IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICHARD A. DODSON,

Petitioner,

v.

DANIEL BENIK, Warden,
Stanley Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

04-C-679-C

REPORT

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Richard Dodson, an inmate at the Stanley Correctional Institution,[1] challenges his January 4, 2001 conviction in the Circuit Court for Kenosha County for three counts of first-degree sexual assault of a child. Dodson contends that the state violated his Sixth Amendment right to a speedy trial by allowing 28 months to elapse before it retried him following the reversal of his conviction on appeal. The state appellate court, applying the four-part balancing test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), rejected Dodson's claim, finding that he had expressly waived his right to a speedy trial, was largely responsible for many of the delays and had not shown that he was prejudiced by the delay.

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[1] When petitioner filed this case he was confined at the Columbia Correctional Institution, so Warden Phil Kingston was the respondent. Now that petitioner has been transferred to the Stanley Correctional Institution the respondent has become Warden Daniel Benik. The clerk of court and the parties should note this change to the caption.

I have reviewed the circuit court record, the state appellate court's decision, and the parties' submissions. Although I am appalled at the 2⅓ year delay in bringing Dodson to trial, I nonetheless conclude that Dodson is not entitled to federal habeas relief. Accordingly, I am recommending that this court deny petitioner's application for a writ.

Facts

In 1995, Petitioner Richard Dodson was convicted of three counts of first-degree sexual assault of a child, Brian S. Two of the counts were based upon incidents of sexual contact between Dodson and the victim. The other count was based on an incident of sexual intercourse between Dodson and the victim.

On appeal, Dodson argued that the trial court had erred by excluding evidence of the victim's prior sexual conduct under Wisconsin's rape shield statute, Wis. Stat. § 972.11. Dodson's challenge was based upon the trial court's refusal at trial to allow Dodson to question the victim regarding a prior incident of sexual contact between him and another boy named Bobby. Dodson had made an offer of proof in which he indicated that Delores Dodson, Dodson's aunt (hereafter "Delores"), would testify that Brian had told her that Bobby had sexually assaulted him. Dodson argued on appeal that Delores's testimony was admissible under an exception to the rape shield statute set forth in *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), because she would testify to acts that closely resembled those charged; this would be material to show an alternative source both of

Brian's sexual knowledge and of his injuries that were consistent with forced anal intercourse. The court of appeals agreed that the trial court erred in excluding Dodson's proffered evidence, but found that this error had prejudiced Dodson only with respect to the sexual intercourse charge. The court rejected a separate challenge brought by Dodson to the jury instructions. The court affirmed Dodson's two convictions based on sexual contact and remanded the case for a new trial solely on the sexual intercourse charge. *State v. Dodson*, 211 Wis. 2d 889, 568 N.W. 2d 651 (Ct. App. 1997) (unpublished opinion).

The Wisconsin Supreme Court granted Dodson's petition to review the court of appeals' decision. In a decision issued by six justices on June 19, 1998, four justices held that the erroneous exclusion of the *Pulizzano* evidence had prejudiced Dodson's right to a fair trial on all three of the charges against him. Three justices found a prejudicial error in the jury instructions. The court remanded the case for a new trial on all the charges. *State v. Dodson*, 219 Wis. 2d 65, 580 N.W. 2d 181 (1998).

On July 24, 1998, the circuit court received the remitted record. On August 5, 1998, the court scheduled the case for a pre-trial on August 18, 1998; the next day, however, the court rescheduled the hearing for September 11, 1998, indicating that it had done so "per the DA." Dodson's lawyer fired off a letter objecting to the delay, so the court moved the hearing forward to September 2, 1998.

At the September 2, 1998 hearing, Dodson asserted his right to a speedy trial. Dodson was represented by attorney Michael Backes. Backes had represented Dodson on

appeal, but not at trial. The court informed Dodson that the speedy trial demand entitled him to a trial within 90 days (*i.e.*, by December 1) but stated that the court preferred to try it earlier. The state responded that it could be ready within a few weeks. The court adjourned briefly so the prosecutor could obtain his calendar. When the court went back on the record, its first statement was "All right. December 14th." Backes indicated that that date would be fine even though it was outside the 90-day speedy trial window, stating that he had talked to Dodson during the break and that Dodson was agreeing to withdraw his speedy trial demand. Addressing Dodson directly, the trial court asked: "Mr. Dodson, do you waive your speedy trial demand to have your trial in December?" Dodson replied "That's fine." The record does not reflect how the court and the parties arrived at the December 14 date.

At the time of the hearing, Dodson was still confined at the Columbia Correctional Institution, where he had begun serving his sentence after his conviction. Dodson argued that he should be released on a signature bond, as he had been before his conviction. The trial court set a cash bond at $75,000, and ordered that if Dodson posted it, further proceedings would be had to consider Dodson's proposed living arrangement and release conditions. The prosecutor told the court at the hearing that he expected that Dodson would be remanded to the Kenosha County Jail.

