, 2009 the district court conducted a further hearing and found, without objection, that Mr. Boyer's competency had been restored. JA 69-71. Upon motion of the state, trial was set for September 21, 2009 despite a defense request for an earlier trial date as the proposed date coincided with the time that counsel, Ms. Jones, was due to give birth. JA 804-05.

On September 21, 2009 the defense filed its *Motion to Reconsider Denial of Speedy Trial Motion*, reurging its prior motion based upon the constitutional right to a speedy trial. JA 811. The motion specifically alleged prejudice from the disappearance or death of numerous witnesses and from the negative effects of prolonged pretrial detention on Mr. Boyer's mental health, resulting

in him becoming psychotic and being rendered incompetent to stand trial for a period. JA 812-13.

Attached to the motion were affidavits from the defense investigator attesting to the exhaustive but unsuccessful efforts undertaken to locate witnesses William Gallier, Russell Clement, Elaine Newman, Laura Wick and Karina Bellard as well as information regarding the death of witness Alice Dassinger. JA 816-39.

The court heard defense argument on the same day. R. 3807-09. The state opposed the motion to reconsider, arguing that the matter had been ruled upon and should not be reopened. R. 3809.

The district court denied the motion to reconsider, expressing its satisfaction with its earlier rulings and findings and relying upon those:

> The matter was ruled upon by this Court, the matter has gone up the appellate ladder, and the Court sees no reason to reconsider, but note that you are supplementing the record with regard to your position, for whatever purposes you think appropriate on behalf of Mr. Boyer, but I am going to deny the motion to reconsider, finding that the Court was satisfied with its earlier rulings and findings and would rely on that.

R. 3810.

I. Trial

Trial commenced on September 22, 2009, and Mr. Boyer was convicted by a non-unanimous[17] jury on September 29, 2009.

J. Appeal

On appeal Mr. Boyer again argued that his Sixth Amendment right to a speedy trial had been violated by the over seven-year delay. JA 185. He re-urged the argument that the delay in funding his defense should be attributed to the state under *Barker v. Wingo*, 407 U.S. 514, 530 (1972). JA 192.

In response the state argued that it could not bring Mr. Boyer to trial without properly funded counsel and that this funding situation was beyond the control of the State (meaning the District Attorney's Office):

> In this case, because the defendant was without properly funded counsel for so long, the State simply could not ethically or legally bring him to trial. The indigent defense representation and funding situation is beyond the ability of the State to control. This Court previously recognized this in its writ decision.

JA 198. As it had in pre-trial litigation, the State argued that the delay was caused by the defense motion to

17. When polled, juror Guillory indicated that the guilty verdict on the count of second degree murder was not her verdict. R. 5730.

determine source of funds and the lack of indigent defense funding:

> In this case, the delay in the defendant's trial was due to his motions and indigent defense funding, a factor which is completely outside the State's ability to control.
>
> * * * *
>
> In this case, the defendant's motion to secure funding greatly affected the State's ability to try him, as it would not proceed with the case against him until such funding had been located.

JA 203; 205.

In denying the speedy trial claim on appeal, the Third Circuit Court of Appeal recognized that the majority of the delay was caused by the lack of funding and that but for this problem the case would have proceeded at a reasonable pace. The court specifically affirmed that identifying and providing adequate funds were the responsibility of the court and the State respectively:

> The largest part of the delay involved the "funding crisis" experienced by the State of Louisiana. It is the court's duty to identify funds and the state's duty to fund the defense, which may involve large amounts of money in first degree murder cases, particularly where the death penalty is sought, as was in the current case.

> Defendant was arraigned on September 9, 2002. Trial was scheduled for February 3, 2003. Defendant filed a motion to determine the source of funds in November 2002, and the first hearing on the motion took place on August 15, 2003, at which time the hearing was continued. Thereafter, the only matters that came before the trial court concerned the source of funding.
>
> * * * *
>
> The majority of the seven-year delay was caused by the "lack of funding."
>
> * * * *
>
> But for the procedural problem, lack of funding for a capital case, the case would have progressed in a timely manner.

