

No. 11-9953

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2012

JONATHAN BOYER,
Petitioner,

-vs-

STATE OF LOUISIANA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state's failure to fund counsel for an indigent petitioner 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?
2. Whether a petitioner's due process right to present a complete defense, to compulsory process, and to confront the witnesses against him is violated where relevant and reliable expert testimony as to the psychology of interrogations and false confessions is excluded at trial by an arbitrary and disproportionate categorical ban?

PARTIES TO THE PROCEEDING

The petitioner is Jonathan Boyer, the petitioner and petitioner-appellant in the courts below.

The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, the State of Louisiana, respectfully opposes the petitioner's petition for a writ of certiorari to review the Louisiana Third Circuit Court of Appeal's judgment in this case.

OPINION BELOW

The Louisiana Third Circuit Court of Appeal's opinion in this case was published as *State v. Boyer*, 2010-693 (La.App. 3 Cir. 2/2/11), 56 So.3d 1119. The opinion and that court's decision affirming Mr. Boyer's conviction were included with the petitioner's certiorari petition as Appendix B. The Louisiana Supreme Court's opinion in this case was published as *State v. Boyer*, 2011-0769 (La. 1/20/12), 78 So.3d 138. The opinion and that court's denial of petitioner's writ were included with the petitioner's certiorari petition as Appendix A.

JURISDICTION

The Third Circuit Court of Appeal of Louisiana affirmed the petitioner's conviction for second degree murder and armed robbery with a firearm on February 2, 2011. The Louisiana Supreme Court denied the petitioner's writ of certiorari on January 20, 2012. The petitioner's petition for a writ of certiorari to this Honorable Court was filed under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution is relied upon by petitioner, and it provides:

In all criminal prosecutions, the accused shall enjoy the right to.....have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

The petitioner additionally relies on the Fourteenth Amendment to the United States Constitution, which states:

No State shall.....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 laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

On June 6, 2002, the petitioner was indicted by a Calcasieu Parish grand jury for first degree murder, a violation of LSA-R.S. 14:30. On September 9, 2002, the petitioner, through counsel, waived a reading of the bill of indictment, tendered a plea of not guilty to the charge, and requested a trial by jury. A delay in these proceedings was caused by several factors, including an indigent defense funding crisis, the issue of the petitioner's competency to proceed to trial, and an abundant number of defense motions which required pretrial litigation.

On May 21, 2007, the petitioner was charged by a bill of information filed by the Calcasieu Parish District Attorney's Office (hereinafter "the State") with armed robbery and armed robbery with a firearm, a violation of LSA-R.S. 14:64.3. Also on that date, the State amended the bill of indictment to reflect a charge of second degree murder, a violation of LSA-R.S. 14:30.1. The State reduced the petitioner's charge from second degree murder in an effort to bring his case to trial.

The petitioner's case was called for trial on September 22, 2009. It was presided over by the Honorable G. Michael Canaday. On September 29, 2009, the jury found the petitioner guilty of second degree murder and armed robbery with a firearm.

The petitioner was sentenced on October 14, 2009. For the second degree murder conviction, the trial court sentenced the petitioner to serve life in prison at hard labor, with that time to be served without benefit of probation, parole or suspension of sentence. As to the charge of armed robbery, the trial court sentenced the petitioner to serve ninety-nine years in prison, with that time to be served without benefit of probation, parole, or suspension of sentence. Pursuant to the sentencing enhancement provision of armed robbery with a firearm, the trial court sentenced the petitioner to serve five years in prison, with that time to be served

without benefit of probation, parole, or suspension of sentence, and to run consecutive to the armed robbery charge. The petitioner was also given credit for time served.

The petitioner filed a motion and order to appeal his conviction. His convictions and sentences were affirmed by the Louisiana Third Circuit Court of Appeal and by the Louisiana Supreme Court. The petitioner has subsequently filed a Petition for Writ of Certiorari to the United States Supreme Court. The State herein timely files its brief in opposition to that petition, which has no merit.

