IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
	)	No. 16CR-6434
v.	)	Hon. Carol M. Howard
MARC WINNER, Defendant.	)	

DEFENDANT'S MOTION TO DISMISS INDICTMENT

Defendant MARC WINNER, by his attorneys, STEVEN J. WEINBERG and JONATHAN M. BRAYMAN, and pursuant to 725 ILCS § 5/114-1, the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, Article I, §§ 2, 7, and 8 of the Illinois Constitution, and this Court's supervisory powers, respectfully moves this Honorable Court to enter an order dismissing the indictment with prejudice, hold a hearing on this motion, and/or grant any other equitable and appropriate relief. In support of this motion, Defendant offers the following:

INTRODUCTION

More than three years ago, in April of 2013, the State determined that there was not sufficient evidence to proceed with their prosecution of Marc Winner in this matter. The State's Attorney made this decision after a preliminary hearing wherein Circuit Court Judge Adam Bourgeois, Jr. determined that there was no probable cause to believe that Mr. Winner had, in July of 2009, committed criminal sexual assault of complainant J.B.

Now, after Mr. Winner has been charged in a separate criminal sexual assault case, stemming from his interaction with complainant C.R. in August of 2015, the State has sought and obtained a true bill of indictment *again* charging Mr. Winner with sexually assaulting J.B.[1] The indictment in this matter must be dismissed based on violations of Mr. Winner's constitutional rights to a speedy trial and to due process.

ARGUMENT

Defendant Marc Winner is charged, in the above-captioned case, by way of a three-count indictment with aggravated criminal sexual assault and aggravated criminal sexual abuse. The charges in this case stem from the allegations of a young woman who, during the evening of July 16, 2009 and into the early morning hours of July 17, 2009, was out drinking alcohol with her friends and Mr. Winner; initially at Market, a restaurant/bar formerly located at 1113 West Randolph Street, and later at Mr. Winner's apartment located at 1001 West Madison Street, Apartment 501; both in Chicago's West Loop. While the discovery materials tendered by the State vary regarding the sequence of events that J.B. alleges occurred that evening, it is clear, after drinking for a period of approximately 9½ hours and using cocaine, J.B. placed a hang-up call to 911 and a call to her sister Sara, which set off a series of events leading to J.B. being picked up by the Chicago

[1] Since the indictment of Mr. Winner in this matter, he has been charged in a third matter by way of indictment number 16CR-8155 for the purported criminal sexual assault of A.H. in July of 2012, which was reported to the Chicago Police Department 6 days after the alleged assault.

Police Department and taken to UIC Hospital for a criminal sexual assault evidence kit.

On the morning of July 17, 2009, Officers William Colon (Star #7289) and Rudy Frias (Star #5707) of the Chicago Police Department's 12th District interviewed J.B. who alleged that Mr. Winner sexually assaulted her. (*See* Group Ex. 1, 07/17/2009 Original Case Incident Report and General Offense Report.)[2] J.B. provided Mr. Winner's name and address. *Id.* On that same day, Chicago Police Evidence Technicians received various pieces of potential physical evidence, including the criminal sexual assault evidence kit from UIC Hospital, which was subsequently sent to the Illinois State Crime Lab. (*See* Ex. 2, eTrack Inventory Item Inquiry Report.) Over a month later, on August 23, 2009, Detectives Mok and Ferek arrested Mr. Winner at his business, Soleil Tanning Salon, 1018 West Madison Street in Chicago, for criminal sexual assault, based on J.B.'s allegations. (*See* Ex. 3, 08/23/2009 Arrest Report.)

On August 23 and 24, 2009, Chicago Police executed search warrants at Mr. Winner's business, seizing a computer hard drive that was apparently linked to the business' surveillance video camera system, as well as obtaining a buccal swab from Mr. Winner. (*See* Ex. 2, eTrack Inventory Item Inquiry Report; Ex. 4, 08/31/2009 Case Supplementary Report.) Additionally, on August 24, 2009, Cook County Assistant State's Attorney (ASA) Ryan Whitney interviewed J.B., her mother, and a circumstantial witness at the former Chicago Police Department's Area 4 Detective

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[2] Due to privacy concerns, the defense submits the exhibits to this motion *in camera* to the Court and the State.