On November 17, 1998, at what was supposed to be the final pretrial conference, Backes requested an adjournment. The court asked Dodson whether he understood his

lawyer's actions and whether he supported his lawyer's request for an adjournment; Dodson answered "yes" to both questions. The court reset the trial to February 19, 1999.

On January 25, 1999, the state filed a motion to adjourn the February trial date. Two days later, Backes filed a motion to withdraw as counsel and a motion to adjourn the trial date. At a hearing on February 4, 1999, Backes explained that he was not receiving payment from Dodson or his family and that he believed there was a breakdown in communication between him and Dodson. Dodson indicated that he had asked Backes to seek an adjournment because the defense was not yet prepared for trial. Although Dodson opposed Backes's request to withdraw, the trial court granted the motion and ordered that the public defender be notified. The court granted the parties' request for an adjournment, finding that it was in Dodson's interest for the case to be adjourned. The court indicated that Dodson's case was a "high priority" and set a February 12, 1999 status hearing at which a new trial date would be set in consultation with successor counsel.

At the February 12 status hearing, Dodson appeared with his newly-appointed lawyer, Hans Koesser. Koesser reported that Dodson had told him he might not be on the case long because Dodson still might retain private counsel. The court set trial for March 29, 1999.

At a status hearing on March 22, 1999, Koesser requested an adjournment, stating that he could not be ready for trial on March 29, 1999. Dodson was to appear at the hearing by phone but the court was unable to reach him at the Columbia Correctional Institution, where Dodson still was incarcerated. Koesser stated that the earliest date on

which he could be ready was May 17, 1999. The victim's mother indicated that if the trial had to be moved, she preferred that it be moved to June, after the victim had completed the school year. Working around the availability of the victim and the schedules of both attorneys and the court, the court set trial for July 19, 1999.

On April 1, 1999, Koesser moved to withdraw. On April 7, Dodson wrote to the court requesting a telephonic appearance on the motion and stated that he had discharged Koesser because the two disagreed about how to handle the case. On April 23, 1999, the court held a hearing at which both Koesser and attorney Denise Hertz-McGrath appeared. Hertz-McGrath stated that she had just been appointed by the public defender's office to take over the case but had not even started looking at the file and did not know if she could be ready to try the case by July 19. After Dodson confirmed that he had discharged Koesser, the court granted Koesser's motion to withdraw. However, it did not adjourn the trial, indicating that it did not want to lose the date.

At a status conference on May 14, 1999, Hertz-McGrath stated that the public defender's office had appointed attorney Robert Bramscher to take over the case because Hertz-McGrath "did not have time to do this matter properly." Bramscher first appeared on the case at a May 20, 1999 status conference. Bramscher stated that he had accepted the case on the condition that the court adjourn the trial, noting that he had a conflict with the July date. Dodson stated that he approved of Bramscher's request to postpone the trial. The court rescheduled trial for August 16, 1999.

On July 23, 1999, Dodson filed a motion to introduce evidence pursuant to *Pulizzano*. The motion recapitulated what Dodson's lawyer had proffered at the first trial: Dodson's Aunt Delores would testify that the victim had told her that a person named Bobby, Dodson's nephew, had sexually assaulted him. The court set the motion for hearing on August 5, 1999. Dodson was not present at this hearing because the district attorney had failed to file a writ securing Dodson's presence. The attorneys informed the court of new developments regarding Delores's testimony: Bramscher voiced concern about Delores's availability to testify at trial. Bramscher stated that the defense had located her only a week earlier in Gurnee, Illinois, that she was in a nursing home recovering from cancer surgery and that she had told the defense investigator that she did not think she could come to Kenosha from Illinois to testify. Bramscher indicated that he wanted to talk to Delores himself about her testifying at trial or at a video deposition. Bramscher stated that Dodson had told him that if the trial had to be delayed, he would accept that because he "wanted it done right."

The court did not strike the trial date but set the motions hearing over to the following Tuesday, August 10, 1999, to address further Delores's availability for trial and other motions filed by the state. At the hearing, both the defense and the prosecutor requested an adjournment of the trial on the basis of information they had obtained from Delores during their respective interviews of her the preceding weekend. The prosecutor reported that Delores had denied ever saying that the victim had told her that he had been sexually assaulted by Bobby; Delores also told the prosecutor and his investigator that

Dodson's brother, Mark Dodson, had tried to get her to lie to help Richard. Bramscher, on the other hand, reported that when he interviewed Delores, she did *not* deny making the statement about the Bobby incident, but said that she couldn't remember making it. Bramscher suspected that Delores was having "a memory failure of convenience so she doesn't have to come up here and doesn't have to cooperate," and indicated that he wanted more time to establish this. Both Bramscher and Dodson, who was present at the hearing, stated that they "absolutely" wanted the trial postponed. The court struck the trial date and scheduled the matter for a status conference on September 22, 1999.