REASONS FOR DENYING THE WRIT

Louisiana, like many other states, is experiencing a crisis in indigent defense funding. Despite this inescapable financial reality, Louisiana still fully complies with the Sixth Amendment mandate for counsel, and the State provides attorneys to assist indigent petitioners like this petitioner. The Louisiana Third Circuit Court of Appeal accurately chronicled the saga of this petitioner's case, which included a delay to resolve issues of his competency, indigent defense funding issues, and numerous motions filed by the petitioner by which he voluntarily extended his time before trial since they required pretrial litigation. (Petitioner's Appendices, pp. A-31-A-43).

The state court did not fail to provide counsel to this petitioner for five years; the petitioner's lack of candor as to his case history is disturbing. Furthermore, as the state court noted, the petitioner failed to even assert a speedy trial claim until years had passed, and he did so while still filing numerous motions which lengthened his time to trial. Since the state court accurately and thoroughly analyzed this case in accordance with this Court's decision in *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 2187 (1972), and because no constitutional violation occurred under the facts of this case, the petitioner's argument on this ground fails.

With regard to the petitioner's argument regarding the lack of false confession evidence being permitted in this case, the state court below fully complied with this Court's mandate on the gate-keeping for such evidence, first espoused in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993). (Petitioner's Appendices, pp. A-14-A-15). The petitioner did not provide this Court with the pretrial writ decision of the Louisiana Third Circuit Court of Appeal and the State writ application which contained this analysis. In any event, while a criminal petitioner has a constitutional right to present a defense, he does not have the right to present any and all evidence at his whim. Where the evidence to be offered by the petitioner failed to meet even minimum standards for evidentiary admissibility as first set forth by this Court in *Daubert*, the state court did not err in excluding it. No constitutional violation occurred with the state court's decision in this matter.

I. THIS COURT SHOULD DECIDE WHETHER LOUISIANA'S FAILURE TO PROVIDE INDIGENT PETITIONER WITH REPRESENTATION FOR THE FIRST FIVE YEARS AFTER HIS ARREST AND INDICTMENT SHOULD COUNT AGAINST THE STATE FOR SPEEDY TRIAL PURPOSES.

- A. The failure to provide an indigent petitioner with an attorney for five years should be weighed against the state for speedy trial purposes, particularly where the actions of the prosecutors knowingly exacerbated a systemic breakdown of the public defender system.**
- B. If the five-year delay is assessed against the state, the balance of the *Barker v. Wingo* factors weigh heavily in Mr. Boyer's favor.**
- C. This Court should act to correct a ruling which treats with impunity a system where indigent petitioners facing the death penalty may (and do) rot away in prison without attorneys and without legal recourse.**

This petitioner did not languish for five years without a lawyer. He was never unrepresented by counsel. That claim is specious. This Court should not review this petition granting any credibility at all to this outrageous claim. Furthermore, petitioners like this one are

not rotting away in Louisiana prisons without effective representation. This petitioner was capably represented at all stages of these proceedings.

The Third Circuit Court of Appeal of Louisiana extensively addressed the petitioner's speedy trial rights claim before rejecting it. The record reveals that this decision was legally proper. (Petitioner's Appendices, pp. A-31-A-43). That state court ruling, which adopted the analysis set forth by this Court in *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 2187 (1972), should remain undisturbed by this Honorable Court.

A petitioner has a right to be represented by competent, qualified defense counsel; this right is recognized in both the United States and Louisiana Constitutions. U.S. Const. amend. VI; La. Const. of 1974, Art. I, §13; *see also* LSA-C.Cr.P. Arts. 511 & 512. For a considerable time span in this case, the petitioner stood charged with capital murder. "Capital certified" counsel is required by La. S.Ct. Rule XXXI. Moreover, LSA-C.Cr.P. Art. 512 lists additional requirements for qualified counsel in capital cases. While petitioner was represented by counsel at all times in this case, an indigent defense funding issue and its impact on representation was raised by petitioner's original counsel. For some time period, the State could not ethically try this petitioner without resolution of counsel and funding issues.

In addition, the record of this case reveals that this petitioner did not wish to be tried absent a solution to both problems, which was a reasonable desire. In fact, the petitioner filed to determine the funding source, and raised the indigent defense funding issue which partially delayed this case. At no time was the petitioner unrepresented, thus his caption stating otherwise is misleading and contrary to the facts. There were also two devastating hurricanes in Louisiana during the time period involved in the petitioner's case, Hurricanes Katrina and Rita, which caused delays in so many cases throughout the State, including Calcasieu Parish, where the

petitioner was tried. These natural disasters further complicated an indigent defense funding system which was already troubled.