JA 133-36.

In conducting its analysis of the constitutional speedy trial claim, the Court of Appeal addressed the merits of the federal constitutional claim but refused to attribute the delay to the state, instead standing by its earlier interlocutory ruling that indigent defense funding failures were outside the control of the state:

> While most certainly the more than seven years from date of arrest to trial was presumptively prejudicial, the remaining *Barker* factors were not present such as to support the quashing of the indictment for second degree murder or

> the bill of information charging Defendant with armed robbery with a firearm. The first three [sic][18] years he was incarcerated, Defendant was charged with first degree murder, which was a non-bailable offense, and the progression of the prosecution was "out of the State's control" as determined by this court and the supreme court.

JA 140-41.

SUMMARY OF ARGUMENT

After his arrest, Jonathan Boyer was held for five years without the effective appointment of counsel. In all, there was a delay of seven and one-half years between his arrest and trial, and Mr. Boyer spent that entire period in jail without bond.

Both the Respondent and the state appellate court agree that the case could not proceed for those five years due to the lack of indigent defense funding.

However, adopting its earlier interlocutory ruling applying Louisiana's statutory prescription scheme, the state appellate court found that Mr. Boyer's speedy trial rights had not been violated, as the progression of the prosecution was out of the state's control (meaning the District Attorney's control).

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18. This appears to be a typographical error in the opinion below. The court acknowledges the correct period of five years at several other points in the opinion.

This Court has established a balancing test to determine whether a defendant's speedy trial rights have been violated. Part of that balancing test is an assessment of the cause of the delay and whether the government or the criminal defendant is more to blame for the delay.

In determining against whom any delay should be weighed, this Court has looked to who has the ultimate authority and responsibility for the particular cause of the delay, and in doing so has not limited that consideration to the authority and responsibilities of the local prosecutor. Instead this Court has looked to the conduct of the State or government as a whole. It is in this vein that this Court has accepted that a systemic breakdown in the public defender system could be charged to the State.

The State of Louisiana has a constitutional and statutory obligation to make a timely and effective appointment of counsel for an indigent defendant. This includes the responsibility to provide adequate funds for the defense. The delay in this case was caused by the failure of the State of Louisiana to meet this obligation for over five years after Mr. Boyer's arrest.

That failure was particularly egregious in the present case because it was part of a long term pattern by the State of Louisiana of willfully neglecting its responsibility to provide for indigent defense.

Even were the cause inquiry confined to the local prosecutor, the result in this case would be the same. By deciding to seek death, the State of Louisiana, through the Calcasieu Parish District Attorney's Office, provoked a delay due to a lack of funding that would not have existed in

a non-capital prosecution. Further, the District Attorney's Office shared control over a huge annual surplus of funds, more than adequate to fund Mr. Boyer's defense, but chose not to make those funds available.

Delay caused by the failure to make an effective appointment of counsel casts a long shadow over the speedy trial analysis. The impact of this particular cause of delay on the other *Barker* factors underscores the importance of weighing such delay against the state.

Applying *Barker's* balancing test to the present case reveals a clear violation of Mr. Boyer's speedy trial rights.

ARGUMENT

A. Speedy trial claims involve a balance of relevant circumstances, including the cause of the delay

The "right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" and is "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 223-26 (1967).

This Court has held that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker v. Wingo*, 407 U.S. 514, 522 (1972). In *Barker* the Court set out four factors – length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant – which must be weighed in a sensitive balancing process along with such other circumstances as may be relevant. The Court made plain that the four factors are related and must be considered together. *Id* at 533.

B. The cause of delay will weigh against the party who bears ultimate responsibility for that cause, which in the case of indigent defense funding is the State

In discussing the assessment of cause of delay, this Court has focused on who bears ultimate responsibility for the circumstance giving rise to the delay or, put another way, whether the government or the defendant is more to blame for the delay.