At the September 22, 1999 conference, the court attempted to set a trial date. Bramscher preferred to set a motions hearing date but not to set a trial date; Dodson agreed that he wanted to do his case "right" rather than be rushed. The court scheduled a motion hearing for November 3, 1999, with the understanding that the prosecutor was going to file a motion to reinstate the original verdicts on the basis of Delores's denials.

The November 3, 1999 hearing was cancelled, apparently by stipulation, and reset for December 13, 1999. The record does not reveal why the hearing was cancelled or why it was not rescheduled prior to December 13. The state asserted in its appellate brief that the parties had stipulated to the adjournment. At a June 19, 2000 hearing Dodson told the court that Bramscher had agreed to the adjournment without Dodson's consent.

At the December 13 hearing, the prosecutor stated that he no longer intended to file a motion to reinstate the verdicts, but reported that Delores was present and ready to testify

regarding the *Pulizzano* evidence.[2] The court determined that Delores was competent and allowed her to testify over defense objection. After hearing the testimony, the court denied a bail motion that Dodson had filed pro se. It then discussed setting a trial date. The court clerk suggested available dates as early as March 20, 2000, but Bramscher was unavailable on most of them. When the court began looking at May 30, Bramscher reported that Dodson indicated that this date was not expedient. The court told Dodson that "if your attorney is not available, your options are you get another attorney . . . and then we start again." Dodson stated that he understood. The parties considered trying the case during the four-day week of Memorial Day, but Dodson thought it would take longer than four days to try the case. At Bramscher's suggestion, the court ultimately set trial for June 19, 2000. The court asked Dodson if he had any questions about the schedule; Dodson replied "No."

On May 16, 2000, Dodson filed a pro se motion for substitution of counsel and a motion to adjourn the June 19, 2000 trial date. The court heard these motions on June 19. Dodson's main complaint was that Bramscher had not adequately prepared for trial. Dodson stated that although he had been able to meet with Bramscher more frequently after his recent transfer from Columbia Correctional to the local jail, their trial preparation efforts had been thwarted by the refusal of the local jailers to provide Dodson with his legal materials. After the court informed Dodson that if Bramscher was discharged, Dodson

[2] The court ultimately denied Dodson's motion to introduce Delores's testimony under the *Pulizzano* exception to the rape shield law.

might have to proceed pro se with Dodson as standby counsel, Dodson said that "the main thing I am looking for here is an adjournment," again indicating the defense was not prepared. Dodson indicated that he would be willing to work with Bramscher if given more time. Bramscher concurred that he was not prepared to go to trial because he had not had a chance to discuss with Dodson all of Dodson's notes and information contained in the documents withheld by the jail.

The court denied Dodson's request for substitution of counsel but granted his request to adjourn the trial. Although the court found no failure on the part of Bramscher to investigate or prepare a defense, it noted that Dodson had maintained an active role in his defense, which "raise[d] the issue of his lack of access to his own trial preparation materials to a different level than might otherwise exist in other cases with another defendant." The court set trial for August 21, 2000.

Around the end of June 2000, the prosecutor informed Bramscher that two prosecution witnesses, Dr. Gary Zaid and Officer Paul Mickelson, were not available for trial the week of August 21, 2000, and that the state intended to use video depositions for both witnesses. Bramscher and Dodson refused to consent to the use of videotaped depositions. At a pretrial conference on July 19, 2000, Bramscher told the court that he wanted Mickelson and Zaid to appear in person at trial because they were the witnesses who would "present the centerpiece of the State's case" against Dodson. Bramscher explained that he might need to call Mickelson on rebuttal and that he wanted the jury to see Zaid testify in

person. Bramscher indicated that although that would likely mean another delay in the trial, Dodson had told Bramscher that "he absolutely feels that it is essential to have those witnesses here." The court denied the state's request to present videotaped depositions; in response, the state requested another postponement of the trial.

At a hearing on July 31, 2000, the state confirmed that it would not proceed without Zaid and Mickelson's testimony, it objected to the court's refusal to permit this testimony by videotaped deposition and it stated that the case should be tried as scheduled on August 21 using the videos. The court stuck with its decision to require the state's witnesses to testify in person, but it moved the trial to November 27, 2000, a date that had been suggested by Bramscher at the previous hearing.

On August 17, 2000, Bramscher died of a heart attack. Attorney Nancy Barasch took over as Dodson's attorney.

