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# When an Appeal Goes Wrong: A “Criminal Justice Nightmare”

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLES

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### WHEN AN APPEAL GOES WRONG: A “CRIMINAL JUSTICE NIGHTMARE”\*

David R. Dow  
Jeffrey R. Newberry\*\*

#### I. INTRODUCTION

*When American civilization finally crumbles, and future historians download the wreckage, it is conceivable that they will cite the case of Jerry Hartfield to explain to their curious audience how law and justice in our time could be so bluntly subverted by the very men and women whose job it was to administer it. Look how these public officials elevated form over substance, our descendants will say; look how hard they defended such manifest injustice. Look how long it took for the justice system to do justice, even*

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\*Hartfield v. State, 516 S.W.3d 57, 68 (Tex. App. 2017) (recognizing that “[t]he State’s negligence in this case created a criminal justice nightmare for Hartfield and the system at-large”), *discretionary rev. refused* (May 17, 2017), *cert. denied*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 473 (2017); see also Richard Pérez-Peña, “Justice Nightmare”: 32 Years in Texas Prisons After Conviction Voided, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/us/jerry-hartfield-texas-prison.html>.

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*after it became clear to the world that a man was imprisoned for decades without a viable judgment against him.*<sup>1</sup>

June 12, 2017, was Jerry Hartfield's first day of freedom in almost forty-one years, even though he had prevailed in the 1980 appeal of his death sentence.<sup>2</sup> The Texas Court of Criminal Appeals (CCA) ordered a new trial in that proceeding, but years, and then decades, went by and no new trial was held. Hartfield spent more than thirty years in a Texas state prison before he finally saw the inside of a courtroom. In this article, we tell his story.

In Part II we provide an overview of Hartfield's federal and state appeals. In Part III, we discuss the procedural history in greater detail. In Part IV, we discuss the central legal issue presented by Hartfield's case—the right to a speedy trial. In Part V, we touch on an ancillary matter and reflect on the perverse incentive created by the Fifth Circuit's disposition of Hartfield's pre-trial habeas application. Finally, in Part VI, we offer some concluding thoughts.

## II. OVERVIEW

Incarcerated since being arrested in September 1976 for the murder of Eunice Lowe, Hartfield had always insisted on his innocence.<sup>3</sup> But he was nonetheless convicted after his 1977 trial and sentenced to death.<sup>4</sup>

In 1980, the CCA vacated Hartfield's conviction and ordered a new trial because a potential juror was wrongfully excused for cause.<sup>5</sup> That new-trial order was not carried out.

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1. Andrew Cohen, *Held Without Retrial for 11,800 Days, Texas Inmate Still Waits for Justice*, ATLANTIC (Jan. 7, 2013), <https://www.theatlantic.com/national/archive/2013/01/held-without-retrial-for-11-800-days-texas-inmate-still-waits-for-justice/266865/>.

2. *Hartfield v. State*, 645 S.W.2d 436 (Tex. Crim. App. 1980) (en banc) (reversing 1977 conviction and remanding for new trial).

3. Cohen, *supra* note 1 (indicating that Hartfield maintains that the confession he made after his arrest was coerced and that he continues to assert his innocence).

4. *Hartfield*, 516 S.W.3d at 59 (summarizing 1980 trial: “[n]early four decades ago, a Wharton County jury convicted appellant Jerry Hartfield of the capital murder of Eunice Lowe and assessed his punishment at death”).

5. *Hartfield*, 645 S.W.2d at 439–41 (recounting questioning of prospective juror).

Instead, the Governor purported to commute Hartfield's sentence to life in prison.<sup>6</sup> But because the CCA's order had become final before the State sought a commutation,<sup>7</sup> the Governor lacked the power to commute the sentence, and his action had no legal effect.

Hartfield, whose IQ places him in the category of mild-to-moderate intellectual disability,<sup>8</sup> is barely literate and could not engage the courts on his own. But a fellow inmate realized in 2006 that Hartfield was more than two decades overdue for his new trial and filed multiple post-conviction applications for writs of habeas corpus and petitions for writs of mandamus in the CCA seeking one.<sup>9</sup> In response, the CCA issued a series of boilerplate denials.<sup>10</sup>

In 2007, Hartfield's inmate adviser finally resorted to filing in federal court. That court realized something unusual was going on in Hartfield's case and appointed the federal public defender's office to represent him. Thus began an almost decade-long period during which the State argued repeatedly that Hartfield was not entitled to the new trial that its highest criminal court had ordered.

This initial round of federal proceedings culminated in the Fifth Circuit's certifying a question to the CCA, asking whether the Governor's commutation had been effective, and if not, whether Hartfield's confinement was justifiable on some other

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6. *Hartfield v. Thaler*, 403 S.W.3d 234, 236 (Tex. Crim. App. 2013) (explaining that mandate issued on March 4, 1983, and that governor purported to commute sentence on March 16, 1983).

7. *Id.* at 239 (explaining that once mandate issued there was no sentence to commute).

8. *See, e.g.*, Amended Brief for Appellant at 18, *Hartfield v. Tex.* (Tex. App. May 16, 2014) (No. 13-14-00238-CV) (indicating that at the time of his first trial, an expert had determined that Hartfield's "full-scale IQ score was fifty-eight") [hereinafter *Amended Appeal Brief*].

9. *Ex Parte Hartfield*, 442 S.W.3d 805, 806 (Tex. App. 2014) (discussing procedural history through August 2014).

10. Seven years later, the CCA would explain that it realized at the time—i.e., in 2006—that Hartfield was being held under no conviction or sentence, but had denied him relief on his speedy-trial claim because he had not used the proper vehicle to raise the issue. *Hartfield*, 403 S.W.3d at 239–40 (“When Petitioner filed a state application for writ of habeas corpus, he filed it under Code of Criminal Procedure Article 11.07. Because Article 11.07 relates only to post-conviction applications for writ of habeas corpus and there was no judgment of conviction against Petitioner, this was not the proper procedure, and we denied his application. He also filed an application for leave to file a petition for mandamus asking us to compel a new trial. This too was the improper procedure.”).

basis.<sup>11</sup> We took over Hartfield's representation at that point, and our first action was to ask the CCA not only to answer the Fifth Circuit's question, but to find Hartfield's confinement unlawful, open one of the dismissed habeas applications, and order Hartfield released.

The CCA did not take that bold step. Nevertheless, six months after agreeing to answer the certified question, the CCA issued an opinion explaining that because Hartfield's conviction and sentence were vacated upon its earlier order's becoming final in 1983, the subsequent attempt to commute the sentence was ineffective and invalid. The CCA also confirmed—as the federal courts had speculated—that Hartfield had failed to exhaust his speedy-trial claim in state court and that it had denied relief on the pleadings filed in 2006 and 2007 because Hartfield had failed to raise his claim in a procedurally correct vehicle. The CCA then noted that Hartfield could exhaust the speedy-trial claim in either of two ways: through a pre-trial application for a writ of habeas corpus (which would be immediately appealable), or by a motion to set aside the indictment (which could be appealed only after a subsequent trial).<sup>12</sup>

A week later, we heeded the CCA's advice and filed a pre-trial habeas application in the state trial court raising Hartfield's speedy-trial claim. The trial court viewed the application as a demand for new trial as well, and so, while proceedings on the speedy-trial claim were pending, proceedings toward giving Hartfield the new trial that the CCA had ordered thirty years earlier were at long last initiated.

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11. *Id.* at 238–39 (noting that court was “answering the determinative question of Texas criminal law of whether there was a judgment of conviction at the time the governor issued a commutation order” and concluding that “[a]s soon as mandate issued, Petitioner’s conviction and sentence were vacated, our order for a new trial became final, and the case was returned to the point it would have been had there never been a trial,” then holding that “[t]he purpose of commutation is to reduce a sentence that was already imposed,” that “the Texas Constitution grants power of commutation ‘after conviction,’” that “[h]ere there was no conviction, and no sentence to reduce,” and that “[b]ecause there was no longer a death sentence to commute, the governor’s order had no effect”); see also *Hartfield*, 442 S.W.3d at 806 (“[T]he Fifth Circuit certified the following question to the Texas Court of Criminal Appeals: ‘What was the status of the judgment of conviction after these events [the issuance of the mandate and the commutation of the sentence] occurred?’”).

12. *Hartfield*, 403 S.W.3d at 240.

The proceedings in the trial court revealed the first hint of the State's strategy of resistance: the district attorney took the position that the CCA had been wrong when it held that Hartfield could raise the speedy-trial claim in a pre-trial writ. The trial court, however, was not inclined to take up the prosecutor's suggestion that it effectively overrule the State's highest criminal court, and so it addressed the merits of the claim.

As was appropriate, the trial court used the four-factor test announced in *Barker v. Wingo*<sup>13</sup> as the framework for its speedy-trial analysis. Concluding that three of the four factors weighed in favor of Hartfield, it also found that the third factor—Hartfield's delayed assertion of the right—weighed against him so heavily that he was not entitled to relief. As we later argued on appeal, the trial court failed in analyzing the third factor to consider at least three salient matters:

- The CCA had ordered a new trial, but the trial court had neither initiated new proceedings nor taken any steps to have Hartfield returned to county custody from State custody in preparation for a trial;
- Because Hartfield was in State custody throughout the delay, his case was fundamentally unlike those in which an individual who is entitled to a new trial but living in freedom is found to have an affirmative obligation to act; and
- Hartfield is intellectually disabled.

All these factors should have been considered in the court's analysis because any one of them might have made a difference in the outcome.

Once we appealed the trial court's decision to the Texas Thirteenth Court of Appeals, the district attorney's office re-urged the position it had taken in the trial court: that the CCA

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13. 407 U.S. 514 (1972). The four *Barker* factors, the third of which is analyzed in greater detail below, *see infra* pp. 184–87, are “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Barker*, 407 U.S. at 530 (citations omitted).

had been wrong when it identified the pre-trial writ of habeas corpus as an appropriate vehicle by which to raise the speedy-trial claim. This time, however, the court took up the district attorney's invitation and ruled—in a stark repudiation of the CCA's order—that Hartfield's claim was not cognizable in a pre-trial writ.<sup>14</sup> We immediately asked the CCA to grant discretionary review to enforce its earlier decision. Without explanation, the CCA refused.

Having failed when using a procedural vehicle identified by the state's highest criminal court as an appropriate way in which to raise the speedy-trial claim, we resorted to a pre-trial habeas petition in federal court.<sup>15</sup> When the district court denied habeas relief, we appealed to the Fifth Circuit, which set the case for argument. Before the argument could occur, however, the State began an accelerated push to commence trial proceedings in state court and Hartfield was quickly convicted.<sup>16</sup> The Fifth Circuit then dismissed the habeas petition as moot, holding that in order to proceed on a pre-trial habeas petition in federal court, a petitioner must be under no conviction when the habeas court issues its opinion.

Hartfield returned again to the state courts. His second trial had been the quintessence of a perfunctory procedure given the three-decade delay. Many important witnesses had died; those still alive possessed only faded memories; and most critically, much of the physical evidence—including the murder weapon and the victim's car—had been lost, making it impossible to test Hartfield's claim of innocence with scientific analysis that might have shown whether Hartfield actually came into contact with either. Despite this prejudice to Hartfield, the jury did not find Hartfield guilty of capital murder, as the State had hoped. Instead, Hartfield's jury found him guilty of simple murder and sentenced him to life in prison.

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14. *Hartfield*, 442 S.W.3d at 808 (“Because a pretrial habeas proceeding is not an appropriate avenue for raising a speedy-trial claim, we vacate the portion of the trial court’s order denying Hartfield’s petitions for writ of habeas corpus, and we dismiss Hartfield’s appeals.” (citation omitted)).

15. While our petition was pending, the State attempted to coerce Hartfield into agreeing not to seek speedy-trial relief. That attempt was unsuccessful. *See infra* page 181.

16. *See Hartfield v. State*, 516 S.W.3d 57 (Tex. App. 2017) (indicating that Hartfield’s second trial began on August 10, 2015, lasted eight days, and resulted in a life sentence).

Hartfield then appealed a second time to the Texas Thirteenth Court of Appeals, which on this occasion addressed the merits of the speedy-trial claim. It found that Hartfield's right to a speedy trial had been violated, ordering that the indictment against him be dismissed with prejudice. But the government was not through resisting. It asked the CCA to grant discretionary review, and after the CCA declined to do so, the attorney general's office asked the United States Supreme Court to grant certiorari. On November 27, 2017, the Court denied the petition. In the meantime, Hartfield had been released.

### III. A CLOSER LOOK

On September 17, 1976, somebody murdered Eunice Lowe, who worked at the Continental Trailways bus station in Bay City, Texas. Her car and the money from the cash drawer at the ticket counter were both taken from the bus station, and there was evidence that she had been sexually assaulted after her death.<sup>17</sup>

#### *A. The Criminal Investigation*

The first lead in the case came from Deputy Sheriff Dennis Brooks, who told Texas Ranger Carl Weathers, head of the investigation, that he had been called to the residence of an older woman the day before the murder about a black man who had come into her house saying he needed to use the phone. The man had given Brooks a false name,<sup>18</sup> and it is not clear from the record how Brooks came to the decision that this had been Jerry Hartfield.

Edward Becerra, a possible alternative suspect, was at the bus station twice on September 17. When he first arrived around 4:45 that afternoon, he saw a black man sitting in the station and Lowe sitting at the counter. Becerra returned to the locked

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17. Brief for the State of Texas at 10, *Hartfield v. State*, 2016 WL 3410809 (Tex. App. May 6, 2015) (No. 13-15-00428-CR) [hereinafter *Texas Brief*]; see also Pérez-Peña, *supra* note \*.

18. *Texas Brief*, *supra* note 17, at 102 (indicating that Brooks had seen a man he identified as Hartfield trying to talk two women into letting him use their phone, and that the man gave him a false name).

station around 7:00 that evening, but was able to enter through a side door. Because the counter was unattended, he boarded a bus without buying a ticket and gave his ticket money to the bus driver instead. Becerra got off the bus in a town about thirty miles away, where Bay City police officers found him and brought him back to Bay City. Becerra was somehow able to convince the officers that he did not kill Lowe. He told them that he saw a black man in the bus station, and the officers had a sketch artist compose a sketch based on Becerra's description even though Becerra told the sketch artist that "to [him], all black guys look alike."<sup>19</sup> Brooks identified the man in the sketch as Hartfield; that identification and the sketch were used to support the arrest warrant issued on September 18.<sup>20</sup>

Hartfield told Brooks on September 16 that he was going to go to Wichita, which prompted Weathers to call the authorities in Wichita and tell them to be on the lookout for Hartfield. An officer in Wichita called Weathers the next day to let him know that officers in Wichita had apprehended Hartfield, who refused to waive extradition. Weathers, accompanied by Bay City Police Detective Doug Holland, went to Wichita "hoping that [Hartfield] would sign a waiver of extradition." Weathers read Hartfield his rights as soon as he met him, and Hartfield's response—according to Weathers—was to ask why he could not go back to Texas. In front of Weathers, Holland, and a Kansas magistrate, Hartfield signed a waiver of extradition, about which the Kansas attorney who had been appointed to represent Hartfield on extradition was not consulted. Though it was already fairly late, the officers took Hartfield to Ardmore, Oklahoma, that evening.<sup>21</sup>

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19. *Id.* at 12 (indicating that Becerra was at bus station twice on day of murder, was later taken by police to view victim's body, stated that he did not kill her, and gave police artist description of man he saw sitting in station that afternoon); *see also* Brief for Appellant at 5, *Hartfield v. State* (Tex. App. Mar. 17, 2016) (No. 13-15-00428-CR) (indicating that Becerra statement to artist is in trial record) [hereinafter *Hartfield Brief*].

20. *Texas Brief*, *supra* note 17, at 101–03 (reproducing statements made in probable-cause affidavit in support of arrest warrant).

21. *Hartfield Brief*, *supra* note 19, at 6 (indicating that Weathers statement of intent is in trial record); *see also Texas Brief*, *supra* note 17, at 110–12 (indicating that Hartfield said he wanted to go back to Texas, that he signed a waiver of extradition, and that officers took him to Ardmore).

When they set out for Texas the next morning, Holland, who was armed, sat in the back seat next to Hartfield. According to Weathers, Hartfield told Weathers and Holland partway through the trip, “I been lying to y’all. I want to tell you the truth,” and then told them where they could find Lowe’s vehicle. The Rangers were later able to locate it using information purportedly provided by Hartfield.<sup>22</sup>

Continuing their trip, Weathers, Holland, and Hartfield stopped at the courthouse in Hillsboro, Texas, where a local deputy joined Weathers, Holland, and Hartfield in small room, where Weathers reportedly typed Hartfield’s confession.<sup>23</sup> After Hartfield signed the document, Weathers, Holland, and Hartfield continued to Bay City. Their first stop in Bay City was a local hospital, because the officers wanted a doctor to examine Hartfield to “make sure nothing was wrong with him, no black eyes, no busted lips, no bruises, no nothing.”<sup>24</sup>

Weathers and Holland then took Hartfield before a magistrate judge so that he could appoint counsel for Hartfield. The magistrate appointed two local lawyers who questioned Hartfield in front of Weathers and Holland. Hartfield reportedly told his new attorneys that the officers had read him his rights, had not abused him, and were the nicest officers he had ever met. According to Weathers and Holland, Hartfield also told them that the statement he signed was true and that he had killed Lowe.<sup>25</sup>

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22. *Hartfield Brief*, *supra* note 19, at 7 (indicating that trial record shows that Holland rode in back seat while armed and that Weathers testified to Hartfield’s purported statement); *see also Texas Brief*, *supra* note 17, at 47 (indicating that Hartfield “led police to Lowe’s car”).

23. *Hartfield Brief*, *supra* note 19, at 8; *see also Texas Brief*, *supra* note 17, at 87.

24. *Hartfield Brief*, *supra* note 19, at 8 (indicating that Weathers statement about Hartfield’s physical condition is in trial record).

25. *Texas Brief*, *supra* note 17, at 88. The lawyers and the magistrate have all since died, so we were not able to ask any of the three about this unusual interaction between the accused and his newly appointed counsel.

*B. The Trial and Direct Appeal, 1977–1983*

Hartfield was convicted of capital murder and sentenced to death in June 1977.<sup>26</sup> He appealed on numerous grounds. On September 17, 1980, the CCA unanimously reversed, holding that the State had wrongly struck a potential juror because of her reservations about the death penalty,<sup>27</sup> and ordered a new trial.

On October 2, 1980, the State sought leave to file a motion for rehearing, urging the court to reform the sentence to life imprisonment instead of remanding for a new trial.<sup>28</sup> The State subsequently asked the court to reconsider its decision. Alternatively, the State asked for a reasonable period of time to seek a commutation of Hartfield's sentence from the governor.<sup>29</sup> On November 26, 1980, the court granted the motion for leave to file the motion for rehearing. The State could have sought to have Hartfield's sentence commuted at this time. It did not. Had the State done so, had the governor commuted Hartfield's sentence, and had the CCA subsequently denied Hartfield relief on the remaining claims raised in his appeal, the commutation would have been effective.<sup>30</sup> But that is not what happened. Instead, not until January 31, 1983 (five days after the CCA finally denied the State's motion for rehearing<sup>31</sup>), did the district attorney, the district court judge, and the county sheriff write the Board of Pardons and Paroles (BPP) to request that Hartfield's

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26. See, e.g., *Amended Appeal Brief*, *supra* note 8, at 4 (noting that “Jerry Hartfield was convicted of the capital murder of Eunice Lowe and sentenced to death in June 1977”).

27. *Hartfield v. State*, 645 S.W.2d 436, 441 (Tex. Crim. App. 1980) (relying on *Witherspoon v. Ill.*, 391 U.S. 510, 520–23 (1968)); see also *Adams v. Tex.*, 448 U.S. 38, 43–45 (1980) (applying *Witherspoon* to the specific procedure Texas employs in capital cases). While a finding today that a Texas defendant is entitled to *Witherspoon* relief would result in that defendant's receiving only a new sentencing trial, the statute providing a procedural mechanism by which an appellate court can issue such an order was not enacted until 1991. See TEX. CODE CRIM. P. ANN. art. 44.29(c) (West 2018). Prior to 1991, an error in a capital trial that related only to punishment required that the defendant receive a new guilt-phase trial as well.

28. See *Hartfield*, 645 S.W.2d at 442.

29. *Id.* The court that ultimately granted Hartfield relief found that the State's requesting time to seek a commutation constituted unequivocal proof “that the State consciously developed an alternative plan to avoid retrying Hartfield after” the CCA issued its opinion ordering it to do so. *Hartfield*, 516 S.W.3d at 68.

30. See *O'Pry v. State*, 642 S.W.2d 748, 751 (Tex. Crim. App. 1981) (holding June 1 commutation effective after CCA remanded because of *Witherspoon* error on May 20).

31. *Hartfield*, 645 S.W.2d at 442.

sentence be commuted. Their letter to the BPP conceded that “it would be extremely difficult for the State to re-try [Hartfield] after over 6 years has passed.”<sup>32</sup>

On February 10, the BPP had not acted, and the State moved for leave to file a second motion for rehearing. However, because the ruling on the first motion for rehearing did not change the disposition of the case, a second motion for rehearing was not permissible.<sup>33</sup> Consequently, the motion for leave to file was denied on March 1, 1983, and the CCA issued its mandate on March 4, 1983. “As soon as mandate issued, [Hartfield’s] conviction and sentence were vacated, [the CCA’s] order for a new trial became final, and the case was returned to the point it would have been had there never been a trial.”<sup>34</sup>

The Wharton County district clerk received the mandate on March 9, 1983. Neither the district attorney nor the district court judge made any attempt to inform either the Governor or the BPP that the CCA had issued a mandate directing a new trial; no other State official made any attempt to do so. The State took no steps toward carrying out the mandate. Instead, on March 15, 1983, the Governor signed a document purporting to commute Hartfield’s sentence to life in prison. The Wharton County clerk then returned a postcard to the clerk of the CCA saying that the mandate had been carried out. In reality, however, “[b]ecause

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32. *See Amended Appeal Brief, supra* note 8, at 7 (quoting letter).

33. *Hartfield*, 403 S.W.3d at 236 n.1 (explaining that Rule 309(f), which was in effect during the early 1980s, provided that “[i]f the Court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission, the losing party may file a motion for rehearing within 15 days after said opinion is delivered,” and deeming it “likely” that the State’s motion for a leave to file a second motion for rehearing was denied “because our opinion on rehearing did not change the disposition of the cause from that on original submission; thus a second motion for rehearing was not a viable option for the State”). The Texas Rules of Appellate Procedure, which now contain the rules for both civil and criminal appeals, have retained a similar limitation. TEX. R. APP. P. 79.5 (West 2018) (providing that no second motion is permitted if the first motion for rehearing is denied, but “[i]f rehearing is granted and the Court delivers an opinion on rehearing, a party may file a further motion for rehearing”).

34. *Hartfield*, 403 S.W.3d at 239 (footnote omitted); *see also Hartfield*, 516 S.W.3d at 68 (“[T]he court of criminal appeals laid out a procedure and timetable for the State to properly effect its plan [to seek commutation], including the time sensitivity of obtaining the governor’s commutation order balanced with the court of criminal appeals’ mandate procedures. The State did not meet these deadlines, despite having actual knowledge of them, including the possible repercussions of not meeting them, and the court of criminal appeals’ mandate issued before the commutation order was signed.”).

there was no longer a death sentence to commute, the governor's order had no effect,"<sup>35</sup> and Hartfield was still entitled to the new trial ordered by the CCA in his first appeal. The State made no attempt to correct the clerk's mistake, notifying neither the CCA nor the Governor that the CCA's mandate was not carried out.

### *C. Hartfield's Efforts to Be Heard, 2006–2012*

#### *1. Post-Conviction Habeas in the CCA*

Acting with the help of another prisoner, Hartfield filed a state application for a post-conviction writ of habeas corpus on November 14, 2006.<sup>36</sup> He supplemented the application with a handwritten pleading filed on November 27, 2006, in which he raised a speedy-trial claim.<sup>37</sup> On January 31, 2007, the CCA denied the application without a written order.<sup>38</sup> Hartfield again attempted to raise his speedy-trial claim in a post-conviction habeas application, but that application was dismissed on May 30, 2007.<sup>39</sup>

#### *2. Mandamus in the CCA*

At roughly the same time, Hartfield attempted to ask the CCA to compel a new trial using a petition for a writ of mandamus.<sup>40</sup> The CCA denied his motion for leave to file the petition and so did not consider it.<sup>41</sup>

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35. *Hartfield*, 403 S.W.3d at 239; *see also* *Whan v. State*, 485 S.W.2d 275, 280 (Tex. Crim. App. 1972) (Onion, J., dissenting) ("If this court has reversed a conviction and issued its mandate, it would not appear that the Governor, prior to a new trial, could grant a pardon or commute the punishment previously assessed.").

36. *Hartfield*, 516 S.W.3d at 61.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

### 3. *Habeas and Mandamus in Federal Court*

#### a. The Southern District of Texas

On October 22, 2007, Hartfield filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas raising two claims: that his right to due process had been denied by the trial court's failure to retry him and that he was being detained by an illegal sentence.<sup>42</sup> That same day, he also filed a petition for a writ of mandamus asking the federal district court to order the State to either retry him or release him.<sup>43</sup> On October 3, 2008, Magistrate Judge Stephen Smith appointed the federal public defender's office to represent Hartfield.<sup>44</sup> Judge Smith concluded that "Hartfield [was] *not* in custody pursuant to the judgment of a state court" because the trial court's judgment of conviction and sentence ceased to exist once the CCA issued its mandate and "no subsequent event [had] changed [that] simple fact."<sup>45</sup> Consequently, he construed Hartfield's application as filed under 28 U.S.C. § 2241<sup>46</sup> and found that venue was not proper in the Southern District because Hartfield was being held at a facility in the Eastern District,<sup>47</sup> and the case was subsequently transferred to the United States District Court for the Eastern District of Texas.<sup>48</sup>

#### b. The Eastern District of Texas

Magistrate Judge John Love recommended that Hartfield's petition be dismissed without prejudice because he had failed to

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42. *Id.*; see also *Hartfield v. Quarterman*, 603 F. Supp. 2d 943, 946 (S.D. Tex. 2009).

43. Petition for a Writ of Mandamus, *Hartfield v. Quarterman*, (E.D. Tex. Apr. 29, 2011) (No. 6:09-cv-00098).

44. *Hartfield*, 603 F. Supp. 2d at 947.

45. *Id.* at 955 (emphasis in original).

46. *Id.*

47. See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 442 ("[W]ith respect to habeas petitions 'designed to relieve an individual from oppressive confinement,' the traditional rule has always been that the Great Writ is 'issuable only in the district of confinement.'" (citation omitted)).

48. *Hartfield*, 603 F. Supp. 2d at 956 (concluding that although Hartfield's petition could have been dismissed for lack of jurisdiction, "the more appropriate course of action" was to "transfer the case to the Eastern District of Texas").

exhaust state remedies.<sup>49</sup> District Judge Michael Schneider adopted the recommendations and dismissed Hartfield's petition without prejudice on April 29, 2011,<sup>50</sup> holding that either a pre-trial habeas application or a motion to set aside the indictment would have been a procedurally appropriate vehicle for presenting Hartfield's claim to the state courts.<sup>51</sup>

### c. The Fifth Circuit

Both sides appealed. Finding no controlling state precedent regarding the status of Hartfield's conviction and sentence, the Fifth Circuit certified that question to the CCA on November 28, 2012.<sup>52</sup> We became Hartfield's counsel at this point because the attorneys of the federal public defender's office could not follow the case into state court.

## IV. RESOLUTION, 2013–2017

### A. *The Certified Question at the CCA*

The CCA answered the certified question on June 12, 2013, holding that Hartfield was “under no conviction or sentence,”<sup>53</sup> but finding that he should have raised his speedy-trial claim in either a motion to set aside the indictment or a pre-trial application for habeas relief.<sup>54</sup> Heeding that instruction, we filed

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49. Report and Recommendation of the United States Magistrate Judge, *Hartfield v. Dir.*, No. 6:09-cv-00098, 2011 WL 1630346, at \*7.

50. *Hartfield v. Dir.*, No. 6:09-cv-00098, 2011 WL 1630201, at \*5 (E.D. Tex. Apr. 29, 2011).

51. *Id.* at \*4.

52. *Hartfield v. Thaler*, 498 F. App'x 440, 444–45 (5th Cir. 2012) (discussing status of case and certifying question: “[T]he Texas Court of Criminal Appeals reversed a district court’s judgment of conviction and capital sentence, did not address the defendant’s other claims of error, and ordered a new trial due to a *Witherspoon* error. Later, the court resolved two motions for leave to file for rehearing and issued its mandate that still required a new trial, but no new trial was ever conducted because the Governor purported to commute the defendant’s sentence. . . . Finding no controlling precedent under Texas law, we hereby certify the following determinative question to the Texas Court of Criminal Appeals: What was the status of the judgment of conviction after these events occurred?”)

53. *Hartfield*, 403 S.W.3d at 240.

54. *Id.* at 239–40 (explaining reasons for earlier procedural denials of attempted post-conviction application for writ of habeas corpus and application for leave to file mandamus

Hartfield's pre-trial application for a writ of habeas corpus in the 130th Judicial District of Texas on June 20, 2013.<sup>55</sup>

*B. The Habeas Petition in the 130th Judicial District*

The State moved to dismiss Hartfield's application, arguing that a speedy-trial claim was not cognizable in a pre-trial habeas application. But while the CCA had ruled in other cases that a speedy-trial claim is not cognizable if raised in a pre-trial application,<sup>56</sup> it had made clear in its June order that Hartfield's claim was in fact cognizable if raised in a pre-trial writ.<sup>57</sup> The court denied the State's motion on this ground, heard the habeas application on December 19, requested two rounds of post-hearing briefs, and then took no further action.

Hartfield's petition remained pending for almost ten months. Believing that by failing to issue a ruling the trial court was subverting the will of the CCA, compounding the violation of Hartfield's right to a speedy trial, and squandering judicial resources, we filed a petition for a writ of mandamus in the Texas Thirteenth Court of Appeals on April 7, 2014, which had the effect of causing the trial court, at long last, to act on Hartfield's application. On April 10, the court entered findings of fact and conclusions of law. We received both the April 7 order and the trial court's findings and conclusions on April 11.<sup>58</sup>

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petition, and suggesting that Hartfield file either motion to set aside indictment or pre-trial application for writ of habeas corpus).

55. In early July 2013, Hartfield was returned to county custody. This marked the first step by the State toward giving Hartfield the new trial that the CCA had ordered thirty years before. Other new lawyers were soon appointed to represent him at the second trial, and preparations for that trial occurred concurrently with proceedings pursuant to the habeas application on which we represented him.

56. *See, e.g., Smith v. Gohmert*, 962 S.W.2d 590, 593 (Tex. Crim. App. 1998) (opining that "a defendant seeking to compel a dismissal of an indictment on speedy trial grounds has an adequate remedy at law" and need not resort to a writ).

57. *Hartfield*, 403 S.W.3d at 240 ("Petitioner could have filed an application under [Texas Code of Criminal Procedure] Article 11.08."); *see* TEX. CODE CRIM. P. ANN. art. 11.08 (providing that "[i]f a person is confined after indictment on a charge of felony, he may apply [for habeas relief] to the judge of the court in which he is indicted").

58. The trial court's reasoning is explained in detail below, *see infra* pages 184–86.

### C. *The Appeal to the Thirteenth Court of Appeals*

We immediately appealed the trial court's decision to the Texas Thirteenth Court of Appeals, which concluded that Hartfield's claim was not cognizable in a pre-trial habeas application, notwithstanding the CCA's determination that it was.<sup>59</sup> The court held that the proper vehicle in which to raise Hartfield's speedy-trial claim was a motion to set aside the indictment, which could—if denied—be appealed in direct appeal proceedings after trial.<sup>60</sup>

### D. *Discretionary Review in the CCA*

The day after the Thirteenth Court of Appeals issued its opinion, we filed a petition for discretionary review in the CCA. The sole grounds for review were whether Hartfield's speedy-trial claim was cognizable in a pre-trial habeas application and, if so, whether his right to a speedy trial had in fact been violated. The first issue had been resolved fourteen months earlier when the CCA ruled that a pre-trial application was one of two means by which Hartfield could raise his speedy-trial claim.<sup>61</sup> Yet this time the CCA refused Hartfield's petition without explanation, silently permitting an intermediate appellate court to prevent him from using the very procedure that the CCA itself—in its capacity as the highest criminal appellate court in Texas—had already identified as appropriate.

We filed a motion for rehearing, which the CCA denied without explanation. This left Hartfield with a ruling from the

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59. *Ex parte Hartfield*, 442 S.W.3d 805, 817 (Tex. App. 2014) (concluding that the CCA did not intend to overrule its prior precedents with its earlier reference to article 11.08, speculating that the CCA might not have intended to indicate that “Hartfield could have filed a petition under article 11.08 to advance his speedy trial claim,” and suggesting that its omission of “that specific language,” was done purposefully, “perhaps to indicate that Hartfield could have used article 11.08 to advance his contention that he was in prison despite the fact that he was under no conviction or sentence” instead), *discretionary rev. refused* (Aug. 27, 2014).

60. *Id.* at 814–15 (discussing Hartfield's pre-trial motion to dismiss the indictment and holding that “Hartfield's post-conviction appeal of the trial court's denial of his motion to dismiss his indictment is his avenue to assert his speedy-trial claim, not the drastic remedy of pretrial habeas relief”).

61. *Hartfield*, 403 S.W.3d at 240 (pointing out that “[a]lternatively, Petitioner could have filed an application under Article 11.08”).

CCA directing him to use a pre-trial writ, a ruling from an intermediate court of appeals telling him that he could not use one, and a ruling from the CCA indicating that it had no objection to the lower court's contradiction of the initial CCA ruling. We were momentarily stymied. But meanwhile, Hartfield's new trial—the one that the CCA had ordered in 1980—was set to commence in August 2015.

### *E. The Speedy-Trial Claim in Federal Court Again*

Less than three weeks after the CCA denied the motion for rehearing, we presented Hartfield's now-exhausted speedy-trial claim to the federal district court in a petition filed under 28 U.S.C. § 2241, naming the sheriff of the county in which Hartfield was incarcerated as defendant. The sheriff answered by filing a motion for summary judgment on December 3, 2014.<sup>62</sup>

By February 9, 2015, the federal district court had yet to act on either Hartfield's § 2241 petition or the State's motion for summary judgment. We believed then that the State was still attempting to coerce Hartfield to accept the plea offer, and so filed a motion for preliminary injunction. The State's response to our motion included an exhibit consisting of the transcript from a status hearing in the state court indicating that Hartfield had by then rejected the State's offer.<sup>63</sup> The State argued in

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62. Around this time, the State began its attempt to bring a quick resolution to the state trial proceedings and to preclude the federal court from granting Hartfield relief on his speedy-trial claim by approaching Hartfield's state-court trial attorneys with a plea offer. The State maintained that it intended to seek the death penalty—despite *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court had declared execution of the intellectually disabled unconstitutional—but offered to allow Hartfield to plead guilty to murder instead of capital murder if he would agree to forego pursuing relief on his speedy-trial claim and accept a life sentence. The State initially gave Hartfield until the first week of January 2015 to accept this offer, but later extended the deadline to February 6, 2015.

Our knowledge of the plea offer was at first limited to what Hartfield's trial attorneys shared with us. We learned more when the State entered the transcript of a February 18, 2015, status hearing at which Hartfield stated that he had rejected the State's offer into the record of the § 2241 action. See *infra* note 63 and accompanying text.

63. See Respondent Osborne's Response in Opposition to Petitioner's Motion for Preliminary Injunction with Brief in Support at Exhibit C, *Hartfield v. Osborne*, (S.D. Tex. Mar. 3, 2015) (No. 4:14-cv-03120), ECF No. 15 (showing, via relevant pages copied from verbatim transcript of February 18, 2015, status conference, that Hartfield had been advised of the State's coercive offer and had rejected it).

consequence that Hartfield could not show irreparable injury if his request for an injunction was denied.

On April 21, 2015, the court granted the State's motion for summary judgment and denied Hartfield's request for an injunction, holding that he had failed to demonstrate circumstances that would justify consideration of his speedy-trial claim on pre-trial habeas review.<sup>64</sup> But finding that Hartfield's "decades-long confinement without a valid criminal conviction" was a "substantial showing of the denial of a constitutional right," the court granted Hartfield a certificate of appealability on the issue of whether his claim presented the special circumstances required to justify consideration of the speedy-trial claim in pre-trial proceedings.<sup>65</sup>

#### *F. The New Trial in State Court*

The prejudice that Hartfield faced at his second trial was significant: evidence was missing, witnesses were dead. As one observer put it, "[t]he murder weapon could not be found and Lowe's car no longer existed."<sup>66</sup> And "[m]any of the more than 125 people on the prosecution's witness list [were] dead or could not be found and some witness testimony from the 1977 trial was read into the retrial [which meant that Hartfield's attorney] could not cross-examine them."<sup>67</sup> As if this were not enough to "raise questions about the fairness of the retrial," vaginal swabs taken during the autopsy "had been lost," as had a soda bottle found at the crime scene "on which the State claimed Hartfield's fingerprint had been found."<sup>68</sup> Despite the prejudice he faced,<sup>69</sup> the jury did not find Hartfield guilty of capital

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64. Hartfield v. Osborne, No. 4:14-cv-03120, 2015 WL 1880449, at \*3 (S.D. Tex. Apr. 21, 2015).

65. *Id.*

66. Matt Ford, *The Retrial of a Texas Man Imprisoned Despite an Overturned Conviction*, ATLANTIC (Aug. 20, 2015), <https://www.theatlantic.com/national/archive/2015/08/the-retrial-of-a-texas-man-imprisoned-despite-his-overturned-conviction/401876/>.

67. *Id.*

68. *Id.*

69. We summarized the circumstances bluntly in our response to the State's petition for certiorari a couple of years later, pointing out that although the State had alleged all along that Hartfield: "1) killed Ms. Lowe with a pickaxe, 2) sexually assaulted her, and 3) absconded in her car, [b]y the time of his 2015 trial, the State had 1) lost the pickaxe, 2) lost the slides containing biological material from Ms. Lowe's vagina, and 3) given her

murder but instead found him guilty of the lesser-included offense of murder and sentenced him to life in prison.

### *G. The Fifth Circuit Declares the Federal Action Moot*

A month after Hartfield's second trial concluded, we filed a Rule 28j letter<sup>70</sup> in the Fifth Circuit, informing the court of the result of the new trial. The following day, the State filed a 28j letter arguing that Hartfield's appeal could no longer proceed pursuant to § 2241 and was instead governed by § 2254.<sup>71</sup> On December 16, 2015, the Fifth Circuit issued an opinion adopting the rule of *Yellowbear v. Wyoming Attorney General*,<sup>72</sup> holding that intervening events—Hartfield's conviction and life sentence—meant that Hartfield's speedy-trial claim could at that point proceed only under § 2254 even though it had been properly filed under § 2241.<sup>73</sup> The court dismissed Hartfield's appeal, leaving his claim susceptible to review by the federal courts only after he exhausted his speedy-trial claim via post-trial proceedings in state court.<sup>74</sup>

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car to her family.” Respondent’s Brief in Opposition to Petition for a Writ of Certiorari, at 17, *Hartfield v. State*, (U.S. Oct. 16, 2017) (No. 17-394) [hereinafter *Cert Opposition*].

70. See FED. R. APP. P. 28(j) (“If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed . . . a party may promptly advise the circuit clerk by letter.”).

71. That statute pertains to applications for writs of habeas corpus filed by persons in custody pursuant to state court judgments. 28 U.S.C. § 2254(a) (2012).

72. 525 F.3d 921, 924 (10th Cir. 2008) (discussing “unusual procedural posture” of case, and noting that “§ 2241 is a vehicle for challenging pretrial detention, . . . or for attacking the execution of a sentence,” while § 2254 provides “the proper avenue for attacking the validity of a conviction and sentence” (citations omitted)).

73. *Hartfield v. Osborne*, 808 F.3d 1066, 1072 (5th Cir. 2015); see also *Yellowbear*, 525 F.3d at 924 (pointing out that an attack on a state-court conviction and sentence should be brought under § 2254). The Fifth Circuit’s reasoning is discussed at greater length below. See *infra* pages 193–97.

74. See *Hartfield*, 808 F.3d at 1074; see also 28 U.S.C. § 2254(b)(1)(A).

*H. The Speedy-Trial Claim Goes Back to State Court,  
2016–2017*

*1. The Trial Court's Findings on the Barker Factors*

On January 20, 2016, the trial court entered amended findings of fact and conclusions of law, which varied only slightly from the findings that it had entered in 2014.

The court held that the first *Barker* factor,<sup>75</sup> which was never in dispute, weighed against the State. Even measuring from the date on which the CCA's mandate became final,<sup>76</sup> thirty years had elapsed before the State took any action toward carrying out the new-trial mandate.

It also found that the delay was caused by the State's negligence and that Hartfield had done nothing to cause the delay, indicating that the second *Barker* factor also favored Hartfield. While the State had consistently argued it could not have known that the governor's commutation was not effective until June 2013, the trial court found that the language in the CCA's opinion on direct appeal emphasized that commutation must occur prior to the mandate.<sup>77</sup>

In contrast, the trial court found that the third *Barker* factor—whether Hartfield asserted his right to a speedy trial—weighed heavily against him. The court correctly noted that Hartfield waited until 2006 to file a pleading that could be considered an assertion of his right to a speedy trial, but held that nothing Hartfield filed in state court prior to the June 20, 2013, application (and nothing he ever filed in federal court) asserted the right. Focusing on Hartfield's failure to use the correct form and the lack of proof that his filings were received either by the prosecutor's office or the trial judge, the court failed to consider Hartfield's intellectual disability, his incarceration throughout the years-long delay, or the CCA's retrial order.

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75. See note 13, *supra*, and accompanying text.

76. In cases involving a retrial, the delay to be considered begins at the moment the defendant is first accused and ends when his retrial commences. *Emery v. State*, 881 S.W.2d 702, 708 (Tex. Crim. App. 1994). Under this rule, the delay in Hartfield's case was one month shy of thirty-nine years.

77. See *Hartfield*, 645 S.W.2d at 442.

Although the court's presumption that Hartfield had been prejudiced by the delay satisfied the fourth *Barker* factor, the court also held that Hartfield had produced "scant evidence of actual prejudice."<sup>78</sup> This finding ignores reality: Hartfield was unable to have any of the physical evidence subjected to forensic analysis because the State had lost most of it, and several witnesses, including some who were never cross-examined during his first trial, died before the second trial. The absence of physical evidence and the deaths of witnesses who had not been cross-examined at the initial trial prejudiced Hartfield's defense.

## 2. *Our Arguments on Appeal*

Because it was the only *Barker* factor on which the trial court found against Hartfield, we focused on the trial court's analysis of the third factor. We argued first that because Hartfield was in state custody throughout the period of delay, it was not entirely clear that *Barker*'s third factor applied at all. We also pointed out that, while some courts have found that an incarcerated person has a duty to assert the right,<sup>79</sup> we were aware of no cases like Hartfield's, in which the incarceration itself has been held unlawful. In this circumstance, we argued, only the State should have been required to take affirmative steps. Our second argument was that, to the extent that *Barker*'s third factor was relevant, the trial court erred in failing to take into account the fact that Hartfield has an IQ of around fifty-eight, reads on a first-grade level, and can write only the simplest words.<sup>80</sup> Finally, we argued that the trial court erred in finding the documents that Hartfield filed pro se during 2006 and 2007 insufficient to assert his right to a speedy trial. He complained in those pro se filings that he had not had a second trial,<sup>81</sup> and a speedy-trial claim need only unambiguously alert

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78. Pet. for Cert. at 13, *Texas v. Hartfield*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 473 (Sept. 14, 2017) (No. 17-394).

79. See *infra* Part V.

80. *Amended Appeal Brief*, *supra* note 8, at 24.

81. See, e.g., *id.* at Exhibit D (referring in Mandatory Judicial Notice to "violation of the Sixth and Fourteenth Amendments of the United States Constitution," complaining that "the petitioner never went back to be retried," and citing *Barker* as relevant to analysis of whether "a defendant's Sixth Amendment right to a speedy trial has been violated"), Exhibit E (referring in Petition for Writ of Mandamus to "an unreasonable delay to be

the State of the delay and the defendant's lack of acquiescence to it.<sup>82</sup>

### 3. *The Opinion of the Thirteenth Court of Appeals*

The court of appeals found that the length of the delay weighed heavily against the State.<sup>83</sup> By holding that the delay was merely sufficient to trigger analysis of the remaining three *Barker* factors,<sup>84</sup> however, the court ignored CCA precedent holding that “a length of delay extending beyond the minimum amount of time required to trigger a full *Barker* analysis weighs heavily against the State because ‘the longer the delay, the more the defendant’s prejudice is compounded.’”<sup>85</sup>

The court of appeals agreed with the trial court that the State had acted negligently.<sup>86</sup> It also “disagree[d] with the State’s legally untenable position that it was unaware of the invalid commutation in order to justify the delay.”<sup>87</sup> The court held that the State was made aware of the effect of the CCA’s mandate by the language in its 1983 opinion, finding that this second *Barker* factor also weighed heavily against the State.<sup>88</sup>

The court of appeals agreed with the trial court that Hartfield’s failure to assert his right to a speedy trial from 1983 to 2006 weighed against him.<sup>89</sup> However, it disagreed with the trial court’s conclusion that Hartfield’s filings in state and federal court between 2006 and 2013 did not constitute

retried,” pointing out that the 1983 reversal had been “for a *new trial*,” and complaining that Hartfield had “never seen his day in court going on 24 years” (emphasis in original).

82. *See generally id.* (expanding our arguments).

83. *Hartfield*, 516 S.W.3d at 65.

84. *See, e.g., Doggett v. United States*, 505 U.S. 647, 651–52 (1992) (“Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” (citation omitted)).

85. *Hartfield*, 516 S.W.3d at 65 (quoting *Gonzales v. State*, 435 S.W.3d 801, 809 (Tex. Crim. App. 2014)); *see also Doggett*, 505 U.S. at 652 (indicating that “the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim”).

86. *Hartfield*, 516 S.W.3d at 68.

87. *Id.*

88. *Id.* (characterizing CCA’s 1983 language describing “procedure and timetable” for state to follow as “clear and unambiguous”).

89. *Id.* at 69–70 (recognizing State’s duty to bring defendant to trial, but also noting that Hartfield did not raise speedy-trial claim for twenty-six years).

assertions of his speedy-trial claim.<sup>90</sup> It held those filings sufficient to make the State aware that Hartfield did not acquiesce in the delay and that they therefore constituted assertions of his right to a speedy trial.<sup>91</sup> Accordingly, the court found that *Barker*'s third factor weighed against Hartfield.<sup>92</sup> And the court of appeals also agreed with the trial court that the fourth *Barker* factor—i.e. whether Hartfield was prejudiced by the delay—weighed against the State.<sup>93</sup>

Balancing the *Barker* factors, the court concluded that Hartfield's constitutional right to a speedy trial had been violated and ordered that the State's indictment against Hartfield be dismissed with prejudice.<sup>94</sup> The State filed a petition for discretionary review with the CCA, which refused it, then filed a petition for certiorari in the United States Supreme Court that was denied on November 27, 2017.<sup>95</sup> The State informed us the next day that it would not seek rehearing. And with that, Hartfield's criminal justice nightmare at long last reached its end.

#### V. ANALYZING THE RIGHT TO A SPEEDY TRIAL: ACCOUNTING FOR THE DEFENDANT'S PERSONAL CHARACTERISTICS IN A *BARKER* ANALYSIS

The Barker of *Barker v. Wingo* was arrested on suspicion of killing an elderly couple in Kentucky.<sup>96</sup> The case against his co-

90. *Id.* at 70 (“On the other hand, we cannot ignore Hartfield’s repeated assertions of his right to a speedy trial from 2006 to 2013 in state and federal court proceedings.”).

91. *Id.*; see also *Henson v. State*, 407 S.W.3d 764, 769 (Tex. Crim. App. 2013) (holding that to be considered an assertion of the constitutional right to a speedy trial, a communication need only unambiguously alert the State of the delay and the defendant’s lack of acquiescence to it); *Zamorano v. State*, 84 S.W.3d 643, 651 n.40 (Tex. Crim. App. 2002) (same).

92. *Hartfield*, 516 S.W.3d at 70 (“[L]ike the trial court, we weigh this factor against Hartfield due to the twenty-three-year inactivity in his case, but not as heavily, because of Hartfield’s state and federal court efforts to his [sic] assert his right to a speedy trial beginning in 2006.”).

93. *Id.*

94. *Id.* at 71. This is the “only possible remedy” when a court finds that a defendant’s constitutional right to a speedy trial has been violated. *Strunk v. United States*, 412 U.S. 434, 440 (1973).

95. *Texas v. Hartfield*, No. 17-394, 2017 WL 4099612 (U.S. Nov. 27, 2017).

96. *Barker*, 407 U.S. at 516.

defendant Manning was stronger than the case against Barker, and believing that it needed Manning's testimony to convict Barker, Kentucky proceeded first against Manning.<sup>97</sup> But because of two hung juries and two reversals, the Commonwealth had to try Manning six times.<sup>98</sup> By the time of the sixth trial, Kentucky had on fourteen separate occasions asked the trial court to delay Barker's trial, but Barker had objected to only one of those requests for continuance—the twelfth.<sup>99</sup> After Manning's last trial, Kentucky moved twice more for continuances, and Barker opposed both motions.<sup>100</sup> The Court held nonetheless that his right to a speedy trial had not been violated.

The *Barker* Court did not hold that Barker's right to a speedy trial had not been violated simply because he had failed to assert it. The finding was based instead on Barker's repeated statements that he was unopposed to the State's motions for continuance.<sup>101</sup> In fact, the Court expressly denounced what it referred to as a demand-waiver rule: "We reject . . . the rule that a defendant who fails to demand a speedy trial forever waives his right,"<sup>102</sup> because "presuming waiver of a fundamental right from inaction is inconsistent with [the] Court's pronouncements on waiver of constitutional rights."<sup>103</sup>

Consistent with this analysis, the Court did not presume waiver in Barker's case, but recognized that the record showed that he had repeatedly failed to speak when he might have asserted his right to a speedy trial. Hartfield's case was different. Both the trial court and the court of appeals presumed that Hartfield had waived his right to a speedy trial during the period from 1983 to 2006 only because the record was silent on whether he wanted during those years to be tried a second

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97. *Id.*

98. *Id.* at 516–17.

99. *Id.* at 517–18.

100. *Id.*

101. *Id.* at 536 ("[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.")

102. *Id.* at 528 (citation omitted).

103. *Id.* at 525.

time.<sup>104</sup> This amounts to imposition of just the sort of demand-waiver rule that the *Barker* Court criticized.<sup>105</sup>

Moreover, Hartfield's case demonstrates the importance of accounting for the personal characteristics of the defendant who attempts to assert the right to a speedy trial. There is, for example, a manifest unfairness in imposing the same duty to assert the right on incarcerated defendants as is imposed on free defendants.<sup>106</sup> Because being incarcerated makes it more difficult to assert one's rights, requiring incarcerated defendants to make explicit requests for speedy trials also encourages the State to keep more defendants incarcerated during the pre-trial period. This is wrong. No defendant should have to ask a trial court to do what an appellate court has ordered it to do.

Hartfield's case is illustrative. Because the State did not take the initial step of having him brought back to the county of conviction until thirty years after the CCA's mandate issued, he spent much of his life incarcerated in a prison hundreds of miles away from the officials to whom his demand for a speedy trial needed to be made. The State apparently expected him to compose and file a pleading in a distant court in order to raise a

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104. *Hartfield*, 516 S.W.3d at 69 (noting the record contained no explanation for Hartfield's failure to assert his right to a speedy trial between 1983 and 2006).

105. The Texas courts are far from the only state courts that regularly assume on silent records that defendants acquiesce to delay. *See, e.g.*, *People v. Crane*, 743 N.E.2d 555, 565–66 (Ill. 2001) (speculating about possible strategic reasons for defendant's failure to make speedy-trial claim and concluding that "defendant's failure to assert his right to a speedy trial should not be viewed as a completely neutral factor"); *cf. Ex parte Stevens*, 499 So. 2d 795, 799–801 (Ala. 1996) (Maddox, Shores & Houston, JJ., dissenting) (noting that defense attorney made no effort to supplement appellate record with defendant's letters to clerk requesting trial, and concluding that finding below that defendant's right to speedy trial had not been violated should not have been reversed). Though it seems to be what is required under *Barker*, we are aware of only one state whose courts hold explicitly that *Barker*'s third prong should not be found to weigh against a defendant merely because of a silent record: *see, e.g.*, *State v. Springer*, 400 P.3d 231, 2017 WL 3034065, at \*2 (Mont. 2017) (holding that delay alone does not prove that a defendant did not want a speedy trial); *State v. Zimmerman*, 328 P.3d 1132, 1140 (Mont. 2014) ("In order to weigh Zimmerman's inaction against him for purposes of Factor Three, the record must establish, one way or another, whether he actually wanted a speedy trial.").

106. *People v. MacDonald*, 27 Cal. App. 3d 508, 514 (Cal. Ct. App. 1972) (recognizing practical obstacles to incarcerated defendant's asserting right to speedy trial). The Oklahoma courts do not appear to require an incarcerated defendant to request a speedy trial. *See State ex rel. Trusty*, 525 P.2d 1231, 1237 (Okla. Crim. App. 1974) (discussing longstanding precedent indicating that "the law makes the demand" for incarcerated defendants).

speedy-trial claim. Yet Hartfield reads at primary-school level; he is incapable of writing a demand letter, an application for relief, or a motion. The State's expecting this intellectually disabled and illiterate prisoner to compose his own speedy-trial demand was inappropriate. And it was manifestly unfair for both the trial court and the court of appeals to fail to consider Hartfield's intellectual disability when determining the weight to assign to his failure to assert his right to a speedy trial.

Especially in cases in which appellate courts have overturned convictions or sentences and ordered that defendants be retried, it is unfair to require these defendants to assert their right to speedy trials. Yet it is nonetheless not unusual for courts to require them to do so.<sup>107</sup> Hartfield's case is typical in this respect. And although not every case will involve incarceration and intellectual disability, any special factors relevant to the defendant's situation should be considered. Speedy-trial review does not require the court to act so quickly that it must replace consideration of the defendant's circumstances with a reasonable-person standard or other rule of thumb. Instead, each speedy-trial case should be evaluated in light of the personal characteristics—intellectual disability, for example, or incarceration, extreme youth, advanced age, or a history of severe mental illness—that might compromise the defendant's ability to ask for a speedy trial.

## VI. WHAT HARTFIELD'S ORDEAL TEACHES APPELLATE COURTS AND APPELLATE LAWYERS ABOUT FEDERAL PRE-TRIAL HABEAS

Hartfield's attempt to obtain pre-trial habeas relief from the federal courts ultimately raises two important issues. The first is whether the appropriate legal vehicle is determined by the petitioner's status as of the date of filing, or instead by the petitioner's status as of the date of decision (or perhaps even by

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107. See, e.g., *Lahr v. State*, 615 N.E.2d 150, 153 (Ind. Ct. App. 1993) (characterizing defendant's efforts to raise speedy-trial claim as "neither particularly timely nor vigorous" and finding no violation); cf. *Nickerson v. State*, 629 So. 2d 60, 64-66 (Ala. 1993) (recognizing that trial judge ignored new-trial order and concluding that violation had occurred, but also seeming to suggest that proof of defendant's knowing failure to assert speedy-trial claim might have yielded different result).

the petitioner's status on some other date).<sup>108</sup> The second is whether, even assuming that a change in the petitioner's status between the date of filing and the date of decision bears on which vehicle is appropriate, the criteria for obtaining relief under § 2254 are so different from those under § 2241 as to justify the Fifth Circuit's decision to dismiss Hartfield's appeal.

A central theme of contemporary habeas jurisprudence in cases challenging state convictions or sentences stresses the tension between vindicating federal constitutional rights and preserving the integrity and autonomy of state criminal process.<sup>109</sup> The possibility of federal pre-trial relief lifts that tension to a far higher level. For that reason, the criteria that must be satisfied before federal courts grant pre-trial relief in cases that originate in state courts are strict,<sup>110</sup> and concerns of federalism dictate that the availability of pre-trial relief should be at least as daunting as the availability of post-conviction relief.<sup>111</sup> But pre-trial relief, albeit rare, is at times warranted.<sup>112</sup>

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108. In *Yahn v. King*, 2015 WL 1814313 (N.D. Cal. 2015), a district court in California suggested that Ninth Circuit cases indicate that the date of filing is determinative. *See id.* at \*2 (referring to Ninth Circuit cases indicating that prisoner's status at time of filing is all that matters for selecting jurisdictional basis for habeas petition (citing *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004), which treated petition filed under §2254 as if it were filed under § 2241); *McNeely v. Blanas*, 336 F.3d 822 (9th Cir. 2003) (same)). The same appears to be true of the Sixth Circuit. *Smith v. Coleman*, 521 F. App'x 444, 447 n.2 (6th Cir. 2013) (stating that nature of claims raised and status of petitioner at time of filing determine court's standard of review).

109. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991) (noting that independent and adequate state ground doctrine will, for example, “bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement” and that, in cases of this type, “the state judgment rests on independent and adequate state procedural grounds”).

110. Oddly, the statutory provision pertaining to post-trial relief generally requires exhaustion, whereas the provision permitting relief prior to judgment contains no such requirement. *Compare* 28 U.S.C. § 2254(b)(1)(A) *with* 28 U.S.C. § 2241 (2012). Nevertheless, despite the absence of an express exhaustion provision in § 2241, the federal courts have implied one. *See, e.g., Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 503 (1973) (Rehnquist & Powell, JJ. & Burger, C.J., dissenting) (discussing history); *Moore v. DeYoung*, 515 F.2d 437, 442 (3d Cir. 1975) (acknowledging that “an exhaustion requirement has developed through decisional law, applying principles of federalism” and explaining that “although there is a distinction in the statutory language of §§ 2254 and 2241, there is no distinction insofar as the exhaustion requirement is concerned”).

111. *E.g., Frisbee v. Collins*, 342 U.S. 519, 520–21 (1952).

112. *Ex parte Royall*, 117 U.S. 241, 252–53 (1886); *see also Fay v. Noia*, 372 U.S. 391 (1963) (discussing history); *DeYoung*, 515 F.2d at 443 (discussing jurisprudential underpinnings of approach to pre-trial habeas).

Precisely because a pre-trial grant of habeas relief is so intrusive, effectively short-circuiting the state criminal process, its availability is cabined by principles similar to those implicated in abstention doctrine.<sup>113</sup> Hence, pre-trial habeas relief is available only if there are special or extraordinary circumstances. Yet the critical concept of special or extraordinary circumstances is not delineated with great clarity in the caselaw. Nevertheless, the cases recognize at least two scenarios in which relief may be available: if the state is acting in bad faith or if the violation of the federal right is perfectly apparent.<sup>114</sup>

Citing Hartfield's thirty-year saga as the quintessence of special circumstances, we sought the rare remedy of federal pre-trial habeas relief on his behalf. The district court dismissed the petition, concluding that he had not shown special circumstances warranting relief. On appeal, we argued that this conclusion was flawed for several reasons:

- The state courts had engaged in a game of bait-and-switch, with the CCA holding that Hartfield could raise the speedy-trial claim in a pre-trial writ,

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113. The classic statement of the principles of abstention in the face of an ongoing criminal proceeding is *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention can apply in the § 2241 context. *E.g.*, *Evans v. Ct. of Common Pleas*, 959 F.2d 1227, 1234 (3d Cir. 1992); *Carden v. Mont.*, 626 F.2d 82, 83–85 (9th Cir. 1980) (discussing general rule prohibiting pre-trial habeas relief and recognizing it as “logical implication of the abstention doctrine announced in *Younger v. Harris*”); *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir. 1979) (affirming denial of pre-trial habeas petition because of abstention considerations even though defendant had exhausted state remedies); *Kolski v. Watkins*, 544 F.2d 762 (5th Cir. 1977) (indicating that petitioner should proceed through state trial, and could if necessary seek federal habeas relief afterward); *Gibson v. Orleans Parish Sheriff*, 971 F. Supp. 2d 625 (E.D. La. 2013) (finding no extraordinary circumstances and abstaining on *Younger* grounds); *see also Braden*, 410 U.S. at 493 (“We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court.”).

114. *E.g.*, *Tex. Ass’n of Bus. v. Earle*, 388 F.3d 515, 519 (5th Cir. 2004) (citing *Younger*). For a useful discussion of what these circumstances might comprise, *see Aydiner v. Giusto*, 401 F. Supp. 2d 1129, 1133–37 (D. Ore 2005). To see some examples of bad faith—cases in which the state had no prospect of obtaining a valid conviction—review, for example, *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (opining that “[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate”); *Gibson*, 971 F. Supp. 2d at 631 (discussing illustrative situations); and *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003) (same).

followed by a decision of the intermediate court of appeals holding precisely the opposite, followed in turn by the CCA's refusal to enforce its earlier judgment. This pattern of behavior, we argued, epitomized bad faith.

- In view of the overwhelming strength of the speedy-trial argument, any conviction that the state court might have obtained would almost surely have been invalid.
- State officials had not only refused to implement the CCA's order of a new trial for over three decades, but the state had continually exercised control over Hartfield for that entire time, imprisoning him without a valid conviction; and
- There was simply no way for Hartfield to receive a fair trial after a thirty-year delay, given the State's loss and destruction of critical evidence—including even the murder weapon—and the deaths of important witnesses.

But once Hartfield's federal action was well underway, the State finally began the process of providing him a new trial. And after our brief for Hartfield had been filed in the Fifth Circuit, he was again convicted in state court. Hence, by the time we appeared before the Fifth Circuit to argue in favor of reversal, the posture of the case had changed. As the court put it with some understatement, "Hartfield's state court conviction following the district court proceedings, but prior to our hearing his case on appeal, places this case in an unusual procedural posture."<sup>115</sup>

In short, the question before the district court, given that Hartfield had not yet been convicted when he appeared pursuant to § 2241, was whether he had shown the special circumstances warranting relief. When the notice of appeal was filed, and when the appeal briefs were filed, the central question was unchanged: Were special circumstances present? By the time of argument,

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115. *Hartfield*, 808 F.3d at 1071.

however, Hartfield was under a judgment of conviction, and therefore his case appeared to fall within § 2254, which pertains to those “in custody pursuant to the judgment of a State court,”<sup>116</sup> not under § 2241.

As the Fifth Circuit noted, § 2254 includes constraints on the availability of habeas relief not contained in § 2241.<sup>117</sup> The initial question, therefore, was whether § 2254 was applicable even though the notice of appeal and the habeas petition were both filed while Hartfield’s case was still obviously one that arose under § 2241. In addressing this question, the court did not adopt the rule, prevalent elsewhere, that it is the content of the petition that matters—which is to say that a petition filed pursuant to § 2241 can if circumstances warrant be treated as having been filed under § 2254.<sup>118</sup>

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116. Compare 28 U.S.C. § 2254(b)(1) (requiring exhaustion of state remedies), with 28 U.S.C. § 2241 (requiring inquiry into whether special circumstances exist before federal court can address merits of underlying claim); see also *Hartfield*, 808 F.3d at 1068 (discussing differences between § 2254 and § 2241).

117. *Hartfield*, 808 F.3d at 1071–73 (citing *Medberry v Crosby*, 351 F.3d 1049 (11th Cir. 2003)).

118. See, e.g., *James v. Walsh*, 308 F.3d 162, 166 (2d Cir. 2002) (noting that it is “the substance of the petition, rather than its form,” that governs); cf. *Cook v. N.Y. St. Div. of Parole*, 321 F.3d 274, 277–78 (2d Cir. 2003) (noting that “the fact that Cook invoked section 2241 did not, however, require the district court to treat it as a section 2241 petition,” and that “if an application that should be brought under 28 U.S.C. § 2254 is mislabeled as a petition under section 2241, the district court must treat it as a section 2254 application instead” (citations omitted)). The Fifth Circuit’s summary of its differing analysis in *Hartfield* bears quoting in full:

Hartfield filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Hartfield argued that his right to a speedy trial had been violated by the State of Texas because the State had held him in prison for approximately thirty years without a valid state court judgment and without retrying him consistent with the mandate of the State’s highest criminal court. The district court denied Hartfield’s petition, reasoning that federal courts do not reach the merits of speedy-trial claims on pretrial habeas review absent “special circumstances.” However, the court issued Hartfield a certificate of appealability as to whether “special circumstances” are present in this case. Although Hartfield was not in custody pursuant to a state court judgment when he originally filed his petition, he was convicted by a Texas state court following the district court’s decision. Because he has been convicted, any writ of habeas corpus granted by a federal court will necessarily free him from custody pursuant to a state court judgment. Therefore, 28 U.S.C. § 2254 now applies to Hartfield’s petition. Section 2254 imposes a specific exhaustion requirement on habeas petitioners, which involves a different inquiry than whether “special circumstances” exist. Because the existence of “special circumstances” is no longer relevant and because we lack jurisdiction over anything related to § 2254 based on the certificate of appealability issued by the district court, we DISMISS his appeal.

Instead, recognizing that the question was one of first impression in the Fifth Circuit, the court looked to *Yellowbear* and held that if a prisoner is convicted after the date on which the habeas petition is filed, it must be brought under § 2254.<sup>119</sup> But this reliance on *Yellowbear* was peculiar, because *Yellowbear* himself filed a federal habeas petition pursuant to § 2241 while his state trial was underway, and, aware of that context, the federal district court dismissed his action for failure to exhaust.<sup>120</sup> *Yellowbear* then appealed, and during the pendency of the appeal he was—like *Hartfield*—convicted, but this superficial similarity to what happened to *Hartfield* is precisely that: superficial. *Hartfield* filed his federal action well in advance of the commencement of his long-delayed state trial, not in the midst of it; in fact, at the time he filed, it was not at all clear when the state proceedings would commence.

The Fifth Circuit was correct to point out that the issue in the district court was whether *Hartfield* had shown special circumstances warranting pre-trial relief. Despite finding that he had not done so, the district court granted him a certificate of appealability on that very question.<sup>121</sup> We argued in the Fifth Circuit that he was nevertheless entitled to relief, even under the limitations set by § 2254, but the Fifth Circuit identified three reasons for declining to address the speedy-trial violation:

- The question presented in the notice of appeal—whether special circumstances were present—was no longer relevant because proof of special circumstances is not required by §2254;
- The district court had not reached any conclusion about *Hartfield*'s claim under § 2254; and

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*Hartfield*, 808 F.3d at 1068 (emphasis in original).

119. In so holding, the court perplexingly cited a Ninth Circuit case holding that the status of the petitioner at the time of filing—i.e., whether he is incarcerated pursuant to a state court judgment when the petition is filed—controls whether the petition should proceed under § 2241. *Hartfield*, 808 F. 3d at 1072 n.1 (citing *Stow*); see *supra* note 108.

120. *Yellowbear*, 525 F.3d at 923.

121. *Hartfield*, 808 F.3d at 1070 (discussing district court's analysis).

- The Fifth Circuit believed that it lacked jurisdiction over any issue other than the special-circumstances question identified in the notice of appeal.<sup>122</sup>

It is not so much that these observations are wrong as that each can be overcome with a simple response. Thus, if the Fifth Circuit had wanted to address the merits, it could have done so. By declining to address the merits, the court unfortunately let the interplay of these observations create an incentive for the State to engage in gamesmanship. An opinion on the merits could have avoided this result, and the merits of Hartfield's speedy-trial claim were identical whether the vehicle for addressing it was § 2241 or § 2254. Moreover, as the Fifth Circuit acknowledged, Hartfield had exhausted his state-court remedies, removing a potential procedural bar to its taking action.

Hartfield's notice of appeal identified the special-circumstances issue, but notices of appeal are to be construed functionally and this one demonstrated that Hartfield was complaining about the district court's refusal to address his speedy-trial claim. If the function of the notice of appeal is to put both the appellee and the court on notice of the issues that

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122. The filing of a notice of appeal as required by Rule 3(a) of the Federal Rules of Appellate Procedure is mandatory and jurisdictional. *E.g.*, *Smith v. Barry*, 502 U.S. 244 (1992). However, the rule's dictates are to be construed liberally. *E.g.*, *id.* at 248; *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (indicating that mere technical failures to comply with requirements of Rule 3 are insufficient to make notices of appeal ineffective). Moreover, in deciding whether a notice of appeal confers appellate jurisdiction over a specific issue, the court must remember that “it is the notice afforded by a document, not the litigant's motivation in filing it, that determines the document's sufficiency as a notice of appeal.” *Smith*, 502 U.S. at 244. And in evaluating whether the notice of appeal has notified the parties and the court which issues the appellant seeks to have reviewed, the court does not examine the notice in a vacuum but “in the context of the record as a whole.” *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1221 (1st Cir. 1990), *vacated on other grounds*, 505 U.S. 1215 (1992).

A final point is worth mentioning. The Federal Rules of Appellate Procedure permit the suspension of most rules. FED. R. APP. P. 2. While the express terms of Rule 2 do not permit the court to extend the time for filing a notice of appeal in most situations, the Rule does not prohibit the court from reading a notice of appeal more generously than a literal reading would permit. And members of the Fifth Circuit in particular have read notices of appeal to create maximum jurisdiction. *Marts v. Hines*, 117 F.3d 1504, 1515 & n.12 (5th Cir. 1997) (en banc) (Garwood, King, Higginbotham, Smith, Duhé, Garza, Benavides & Dennis, JJ., dissenting) (recognizing that “the initial appellant's notice of appeal gives the court of appeals jurisdiction over the whole case” so that it may “review the entire judgment”).

the appellant seeks to have reviewed, and if the content of the notice is to be interpreted in context, the Fifth Circuit can have had little doubt about Hartfield's claim that three decades of delay violated his right to a speedy trial. Of course the district court had not addressed that question, but review in the Fifth Circuit would have been *de novo* whether Hartfield or the State had prevailed in the district court. The Fifth Circuit should have addressed the question in the interest of judicial economy. Indeed, because the speedy-trial analysis includes consideration of whether the defendant has been prejudiced by the passage of time, the Fifth Circuit was perfectly positioned to undertake that analysis. If there had been any doubt about prejudicial delay when Hartfield filed his petition, that doubt had been resolved conclusively by Hartfield's conviction at his long-delayed second trial, which was compromised by the disappearance of critical evidence and the deaths of several witnesses, and had concluded with a new murder conviction before the Fifth Circuit issued its opinion.

The Fifth Circuit could have taken a straightforward path to address the speedy-trial question. Its unwillingness to pursue that path and its resorting instead to mechanical reasoning has created another opportunity for states to violate defendants' rights to speedy trials. Hartfield's case demonstrates that a state can ignore an order to grant a defendant a new trial, and if the defendant resorts to pre-trial federal habeas pursuant to § 2241, the state can hurriedly try the defendant in the hope that a guilty verdict will be obtained, rendering the defendant's § 2241 filing moot.

The wiser course would have been for the Fifth Circuit to hold that if the state trial has not begun when the federal petition is filed, an action under § 2241 is permitted and need not be dismissed if the state trial concludes with a verdict against the defendant before the federal habeas action has been decided. Given the implicit exhaustion requirement in § 2241, there is little chance that a state defendant could rush to federal court in an attempt to outrace the commencement of state criminal proceedings, but if such an unusual circumstance were to arise, the federal court could simply hold that special circumstances warranting pre-trial relief are not present.

## VII. CONCLUDING THOUGHTS

In an interview conducted the day he was released, Hartfield said that he was not bitter and was not angry with the people responsible for holding him for over thirty years under no conviction or sentence.<sup>123</sup> But we should be angry for him. We should not be angry at any one person or even any particular group of people, but instead at the systemic failure that resulted in Hartfield's nightmare.

Every part of the system failed him: the state trial court; the state's intermediate court of appeals (which rejected Hartfield's pre-trial attempt to obtain relief and therefore caused him to endure two additional years of unlawful confinement); the CCA (which four times elevated form over substance and then refused to enforce its own judgment); the federal district courts and the Fifth Circuit;<sup>124</sup> and, most of all, the state prosecutors in both the district attorney's office and the office of the Attorney General. It took far too long, but at last, the Thirteenth Court of Appeals correctly recognized that it was a nightmare not only for Hartfield, but also for the "system at-large."<sup>125</sup>

Short of executing someone who is actually innocent, it would be difficult to conjure up a case more tragic than Hartfield's. The State ignored the CCA's new-trial mandate for over thirty years, and the CCA allowed its mandate to be ignored. Even once the judges of the CCA learned that Hartfield had been incarcerated under no conviction or sentence for over twenty years, they did nothing, hiding behind the justification that this intellectually disabled man, acting with only the advice and counsel of a fellow inmate, had chosen the wrong procedural vehicle by which to raise his claim. Meanwhile, the state's lawyers, rather than acknowledging their predecessors' error, repeatedly attempted to justify it as they blocked Hartfield's attempts to get a new trial. Then, faced with a

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123. Andrew Cohen, *The Man Who Spent 35 Years in Prison Without a Trial*, MARSHALL PROJECT—CASE IN POINT (June 12, 2017), <https://www.themarshallproject.org/2017/06/12/the-man-who-spent-35-years-in-prison-without-a-trial>.

124. Obviously, the federal courts are not responsible for the injustice Hartfield endured. But both the trial courts and the Fifth Circuit declined to take action that could have ended the ordeal sooner. In any episode of colossal injustice many players will bear responsibility, and in Hartfield's case, the federal courts do not escape without blame.

125. *Hartfield*, 516 S.W.3d at 68.

question of first impression presented in an extraordinary case, the Fifth Circuit chose not to do justice, but to adopt a rule that incentivized the State's procedural gamesmanship. And it exacted no penalty for the State's wrongfully incarcerating a man for more than half his life.

There are no good guys in this story. The ending is hopeful, but not exactly happy. If this case presents a lesson for the rest of us, it is that courts have the power to do justice for a reason: that they might use it.

