STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

NO. 2016AP2116-CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

JAMES CHARLESTON

Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX

Appeal From A Final Judgment of Conviction and Sentence
Entered April 28, 2016,
Kenosha County Circuit Court Case No. 2014CF149,
The Honorable Mary K. Wagner, Presiding

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Should the Wisconsin charges against Charleston have been dismissed because he was not transferred to Wisconsin for their timely disposition, and he had strictly and substantially complied with the prisoner-related requirements of the Interstate Agreement on Detainers (Wis. Stat. § 976.05) in his request for final disposition, which was ignored by the Illinois prison warden who held him in custody?

The circuit court ruled that the Wisconsin charges should not be affected by the inaction of the Illinois prison warden and denied a defense motion to dismiss.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case to the extent that appellant's arguments do not fall under Wis. Stat. (Rule) § 809.22(2)(a); however, the briefs will likely fully develop the theories and legal authorities so that oral argument would be of marginal value.

Publication is appropriate under Wis. Stat. (Rule) § 809.23(a)(1) and (2) because resolution of the issues will likely clarify existing rules and apply those rules to facts significantly different from those in published opinions.

STATEMENT OF THE CASE

Appellant James Charleston ("Charleston") was charged by a criminal

complaint filed February 6, 2014 with misdemeanor theft and a felony count of unauthorized use of an individual's personal identifying information or documents. (R. 1) Following Charleston's release on bond, he failed to appear for a scheduled court appearance and a bench warrant was issued for his arrest on April 24, 2014. (R.9) After determining that Charleston was in Illinois custody at that time, Wisconsin officials lodged a "Detainer/Extradition Request" with Illinois jail officials and alerted the Governor of Illinois that when Charleston was "ready for release" the Kenosha Sheriff should be notified. (R. 23).

The Kenosha Sheriff notified the Illinois Department of Corrections Southwestern Illinois Correctional Center, where Charleston then was in custody, on January 13, 2015, that he was a Wisconsin fugitive subject to the bench warrant. The Sheriff indicated that Wisconsin would want him extradited to face his Kenosha County charges. (R.23).

In August 2015 Kenosha officials received paperwork from Illinois prison officials that Charleston had requested a final disposition of his Kenosha case on August 12, 2015. After the District Attorney and Kenosha Circuit Court agreed to receive custody of Charleston, he was brought to the Kenosha County Jail in October 2015 (R. 11), where he appeared at several court appearances, resulting in his release on bond.

Private counsel was appointed to represent Charleston, who then lodged objections to the Circuit Court's jurisdiction and filed a motion to dismiss (R. 17) based on Charleston's having submitted a prior request for final disposition of the Kenosha charges to Illinois prison officials on November 14, 2014, although the request was not acted on by the Southwestern Illinois Correctional Center's warden (where Charleston was then in custody) and was not forwarded to the Kenosha County Sheriff, District Attorney, or Circuit Court. Charleston's objections and motion to dismiss cited the Interstate Agreement on Detainers Act in Wis. Stat. § 976.05 requirement that an out-of-state prisoner who requests a final disposition should be brought to trial in Wisconsin within 180 days after making the request. Following a series of court proceedings where the issue was argued, the Kenosha County Circuit Court denied Charleston's motion to dismiss on March 24, 2016. (R. 43).

Subsequent negotiations between the State and the defense resulted in Charleston's entry of a guilty plea on April 28, 2016 to the misdemeanor theft charge, for which the court imposed a fine and costs. (R. 29, 45). Extensions of time to appeal were granted by this Court because of delays in transcript preparations, so that a notice of appeal was timely filed on October 27, 2016. Following the submissions of briefs on the question of whether Charleston's plea

had waived his right to appeal, this Court determined on April 26, 2017 that this appeal could proceed.

STATEMENT OF FACTS

Following issuance of the bench warrant, the Kenosha County Sheriff's Department issued a "Detainer/Extradition Request" on April 30, 2014 asking the Lake County, Illinois jail to detain Charleston, and stating "we will extradite," which was filed with the Kenosha District Attorney's Office on May 1, 2014. (R. 23).[1] An extradition requisition letter was sent from the Wisconsin's Governor to Illinois' Governor on June 18, 2014 that requested that the Sheriff be notified '[w]hen the defendant is ready for release." The next communication from Wisconsin to Illinois officials did not occur until January 13, 2015 when the Sheriff directed a fax to the records office of the Southwestern Illinois Corrections Center, stating that Charleston was a fugitive subject to the Department's warrants for extradition "back to Wisconsin." (R.23).