On November 27, 2000, Dodson finally got his retrial. On December 1, 2000, the jury found him guilty on all counts. On January 4, 2001, the court sentenced Dodson to 40 years in prison followed by 20 years of probation.

Dodson appealed, contending that his constitutional and statutory right to a fair trial had been violated as a result of the 28-month delay between the supreme court's remittitur and his retrial. The Wisconsin Court of Appeals rejected his claims and affirmed the conviction. *State v. Dodson*, 2003 WI App 111, 264 Wis. 2d 892, 664 N.W. 2d 126 (unpublished opinion). First, it held that when Dodson withdrew his speedy trial request at

the initial status hearing on September 2, 1998, that one express waiver remained binding on him until his trial in November 2000: the court noted that Dodson thereafter never "expressly reasserted the right to a speedy trial," and held that this was a step he should have taken in order to renew his right to a speedy trial. *Id*. at ¶¶ 7-9. The court rejected Dodson's contentions that his right to a speedy trial reinstated automatically when the original December 14, 1998 trial date was adjourned, and that he had an ongoing, unspoken right to a speedy trial notwithstanding his express waiver. *Id*. at ¶ 8.

Despite its conclusion regarding waiver, the court addressed Dodson' speedy trial claim on its merits, employing the four factors identified by the United States Supreme Court:

> (1) the length of the delay
>
> (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay
>
> (3) whether the defendant asserted the right to a speedy trial; and
>
> (4) whether the delay resulted in any prejudice to the defendant.

Id. at ¶ 11 (quoting *State v. Leighton*, 2000 WI App 156, ¶ 6, in turn citing *Doggett v. United States*, 505 U.S. 647, 651 (1992) and *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

The court explained that it was deciding the merits of Dodson's claim for several reasons, including "to avoid having to discuss and decide the retroactivity or prospectivity of this new rule and whether the announcement of this new rule should be applied to Dodson." *Id*. at

¶ 10. Noting that it already had resolved the third factor of the test against Dodson, the court turned to the first consideration, the length of the delay. The court found that the 28-month delay from remittitur to trial was presumptively prejudicial, thereby triggering inquiry into the other factors. *Id*. at ¶ 12.

The court focused on factor 2, reasons for the delay. The court rejected Dodson's claim that his speedy trial clock began running the day the state supreme court issued its opinion, noting that the trial court did not have authority to act until it actually received the remittitur. The court rejected Dodson's claim that the court did not schedule the first status conference promptly enough, finding that approximately 40 days from the date of remittitur to the first status conference was "hardly unreasonable." *Id*. at ¶ 14.

The court found that the delay of approximately 3½ months from the time of the first status conference to the December 14, 1998 trial date was not chargeable either to Dodson or the state because the parties and the court chose that date to accommodate discovery, trial preparation, and the calendars of the court and counsel. In addition, it noted that Dodson expressly consented to that date, even though it was more than 90 days after the pretrial.

The court found that most of the delays during the next eight months to August 16, 1999, were the result of the substitutions of defense counsel caused by Dodson. It found that the next delay of seven months, from August 1999 to March 2000, arose from the need to determine the admissibility of Delores's alleged statement regarding the victim's sexual assault by someone else. The court noted that when the issue first surfaced in August 1999,

Bramscher and Dodson both stated unequivocally that they wanted an adjournment of the trial so they could investigate further. The court of appeals found that "[g]iven that one of the grounds for reversing Dodson's convictions after his first trial was due to the exclusion of this particular *Pulizzano* evidence, it was reasonable to give both parties the opportunity to adequately prepare for and present the issue to the court." *Id*. at ¶ 26. The court noted that the delay "may have been necessary for the orderly preparation of the case for trial," and in any event, was not due to any negligence by the state or any intentional effort to stall the trial date. *Id*.

The appellate court noted that the state and the trial court could have been ready for trial as early as March 2000, but because of Bramscher's unavailability, trial was set for June 19, 2000. Accordingly, the court attributed the delay from March to June 2000 to Dodson.

The court found that the next postponement, from June 19 to August 21, 2000, was attributable to Dodson, who had requested an adjournment because he did not feel that Bramscher was prepared for trial.

The court of appeals also held Dodson accountable for the final adjournment from August 21 to November 27, 2000 because Dodson had invoked his Confrontation Clause right to rebuff the state's demand to have two of its primary witnesses testify via videotaped deposition. In the end, the court agreed with the state that almost all of the delay in bringing Dodson's case to trial was directly attributable to the defense. *Id*. at ¶ 32.