In *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 2187 (1972), the U.S. Supreme Court held that when it comes to setting statutory criteria for ensuring a speedy trial procedure, the states are “free to prescribe a reasonable period consistent with the constitutional standards.” *Barker* has been cited repeatedly by Louisiana courts called upon to address the speedy trial issue, and was the basis for the state court’s analysis in this case. In *Barker*, the United States Supreme Court reiterated that a petitioner in a criminal case has a Sixth Amendment right to a speedy trial. The Court set forth various factors to be considered when determining whether that right has been violated. According to the *Barker* Court, the factors to be considered are: (1) the petitioner’s assertion of his right to a speedy trial; (2) the prejudice to the petitioner; (3) the length of the delay; and (4) the reasons for the delay. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192.

As for the petitioner’s responsibility to assert his right to a speedy trial, the *Barker* Court stated:

[W]hether and how a petitioner asserts his right is closely related to the other factors we have mentioned.....The petitioner’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the petitioner is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a petitioner to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531-532, 92 S.Ct. at 2192-2193.

If a petitioner fails to assert his speedy trial right, then it will be hard for him to establish that he was denied a speedy trial. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. As the state court noted in this case, years passed before this petitioner ever asserted a speedy trial right.

According to the *Barker* Court, the length of the delay serves as a type of triggering mechanism, and until there is a delay which is “presumptively prejudicial,” there need be no inquiry into the other factors. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192. The *Barker* Court noted:

Nevertheless, because of the imprecision of the right to speedy trial, the length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, 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 530-531, 92 S.Ct. at 2192.

The delay in this case was considered presumptively prejudicial by the state court; thus a thorough analysis of all *Barker v. Wingo* factors was conducted by that court. The State cannot analyze this case in a better fashion than the state court did, and thus herein adopts its reasoning in brief. (Petitioner’s Appendices, pp. A-31-A-43).

In *Barker*, the Supreme Court noted that a factor which is closely related to the length of the delay, is the government’s reason for the delay. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. According to the Court, “a valid reason, such as a missing witness, should serve to justify appropriate delay.” *Id.* In this case, the delay in the petitioner’s trial was due to his motions, the issue of his competency, and indigent defense funding, factors completely outside the State’s ability to control.

The *Barker* Court discussed the fourth factor, which is prejudice to the petitioner. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. The Court stated that prejudice should be assessed in light of the petitioner’s rights, and identified three such interests to be considered when assessing prejudice: (1) prevention of oppressive pre-trial incarceration; (2) minimization of the accused’s

anxiety and concern; (3) limitation of the possibility of an impaired defense. *Id.* The *Barker* Court stated that none of the four factors discussed above is either a prerequisite or an adequate circumstance to establishing that a petitioner's right to a speedy trial has been violated. *Barker*, 407 U.S. at 533, 92 S.Ct. at 2193. As the Court noted: "...these factors have no talismanic qualities." *Id.* Instead, the factors are interrelated and must be collectively considered with other important circumstances; courts are required to engage in a balancing process when determining whether a petitioner's right to a speedy trial has been violated. *Id.*¹

In the petitioner's brief, he does not persuasively argue any of the *Barker v. Wingo* factors. (Petitioner's brief, pp. 16-19). The petitioner does not sufficiently establish how he was negatively impacted by the delay in his trial's inception. In fact, the state court specifically rejected the petitioner's vague claim of prejudicial impact by the trial delay; that decision was not wrong. In summary, while the petitioner's delay to trial was presumptively prejudicial, it was not unconstitutional when one considers the facts of this case, as well as the actions of this petitioner and his counsel, which delayed the onset of his trial.

II. THE COURT SHOULD DECIDE WHETHER A PETITIONER'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE, TO COMPULSORY PROCESS, AND TO CONFRONT THE WITNESSES AGAINST HIM IS VIOLATED WHERE RELEVANT AND RELIABLE EXPERT TESTIMONY AS TO THE PSYCHOLOGY OF INTERROGATIONS AND FALSE CONFESSIONS IS EXCLUDED AT TRIAL BY AN ARBITRARY AND DISPROPORTIONATE CATEGORICAL BAN.

¹ The *Barker* Court ultimately concluded that the petitioner's right to a speedy trial was not violated, despite a five-year delay between his arrest and his trial, because the prejudice to him was minimal, and he never filed a motion for a speedy trial. *Barker*, 407 U.S. at 533-534, 92 S.Ct. at 2193-2194. The *Barker* Court did note that "barring extraordinary circumstances, we would be reluctant indeed to rule that a petitioner was denied this constitutional right on a record that strongly indicates, as does this one, that the petitioner did not want a speedy trial." *Barker*, 407 U.S. at 536, 92 S.Ct. at 2195.

- A. Where expert testimony as to the psychology of false confessions and interrogations has been found to be relevant and reliable, it violated Petitioner's due process right to present a complete defense, to compulsory process, and to confront the witnesses against him where such testimony was excluded at trial.**
- B. Federal and state courts are divided on the admissibility of expert testimony as to the psychology of interrogation and the occurrence of false confessions, even where the testimony is found to meet statutory and jurisprudential standards of admissibility.**
 - i. Federal Circuits**
 - ii. State Courts**
- C. This Court should act to settle the question of the admissibility of expert testimony as to false confessions, where such evidence has been found to be relevant and reliable.**

The petitioner complains about the Louisiana intermediate appellate court's failure to allow him to introduce "junk science" before the jury. (Petitioner's brief, pp.22-35). The State filed a writ application with the Louisiana Third Circuit Court of Appeal after the trial court denied its motion to exclude "junk science" false confession evidence. The State also filed for a *Daubert* hearing on such evidence, and the trial court ruled the evidence admissible. Before trial, the Louisiana Third Circuit Court of Appeal previously ruled that the so-called "false confessions" testimony by a defense expert witness, Dr. Simon Fulero, should not have been allowed at trial. That was after the State's pretrial writ application was granted. The petitioner did not attach in his appendices the decision of the Louisiana Third Circuit Court of Appeal and the State's pretrial application which were critical documents to this claim.

The petitioner's proposed false confession evidence did not meet criteria for expert testimony under either the jurisprudence or the governing statutory law. The "false confession" expert testimony also failed to meet jurisprudential criteria for its admission. In *State v. Chauvin*, 2002-1188 (La. 5/20/03), 846 So.2d 697, the Louisiana Supreme Court noted that the criteria for admitting expert testimony first enunciated by the United States Supreme Court in

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993), were to be used by Louisiana courts. *Chauvin*, 846 So.2d at 700-701. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the United States Supreme Court set forth criteria to be used by trial judges when deciding whether or not to admit expert testimony. In *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the United States Supreme Court held that the *Daubert* test for admissibility of expert testimony extended to all expert testimony, not just scientific testimony. *Kumho*, 526 U.S. at 147, 119 S.Ct. at 1174. In *State v. Foret*, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the admissibility test proposed by the *Daubert* Court, while noting that LSA-C.E. Art. 702 governs the general rule for admissibility of expert testimony in Louisiana courts. *Foret*, 628 So.2d at 1121.

Since it did not meet admissibility criteria, no error was made in the state court's decision to prohibit this "false confession" evidence. While a defendant has a constitutional right to present a defense, he does not have a right to present any and all evidence he wishes to admit. The state court in this case followed the jurisprudential guidelines of this Court in denying the admissibility of this false confession expert; no constitutional error occurred when it did so.

III. WHILE THE DECISION FROM WHICH REVIEW IS SOUGHT IS NOT A DECISION OF THE STATE'S HIGHEST COURT, THIS COURT SHOULD NOT HESITATE TO GRANT CERTIORARI FOR THAT PURPOSE.

The State does not dispute that this Court may grant review of a certiorari petition which stems from an intermediate appellate court decision under 28 U.S.C. §1257. However, since the state court decisions which the petitioner seeks review of were based on, and precisely followed, the controlling precedents of this Court, no certiorari relief is necessary in this case.

CONCLUSION

The State respectfully submits that for the above and foregoing reasons, the petitioner's petition for a writ of certiorari should be denied by this Honorable Court.

Respectfully submitted:

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A handwritten signature in black ink, appearing to read 'Carla S. Sigler', with a horizontal line drawn across the middle of the signature.

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