But in the meantime, according to Exhibit 1 to the February 9, 2016 defense motion to dismiss and affidavit (A. App. 107-109), Charleston had filled out a pre-printed form titled "Request Demand for Final Disposition on Interstate Detainer" on November 14, 2014, with handwritten text that it was directed to "Warden Jeff

[1] A collection of detainer and extradition documents was filed with Circuit Court by the District Attorney's Office on February 25, 2016 as unmarked, unnumbered, and unverified attachments to the "State's Response to Defendant's Motion to Dismiss" (R. 23). Because the response attachments do not bear exhibit marks or consecutive page numbering, and there is a page length discrepancy between the 70 pages that appellant's counsel received from the clerk's office and the record index reference to R.23 as 59 pages, the appeal record references here cannot be more specific..

Parker." The handwritten text also identified: the two charges pending against him by descriptive title ("Theft-Movable Property" and "Misappropriate ID Info"); the Kenosha District Attorney's internal office system case number; the Kenosha Circuit Court case number; and Kenosha County as the jurisdiction where the charges were pending. The document was dated November 14, 2014 and it was signed by Charleston, with his signature notarized that same date by a State of Illinois Notary Public, Russell D. Huelsmann, who also signed and affixed a notary seal stamp. (A. App. 110).

Charleston also signed a preprinted form "Certificate of Service," marked as Exhibit 2 to the defense motion (A. App. 111), in which he certified that on November 14, 2014 he "served the attached Request to Process Demand Under Interstate Agreement of Detainers on Warden Jeff Parker, 950 Kings Highway, P.O. Box 129, E. St. Louis, Illinois 62203 by placing the same, addressed to the Warden as here indicated, into the box designated for U.S. Mail (including intra-institutional mail) at Southwestern IL Correctional Center." The certificate asserted that it complied with the Illinois Code of Civil Procedure, 735 ILCS 5/1-109 and was subject to its penalties.

No Illinois or Wisconsin extradition actions were undertaken in conjunction with Charleston's request.

Rather, the same two preprinted forms that Charleston had completed in November 2014, later appeared as attachments to an August 14, 2015 letter from the Illinois prison warden at Graham Correctional Center, directed to the Kenosha District Attorney (R. 23), and stated that Charleston had made a trial request and that procedures should be instituted to transfer custody in response to the Kenosha County warrant. Although the preprinted forms were the same as those that Charleston had previously used, the handwritten content was slightly different: the request for final disposition was dated August 12, 2015, and referenced a different warden at a Illinois different correctional center, and Charleston's signature was notarized by a different notary public. Otherwise, the handwritten information identifying Charleston, the type of pending charges, the district attorney office case number and the circuit court case number, were the same as Exhibit 1. Likewise, the certificate of service was the same, except that it described that service on the different warden occurred at the different institution on August 12, 2015.

Following Charleston's transfer in October 2015 (R. 11) to Kenosha County, his counsel brought his November 2014 request for disposition to the court's attention on December 8, 2015 (R. 41, p. 2), and February 9, 2016 (R. 42, p. 2). At a March 24, 2016 motion to dismiss hearing (R. 43), the court indicated that it did not doubt that Charleston had in fact served the warden with his trial disposition

request on November 14, 2014. but it questioned whether the warden had sent anything about that request to the court. (R. 43, p. 2; A. App. 102). The court agreed with defense counsel that Illinois did not take "appropriate action to notify Wisconsin" of Charleston's request. But it concluded that it would not "hold the State of Wisconsin responsible for the inaction of the State of Illinois's warden." (R. 43, p. 3; A. App. 103). The court's thinking shifted a bit thereafter when it stated:

> We don't have anything marked on it or indicating on it that it ever got to the warden. . . [W]e don't have any indication that the warden failed to act on it. Presumably, he did. I don't know. But it shows that he tried to do something. Unfortunately, it didn't work."

(R. 43, p. 4; A. App. 104). The court then questioned the import of the certificate of service (Exhibit 2): "You know, in order to sign an affidavit of service, you have to hand it to somebody and, you know, see yourself give it to him. So I don't think that's a violation." (R. 43, p. 5; A. App. 105).