Finally, the court found that the delay had not prejudiced Dodson. It found that he was not subject to oppressive incarceration because, "as it turned out, he was again sentenced to lengthy incarceration in his subsequent retrial." *Id*. at ¶ 33 (citing *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990)). Addressing Dodson's claim that he was subject to significant anxiety and stress while awaiting trial, the court found that Dodson had offered no substantial proof to show that his anxiety and concern were greater than that of any other prisoner awaiting trial. *Id*. at ¶ 35. Finally, the court found that the delay did not cause any prejudice to Dodson's ability to receive a fair trial. It rejected Dodson's claim that during the delay, Delores' memory and condition had deteriorated, resulting in the loss of her testimony. The court pointed out that Delores had provided sworn testimony at a hearing in December 1999, which was only 12 months after the original retrial date, and the trial court had found her to be a competent witness at that time. *Id*. at 36.

The Wisconsin Supreme Court denied Dodson's petition for review on June 12, 2003.

Analysis

A. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to conclusions reached by state courts. Specifically, this court may not grant Dodson's application for a writ of habeas corpus unless the state court's adjudication of his claim

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

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Under § 2254(d)(1), an "unreasonable application" of federal law is different from an incorrect application of federal law. *Williams,* 529 U.S. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411. In a case like

this one involving a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."), *reversed on other grounds*, 521 U.S. 320 (1997). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

Under § 2254(d)(2), the state court's findings of fact are presumed correct, and it is the petitioner's burden to show by clear and convincing evidence that the state court's factual determinations were incorrect *and* unreasonable. *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002).

B. Procedural Default: State Court's Finding of Waiver

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .". Examining the contours of that right in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the United States Supreme Court stated:

> [T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

Id. at 521 (footnote omitted.) Thus, an "inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case . . .". *Id*. at 522. In adopting a balancing test "in which the conduct of both the prosecution and the defendant are weighed," *id*. at 530, the *Barker* court identified four factors that courts should assess in determining whether a particular defendant has been denied his right to a speedy trial: a) length of delay; b) the reasons for the delay; c)the defendant's assertion of his right; and d) prejudice to the defendant. *Id.* None of the factors is dispositive. *Id*. at 533.

Before applying § 2254(d) to the merits of Dodson's speedy trial claim, I pause to address the state's cursory assertion that the state appellate court's finding that Dodson waived his speedy trial claim constitutes a procedural default that bars this court from considering the claim on the merits. The state has not developed its procedural default claim in any meaningful fashion, simply asserting the claim perfunctorily as an "affirmative defense." So, the claim of waiver is waived. *See Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived."). Were it necessary to analyze the issue, I would find that Dodson had not waived his claim and that the state court's waiver decision probably was contrary to and involved an unreasonable application of *Barker v. Wingo*. But it is not necessary to decide this issue because the court of appeals substantively decided Dodson's speedy trial claim using all four *Barker* factors.

Although the court remarked that it was resolving the third factor, Dodson's assertion of his right, against Dodson on the basis of his one explicit waiver, a review of the court's entire decision establishes that the court also considered the totality of Dodson's conduct after the rescheduled December 1998 trial date. Notably, in discussing the reasons for the delay, the court found that Dodson had explicitly requested or implicitly consented to most of the delays "even after the rescheduled December 1998 trial date." *State v. Dodson*, 2003 WI App 111, ¶ 39. As the Court noted in *Barker*, consideration of the cause-of-delay factor and the assertion-of-the-right factor often merge into a single analysis. *Barker*, 407 U.S. at n.30. Dodson's failure expressly to reassert a speedy trial demand after he had withdrawn it could be factored into this analysis. *Id*. at 528 ("The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."). Read as a whole, the court of appeals' decision shows that notwithstanding its questionable waiver finding, it adjudicated Dodson's claim in a manner that was not contrary to the approach required by *Barker*.

C. Application of § 2254(d)

In light of the foregoing, Dodson must show that the court of appeals "unreasonably applied" *Barker* or that its decision was based upon an "unreasonable" determination of the facts. 28 U.S.C. § 2254(d). It is very difficult to establish that a state court unreasonably applied federal law. A state court decision and the factual findings upon which it is based

can be reasonable even if they are wrong. Moreover, the outer limit of "reasonable" is broad with respect to a speedy trial claim like Dodson's because the rule governing its adjudication involves a "difficult and sensitive balancing process," *Barker*, 407 U.S. at 533, as opposed to a bright line rule. As the Supreme Court explained in *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (2004):

> The term "unreasonable" [as used in § 2254(d)(1)] is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

541 U.S. at ___, 124 S.Ct. at 2149. *See also Lindh*, 96 F.3d at 871 (7th Cir. 1996) (citing speedy trial claim as example of "question of degree," for which "a responsible, thoughtful answer reached afer a full opportunity to litigate is adequate to support the judgment").