Headquarters. (*See* Ex. 4, Case Supplementary Report.) ASA Whitney also interviewed J.B.'s sister, Sara, over the phone. *Id.*

After speaking with complainant J.B. and these three witnesses, ASA Whitney continued the investigation for results from the crime lab, and Detectives Mok and Ferek requested that the Chicago Police Department's investigation be suspended pending these results. *Id.* ASA Whitney and Detective Mok released Mr. Winner from police custody pending the lab results. *Id.* On October 14, 2009, these results were returned by the Illinois State Police Department's Division of Forensic Services to Detective Mok. (*See* Ex. 5, 10/14/2009 Illinois State Police Laboratory Report.) The discovery materials tendered to the defense contain no indication that the Chicago Police Department or the Cook County State's Attorney took any further action on their criminal prosecution of Mr. Winner for the alleged criminal sexual assault of J.B. in 2009, 2010, 2011, or 2012.

On March 10, 2013, however, the Cook County State's Attorney's Office approved formal felony charges against Mr. Winner and, the following day, Judge Gloria Chevere issued a warrant for his arrest, based on the same allegations previously made by J.B. and the same evidence previously gathered. (*See* Group Ex. 6, 04/15/2013 Case Supplementary Report; Warrant Documents.) Mr. Winner's second arrest was made 43-44 months, or nearly 4 years, after J.B. made her allegations against him and 42-43 months after his initial arrest on this case. Mr. Winner's case was docketed under Municipal Case No. 13-110385301. (*See* Ex. 7, 03/11/2013 Arrest Report; *see also* Ex. 8, Branch 66 "Half-Sheet.")

On March 12, 2013, Mr. Winner appeared in Branch 66, answered ready for preliminary hearing and demanded his right to a speedy trial. (Ex. 8, Branch 66 "Half-Sheet.") The case was continued on the State's motion to April 1, 2013. *Id.* On that date, J.B. testified at a preliminary hearing and the case was dismissed by judicial determination, after Judge Bourgeois entered a finding of no probable cause. *Id.*

After Judge Bourgeois dismissed the case, the Cook County State's Attorney's Office chose not to proceed on J.B.'s allegations against Mr. Winner any further, through presenting their case to the grand jury. In fact, more than 3 years would pass before the State's Attorney's Office would ultimately seek a grand jury indictment pertaining to J.B.'s allegations. This constitutes an additional delay of 36-37 months between the date that the municipal case was dismissed – April 1, 2013 – and April 21, 2016, the date that the Cook County State's Attorney obtained a true bill of indictment on J.B.'s case.

In total, more than 81 months, or nearly 7 years, passed between the date of the alleged criminal sexual assault of J.B. and the date of Mr. Winner's indictment based on her allegations. These undue delays resulted in the deprivation of Defendant's constitutional rights to a speedy trial and to due process under the Illinois and United States Constitutions. The indictment must be dismissed based on these extraordinary and unjustified delays in the criminal prosecution of Mr. Winner.

ARGUMENT

I. The indictment must be dismissed based on a violation of Mr. Winner's constitutional right to a speedy trial as the delay in bringing Mr. Winner to trial in this matter is presumptively prejudicial and unjustified.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." *See* U.S. CONST., amend. VI and XIV; *see also* ILL. CONST. 1970, art. I, §§ 2, 7, and 8. A defendant's constitutional right to a speedy trial is triggered by an arrest, indictment, or other official accusation. *People v. Totzke*, 2012 IL App (2d) 110823 (2012); *Doggett v. United States*, 505 U.S. 647, 655 (1992). "The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *United States v. Marion*, 404 U.S. 307, 313 (1971). In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim. *United Sates v. MacDonald*, 456 U.S. 1, 7 (1982); *Dillingham v. United States*, 423 U.S. 64 (1975).

The Supreme Court identified the interests served by the Speedy Trial Clause in *Marion*:

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial

> resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."

Id., 404 U.S. at 320; *see also Barker v. Wingo*, 407 U.S. 514, 532-33 (1972).

Determination of whether a criminal defendant's right to a speedy trial has been violated requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530-31; *accord Doggett*, 505 U.S. at 651 (describing these *Barker* factors as "whether the delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice" as a result of the delay).

The threshold question is whether the delay is presumptively prejudicial. *Totzke*, 2012 IL App (2d) 110823, at ¶ 32; *People v. Silver*, 376 Ill. App. 3d 780, 784 (2007). If the delay is presumptively prejudicial, a court will balance the remaining three *Barker* factors. *Id.* For the purposes of the threshold inquiry, "one year is the generally recognized dividing point between ordinary and presumptively prejudicial delay." *Totzke*, 2012 IL App (2d) 110823, at ¶ 33 (citing *People v. Singleton*, 278 Ill. App. 3d 296, 299 (1st Dist. 1996)). Excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or identify. *Doggett*, 505 U.S. at 655. While presumptive prejudice cannot alone carry a constitutional speedy trial claim, without consideration of the remaining *Barker* factors, "its importance increases with the length of delay." *Id.* at 655-56.

A. The delays in this matter are extraordinary in length and presumptively prejudicial to Mr. Winner.

In this case, the time between Mr. Winner's initial arrest in relation to the allegations of J.B. – on August 23, 2009 – and the judicial determination that there was no probable cause to proceed to trial on this matter – on April 1, 2013 – constitutes a delay of more than 43 months. The delay between Mr. Winner's initial arrest and indictment constitutes an overall delay of nearly 7 years. These delays are substantially in excess of 1 year, which is presumptively prejudicial, and requires the weighing of the remaining three *Barker* factors. *Id.*

B. The delay in providing Mr. Winner with a trial in this matter is solely attributable to the State and cannot be adequately justified by the prosecution.

The burden to provide a justifiable reason for delay rests with the State. *Singleton*, 278 Ill. App. 3d at 300. While a deliberate attempt on the part of the State to delay its prosecution of a defendant to prejudice the defendant will be weighed heavily against the State, "even a neutral reason must also be weighed against the State rather than the defendant." *Id*; *accord People v. Belcher*, 186 Ill. App. 3d 202 (2d Dist. 1989). The State must bear the blame where its failure to prosecute arises from "its own faulty police procedure, negligence, or incompetence." *Singleton*, 278 Ill. App. 3d at 300 (citing *Doggett*, 505 U.S. at 652-53; *People v. Yaeger*, 84 Ill. App. 3d 415, 421 (3d Dist. 1980); *People v. Nichols*, 60 Ill. App. 3d 919, 925 (1978)). For example, the *Singleton* Court found the State's explanation for a four-year delay "woefully inadequate" where the State asserted that it believed the defendant to be a fugitive, but could not substantiate that claim, and admitted

that the case may have essentially "slipped through the cracks" because of "a computer flaw or human error or clerical mistake." *Id.*, 278 Ill. App. 3d at 300; *see also Doggett*, 505 U.S. at 653 ("While the Government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug trafficking, it was still findable negligence and the finding stands").

The allegations of J.B. became known to the Chicago Police Department and the Cook County State's Attorney during the summer of 2009. Based on these allegations, the Chicago Police Department immediately commenced an investigation, which ultimately led to Mr. Winner's arrest on August 23, 2009 at his place of business, Soleil Tanning Salon, 1018 West Madison Street, in Chicago. At the time of his August 23, 2009 arrest, Mr. Winner's residence was listed on the Arrest Report as 1001 West Madison Street, Apartment 501, in Chicago. Additionally, Mr. Winner remained living and operating his business in the 1000 block of West Madison Street until recently.

While the allegations of J.B. were made known within a very short timeframe to the State, and the outstanding laboratory reports were returned shortly thereafter, in October 2009, the State delayed its prosecution of Mr. Winner for a period of more than 3 years. In March of 2013, however, the Cook County State's Attorney's Felony Review Unit initiated a second arrest of Mr. Winner, this time by way of an arrest warrant. On March 12, 2013, Mr. Winner appeared in Branch 66, answered ready for preliminary hearing and entered a demand for trial. The State moved for a continuance, which the Court granted.

On the next court date – April 1, 2013 – both the State and the defense answered ready for preliminary hearing. After the Court heard evidence, which included the testimony of complainant J.B., Judge Bourgeois determined there was no probable cause to believe that Mr. Winner committed a criminal sexual assault of J.B. After the dismissal, pursuant to the finding of no probable cause, the State chose not to pursue the matter further.

Now, more than *another three years* after the judicial and executive determinations that this matter should move no further than a preliminary hearing in Branch 66, the State has sought and obtained a true bill of indictment against Mr. Winner pertaining to J.B.'s allegations. The defense anticipates, at an evidentiary hearing, that the State will not be able to present evidence that adequately justifies the extraordinary delay in this matter, including any newly discovered evidence pertaining to J.B.'s allegations that caused the State to seek a true bill of indictment at this juncture. Rather, the defense anticipates that a hearing will prove that the State sought a true bill of indictment in this matter based on the State's determination that it would provide them with a tactical advantage over Mr. Winner.

C. Defendant has consistently and promptly asserted his right to a speedy trial.

A criminal defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant has been deprived of the right. *Barker*, 407 U.S. at 531-32. Conversely, failure to assert his or her speedy

trial right will make it difficult for a criminal defendant to prove that he or she was denied a speedy trial. *Id.* at 532.

At Mr. Winner's very first opportunity to do so, he demanded his right to a speedy trial and to his right to a prompt preliminary hearing. On March 12, 2013, Mr. Winner answered ready for preliminary hearing and demanded his right to a speedy trial. The State, having delayed their prosecution of Mr. Winner for substantially in excess of 3 years after his initial arrest in this matter, again delayed by seeking a continuance of Mr. Winner's preliminary hearing.

On the next court date, however, the State did answer ready for a preliminary hearing and proceeded to present its evidence, after which the Court entered a finding of no probable cause. This judicial determination terminated the case against Mr. Winner – at least for the time being – and discharged him. At that point, the State decided to not pursue the charges pertaining to J.B. any further.

More recently, after Mr. Winner was made aware that the State had obtained an indictment charging him with sexually assaulting J.B., he promptly asserted his constitutional rights, by preparing and filing this motion. Defendant seeks dismissal prior to the State even making a formal election on which indictment they will proceed on first. Based on the foregoing, it is clear that Mr. Winner has consistently and promptly asserted his right to a speedy trial in this matter.

D. The State's delays in this criminal prosecution are presumptively and actually prejudicial to Mr. Winner.

While the Due Process Clause and statutes of limitations protect against the prejudice caused to a criminal suspect based on the passage of time, the Sixth

Amendment right to a speedy trial is primarily intended to prevent (1) lengthy incarceration prior to trial; (2) to reduce the substantial impairment of liberty imposed on an accused while released on bail; and (3) to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. *MacDonald*, 456 U.S. at 8. 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." *Barker*, 407 U.S. at 532. The *Barker* Court explicitly recognized the impairment of one's defense is the most difficult form of speedy trial prejudice to prove "because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Id.*

The Court presumes prejudice to a criminal defendant when his right to a speedy trial is delayed in excess of one year. Moreover, the presumption of prejudice intensifies over time. Here, the initial delay of more than 43 months, is nearly 4 times what is considered presumptively prejudicial under the law. To make matters worse, after the finding of no probable cause, the State delayed another 3 years to seek an indictment in this case.

While these delays are presumed to have prejudiced Mr. Winner, he has also been actually prejudiced by this extraordinary delay. Evidence has not been preserved that is highly relevant to defending the charges in this matter. If J.B. medical records still exist, they have not been provided to the defense. Evidence which comes by way of testimony from witnesses will be of lesser quality due to the passage of time. Also, any video recordings that may have existed in 2009 – from

Mr. Winner's residence at 1001 West Madison, or his business at 1018 West Madison, or the Dominick's where J.B. went after leaving Mr. Winner's residence – have not been provided by the State and were likely not preserved as evidence.

II. The indictment must be dismissed based on the extraordinary and prejudicial delay of 81 months, or nearly 7 years, between the alleged crime and Defendant's recent indictment.

The Illinois Constitution provides, "No person shall be held to answer for a crime punishable ... by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause." ILL. CONST. 1970, art. I, § 7; *see also* 725 ILCS § 5/111-2(a). While "[c]hallenges to grand jury proceedings are limited," *People v. DiVincenzo*, 183 Ill.2d 239, 255, 700 N.E.2d 981, 989 (1998), a defendant may move for dismissal based on reasons apart from those listed 725 ILCS § 114-1(a). *See, e.g., People v. Fassler*, 153 Ill.2d 49, 58, 605 N.E.2d 576, 580 (1992). A court is authorized to dismiss an indictment "when failure to do so will effect a deprivation of due process." *Id.* (citations omitted); *see also People v. Oliver*, 368 Ill.App.3d 690, 694-95, 859 N.E.2d 38, 44 (2d Dist. 2006).

The constitutional guarantee of due process, which protects a criminal defendant against proceedings that are fundamentally unfair in some manner, applies more broadly than a defendant's constitutional right to a speedy trial. *Totzke*, 2012 IL App (2d) 110823; *Doggett*, 505 U.S. at 655 n. 2 ("a defendant may invoke due process to challenge delay both before and after official accusation"). Any undue delay after charges are dismissed in prosecuting a criminal defendant

can constitute a due process violation where a defendant shows substantial prejudice and intentional tactical maneuvering by the State. *Totzke*, 2012 IL App (2d) 110823, at ¶ 27. A trial court must consider whether the delay itself (not just its commencement) was an intentional device by the State to gain a tactical advantage over the defendant. *Id.* at ¶ 28.

When a defendant alleges a due process violation, the trial court must engage in fact-finding and weighing of the necessary factors unique to each case, so as to avoid fact-finding by the appellate court. *Id.* at ¶ 29 (citing *People v. Delgado*, 368 Ill. App. 3d 661, 664 (1st Dist. 2006)). For example, in *Totzke*, while the trial court heard testimony from live witnesses including the Assistant State's Attorney who moved to dismiss charges against the defendant, the case was remanded for the court to make factual findings regarding whether the defendant had established the requisite substantial prejudice and intentional tactical maneuvering by the State to constitute a due process violation. *Id.*, 2012 IL App (2d) 110823, at ¶¶ 34-35. An appellate court will uphold a trial court's factual determinations unless they are against the manifest weight of the evidence. *Silver*, 376 Ill. App. 3d at 783.

The length of delay in prosecuting this case is extraordinary. After Mr. Winner's initial arrest in 2009, the State ultimately did not pursue charges against him until 2013. Once formally charged by way of felony complaint, Mr. Winner asserted his due process and speedy trial rights at his first opportunity to do so. Then, on April 1, 2013, a Circuit Court Judge found that there was no probable cause to hold Mr. Winner over for trial in this matter, meaning there was

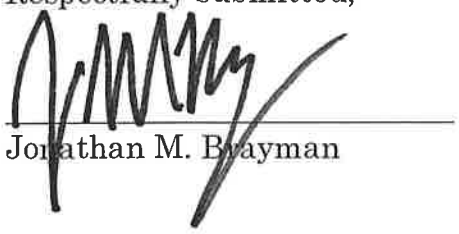
insufficient reliable evidence to support the belief that Mr. Winner committed a criminal sexual assault of J.B. *See, e.g., People v. Bonner*, 37 Ill.2d 553, 559 (1967) (scope and purpose of preliminary hearing is, in general, to ascertain whether the crime charged has been committed and, if so, whether there is probable cause to believe that it was committed by the accused).

After this judicial determination, the State could have promptly moved to seek a true bill of indictment against Mr. Winner. *See* 725 ILCS 5/112-4(b); *People v. Love*, 139 Ill. App. 3d 104, 109 (1st Dist. 1985) (a finding of no probable cause at a preliminary hearing does not bar subsequent indictment). It chose against this course of action and terminated its prosecution of Mr. Winner. The State has now chosen, over 3 years after the finding of no probable cause, to prosecute Mr. Winner by way of grand jury indictment. This is presumptively and actually prejudicial to Mr. Winner. The extraordinary delay in the prosecution of this case can in no way be attributed to Mr. Winner. Although Mr. Winner does not need to show actual prejudice or bad faith on the State's part, he believes that an evidentiary hearing in this matter will demonstrate more than mere negligence in the State's prosecution of him.

CONCLUSION

For all of the foregoing reasons, dismissal of the indictment is, therefore, necessary. Defendant Marc Winner respectfully moves this Honorable Court to enter an order dismissing the indictment with prejudice, hold a hearing on this motion, and/or grant any other equitable and appropriate relief.

Respectfully submitted,



Jonathan M. Brayman

Steven J. Weinberg
WEINBERG LAW
53 W. Jackson Blvd., Suite 1215
Chicago, Illinois 60604
(312) 322-0097

Jonathan M. Brayman
BREEN & PUGH
53 W. Jackson Blvd., Suite 1215
Chicago, Illinois 60604
(312) 360-1001

Attorneys for Defendant Marc Winner