ARGUMENT

BECAUSE CHARLESTON'S REQUEST FOR DISPOSITION STRICTLY AND SUBSTANTIALLY COMPLIED WIS. STAT. § 976.05, THE CHARGES AGAINST HIM SHOULD HAVE BEEN DISMISSED.

At first the circuit court was convinced that Charleston had in fact served the Illinois warden who held him in custody: "I don't doubt that he gave on November 14th, or thereabout, a request for detainer to the warden of the prison he

was in." (R. 43, p. 2; A. App. 102) In that regard the court found that Charleston had strictly complied with the only procedural requirement that Wis. Stat. § 976.05 imposes on a prisoner who wishes to assert his right to gain a speedy trial or disposition of charges pending in another jurisdiction. The only step required of the prisoner in the transfer process is that he or she make a request of the custodian for a transfer. This is described as the prisoner's "request for final disposition." The prisoner's obligation to prepare and submit that request for final disposition is embodied in Wis. Stat. § 976.05(3)(b), which provides in pertinent part: "The written notice and request for final disposition referred to in par. (a) shall be given or sent by the prisoner to the department, or warden, or other official having custody of the prisoner . . . ."

After the request for final disposition has been "given or sent" to the prisoner's custodial official, all other steps in the transfer process must be taken by that custodian, and then by other prosecutorial and court officials. Under Wis. Stat. § 976.05(3)(b), once the prisoner's request for final disposition is given or is sent, the custodian must take the second step and "promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested." The "certificate" that the custodian is required to transmit is described in § 976.05(3)(a): "The request of the prisoner

shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility or date of release to extended supervision of the prisoner and any decisions of the department relating to the prisoner."

Under normal circumstances, when both the prisoner and his custodian have met those requirements, the prisoner, according to Wis. Stat. § 976.05(3)(a), "has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his or her imprisonment and his or her request for a final disposition to be made of the indictment, information or complaint." At that point Wis. Stat. § 976.05(3)(a) states that "the prisoner shall be brought to trial within 180 days."

To the extent that the circuit court strayed from its initial finding that Charleston had complied with his obligation of serving the warden with the formal request for final disposition, the court veered off course into rank speculation. For one, Charleston did everything that was required of him when he completed the form that a prisoner is required to complete under the Act. Further, his form was unquestionably notarized by an official notary public. Indeed, the official notary

public status of Russell D. Huelsmann is publicly posted at the Illinois Secretary of State's website.[2] The fact that Charleston completed the formality of having the request document properly completed and had it notarized, at minimum, supports a reasonable inference that he also took steps to convey it to the warden. At any rate, those facts counter any speculations, later stated by the circuit court, that Charleston might have given the completed form to someone other than the warden, such as the notary.

Charleston's certificate of service also undermined the court's remaining reservations as to whether service was effected. That is because Charleston's certificate of service stated that he followed, to the letter, the procedures dictated by the Illinois law governing service of process by state prisoners who are proceeding *pro se*. ILCS S. Ct. Rule 12 (b)(4) states: "***Service is proved***: . . (4) in case of service by mail by a *pro se* petitioner from a correctional institution, ***by certification*** . . ., of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was so delivered."[3] (Emphasis added.) Charleston's certificate did just

[2] Huelsmann 's notary public status number is 734261, and he was last issued a commission as notary public on March 10, 2014.See, *http//www.ilsos.gov/notary/notary*, last accessed on June 22, 2017.

[3] Rule 12 states that the form of the certification of service is governed by ILCS 5/1-109, which provides in pertinent part: "The person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form: Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct,

that. Accordingly, by following Illinois mandates governing of documents by incarcerated *pro se* petitioners, Charleston proved that he served the warden, as a matter of law, by placing the request in the institutional mail system.

With those preliminary considerations now disposed of, the main issues for this appeal are: did Charleston strictly comply with the requirements of Wis. Stat. § 976.05, so that the Wisconsin charges should have been dismissed because Illinois and Wisconsin officials did not meet their obligations to trigger the 180-day disposition requirement? If Charleston did not show there was strict compliance with the requirements of the statute, should the Wisconsin charges have been dismissed nonetheless, because he substantially complied, even though the Illinois warden failed to notify Wisconsin of Charleston's request?

Because Exhibit 1 showed that Charleston properly completed and signed the preprinted request for disposition form, had it notarized, and Exhibit 2 showed that he deposited his request in the prison mail system, thereby establishing proof of service under the dictates of Illinois law for *pro se* petitioners, and because those facts were not rebutted by the State, Charleston strictly complied with the requirement of Wis. Stat. § 976.05. The circuit court agreed: "I don't doubt that he

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except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. ***Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath.*** (Emphasis added.)

gave on November 14th, or thereabout, a request for detainer to the warden of the prison he was in." (R. 43, p. 2; A. App. 102). The Wisconsin Supreme Court described the effect of a prisoner's strict compliance in *State v. Eesley*, 225 Wis.2d 248, 254–58, 591 N.W.2d 846 (1999), as follows:

> Generally, Article III, § 976.05(3) . . . provides procedures whereby a prisoner against whom a detainer has been lodged, can demand a speedy disposition of the charges. . . . When a detainer is filed against a prisoner, the warden must promptly inform the prisoner of such detainer and of his or her right to demand disposition. § 976.05(3)(c). ***If the prisoner makes such a request, the trial must commence within 180 days of the request. § 976.05(3)(a). If the receiving state fails to have a trial*** on the outstanding indictment, information or complaint within the prescribed time period and before the prisoner is transported back to the original place of imprisonment, ***the court is required to dismiss such charges with prejudice. § 976.05(3)(d).***

(Emphasis added.) This court similarly described the effect of a prisoner's strict compliance with the request for disposition procedure in *State v. Tarrant*, 2009 WI App 121, ¶ 22, 321 Wis.2d 69, 82-83, 772 N.W.2d 750: "Once a prisoner has properly requested a prompt and final disposition of pending criminal charges, the only way the State can avoid its obligation to bring the prisoner to trial within 180 days of the request is to dismiss the untried complaint or information." Indeed, this court directed that the charges and conviction against Tarrant be dismissed "because he was not brought to trial within 180 days of his demand for a prompt and final disposition." *Id*. at ¶20, 321 Wis.2d at 82.

The remedy of dismissal is mandated because the prisoner has done

everything required of him by law, and everything within his control, to achieve a prompt disposition; when that disposition does not occur, he continues to be subjected "to the detrimental effects of pending criminal charges" even though he acted properly and in good faith reliance on his custodian. *State v. Tarrant,* 2009 WI App 121, ¶ 19, 321 Wis.2d at 82. In *Tarrant,* this court spelled out those "detrimental effects" in greater detail, first noting that § 976.05 "is designed in part to protect prisoners from the adverse psychological impact of having outstanding charges pending for long periods of time" and then quoting from Professor Michael B. Mushlin's treatise, RIGHTS OF PRISONERS (3d ed. 2002) at 376:

> [T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [those holding] them to additional good time credits against their sentence[s]; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

State v. Tarrant, 2009 WI App 121, ¶ 18, 321 Wis.2d at 80-81. Once Charleston

established that he strictly complied with the request for final disposition requirements, he did not have to show that he suffered a psychological injury to which *Tarrant* alluded, or any deprivations described by Professor Mushlin. In *Tarrant* the court rejected the States' argument that a prisoner must demonstrate actual prejudice to obtain a dismissal*:* "Tarrant does not have to prove he was prejudiced by not getting a prompt and final disposition in order to be entitled to relief under the IAD." 2009 WI App 121, ¶ 21, 321 Wis.2d at 82.

Charleston anticipates that the State will argue that relief should be denied because Wis. Stat. § 976.05(3)(a) requires a defendant to be brought to trial "within 180 days after the prisoner has *caused to be delivered to the prosecuting officer* and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his or her imprisonment and his or her request for a final disposition to be made of the ... complaint [.]" (Emphasis added.) The Wisconsin Supreme Court interpreted that italicized clause in *State v. Whittemore,* 166 Wis. 2d 127, 479 N.W. 2d 566 *(*Ct. App. 1991*).* But there the issue was whether the defendant satisfied the "caused to be delivered" clause when he delivered his disposition request to prison officials, or instead when his request, as forwarded by the prison officials, was file stamped by the prosecutor's office. *Id.*, 166 Wis.2d at 132–33, 479 N.W.2d 566 (citation omitted). The court concluded that the phrase

"cause to be delivered" was equivalent to "has delivered." *Id.* at 133, 479 N.W.2d 566. As such, the court held that the 180–day time limit began on the date that the prisoner's request was delivered to the prosecutor's office, and not the date when the warden sent out the request. *Id.* at 132–34, 479 N.W.2d 566.

But *Whittmore's* holding is limited by its facts to the particular issue where the custodian took the necessary steps under Wis. Stat. § 976.05(3)(a) and (b) to alert the prosecutor's office of the disposition request. Here, Charleston's custodian failed to act and failed to alert the Kenosha District Attorney and the circuit court, through no fault of Charleston.

In such a circumstance Wisconsin court and other state courts have recognized a "substantial compliance" exception to the requirements of § 976.05. The substantial compliance exception applies when a defendant fails "to meet the technical requirements of the IAD because of 'intentional or negligent sabotage by government officials.'" *State v Blackburn*, 214 Wis. 2d 372, 381-82, 571 N.W.2d 695 (Ct. App. 1997) (internal citations omitted). See also, *State v. Thomas*, 2013 WI App 78, ¶ 22, 348 Wis.2d 699, 712, 834 N.W.2d 425.

Blackburn relied on several cases that had applied the "substantial compliance" exception "where the prisoner's failure to meet the technical requirements of the IAD was due to inadequate guidance from prison officials."

Id., 214 Wis. 2d 372, 381, 571 N.W.2d 695. One case, *United States v. Reed,* 910 F.2d 621 (9th Cir. 1990), is particularly relevant because it relied, in turn, on two case examples where prison officials were at fault for not following proper procedures, despite the prisoner's substantial compliance. In *United States v. Hutchins*, 489 F. Supp. 710, 714-15 (N.D.Ind.1980), the court rejected the idea that "the rights of a sentenced prisoner under the Agreement can be successfully torpedoed when prison authorities having custody of the prisoner neglect to fulfill their duties under Article III(c) to provide notice and opportunity." And in *United States v. Smith*, 696 F. Supp. 1381 (D.Or.1988), where the prisoner filled out the proper request for disposition form but the custodian failed to forward a required supporting document, the court rejected the idea that it was the prisoner's responsibility to make sure that the custodian had met its obligations: "[A] prisoner's rights under the IADA should not be subject to intentional or negligent sabotage by government officials. To adopt the government's position would allow prison officials to undermine prisoner's speedy trial rights by neglecting to perform their statutory duties." *Id.* at 1384-85.

While the *Blackburn* and *Thomas* decisions both validate application of the "substantial compliance" exception to the requirements of § 976.05, neither Blackburn nor Thomas demonstrated that they had substantially complied with the

prisoner component of the statute. Blackburn expressly refused to allow Illinois prison officials to send in the proper IAD request forms; so the non-compliance was his fault, and not the fault of prison officials. Likewise, Illinois prison officials sent in Thomas's IAD paperwork, but its actual receipt in the District Attorney's office was delayed by another county office's "misdirection" of the mail.

Here Charleston did show, at minimum, that his request for final disposition was either intentionally or negligently sabotaged by Illinois prison officials, because his request was proper in form and had been served as required by Illinois law. As such, the substantial compliance doctrine applies. *State v. Thomas*, 2013 WI App 78, ¶¶ 22-23, 348 Wis.2d 699, 712.

CONCLUSION

Wis. Stat. § 976.05 is a remedial statute and should be construed liberally in favor of James Charleston's position. *State v. Tarrant*, 2009 WI App 121, ¶ 7, 321 Wis.2d 69, 772 N.W.2d 750. Accordingly, he respectfully requests that the decision and order of the circuit court be reversed and this matter be remanded with instructions that his conviction be vacated and the criminal charges be dismissed.

Dated at Milwaukee, Wisconsin, January 26, 2017.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,151 words.

*_/s/James A. Walrath*_____
James A. Walrath

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

*_/s/James A. Walrath*_____
James A. Walrath

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the June 26, 2017, I caused 10 copies of the Brief and Appendix of Appellant to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688 and that three copies were served by mail on opposing counsel of record, Charlotte Gibson, Assistant Attorney General, P.O. Box 7857, Madison, Wisconsin 53707-7857 and District Attorney Michael D. Graveley, 912 56th Street, Kenosha, Wisconsin 53140-3747.

*__/s/James A. Walrath*_____
James A. Walrath