In light of this deferential standard, it is not necessary or productive for this court to account for every day of the delay or to address every argument Dodson makes in his 70-page brief, although I address some of his major arguments below. Clearly, as the state court of appeals acknowledged, the 28 months that elapsed between the date the trial court received the remitted record from the state supreme court and the date of Dodson's second

trial was excessive. *See Doggett v. United States*, 505 U.S. 647, 652 & n. 1 (1992) (post-charging delay of more than one year "presumptively prejudicial" as to trigger speedy trial analysis). Also, the trial court's failure to manage Dodson's case more aggressively caused some of the delay. Even so, a thorough review of the record establishes that it was not unreasonable for the court of appeals to conclude that Dodson had not been deprived of his right to a speedy trial. That said, it probably would not have been unreasonable for the court to have ruled in Dodson's favor, but the existence of this possibility does not entitle Dodson to federal habeas relief.

Dodson starts at the beginning, contending that his clock for retrial should have started on June 19, 1998, the date the state supreme court issued its decision remanding his case, rather than July 24, 1998, the date the trial court received the remitted record. Dodson is incorrect: as the court of appeals observes, state law prohibited the circuit court from scheduling proceedings in Dodson's case until the record was remitted. *State v. Neutz*, 73 Wis.2d 520, 522, 243 N.W.2d 506 (1976) (trial court has no jurisdiction to act until it receives remittitur); Wis. Stat. §§ 808.075(4)(g); 808.08(2). Also, the state appellate court's determination parallels the manner in which federal courts have resolved the issue. *See, e.g., United States v. Fountain*, 840 F.2d 509, 511 (7th Cir. 1988) (after reversal of conviction on appeal, speedy trial clock begins to run when court of appeals issues mandate).

Dodson then argues that the court of appeals unreasonably determined the facts when it found that he was responsible for most of the delays and that the delays for which he was not responsible were not due to any negligence or intent by the state to delay the trial. Dodson complains that the trial court should have found a trial date earlier than December 14, 1998. However, Dodson explicitly agreed to the December 14 trial date and withdrew his speedy trial demand. Dodson suggests that he was forced into agreeing to this date because there were no other dates available on the court's calendar. The record is silent on this because the parties and the court arrived at the December 14 date off the record. The appellate court inferred that the date was chosen to accommodate discovery, trial preparation and the calendars of both the court and counsel. In the absence of clear evidence to the contrary, this court has no basis to dispute the reasonableness or correctness of this finding. In any case, Dodson has not shown that the delay from the date the trial court received the remitted record to December 14, 1998 was the result of any negligence or intent by the state to delay the trial.

It also was reasonable for the court of appeals to conclude that the state was not responsible for the eight-month delay between the original December 1998 trial date and August 16, 1999. As the court found, much of the delay during this time period resulted from substitutions of counsel, at least one of which was at Dodson's request. Dodson argues that most of this delay could have been avoided if the court had denied Attorney Backes's motion to withdraw and had ordered him to be compensated by the state public defender's

office. However, Dodson has pointed to nothing to suggest that Backes would have agreed to accept compensation for the remainder of his work on the case at the statutory rate that the public defender is authorized to pay private attorneys. *Cf.* Wis. Admin. Code § PD 2.07(1) (attorney consent necessary before retained counsel can be appointed to continue to represent client at public expense); § PD 4.025(1) (privately retained counsel appointed by state public defender entitled to statutory rate for work performed after date of public defender appointment). Backes gave no indication at the hearing on his motion to withdraw that he would be willing to stay on at the government rate. Dodson's speculation does not establish that the eight-month delay following Backes's withdrawal must be laid at the trial court's feet. It is worth noting that at the hearing on Backes's motion to withdraw and for adjournment of the trial, Dodson reported that he had asked Backes to seek an adjournment because the defense was not prepared. Therefore, it was not unreasonable for the court of appeals to conclude that most of the delays resulting from the substitution of counsel, who required additional time to become familiar with the case, were attributable to the defense.

The court of appeals found that the next period of delay, from August 1999 through March 2000, appeared to have been necessary to resolve the question about the admissibility of Aunt Delores's alleged statement, and in any event, was not due to any negligence or intent by the state to stall the trial date. Dodson disputes the reasonableness of this finding. Although he concedes that he agreed to some delay when he requested an adjournment of August 16 trial date, he argues that he did not agree to postpone his trial until December 13,

1999. Dodson argues that the record shows that the delay between late August and December 1999 was the state's fault because it kept requesting adjournments to prepare a motion to reinstate the verdict that ultimately it never filed. According to Dodson, the state had the information it needed to prepare this motion by the end of August 1999, when it submitted a detective's report of an interview with Delores.