> *Barker* instructs that "different weights should be assigned to different reasons," [407 U.S.,] at 531, 92 S. Ct. 2182, 33 L. Ed. 2d 101, and in applying *Barker*, we have asked "whether the government or the criminal defendant is more to blame for th[e] delay." *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Deliberate delay "to hamper the defense" weighs heavily against the prosecution. *Barker*, 407 U.S., at 531, 92 S. Ct. 2182, 33 L. Ed. 2d 101. "[M]ore neutral reason[s] such as negligence or overcrowded courts" weigh less heavily "but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Ibid.*
>
> In contrast, delay caused by the defense weighs against the defendant: "[I]f delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Id.*, at 529, 92 S. Ct. 2182, 33 L. Ed. 2d 101.

Vermont v. Brillon, 556 U.S. 81, 90 (2009).

The Court of Appeal erroneously limited its consideration to those matters within the control of the local prosecuting authority.

This Court has been clear in not limiting the responsibility of the State in this way. In *Barker*, the Court specifically identified the government's responsibility for delay caused by overcrowded courts. *Barker*, 407 U.S. at 531.

This Court has expressly acknowledged that "[d]elay resulting from a systemic 'breakdown in the public defender system,' could be charged to the State." *Vermont v. Brillon*, 556 U.S. 81, 94 (2009) (quoting *State v. Brillon*, 955 A.2d 1108, 1111 (Vt. 2008)).[19]

Ultimately, the constitutional obligation to provide a speedy trial rests on the state, not the local District Attorney:

> by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial is enforceable against the States as "one of the most basic rights preserved by our Constitution."

Smith v. Hooey, 393 U.S. 374, 374-75 (1969) (citing *Klopfer*, 386 U.S. 213 at 226). In Louisiana, each criminal

19. *See, e.g.*, *State v. Hanger*, 706 P.2d 1240, 1242 (Ariz. Ct. App. 1985) (dismissal with prejudice of prosecution after failure to fund indigent defense rendered a speedy trial violation inevitable); *Glover v. State*, 817 S.W.2d 409 (Ark. 1991) (delay in court appointment of counsel not good cause for delay under speedy trial statute).

prosecution is brought on behalf of the state and it is the State of Louisiana, not the District Attorney, who is the named party in the proceeding. La. Code Crim. Pro. art. 381; La. Const. art. V § 26; La. Rev. Stat. § 16:1(B).

The State of Louisiana cannot insulate itself from its responsibilities under the Bill of Rights by applying those responsibilities only to a local prosecutor.

C. The single dominant cause of delay in this case was the failure of the State of Louisiana to provide funds for Mr. Boyer's defense to a capital indictment

Mr. Boyer was arrested on March 8, 2002, extradited to Louisiana on May 2, 2002, indicted on June 6, 2002 and brought to trial on September 22, 2009.

From the time of his extradition, through his indictment all the way up to May 21 2007 when the charges against him were reduced, the State of Louisiana breached its constitutional responsibility to make an effective appointment of counsel for Mr. Boyer.

There is no dispute that during these five years Mr. Boyer's case was delayed because of the failure of the State of Louisiana to provide funds for his defense.

The State has argued throughout this case that it was unable to bring Mr. Boyer to trial for those five years due to the lack of funding of indigent defense. JA 198, 263, 317. The Third Circuit Court of Appeal has twice held that the delays in the case were caused by the failure of the State of Louisiana to fund indigent defense. JA 133, 287. In *Citizen*,

the court similarly identified the failure to allocate funds for indigent defense as indefinitely preventing cases from being brought to trial. *Citizen*, 898 So. 2d at 338.

While the primary cause of the delay was the lack of funding, the secondary cause was the choice of the State of Louisiana, through the District Attorney's Office, to institute a capital prosecution, thus provoking and exacerbating the primary cause of delay – the failure to fund indigent capital defense.

This Court has recognized that the duty to bring cases to trial lies with the state, and not the criminal defendant. *Barker*, 407 U.S. at 527. Under Louisiana law, the State has the responsibility and authority to set cases for trial. La. Code Crim. Pro. art. 702 ("Cases shall be set for trial by the court on motion of the state . . . "); *State v. Simpson*, 551 So. 2d 1303, 1304-05 (La. 1989) (the district attorney has the primary responsibility to move to set criminal cases for trial); *see also* La. Code Crim. Pro. art. 578.

The State also has the responsibility and authority to provide counsel and the tools for a defense for indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *Citizen*, 898 So. 2d at 335 ("the constitution explicitly places the duty of providing a working system for securing the representation of indigent defendants squarely on the shoulders of the legislature.").

The duty to provide counsel is not discharged by an appointment in name only but must be an effective appointment of counsel, made at such a time and under such circumstances as to permit effective aid in the

preparation and trial of the case. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

In Louisiana, a defendant must be presented to a judge within 72 hours of arrest "for the purpose of the appointment of counsel." La. Code Crim. Pro. art. 230.1. Where the defendant has the right to have the court appoint counsel to defend him, "the court shall assign counsel to the defendant." La. Code Crim. Pro. art. 230.1(B); *see also* La. Code Crim. Pro. art. 512 (court must provide counsel with at least five years experience for any uncounseled capital defendant at arraignment). At least two capitally certified[20] counsel must be appointed. La. Sup. Ct. R. XXXI(A)(1)(a).

Third, in Louisiana the State has the express responsibility and the authority to provide for a system for compensating qualified counsel for indigents. La. Const. art. I § 13; *Citizen*, 898 So. 2d at 335.

As the Court of Appeal succinctly stated:

> It is the court's duty to identify funds and the state's duty to fund the defense, which may involve large amounts of money in first degree murder cases, particularly where the death penalty is sought, as was in the current case.

State v. Boyer, 10-693 (La. App. 3 Cir. 2/21/2011); 56 So. 3d 1119, 1142.

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20. *State v. Taylor*, 93-2201 (La. 2/28/96); 669 So. 2d 364, 367-69 (capital certification justifies reintroduction of contemporaneous objection rule in capital cases).

While the Constitution places the responsibility for funding squarely with the legislature, the Court in *Citizen* made it clear that in the 14th Judicial District the legal entities responsible for the Criminal Court Fund were at liberty to make those funds available for indigent defense expenses. *Citizen* at 338; La. Rev. Stat. § 15:571.11. That is, the District Attorney with the approval of the presiding judge could have decided to make the surplus funds available at any time. *Id.*

D. The delay caused by the failure of the State to provide counsel for Mr. Boyer was as a result of a systemic failure in the public defender system caused by a willful and chronic failure by the legislature to provide funds

The funding shortfall in the 14th Judicial District in Mr. Boyer's case was not unexpected or unpredictable but instead was simply yet another chapter in a history of chronic underfunding of indigent defense in that district.

In 1976, Louisiana established the IDBs, which were funded through assessments on criminal violations, principally traffic tickets, a funding mechanism that proved woefully inadequate. *State v. Peart*, 621 So. 2d 780, 784-89 (La. 1993) (discussing inadequacy of indigent defense funding); Richard Drew, *Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 La. L. Rev. 955 (Summer 2009).

In the face of legislative inaction, in 1990 the Louisiana Supreme Court appointed a Statewide IDB Committee of the state's Judicial Council to study and recommend changes to Louisiana's indigent defense system. *Peart*,

621 So. 2d at 789 n.9. The Committee adopted the recommendations in a report it had commissioned from the Spangenberg Group which included doubling the funding of indigent defense in the state. *Peart*, 621 So. 2d at 790.

In July 1993, the Louisiana Supreme Court addressed the consequences of chronic underfunding of indigent defender services, stating:

> Specifically, the system has resulted in wide variations in levels of funding, both between different IDB's and within the same IDB over time. The general pattern has been one of chronic underfunding of indigent defense programs in most areas of the state.

Peart, 621 So. 2d at 789. The court concluded that caseload levels had resulted in constitutionally ineffective assistance of counsel and found a rebuttable presumption of ineffective assistance for defendants in Section E of the Orleans Criminal District Court. *Id.*

The court in *Peart* sounded a warning that legislative action should be taken to reform indigent defense or the court would consider more intrusive measures:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of

> counsel. We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.

Peart, 621 So. 2d at 791 (citations omitted).

Two months later the court banned the involuntary, uncompensated appointment of counsel.[21] *State v. Wigley*, 624 So. 2d 425 (La. 1993).

In May, 1994, the Court held that a district court could order the Parish government to defray necessary indigent defense expenses. *State v. Craig*, 93-2515 (La. 5/23/94), 637 So. 2d 437, 439-40. Barely three months later the legislature abrogated this decision, expressly excluding the use of local city, parish or criminal court funds as a source of funding for indigent defense. *See Citizen*, 898 So. 2d at 332.

On July 1, 1994 the Louisiana Supreme Court adopted Rule XXXI, establishing the Louisiana Indigent Defender Board (LIDB) and its various programs. *State v. Touchet*, 93-2839 (La. 9/6/94); 642 So. 2d 1213, 1222 (discussing historical developments). An interbranch taskforce appointed by the Governor and chaired by the Chief Justice of the Supreme Court requested $10 million to support a full year of the LIDB's program. *Id.*

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21. Evidence in the district court revealed that up to that point that no attorney appointed from the non-volunteer list had ever been compensated by the Indigent Defender Board. *State v. Wigley*, 599 So. 2d 858, 860 (La. App. 3 Cir. 1992).

The legislature never funded LIDB at the amount requested by the interbranch taskforce. LIDB was funded $5 million for its first partial year of operation and then at $7.5 million per year thereafter. JA 481.

Beginning January 1, 1998, the legislature reconstituted the LIDB as the Louisiana Indigent Defense Assistance Board (LIDAB). La. Acts 1997, No. 1361, eff. Dec. 31, 1997. The initial budget of LIDAB was $7.5 million. JA 481-82. This remained the budget of LIDAB until 2004, despite repeated requests by the Executive Director of LIDAB for funding to be increased to $20 million.[22] JA 482-83. In 2004 the budget was increased to about $8 million and then to $10 million in 2005. JA 483.

Beginning in the summer of 2002, the National Legal Aid & Defender Association (NLADA) and the National Association of Criminal Defense Lawyers (NACDL) became heavily involved in seeking reform of Louisiana's indigent defense funding system, ultimately producing a report describing their work in Louisiana and the inadequacy of the funding arrangements. National Association of Criminal Defense Lawyers, In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon (March 2004).

The woeful state of public defense in Calcasieu Parish also provoked a separate study funded by the ABA Gideon

22. To make matters worse, in 1999, the legislature imposed upon LIDAB the obligation to fund representation in capital appeals and capital post-conviction applications in state court without adding any additional funding. La. Acts 1999, No. 1012; JA 493-97.

Initiative documenting the appalling under-representation of the poor in the Parish. Michael Kurth and Daryl Burckel, Defending the Indigent in Southwest Louisiana (July 2003).

The year 2003 also produced a resolution from the Louisiana State Bar Association castigating the State of Louisiana and calling for reform of the indigent defense system. Wayne J. Lee, *Indigent Defense – A Failed Promise*, 51 La. B.J. 174 (October/November 2003).

Accepting the Bar's critique, resolutions in June 2003 in the Louisiana House and Senate[23] led to the establishment of the Louisiana Task Force on Indigent Defense Services. The Task Force was directed to study indigent defense and report by March 2004.

In 2004, Judge Cooks of the Third Circuit Court of Appeal wrote a scathing article critiquing the structure and funding of Louisiana's indigent defense system and concluding that the State's method of funding indigent defense was constitutionally deficient. Sylvia R. Cooks & Karen Karre Fontenot, *The Messiah is Not Coming: It's Time for Louisiana to Change its Method of Funding Indigent Defense*, 31 S.U.L. Rev. 197, 208 (Spring 2004).

The legislature continued the Task Force in 2004, setting a new report date of April 2005,[24] prompting the Louisiana Supreme Court to state:

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23. H.R. Res. 151, Reg. Sess. (La. 2003); S. Res. 112, Reg. Sess. (2003).

24. S. Con. Res. 136, Reg. Sess. (La. 2004).

> We assume that, given the obvious deficiencies in funding from the State to satisfy its constitutional mandate in La. Const. Art. I, § 13, this Task Force will work diligently to formulate specific recommendations on April 1, 2005, to address these problems and that the legislature will act quickly to promulgate these, or other, appropriate solutions.

Citizen, 898 So. 2d at 336.

It would be two more years before Louisiana passed legislation reforming its indigent defense system[25] – five years too late to help Mr. Boyer.

The lack of funding in Mr. Boyer's case represented part of a pattern of chronic underfunding of indigent defense programs. Pattern Louisiana had been receiving increasingly scathing warnings about for over a decade. The failure goes beyond mere negligence and represents a willful failure by the State of Louisiana to meet its constitutional and statutory responsibilities in the area of indigent defense.

E. The responsibility and authority to charge and to maintain a capital prosecution rests squarely with the State

Delay caused as a result of a discretionary decision of the prosecution, made for its advantage, has been weighed heavily against the State, even in the absence of bad faith. *United States v. Provoo*, 17 F.R.D. 183, 202 (D. Md. 1955),

25. *See* Louisiana Public Defender Act, Acts 2007, No. 307.

aff'd, 350 U.S. 857 (1955) (choice of venue was "a deliberate choice for a supposed advantage, which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith").

In Louisiana a charge of first degree murder if proven exposes a defendant to either death or life imprisonment and the local District Attorney has the exclusive discretion to determine whether to seek the death penalty or not. La. Rev. Stat. § 14:30; La. Code Crim. Pro. art. 61.

There is no legal requirement that a prosecutor affirmatively elect to seek the death penalty though a practice of providing notice of intent to seek or not to seek the death penalty operates in some parts of Louisiana.

The decision to seek death is not only discretionary but strategic, carrying with it numerous advantages for the prosecution beyond the ability to obtain the enhanced penalty of death. For instance, the defendant may be held without bond;[26] the prescriptive period for a capital crime is three years, rather than the two years applicable for other felonies;[27] the case is tried before a death-qualified jury;[28] defense strategy is more constrained and conservative;[29]

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26. La. Const. art. I, § 18; La. Code Crim. Pro. art. 331.

27. La. Code Crim. Pro. art. 578.

28. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 786-87 (2006) (collecting research on prosecution bias of death qualified jurors).

29. *Florida v. Nixon*, 543 U.S. 175, 191-192 (2004) (discussing strategic challenges for guilt phase in capital cases).

and, the prosecution is able to use the threat of death to motivate plea negotiations.[30]

The delay caused by the lack of funding in this case was itself provoked by the discretionary decision to proceed capitally against Mr. Boyer on a count of first degree murder, a decision the state later abandoned.

F. The failure to provide counsel adversely impacts the ability of a defendant to assert or act upon his speedy trial rights

A failure to make an effective appointment of counsel to an indigent defendant should count heavily against the state because it directly impairs an accused's ability to assert his right to a speedy trial or even to make a strategic decision to forego that right.

In the absence of an effective appointment of counsel, an accused cannot meaningfully demand a speedy trial without waiving his right to counsel. Such a forced choice between fundamental constitutional rights is intolerable.[31] Thus, the Supreme Court of Arkansas has refused to force indigent defendants to choose between their constitutional

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30. *Brady v. United States*, 397 U.S. 742 (1970) (finding a plea entered to avoid possible death penalty is voluntary).

31. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding it "intolerable that one constitutional right should have to be surrendered in order to assert another"). This is particularly so where compelling the election between the right to a speedy trial and the right to counsel "impairs to an appreciable extent" the policies behind both of those rights. *McGautha v. California*, 402 U.S. 183, 213 (1971).

right to be represented by counsel and their constitutional right to have a speedy trial where there were systemic delays in the appointment of counsel. *Glover v. State*, 817 S.W.2d 409 (Ark. 1991) (refusing to force indigent defendants to choose between their constitutional rights to be represented by counsel and to have a speedy trial).

Furthermore, under Louisiana law, "[a] motion by the defendant for a speedy trial, in order to be valid, must be accompanied by an affidavit by defendant's counsel certifying that the defendant and his counsel are prepared to proceed to trial within the delays set forth in this Article". La. Code Crim. Pro. art. 701(D)(1).

One of the rationales for weighing the assertion of the right in considering a speedy trial claim is that it "allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule." *Barker*, 407 U.S. at 528-29.

A failure to make an effective appointment of counsel prevents a defendant from meeting the minimum procedural requirement for filing a motion for speedy trial in Louisiana. A defendant must instead wait until the case has prescribed and move to quash. As Judge Cooks observed in the present case, after filing a motion to determine source of funds, defense counsel "pursued the only legal remedy at his disposal, which was to file a motion to quash the indictment against his client." *State v. Boyer*, 07-85 (La. App. 3 Cir. 8/22/2007) (Cooks, J., abstaining).

It is little wonder that this Court used the example of a case where no counsel is appointed as an example of

when a failure to assert will be relatively unimportant. *Barker*, 407 U.S. at 529. Such must also be true where there is no effective appointment of counsel.

Given the adverse impact of the failure to make an effective appointment of counsel on a defendant's ability to assert his right to a speedy trial, that failure should weigh heavily against the State.

G. The uniquely prejudicial quality of delay caused by a denial of counsel also dictates that such delay must count heavily against the state

This Court has previously held that the speedy trial guarantee is essential to protect at least three basic demands of our criminal justice system: (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself. *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1965)).

To borrow the formulation from *Smith v. Hooey*: "[t]hese demands are both aggravated and compounded in the case of an accused who is" imprisoned" without the effective appointment of counsel. *Smith v. Hooey*, 393 U.S. at 377-78.

An indigent defendant awaiting effective appointment of counsel is unable to effectively seek release from custody, has no advocate to mediate the negative consequences of confinement, is powerless to respond to the public accusation and is unable to take steps to mitigate the prejudice to his defense. Indeed, like Mr. Boyer, such a

defendant cannot even develop and effectively litigate a motion to quash until counsel is provided.

By comparison, a counseled defendant experiencing a delay of trial may yet investigate and prepare his case, may move to preserve testimony or other evidence when it is in danger of being degraded or destroyed and may monitor and respond to the risk of any other prejudice arising from the denial of a speedy trial.

H. Correct application of the Barker factors to the present case clearly demonstrates that Mr. Boyer's speedy trial rights were violated

(i) Length of Delay

Delay here was over seven years, with five years spent without an effective appointment of counsel.

This court described the five year delay between arrest and trial for Willie Barker as "extraordinary," though Barker had counsel and had been at liberty for all but ten months of the period. *Barker*, 407 U.S. at 533-34. This Court described Barker's as a close case, even though Barker did not want a speedy trial and clearly acquiesced in the delay for strategic reasons. *Id.*

This Court has also observed that lower courts have found delay to be presumptively prejudicial, at least as it approaches one year. *Doggett v. United States*, 505 U.S. 647, 652 (1992).

The Louisiana legislature has set two years as the absolute maximum period within which a second degree

murder case must be brought to trial. La. Code Crim. Pro. art. 578(A)(2). Where counsel swears an affidavit of readiness for trial, the case must be tried within four months or the defendant released from custody. La. Code Crim. Pro. art. 701(D).

In *Doggett*, where the defendant remained at liberty for a six year period of delay, blissfully unaware of the pending charge against him, this Court stated:

> When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief.

Doggett, 505 U.S. 658 (footnotes and citations omitted).

(ii) Cause of delay

The delay here was caused by the willful and chronic failure of the State of Louisiana to make adequate provision for counsel for indigent defendants. A cause of delay arising from a breach by the state of its constitutional responsibility to provide counsel for indigents should be weighed heavily against the state.

Similarly, where that delay was provoked by the discretionary, strategic decision to seek a death penalty, the ensuing delay should be weighed heavily against the state.

(iii) Assertion

Jonathan Boyer advised the court of his indigency and sought the appointment of counsel. A barely literate, cognitively impaired, mentally ill, indigent prisoner can be expected to do no more.

Delays in the first two trial settings were joined in by the State because no funding had been provided for a defense. The next trial setting was four years later, after the State relented and obviated the funding problem.

The defense timely filed a motion to quash immediately after the expiry of the prescriptive period, two years before the funding delay was resolved.[32] The defense litigated the denial of that motion in the district court in November 2006 and then sought review in the Court of Appeal and Louisiana Supreme Court until being finally denied in November 2007. After the stay of proceedings due to the recusal issue was lifted in December 2007, the defense filed a motion to quash based on the speedy trial right in January 2008.[33] After this motion was denied, Mr. Boyer again reurged the motion before trial.

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32. Mr. Lorenzi also doggedly pursued funding for Mr. Boyer and unsuccessfully implored the district court to rule on the funding motion a year before the funding delay was resolved.

33. The state appellate court described this as perfunctory because it did not consider the appellate litigation in 2007 nor consider the effect of the stay. *Boyer*, 56 So. 3d at 1143. The state appellate court clearly erred in this respect.

Where the state fails to make an effective appointment of counsel issues of assertion should carry little weight but in this case Mr. Boyer's rights were aggressively asserted.

(iv) Prejudice

Mr. Boyer was held in the Parish jail for over seven years awaiting trial; five years without an effective appointment of counsel. In bringing his motions to quash for the violation of his speedy trial right, Mr. Boyer described the disruptions to his life, the impairments that custody had brought as well as the anxiety and public opprobrium suffered. JA 728-31. Counsel specifically alleged that Mr. Boyer's decompensation and resulting incompetence was caused by his lengthy pre-trial detention. JA 813.

In addition, Mr. Boyer demonstrated specific prejudice to his defense by the loss of witnesses both for the purpose of investigation and presentation at trial. JA 744. (Motion to Quash Indictment and Bill of Information Due to Violation of Speedy Trial Right describing role of witnesses who could no longer be found); R. 3196-252 (defense counsel's updated description of the missing witnesses and their role in the defense); R. 1900 (detailing the exhaustive attempts to locate the missing witnesses). Counsel also described the inability to make a relatively contemporaneous assessment of Mr. Boyer's mental health at the time of the crime or his statement to police. JA 731.

Specific prejudice to Mr. Boyer's defense is shown through the unavailability of witnesses relevant to the defense presentation. Even with the impairments to the defense, the prosecution was unable to secure a unanimous

verdict and in any other state in the country the jury's verdict would have been inadequate to record a murder conviction.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Louisiana Third Circuit Court of Appeal, find a violation of Mr. Boyer's speedy trial rights and enter orders accordingly.

Respectfully Submitted,

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