However, other parts of the record indicate that the Delores matter had not been resolved by the end of August. Notably, at a status conference on September 22, 1999, the prosecutor indicated that the parties were going to attempt to re-interview Delores with all parties present; Dodson did not challenge this assertion or argue that no additional time was needed. Furthermore, although the prosecutor told the court that the matter could be set on for trial, both Dodson and his lawyer indicated that they preferred to wait to schedule a new trial date until after the motion hearing on December 13. As the court of appeals noted, at the December 13 hearing the court offered several trial dates beginning as early as March. However, none of the dates worked for attorney Bramscher, so the court scheduled trial for June 19, 2000.

It is obvious that neither the trial court nor the prosecutor was pushing this case to trial during the period from August 1999 to March 2000, but it is equally obvious that during this period Dodson was not pushing either. Of course it is the *state's* duty to bring a defendant to trial, *Barker*, 407 U.S. at 527, but the record as a whole supports the court of appeals' conclusion that the delay occurred because of the dispute over the admissibility

of Delores's purported statement; in any event, it was not the result of any negligence or delay tactics on the part of the state.

The record also reasonably supports the court of appeals' conclusion that Dodson was responsible for the next postponement of his trial. As the court noted, about a month before trial was scheduled to begin on June 19, 2000, Dodson filed a motion for substitution of counsel and an adjournment on the ground that the defense was not prepared. The court persuaded Dodson to continue with Bramscher, although it granted the request for another postponement. Dodson argues that the state is to blame for this delay because it failed to provide him with all of his legal materials that were necessary to prepare for the trial, forcing the adjournment. Bramscher did report that he had not had time to go through all of Dodson's legal materials with him, but the trial court noted that it was granting the adjournment because Dodson had "maintained an active role in his own defense, and that raises the issue of his lack of access to his own trial preparation materials to a different level than might otherwise exist in other cases with another defendant." Thus, the court did not grant the adjournment simply because of the withheld legal materials; it granted it to accommodate Dodson's unusually active participation in his defense. Although Bramscher supported Dodson's request for an adjournment, he did not say that he was not ready to go to trial apart from not having reviewed all of Dodson's materials with him. Contrary to Dodson's suggestion, his insistence that he essentially "co-lawyer" the case was the main cause of this delay. The state court of appeals reasonably determined that Dodson was responsible for this period of delay.

However, it was not reasonable for the court of appeals to hold Dodson responsible for the delay from August 21 to November 21, 2000. The court of appeals found that Dodson was at fault for this delay because he refused to allow two of the state's witnesses who were unavailable for trial on August 21 to appear via videotaped depositions. However, these were prosecution witnesses, and it was the state that requested a continuance when Dodson would not consent to the videotapes. Dodson was not obliged to agree to the presentation of videotaped depositions at trial. He had a constitutional right to insist that the state's witnesses against him testify in person. So the problem in this instance was the state's intransigence, not Dodson's. The trial court should have ordered the state either to produce its witnesses or to present its case without them. It is incorrect to deem Dodson's assertion of one constitutional right as his constructive waiver of another.

Nonetheless, a state court decision can be incorrect (or partially incorrect) and still be reasonable. Even if this three-month period of delay is shifted from Dodson's column to the state's, it is not unreasonable to conclude that the overall tally of supports the appellate court's conclusion that Dodson acted inconsistently with his right to a speedy trial by requesting and acquiescing in the delays. Although Dodson points to various portions of the record that arguably demonstrate his wish to be tried as soon as possible (including several motions for release on bail) the record as a whole indicates that Dodson's desire for a speedy trial was secondary to his other interests, one of which was to ensure that his defense was presented on his terms. The record establishes that Dodson actively managed his case and

did not hesitate to offer his opinions to the court, yet rarely did Dodson complain that his case was proceeding too slowly.

The strongest argument Dodson could make is that the trial court was *too* willing to accept the parties' various reasons for wanting an adjournment, but that cannot amount to a speedy trial violation when Dodson requested some of the adjournments. "Failure to assert the right [to a speedy trial] will make it difficult for a defendant to prove that he was denied a speedy trial"; further, "the more serious the deprivation, the more likely a defendant is to complain," *Barker*, 407 U.S. at 532, 531. From this it is reasonable to infer that when a defendant requests or consents to delays in his trial, he suffers no deprivation of his speedy trial right.

It was not unreasonable for the state appellate court to conclude that the fourth factor, prejudice to the defendant, did not weigh heavily in Dodson's favor. In *Barker*, the Court identified three types of prejudice that can result from unreasonable delay between accusation and trial: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. *Barker*, 407 U.S. at 532. Of these forms of prejudice, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.

It was not unreasonable for the court of appeals to conclude that Dodson had not shown enough prejudice to tip the balance. As the court noted, the only alleged impairment

to Dodson's defense was the purported loss of testimony of Delores Dodson. Dodson contended that Delores would have presented admissible *Pullizano* testimony had his trial occurred earlier. However, the court observed that Delores had retracted her *Pullizano* statement at a hearing on December 13, 1999, only twelve months after the original trial date, and at that time was found to be competent. In fact, Delores had actually retracted her statement four months earlier, in August 1999, when she told the prosecutor that she had never made the alleged statement that had been attributed to her. It was therefore not unreasonable for the court of appeals to reject Dodson's claim that the delay in the trial had resulted in the loss of Delores's testimony.

In his brief in support of his habeas petition, Dodson points to numerous other witnesses who he contends were unavailable at his retrial. However, not only did Dodson fail to present this evidence to the state courts, his brief indicates that these alleged witnesses did not appear at trial for reasons other than the delay in the trial. For example, Dodson asserts that some of these witnesses could not be located by the defense investigator and others could not be subpoenaed for trial as a result of attorney Bramscher's sudden death. Moreover, Dodson's assertion that these witnesses were "critical" to his defense is suspect because these witnesses apparently did not testify at Dodson's first trial; if they had, their testimony would have been available for the second trial.

What remains are Dodson's prejudice claims, which are not a major consideration in the analysis. *See Barker*, 404 U.S. at 535 ("More important than the absence of serious

prejudice, is the fact that Barker did not want a speedy trial"). First, although it does not change the outcome, the court of appeals should not have rejected Dodson's allegations of oppressive pretrial incarceration simply because Dodson ultimately was found guilty again on retrial. The case the court cited, *United States v. Antoine*, 906 F.2d 1379 (9th Cir. 1990), addressed the issue of prejudice in the context of a convicted defendant's due process claim resulting from the appellate court's delay in deciding his appeal. Dodson, however was an unconvicted pretrial detainee presumed to be innocent.

Even so, it was not unreasonable for the state court of appeals to conclude that Dodson's allegations of oppressive incarceration and anxiety did not outweigh the other factors showing no speedy trial violation. Dodson argues that the trial court erred by setting a high cash bail and by denying his various motions for pretrial release. The propriety of the trial court's bail decision is not an independent matter subject to review by this court. Notably, petitioner never appealed any of the trial court's rulings on bail, so he never exhausted his state remedies on this issue. Likewise, this court may not review the propriety of the state's decision to confine Dodson at a state prison instead of a local jail while awaiting retrial. That is purely a question of state concern that is not cognizable in a federal habeas corpus action. Moreover, Dodson has not shown that his incarceration in the Columbia Correctional Institution was more oppressive than had he been confined in the Kenosha County jail. *See United States v. Sarvis*, 523 F.2d 1177, n. 3 (D.C. Cir. 1975)

(defendant's incarceration was less oppressive because he was serving time before retrial in a regular penal institution rather than in jail).

Not so fast, argues Dodson: he contends that while incarcerated he was sexually assaulted by one inmate and threatened by another. However, Dodson has not provided documentation of the assault and his documentation of the threat consists only of his complaint to the prison security officer. The court of appeals reasonably concluded that Dodson's conclusory allegations failed to demonstrate that his anxiety and concern were any more significant than any other prisoner awaiting retrial. *See United States v. Annerino*, 495 F.2d 1159, 1163-64 (7th Cir. 1974) ("conclusory allegations of general anxiety and depression" insufficient to show constitutional violation absent strong showing on length of delay and reason for delay).

Moreover, Dodson's allegations of oppressive incarceration, severe stress and anxiety are undermined by his failure frequently and forcefully to demand a speedy trial. Even if the court accepts Dodson's allegations as true, they are insufficient to show that the state court of appeals unreasonably concluded that Dodson had not been deprived of his right to a speedy trial in light of the other *Barker* factors that do not sustain a speedy trial violation.

D. Conclusion

The heart of the question before this court is whether the state outcome in Dodson's case is "unreasonable," as that word is defined in federal habeas litigation. The conclusion that the outcome was "not unreasonable" is not an endorsement of the state's failure to try a detained defendant for almost 2½ years. At some point in a meandering prosecution like this one, the trial court is obliged to grab the reins and spur the case to resolution. I will leave it at that; other than the limited review provided by § 2254, federal courts should be circumspect second-guessing state court practices and procedures.

The bottom line is that the state court of appeals gave Dodson's claim serious consideration using the four *Barker* factors. The overall decision was within § 2254(d)'s bounds of reasonableness. Under § 2254(d), "the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions." *Lindh*, 96 F.3d at 871. This is not such an occasion.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court deny Richard Dodson's petition for a writ of habeas corpus.

Entered this 1st day of March, 2005.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge