Circuit Court for Anne Arundel County
Case No.: C-02-CR-19-002678

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1070

September Term, 2020

SEAN CALLENDER

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 18, 2021

Appellant, Sean Callender, was originally indicted in the Circuit Court for Anne Arundel County and charged with first and second degree assault, reckless endangerment, and false imprisonment. A superseding indictment was subsequently filed and included additional charges of two counts of second degree rape, two counts of sex offense in the fourth degree, and two counts of violating an out-of-state order. Following a jury trial, appellant was convicted of second degree assault and two counts of violating an out-of-state protective order, and acquitted on all remaining charges. After he was sentenced to consecutive sentences of 90 days' imprisonment for each of the counts of violating a protective order, to be followed by ten years' imprisonment, with all but four years suspended, for second degree assault, and five years' supervised probation, appellant timely appealed and presents the following questions, slightly rephrased, for our review:

> 1. Was Mr. Callender denied the right to a speedy trial under the Sixth Amendment and the 180-day rule under *State v. Hicks*, 285 Md. 310 (1979)?
>
> 2. Did the court abuse its discretion in refusing to strike the testimony of a State's witness who invoked the privilege against self-incrimination on cross-examination?

For the following reasons, we shall affirm.

BACKGROUND

The primary issue in this case concerns a delay between the time appellant was charged in this case and his jury trial. Much of the delay occurred after the filing of a superseding indictment, which added additional charges to the original indictment, and because during the year 2020 the Maryland courts were closed due to the pandemic caused

by the coronavirus, *a.k.a.*, COVID-19. The following dates and events are pertinent to the subject of this appeal:

July 8, 2019 – *Arrest and Charges filed*. Appellant arrested and charged in the District Court of Maryland for Anne Arundel County with first and second degree assault, reckless endangerment, and false imprisonment.

July 9, 2019 – *Bail review*. Appellant's initial appearance in person in District Court; advised of rights; ordered held without bond.

August 2, 2019 – *Indictment (Case No. 1774)* filed in Circuit Court for Anne Arundel County. Appellant charged with first- and second-degree assault, reckless endangerment, and false imprisonment.

August 12, 2019 – *Initial Appearance of Counsel in Circuit Court (Case No. 1774)*.

October 4, 2019 – *Status Conference (Case No. 1774)*. Court and appellant informed the case was under further investigation by federal authorities, concerning possible human trafficking involving the same victim, and that the State was likely to file a superseding indictment to include additional charges. Trial set for December 5, 2019.

November 22, 2019 – *Superseding Indictment (Case No. 2678)* filed in Circuit Court. Appellant charged in new, superseding indictment with first- and second-degree assault, reckless endangerment, two counts of second-degree rape, two counts of sex offense in the fourth degree, false imprisonment, and two counts of violating an out-of-state order.

December 2, 2019 – *Initial Appearance (Case No. 2678)* of Appellant, *pro se*, on superseding indictment in Case No. 2678. Appellant informed of new charges and possible

penalties, as well as his right to counsel. Appellant inquired about the previously set trial date of December 5, 2019, and advised that date would be changed following the filing of the superseding indictment. Appellant further inquired about the 180-day limit under *State v. Hicks*, 285 Md. 310 (1979), and court responded that appellant should get a lawyer. New trial date set in Case No. 2678 for March 19, 2020.[1]

December 4, 2019 – *Initial Appearance of Counsel (Case No. 2678)*.

December 5, 2019 – *Nolle Prosequi (Case No. 1774). Pretrial Hearing (Case No. 2678)*. ("Nol pros") Charges in Case No. 1774 nol prossed.[2] Bond and pretrial conditions transferred to Case No. 2678. Initial appearance of appellant's counsel in Case No. 2678. Omnibus motion filed on December 18, 2019, including demand for speedy trial. Appellant to remain on no bond status in Case No. 2678.

[1] "*Hicks*" is a shorthand reference to *State v. Hicks*, 285 Md. 310 (1979), and its progeny, which relate to the requirement now found in Md. Rule 4-271 and Section 6-103 of the Criminal Procedure ("Crim. Proc.") Article of the Maryland Code, that a criminal defendant be brought to trial within 180 days after the earlier of the appearance of counsel, or the first appearance of the defendant before the circuit court, unless good cause is shown. *Hicks*, 285 Md. at 315-16. A *Hicks* violation results in the dismissal of the charges with prejudice. *Id*. at 318.

[2] Maryland Rule 4-247(a) provides: "The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court." As explained by the Court of Appeals, "A nolle prosequi, or nol pros, is an action taken by the State to dismiss pending charges when it determines that it does not intend to prosecute the defendant under a particular indictment." *State v. Huntley*, 411 Md. 288, 291 n.4 (2009).

January 24, 2020 – *Status Conference (Case No. 2678)*. Trial date advanced to March 5, 2020 at the State's request, because the prosecutor would be out of the country. Appellant did not object.

February 10, 2020 – *Hicks date (Case No. 1774)*. 180th day after initial appearance.[3]

March 2, 2020 – *Motion to Postpone Trial Date filed by State (Case No. 2678)*. State's motion to postpone trial because victim was unavailable due to pending midterm exams that week at her university. Appellant objected. Motion granted; Trial reset to April 21, 2020.

March 12, 2020 - *COVID-19 Administrative Orders*. Pursuant to Maryland Rule 16-1003 (a), Chief Judge Barbera orders statewide suspension of jury trials and non-essential judicial activities due to the emergency (pandemic) pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution (Rules and Regulations; responsibilities of Chief Judge of Court of Appeals). This is followed the next day, March 13, 2020, by the *Statewide Closing of the Courts to the Public Due to the COVID-19 Emergency*. *See* https://www.mdcourts.gov/coronavirusorders; *see also* Md. Rule 16-1003 (a).[4]

[3] The 180th day after counsel's initial appearance in Case No. 1774, August 12, 2019, was Saturday, February 8, 2020, so the *Hicks* date in the prior case was Monday, February 10, 2020. *See* Md. Rule 1-203.

[4] Maryland Rule 16-1003 (effective March 16, 2020) provides, in pertinent part:

(continued…)

April 3, 2020 – *COVID-19 Administrative Order – Emergency Tolling or Suspension of Statutes of Limitation and Statutory and Rules Deadlines (Obsolete/Rescinded)*. Order tolling and/or suspending statutory and rules deadlines related to the initiation of matters and to hear pending matters, pursuant to Maryland Rule 16-1003 (a) (7), effective March 16, 2020, by the number of days that the courts are closed to the public due to the pandemic. *Id*.[5]

April 7, 2020 – *Petition for Review of Bail* filed (*Case No. 2678*). Request for modification of no bail status due to COVID-19.

April 13, 2020 – *Video Bail Review Hearing (Case No. 2678).* Petition denied, and bail to remain the same.

> (a) Generally. Upon a determination by the Chief Judge of the Court of Appeals that an emergency declared by the Governor or an event within the scope of Rule 16-1001 (b) significantly affects access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Maryland Judiciary to operate effectively, the Chief Judge, by Administrative Order, may, to the extent necessary:
>
> * * *
>
> (7) suspend, toll, extend, or otherwise grant relief from time deadlines, requirements, or expirations otherwise imposed by applicable statutes, Rules, or court orders, including deadlines for appeals or other filings, deadlines for filing or conducting judicial proceedings, and the expiration of injunctive, restraining, protective, or other orders that otherwise would expire, where there is no practical ability of a party subject to such deadline, requirement, or expiration to comply with the deadline or requirement or seek other relief;

[5] Over the course of the pandemic, a number of orders were revised and/or rescinded as obsolete. As of October 2021, the Maryland Judiciary is still operating pursuant to Administrative Orders with respect to the coronavirus pandemic. *See generally*, https://mdcourts.gov/sites/default/files/import/coronavirus/marylandjudiciarycovid19timeline.pdf

April 16, 2020 – *Good Cause Order Postponing Trial (Case No. 2678)*. Trial postponed, and providing: "Given the various Administrative Orders Issued by Chief Judge Mary Ellen Barbera related to the 'COVID-19 Emergency', the undersigned finds *good cause* to continue the trial and/or motions hearing in the above captioned matter. THE TRIAL AND/OR MOTIONS HEARING WILL BE RE-SET VIA NOTICE FROM THE COURT'S CRIMINAL DEPARTMENT *AS SOON AS REASONABLY PRACTICABLE*." (Italics added.)

April 24, 2020 – *Amended COVID-19 Administrative Order - Clarifying the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines (Obsolete/Rescinded)*. Noting that "Any such filings made within the period to be described … shall relate back to the day before the deadline expired[.]"

April 27, 2020 – *Video Bail Review Hearing (Case No. 2678)*. No change in bond status noted. "Hearing held on concerns [defendant] had w/representation."

May 4, 2020 – *Amended COVID-19 Administrative Order - Further Clarifying the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (Obsolete/Rescinded)*. Clarifying that the tolling and/or suspension of deadlines applies to both the "*initiation of matters*" and "all statutes and rules deadlines *to conduct pending judicial proceedings*" (emphasis added). Rescinding prior Amended Administrative Order Clarifying Deadlines.

May 22, 2020 – *COVID-19 Administrative Order - Progressive Resumption of Full Function of Judiciary Operations Previously Restricted Due to the COVID-19 Emergency*

(Obsolete/Rescinded). (Hereinafter "May 22, 2020 COVID-19 Administrative Order - Progressive Resumption of Judiciary Operations".)

May 22, 2020 – *Revised COVID-19 Administrative Order - on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (Obsolete/Rescinded).* (Hereinafter, "May 22, 2020 COVID-19 Administrative Order – Emergency Tolling or Suspension of Deadlines".) Observing that, pursuant to a separate order, offices of the clerks of courts will reopen to the public on July 20, 2020. Further ordering that "the time remaining for the initiation of matters" is tolled from March 16, 2020 through July 20, 2020, and those deadlines for initiating matters are extended for an additional 15 days. Separately ordering that "all statutes and rules deadlines to conduct pending judicial proceedings" are tolled from March 16, 2020 through July 20, 2020, and those deadlines are "extended by an additional 60 days[.]" Rescinding prior administrative orders.[6]

[6] Pertinent to the issues raised, the Maryland Judiciary is currently operating under the Tenth Revised Administrative Order on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (effective August 9, 2021). That order continues to provide that the time deadlines to conduct proceedings that were pending on March 16, 2020 is tolled from March 16, 2020 through July 20, 2020, and that the associated deadlines are extended "by an additional 60 days in order for the courts to reschedule and hold the same[.]" *See* https://www.mdcourts.gov/corona virusorders. Note that, also on May 22, 2020, in a separate order for the Progressive Resumption of Full Function of Judiciary Operations, Chief Judge Barbera issued an Administrative Order delineating Phase IV operations, wherein courts would resume non-jury trials beginning on August 31, 2020, and Phase V operations, wherein the courts would resume jury trials from October 5, 2020 forward. However, this order made clear that the (continued…)

June 1, 2020 – *Original Hicks date (Case No. 2678).* 180th day after arraignment. (Original date prior to COVID-19 Administrative Orders tolling deadlines).[7]

June 16, 2020 – *Trial date reset (Case No. 2678)*. Trial reset for October 8, 2020.

July 2, 2020 – *Motion to Dismiss for Lack of Speedy Trial filed (Case No. 2678)*. Alleging prejudicial delay of approximately one year since date of arrest, reasons for delay all chargeable to State, and oppressive pretrial incarceration due to COVID-19.

July 20, 2020 – *Phase III Operations* begin, including resumption of certain non-jury trials in the District Court. *See* May 22, 2020 COVID-19 Administrative Order - Progressive Resumption of Judiciary Operations.

July 30, 2020. *Motions hearing on Motion to Dismiss (Case No. 2678)*. Hearing reset for August 5, 2020.

August 5, 2020. *Motions hearing on Motion to Dismiss (Case No. 2678)*. Trial court heard argument on Appellant's Motion to Dismiss for Lack of Speedy Trial and for Violation of the Rule in *State v. Hicks*.[8]

---

separate, revised Administrative Order governing tolling or suspension of deadlines controlled for the initiation of and the conduct of certain court proceedings. As indicated, the tolling period was from March 16, 2020 through July 20, 2020, with an additional 60 day extension.

[7] The 180th day after the arraignment in the second prosecution was Saturday, May 30, 2020, so the *Hicks* deadline was Monday, June 1, 2020. *See* Md. Rule 1-203; *White v. State*, 250 Md. App. 604 (observing that, when there is no bad faith by prosecutor, *Hicks* clock begins to run anew from arraignment or first appearance of counsel under the second prosecution), *cert. denied*, 475 Md. 717 (2021). Note - This date does not account for the tolling allowed for by the COVID-19 Administrative Orders.

[8] We shall discuss this motion and the court's ruling in more detail in the discussion that follows.

August 14, 2020. *Court's oral ruling denying Appellant's Motion to Dismiss. (Case No. 2678).*

August 31, 2020 – *Phase IV Operations* begin, including the resumption of non-jury trials in criminal matters in circuit court. *See* May 22, 2020 COVID-19 Administrative Order - Progressive Resumption of Judiciary Operations.

September 2, 2020 – *Pretrial Hearing (Case No. 2678)*. Videoconference. Bail to remain the same.

October 1, 2020 – *Motions Hearing (Case No. 2678)*. Evidentiary issues concerning, *inter alia*, other crimes evidence, "specifically alleged human trafficking and any additional investigations into either party[,]" as well as victim's testimony regarding victim's federal grand jury testimony, resolved by consent agreement.

October 5, 2020 – *Phase V Operations* begin, including resumption of jury trials in criminal matters in circuit court. *See* May 22, 2020 COVID-19 Administrative Order - Progressive Resumption of Judiciary Operations.

October 8, 2020 – *Jury Trial – Day 1 (Case No. 2678)*. Jury selection.

October 9, 2020 – *Jury Trial – Day 2 (Case No. 2678)*. Jury selected and sworn. Opening statements.

October 13, 2020 – *Jury Trial – Day 3 (Case No. 2678)*.

The following facts were developed at trial. The victim testified that appellant was the father of her one-year-old son.[9] At the time pertinent to the events in this case, the

[9] The State has requested that we not identify the complaining witness by name. (continued…)

victim and her son were living in a homeless shelter. On July 7, 2019, appellant was driving her car back to the shelter with her son when appellant inquired whether she needed money. The victim explained that she did, indeed, need money to take care of her son and appellant offered to give her some after she accompanied him to a hotel. Appellant then checked into a hotel, told her that he had "money coming, some was being dropped off[,]" and she agreed to stay with him in the hotel room in the meantime.

The victim clarified that it was her intention to return to the shelter, but agreed that she remained, smoked some marijuana, and watched television with appellant in the room. She further testified that she did not have a license to drive and did not want to leave at night with her son, who was three months old at the time. She decided to stay overnight, sleeping on the same bed with appellant, but with their son in between them.

The next morning, the victim and appellant got into an argument concerning "his continued controlling behavior[.]" In fact, there was a protective order in effect against the appellant at the time. During the course of the argument, appellant demanded to see the contents of her cellphone. The victim then tried to leave and bent down to grab her son's diaper bag. At that point, the appellant came up behind her and put her in a chokehold. The victim testified that she was shocked and could not breathe. Appellant then picked her up and threw her on the bed. He did not release her until after she unlocked her cellphone and gave it to him. During this portion of the incident, the victim sustained injuries to her jaw

Given that appellant was convicted of an assault, we shall refer to her as the victim in this opinion. *See Raynor v. State*, 440 Md. 71, 75 n 1 (2014) (declining to use sexual assault victim's name or initials for privacy reasons), *cert. denied*, 574 U.S. 1192 (2015).

and appellant "threatened to kill me and my son."

At this point, as the victim was sitting on the edge of the bed, crying and feeling "afraid" and "scared," appellant approached her, pulled out his penis, and stated, "well, while we're here…" He then placed his penis in her mouth. She further testified that appellant subsequently forced her to engage in vaginal intercourse. The victim testified that, all the while, her son was in the same room and that she "thought I was going to die."

Eventually, after agreeing with appellant that they "could be one big happy family" again, the three left the room and walked out to the victim's car. She told appellant that she just wanted to leave and go home and that she was not going to call the police. The appellant then returned her car keys and the victim drove across the street and called 911.

On cross-examination, the victim agreed she told appellant that he was the father of their son and that she had asked him in the past for money to buy diapers and supplies. She was also asked about her attempts to obtain federal benefits, the subject of the second question presented, and we shall provide additional detail in the discussion that follows.

On further cross-examination, the victim agreed she contacted appellant first by text message to ask for money. She confirmed that she met appellant willingly despite a prior protective order. She also did not dispute that she went to the hotel room, smoked marijuana, and spent the night with appellant voluntarily. And, she agreed that, when they woke up, they discovered that the air conditioning was broken and actually moved to another room, with her son, of her own volition. She also testified that she never actually said "no" to any of the sexual acts at issue. The victim was also impeached with a number of prior inconsistent statements, including, but not limited to, her telling the police that "no

force" was used in the incident.

The jury also heard evidence from the State's forensic nurse examiner who agreed that, based on her examination of the victim, that, other than the apparent swelling to the victim's jaw, there were no observed vaginal injuries consistent with the victim's narrative of the incident. The parties also stipulated that the victim never told the police that appellant threatened to kill her or her child.

October 14, 2020 – *Jury Trial – Day 4 (Case No. 2678)* – closing arguments and verdict.

October 26, 2020 – *Sentencing (Case No. 2678)*.

December 4, 2020 - *Tolled Hicks Date (Case No. 2678)* – 180th day accounting for tolling from 03/16/20 to 07/20/20 plus additional 60 days extending for pending judicial proceedings (*see* May 22, 2020 COVID-19 Administrative Order – Emergency Tolling or Suspension of Deadlines).[10]

We shall include additional detail in the following discussion.

[10] As will be further explained, we arrive at the December 4, 2020 date, using the pertinent dates from Case No. 2678, as follows. Appellant's initial appearance occurred on December 2, 2019. One hundred and five (105) days later, on March 16, 2020, tolling began under Chief Judge Barbera's Emergency Order. Tolling continued until July 20, 2020, under the pertinent May 22, 2020 Revised Administrative Order, which further allowed for a sixty (60) day extension for the Clerk's Offices around the State to reschedule events. That 60-day extension ended on September 18, 2020, a Friday. Thus, pursuant to Md. Rule 1-203, the 106th day for our *Hicks* calculations was the following Monday, September 21, 2020. Based on this, the 180th day in Case No. 2678 occurred seventy-four (74) days later, on December 4, 2020.

DISCUSSION

I.

Appellant's primary contentions are: (1) that the State violated the *Hicks* rule because he was not tried within 180 days; and (2) he was denied his constitutional right to a speedy trial. The State responds that appellant's rights were not violated under either rationale because he was tried by a jury within the time allotted under both the superseding indictment and Chief Judge Barbera's Administrative Orders with respect to the COVID-19 pandemic. As will be explained, we agree with the State.

Motions Hearing

We have already set forth a chronological background with respect to the relevant dates in this case. The issues presented on appeal were considered by the circuit court on August 5, 2020 when it heard argument on Appellant's Motion to Dismiss for Lack of Speedy Trial and for Violation of the Rule in *State v. Hicks*. There, appellant argued that the case was in violation of the 180-day rule derived from *State v. Hicks* and Maryland Rule 4-271, and also his right to a speedy trial under the Due Process Clause of the 14th Amendment. As for *Hicks*, appellant argued that the 180 days ran from the original indictment, in Case No. 1774, and that dismissal was the appropriate remedy. Were the court to disagree and conclude that the 180 days began with the second, superseding indictment, appellant maintained that the case was still in violation of the rule because the time would have run out but for the State's postponements, which had the result of necessitating further postponements under the Chief Judge's COVID-19 Administrative Orders.

In addition, appellant argued that there was no need to nol pros the original indictment because the evidence in that case (Case No. 1774) and the superseding indictment (Case No. 2678) was exactly the same. Appellant argued that the case should be dismissed because the State obtained the nol pros in bad faith, that appellant objected, and that the nol pros had the effect of forcing the case beyond the original 180 *Hicks* date, which counsel proffered was January 14, 2020.[11] Further, appellant argued that the case should also be dismissed under the superseding second indictment because it was, as of the date of this hearing, beyond the second *Hicks* date, which was proffered as June 5, 2020.[12] Appellant maintained that all the postponements were initiated by the State and that he was deprived of his rights under *Hicks* and that the case should be dismissed.

With respect to the speedy trial claim, appellant contended that the length of delay was presumptively prejudicial, that the reasons were solely attributable to the State, that any delay due to the COVID-19 pandemic was caused by the State's actions in delaying this case past Chief Judge Barbera's first Administrative Order on or around March 12-13, 2020 with respect to that crisis, that even if considered a neutral reason, these orders were chargeable to the State and should be weighed heavily against them, that appellant asserted his right to a speedy trial, and that, on balance, the delay was prejudicial under the circumstances.

[11] As set forth in our background, we conclude that the first *Hicks* date was February 10, 2020.

[12] We conclude that the second *Hicks* date, before taking tolling into account, was June 1, 2020.

The State responded, generally, that the reason for the superseding indictment in this case was to add the additional charges of two counts of second degree rape, two counts of sex offense in the fourth degree and two counts of violation of an out-of-state order. The State explained that there was no bad faith in filing this superseding indictment because the reason for that was because "the Defendant was being investigated by another agency and nothing came of that. And when the State realized there would be no forthcoming charges from a different agency, the State then indicted on those charges on November 22nd." The original indictment, Case No. 1774, was then nol prossed, not because of tactics or because the State was not ready, but to accommodate the additional charges. The State continued that, with the addition of the rape and domestic violence charges, the case became "more complex," and that this, as well as the unavailability of a witness, provided good cause to explain the delay. The coronavirus pandemic then followed and the State contended that any delays as a result of that should be accorded neutral status. As for prejudice, the State replied that there were no allegations that witnesses were no longer available to the appellant, no evidence of memory loss of witness's recollection, beyond bald assertions, and that appellant's defense was not impaired.

In reply, appellant's counsel challenged Chief Judge Barbera's authority to issue Administrative Orders to postpone proceedings "during an indefinite closure of the courts at her demand, her Order and then allow another thirty days upon reopening" because it

violated his rights under *Hicks* and to a speedy trial.[13] Appellant also responded that there was no new evidence in the case when the State filed the superseding indictment, noting that the State could have, but did not, file the rape and sex offenses in the original indictment. In addition, counsel proffered, that although there were allegations that appellant was being investigated by unidentified federal authorities, appellant's counsel never received any information substantiating that "bald accusation that he's being looked at by the Feds." Counsel maintained that dismissal under *Hicks* was required because the superseding indictment was filed in bad faith in order to avoid the first *Hicks* deadline, and that, alternatively, the new trial under the second superseding indictment was beyond the second *Hicks* deadline. The court took the matter under advisement.

On August 14, 2020, the court denied appellant's motion to dismiss Case No. 2678. After making findings of fact that are generally consistent with the background set forth in this opinion, the court addressed the key issue presented, *i.e*., whether the State's filing of a superseding indictment in Case No. 2678 and a *nol pros* of the original charges in Case No. 1774, denied appellant's right to a speedy trial under *Barker v. Wingo*, 407 U.S. 514 (1972) or his right under the Maryland Rules to be tried within 180 days under *State v.*

[13] At times, both appellant and the State refer to an additional thirty (30) days to allow for reopening of the courts. The pertinent administrative orders with respect to tolling and suspension of deadlines provide an additional sixty (60) days' extension. We further note that appellant, in this case, does not challenge Chief Judge Barbera's authority to issue the administrative orders under Rule 16-1003. *See generally, Murphy v. Liberty Mutual Insurance*, Misc. No. 005, Sept. Term 2021 (to be argued December 3, 2021) (certified question from U.S. District Court for the District of Maryland - whether the Maryland Court of Appeals acted within its enabling authority when its April 24, 2020 Administrative Order tolled Maryland's statutes of limitation in response to the COVID-19 pandemic?).

Hicks, supra.[14] On the question of bad or good faith by the State, the court stated the following:

> The State explained the reason for the superseding indictment and the subsequent nolle pross. They explained that there was a federal investigation and that that, they had no control over that, the concurrent or federal investigation that was running alongside this case. As soon as they learned that they were not, the federal entity was not going to pursue charges, they re-indicted, the[y] indicted him including the additional charges that the federal government was attempting to investigate or whether those, so basically this case involves, just for the record, a first degree assault and various charges, but it also had a sexual assault component where the Defendant was charged with rape. The original charging document in this case did not include the rape or sexual allegations. The State's pointed out that there was a separate entity that was a different agency that was investigating the sexual allegations and that they were working or waiting or dealing with that other entity and waiting for their determination as to how they were going to proceed with that.
>
> On the other side of that is [Defense Counsel] said that, and I have to give you credit here, [Defense Counsel], you weren't claiming that the intent of the State in filing that second superseding indictment or entering the nolle pross was necessarily to thwart the speedy trial right. Your argument was it was more of the State should have charged those charges from the outset. That it wasn't a matter of expanding an investigation or of doing additional work, it was that there was a tactical decision to allow this other entity to proceed with it prior to, and waiting to see what the outcome was before they made the decision as to whether they necessarily needed it to include. So it was almost more of a negligence, or they should have acted differently type claim.
>
> I, again, I think what the case law requires is that I would have to find that the intent for bad faith here would be the intent to thwart his right to a speedy trial and I don't believe that we can, I can attribute that intent to the State in their actions here. It's not always simple, working with multiple agencies and in this particular case I think it's understandable in that there were sensitive issues at play. These were additional rape allegations and I can understand efforts on various investigative agencies to not necessarily

[14] Contrary to the court's finding, defense counsel first entered an appearance in Case No. 1774 on August 12, 2019. Based on this, the first *Hicks* date was February 10, 2020.

> duplicate that type of investigation and stepping on each other's toes and causing more impact in all of those. So even if I found that the State was improper in not charging that, it's still not giving them the intent that's required for the bad faith here. So they meet the first prong of what I'm supposed to find for a good faith reason.

The court then concluded that the State did not act in bad faith and that this "reset the clock" pertinent to this issue. As will be further explained, the court then agreed that the overall delay was presumptively prejudicial and considered the reasons for that delay. Notably, the court recognized that this was a felony prosecution involving allegations of first degree and sexual assault. The court recognized that one of the primary reasons for delay was the unavailability of the State's primary witness, the victim. Although the State originally intended to advance the trial date, they later found that the victim had a scheduling conflict caused by her schooling and final exams. The court stated:

> But it did appear that efforts were made by the State to try to get postponed a little sooner than it was but it just, it didn't happen. And I don't feel that the State tried to do anything intentional again to thwart his, Mr. Callender's speedy trial rights. I think that they relied and made good faith efforts. They relied on something that they should have been able to rely on, a representation that the victim was available, that they cleared this date with the victim and that they didn't realize that it wasn't. So at best I will accuse them of negligence in their ability to coordinate with the victim or get the proper dates. But again, I'm not going to assign the bad faith or deliberate attempt which would require a heavy weighing against them. So though it is attributable to the State I'm going to weigh it slightly.

The court then addressed the delay caused by the coronavirus pandemic. The court stated:

> Then that brings us to the last trial date which is the April 21st all the way to October 6th and I don't know, was, did you tell me that there was a May date that was, there was also a May date in there but again, I think this all falls under the same analysis because the same circumstances existed for

> the May trial date and it was through nobody's fault that any of those trial dates did not.
>
> And I think that we have to acknowledge the circumstances that we are in. The Court was not, was closed, I mean it wasn't, there were no options, it was impossible to get you to trial. And though I'm sympathetic that this is prolonged, the pandemic has prolonged this for you, there is nothing that anyone could do about the pandemic. So this is a valid reason for this case not going forward and because it's a valid reason it's neutral.
>
> I know [Defense Counsel] made some reference to arguments as to some questions as to whether Chief Judge Barbera had the authority or the ability to extend all of those time limits. I'm going to leave that question for another day. I think the question before me is about whether or not there's a speedy trial and whether I'm, my ruling is, and I guess in some part it's reliant on it but it's not contingent on her order or her authority, it's the practicalities of the situation. The courts were closed, there was no ability for us to even get in the building, let alone get jurors here and get you tried for it. So, I'm going to leave that question. I'm not ignoring the question, I'm just going to kind of let someone else make that call.

The court determined that the reasons for delay, many of which were chargeable to the State, were neutral or did not weigh heavily in its analysis. After finding that appellant timely asserted his right to a speedy trial, the court considered the prejudice appellant may have sustained as a result of oppressive pretrial incarceration, anxiety and concern, or impairment of his defense. The court recognized the current "circumstances that are going on in the world today," and that the appellant was "anxious" and under "emotional stress." The court also stated that "there was no hard facts and hard prejudice or actual prejudice that was asserted in this case" and that "the possibility of prejudice" was not a sufficient reason considering that possibility is "inherent in any delay, however short." The court continued:

> -- so then I'm left with the anxiety and the emotional stress and you should only prevail on that if the only countervailing considerations that caused this

delay is the overcrowding dockets and large caseloads of the State. But as I indicated those aren't the only things that created this delay and created the reason that we are here. That there were other things, that there was a legitimate interest in the State to continue the case to try to get the additional charges. That it wasn't through any intent to delay or it wasn't just the Court's inability to reach the case. It's due to a global pandemic and certain other aspects that I don't believe that the State are heavily at fault for. So I will consider that last one and it says, it should only be afforded slight weight. So I would afford it slight weight.

The court then ruled as follows:

> So then as I analyze all of the factors, I do find that the length between arrest and trial is not egregious under all of the circumstances that we have here. And I am including it all the way back to the arrest. I will say that the reasons for the delay although weighing slightly against the State are not, were certainly not efforts that were intended to undermine your case or an attempt to put you at a disadvantage.
>
> I also do find that you asserted your speedy trial right, I find that you did that diligently and effectively throughout the course of this trial, the case.
>
> And finally I do find that you have failed, that Mr. Callender has failed to identify any specific prejudice other than the pretrial incarceration and anxiety. And that I'm going to find that the nature of the case, the nature of the circumstances that we are in, and that all of that when I consider that the delay bringing these cases are not in violation of your speedy trial rights.
>
> So at this point, the State prevails on the Motion and the Court declines to dismiss the case based on speedy trial. . . .[15]

A. Appellant was tried within 180 days following his initial appearance on the superseding indictment in Case No. 2678.

The Court of Appeals has made clear that, pursuant to Crim. Proc. § 6-103 (a) and Maryland Rule 4-271 (a) (1), "the trial in a circuit court criminal prosecution must begin

[15] Based on our review of the arguments raised by appellant in his written motion and during argument at the hearing, as well as considering the arguments raised on appeal, it appears that the parties accept that this ruling also served to deny appellant's motion to dismiss on *Hicks* grounds. *See generally*, Md. Rule 8-131 (a).

no later than 180 days after the earlier of (1) the entry of the appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court." *State v. Huntley*, 411 Md. 288, 290 (2009) (footnotes omitted); *accord Choate v. State*, 214 Md. App. 118, 139, *cert. denied*, 436 Md. 328 (2013). There is, however, an exception to this requirement. "On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date." Md. Rule 4-271(a)(1). "[A] determination of what constitutes good cause is dependent upon the facts and circumstances of each case as the administrative judge, in the exercise of his discretion, finds them to be." *State v. Toney*, 315 Md. 122, 132 (1989). Unless the defendant waives his *Hicks* right or the court grants a postponement for good cause, a case not brought to trial within 180 days must be dismissed. *Goldring v. State*, 358 Md. 490, 493 (2000) (citing *Dorsey v. State*, 349 Md. 688, 701 (1998)). This is because the statute and the rule "codify and implement the chief legislative objective that 'there should be a prompt disposition of criminal charges in the circuit courts.'" *Dorsey*, 349 Md. at 700 (quoting *State v. Hicks*, 285 Md. at 334). "[T]he mechanism of the *Hicks* Rule serves as a means of protecting society's interest in the efficient administration of justice." *Id*. at 701.

In short, the issue here is whether the *Hicks* clock started ticking anew after the filing of the superseding indictment in Case No. 2678. If it does not, then, based on the chronology previously set forth, the original *Hicks* date under Case No. 1774 of February 10, 2020 controls and appellant would be entitled to relief. However, if the clock did start afresh, then affirmance would be required considering that the new *Hicks* date, as tolled

and suspended under the COVID-19 Administrative Orders, was December 4, 2020, and appellant's trial began on October 8, 2020.

The general rule is that when the State enters a *nol pros* and later recharges the defendant with the same offenses and identical charges, the *Hicks* 180-day time window for bringing the defendant to trial begins to run anew under the second prosecution. *Huntley*, 411 Md. at 293 (holding that, ordinarily, where criminal charges are dropped and the State files identical charges, the 180-day period for commencing trial begins to run anew after the refiling) (citing *Curley v. State*, 299 Md. 449, 458 (1984)). There are two exceptions to the general rule: where the *purpose* of the State's *nol pros*, or the necessary *effect* of its entry, is to circumvent the statute and rule governing time limits for trial, the 180-day period for trial begins with the triggering event under the initial prosecution, rather than beginning anew with the second prosecution. *Id*. The purpose-or-effect exception does not apply where the prosecution is acting in good faith, *i.e.*, so as to not '"evade"' or '"circumvent"' the requirements of Crim. Proc. § 6-103 and Rule 4-271. *Id*. at 295 (quoting *Curley*, 299 Md. at 459). Circumvention occurs "*only* when the alternative to the nol pros would have been a dismissal with prejudice for noncompliance" with Crim. Proc. § 6-103 and Rule 4-271. *State v. Brown*, 341 Md. 609, 619 (1996) (referencing prior version of statute and rule, emphasis in original).

Whether the entry of a nol pros has the "necessary effect" of circumventing the 180-day rule depends upon the unique factual circumstances of each case. Indeed, there is a "critical distinction between 1) a *nol pros* that merely has the **actual effect** of carrying a trial beyond the 180-day limit and 2) a *nol pros* that has the **necessary effect** of carrying a

trial beyond the 180-day limit." *Baker v. State*, 130 Md. App. 281, 290 (2000) (emphasis in original). "Only the latter will foreclose the trial from going forward. The cases, moreover, have adopted a very narrow interpretation of the modifying adjective and adverb necessary and necessarily." *Id*. (emphasis omitted). Compare *Curley*, *supra* (remanding with order to dismiss because the nol pros was entered on the 180th day and the State was not prepared for trial), with *State v. Glenn*, 299 Md. 464, 467 (1984) (ultimately reversing trial court's dismissal because the nol pros was entered, prior to expiration of 180 days, and after defense counsel declined to agree to an amendment of a defective charging document and where the necessary effect was not to circumvent the rule). *See also State v. Huntley*, 411 Md. at 302-03 (holding that nol pros one day prior to expiration of *Hicks* because the original indictment contained the wrong dates for the offenses did not circumvent the 180-day rule where there was no evidence of bad faith on the part of the State); *State v. Brown*, 341 Md. at 620-21 (concluding that nol pros, entered 43 days before the expiration of the 180-day rule in order to facilitate DNA testing did not have the necessary effect of circumventing the rule); *Baker*, 130 Md. App. at 302-03 (upholding the entry of a nol pros nineteen days prior to trial because the State determined it was in the best interest of a nine-year-old child abuse victim to delay proceedings until proper notice had been given to call a social worker to testify to child's hearsay statements).

Here, when the State nol prossed the original indictment in Case No. 1774 on December 5, 2019, the 180-day *Hicks* date expired 67 days later on February 10, 2020. The nol pros followed the filing of a superseding indictment in Case No. 2678, on November 22, 2019, which added additional charges, notably after the court and the

appellant were informed that the case had been under further investigation by federal authorities concerning possible human trafficking involving the same victim. Nevertheless, even absent that superseding indictment, the State still had plenty of time remaining to prosecute the original charges in Case No. 1774. Accordingly, we are persuaded that the necessary effect of the nol pros was not to circumvent the 180-day rule and appellant's *Hicks* claim is without merit. The motions court properly denied the motion on this basis.

B. Appellant was not denied his constitutional right to a speedy trial.

Appellant and the State also contest whether he was denied his right to a speedy trial under the Sixth Amendment to the United States Constitution. In assessing the issue of whether one has been denied this constitutional right, the reviewing court makes its own independent examination of the record to determine whether the right has been denied. *Glover v. State*, 368 Md. 211, 220 (2002); *accord Howard v. State*, 440 Md. 427, 446-47 (2014). Claims that the Sixth Amendment guarantee has been violated are assessed under the balancing test announced by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See State v. Kanneh*, 403 Md. 678, 687 (2008); *Divver v. State*, 356 Md. 379, 388 (1999). There are four factors to be used in determining whether a defendant's right to a speedy trial has been violated: '"[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."' *Kanneh*, 403 Md. at 688 (quoting *Barker*, 407 U.S. at 530). None of these factors are '"either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be

relevant.'" *Id*. at 688 (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990), in turn quoting *Barker*, 407 U.S. at 533).

"This Court has noted that the first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *Id.* (citation omitted). Generally, "[f]or speedy trial purposes the length of delay is measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial." *Divver*, 356 Md. at 388-389 (citation omitted). "However, 'the length of the delay is the least determinative of the four factors that [a court] consider[s] in' determining whether a defendant's right to a speedy trial was violated." *Howard*, 440 Md. at 447-48 (citation omitted); *see also Doggett v. United States*, 505 U.S. 647, 652 n .1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year") (citation omitted).

Length of Delay

Both parties direct our attention to *Singh v. State*, 247 Md. App. 322 (2020) to calculate the length of delay applicable under the facts of this case. In *Singh*, we acknowledged the general rule "'that where the State terminates a prosecution in good faith, *i.e*. it does not intend to circumvent the speedy trial right, and the termination does not have that effect, the period preceding the earlier dismissal is not counted in the speedy trial analysis.'" *Id*. at 340-41 (citation omitted).

Singh, like this case, involved a superseding indictment that added new charges to

the original indictment. *Id.* at 332-33, 341 n. 15. In that context, we adopted the analysis set forth in *United States v. Handa*, 892 F.3d 95 (1st Cir. 2018), holding that:

> [T]he bringing of the additional charge *does not reset* the Sixth Amendment speedy trial clock to the date of a superseding indictment where (1) the additional charge and the charge for which the defendant was previously accused are based on the same act or transaction, or are connected with or constitute parts of the common scheme or plan previously charged, *and* (2) the government could have, with diligence, brought the additional charge at the time of the prior accusation.

Singh, 247 Md. App. at 345 (quoting *Handa, supra*, 892 F.3d at 106-07, emphasis added).

The State concedes that the new sexual assault charges filed in the superseding indictment in Case No. 2678 were based on the same act or transaction as the original assault charges in Case No. 1774. However, the State disputes that these charges could have been brought with due diligence considering the aforementioned pending federal investigation on human trafficking charges. We are not persuaded.

Under the circumstances of this case, the underlying facts were known and the State could have charged the sexual assault offenses at the time of the original indictment. We note that the rule in *Singh* is set forth in the conjunctive, thus, we understand that both conditions must be met to reset the speedy trial clock to the filing date of the superseding indictment, *i.e.*, November 22, 2019. Based on this, we shall apply the general rule and conclude that the speedy trial clock started with appellant's arrest on July 8, 2019. Considering that appellant was not tried until October 8, 2020, well over a year later, we conclude that the delay was of constitutional dimension and that consideration of the

remaining *Barker* factors are in order.[16]

Reasons for delay

All reasons for delay are not considered the same. Some carry greater weight than others:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

Barker, 407 U.S. at 531 (footnote omitted); *see also Doggett*, 505 U.S. at 652 (according "considerable deference" to trial court's findings regarding reasons for delay).

July 8, 2019 (arrest and charges - Case No. 1774) to December 5, 2019 (First trial date - Case No. 1774): This period is considered pretrial preparation and is traditionally treated as neutral, not chargeable to either party. *See Hallowell v. State*, 235 Md. App. 484, 515 (2018) (pretrial preparation "is accorded essentially no weight in the analysis, as that is the time it would have taken for trial preparation in the absence of any of the ensuing postponements").

[16] Moreover, even were we to start the clock later, on November 22, 2019, our conclusion that the delay, of approximately 10 months and 16 days until the first day of trial, was presumptively prejudicial would be the same. *See, e.g.*, *Lloyd v. State*, 207 Md. App. 322, 329 (2012) (addressing the three remaining *Barker* factors concluded that the eight month and fifteen-day delay "'might' be construed as presumptively prejudicial and of constitutional dimension"), *cert. denied*, 430 Md. 12 (2013). Further, contrary to the State's suggestion that we consider the closure of the courts during the pandemic to explain the length of delay, that issue concerns the reasons for the delay and will be addressed accordingly.

December 5, 2019 (Nol Pros – Case No. 1774) to March 2, 2020 (Motion to Postpone Trial – Case No. 2678): Although we begin this paragraph on December 5th, a number of events occurred before and during this time frame, most of which concerned the State's filing of additional charges and nol prossing the original indictment. These include: November 22, 2019 (superseding indictment filed in Case No. 2678); December 2, 2019 (trial date set for March 19, 2020); December 5, 2019 (nol pros of Case No. 1774); January 24, 2020 (State request that the trial be advanced to March 5, 2020); and March 2, 2020 (trial reset to April 21, 2020). We conclude that all these reasons are attributable to the State, but are not weighed heavily as there was no showing that the delays denied appellant's right to a speedy and fair trial. *See generally, State v. Bailey*, 319 Md. at 411-12 (concluding that entry of nol pros was chargeable to the State, and that, ultimately, Bailey was not denied speedy trial); *Greene v. State*, 237 Md. App. 502, 516-17 (2018) ("[U]nder the circumstances presented, we are persuaded that the circuit court's factual findings, i.e., that there was no evidence of bad faith by the State in its decision-making process in *nol prossing* and re-charging the documents, were not clearly erroneous").

March 2, 2020 (Motion to Postpone) to March 12, 2020: On March 2, 2020, the court granted the State's request to postpone trial to April 21, 2020 due to the unavailability of a State's witness. This is charged to the State but does not weigh heavily in the analysis. *See Howard v. State*, 440 Md. 427, 448 (2014) (recognizing that "'a valid reason, such as a missing witness, should serve to justify appropriate delay"') (quoting *Barker*, 407 U.S. at 531).

March 12, 2020 (COVID-19 Administrative Orders) to October 8, 2020 (First day of Trial (Case No. 2678): The most significant portion of the delay before commencement of trial occurred due to delays caused by the coronavirus and COVID-19 pandemic. Neither party has cited a Maryland case on point. In considering this reason, we begin by quoting pertinent provisions from one of Chief Judge Barbera's Administrative Orders concerning pending judicial proceedings during the coronavirus and COVID-19 pandemic:

> WHEREAS, In instances of emergency conditions, whether natural or otherwise, that significantly disrupt access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Judiciary to operate effectively, the Chief Judge of the Court of Appeals may be required to determine the extent to which court operations or judicial functions shall continue; and
>
> WHEREAS, Due to the outbreak of the novel coronavirus, COVID-19, and consistent with guidance issued by the Centers for Disease Control and Prevention (CDC) and the Maryland Department of Health (MDH), an emergency exists for which measures continue to be required to mitigate potential for exposure for individuals visiting a court or judicial facility and for judicial personnel; and
>
> WHEREAS, The impact of the restrictions required to respond to the COVID-19 pandemic has had a widespread detrimental impact upon the administration of justice, impeding the ability of parties and potential litigants to meet with counsel, conduct research, gather evidence, and prepare complaints, pleadings, and responses, with the impact falling hardest upon those who are impoverished; and
>
> WHEREAS, The detrimental impact of the COVID-19 pandemic is so widespread as to have created a general and pervasive practical inability for certain deadlines to be met; …
>
> * * *
>
> NOW, THEREFORE, I, Mary Ellen Barbera, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order this 6th day of August 2021, that, effective August 9, 2021: . . .

* * *

> (h) By previous Order, pursuant to Maryland Rule 16-1003(a)(7), all statutes and rules deadlines to conduct pending judicial proceedings shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals; and
>
> (i) For the purposes of tolling of all statutes and rules deadlines to conduct pending judicial proceedings, in this Order, "tolled or suspended by the number of days that the courts were closed" means that the days that the offices of the clerks of court were closed to the public (from March 16, 2020 through July 20, 2020) do not count against the time remaining to conduct judicial proceedings; and
>
> (j) With the offices of the clerks of courts having reopened to the public on July 20, 2020, the deadlines to conduct proceedings pending on March 16, 2020, having been extended, by previous Order, by an additional 60 days in order for the courts to reschedule and hold the same; …

COVID-19 Administrative Order – Tenth Revised Administrative Order on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (August 6, 2021).[17]

We recognize that the right to a speedy trial is a fundamental right under the United States Constitution. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S. Ct. 63, 68, 208 L. Ed. 2d 206 (2020) (stating, in a case under the First Amendment, that "even in a pandemic, the Constitution cannot be put away and forgotten"). However, courts considering the impact of the coronavirus pandemic also recognize that the global

[17] Similar tolling and suspension of deadlines apply to the initiation of matters in the courts. *See generally, Murphy v. Liberty Mutual Insurance, supra* (to be argued December 3, 2021) (certified question concerning tolled statutes of limitation).

emergency requires a contextual balancing of said right against matters of public health and safety. *See, e.g.*, *United States v. Olsen*, 995 F.3d 683, 693 (9th Cir. 2021) (observing, in a case under the federal Speedy Trial Act, 18 U.S.C. Section 3161 et seq, that "surely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health").

Indeed, our research reveals that the overwhelming majority of courts to consider this issue under the *Barker* analysis have weighed delays caused by the pandemic only slightly, or not at all. *See United States v. Macken*, No. 2:20-CR-00023-KJM, 2021 WL 2711250, at *3 (E.D. Cal. July 1, 2021) (denying motion to dismiss for alleged violation of Sixth Amendment right to speedy trial and observing that one of several reason for delay was "the impossibility of a safe jury trial during the pandemic" and that "[t]he government was neither negligent nor deliberately slow. Neither party is to blame"); *United States v. Akhavan*, 523 F.Supp.3d 443, 451 (S.D.N.Y. Mar. 1, 2021) ("[T]he three-month delay thereafter is not attributable to the Government but rather to the pandemic, a neutral reason outside of the Government's control").

Notably, the federal Eastern District of Virginia found that the COVID-19 pandemic was a valid reason for delay, and rejected any suggestion that said delay should weigh heavily, or at all, against the government. *See United States v. Pair*, 522 F.Supp.3d 185, 194 (E.D. Va. Feb. 26, 2021), *appeal filed* (June 1, 2021). That Court explained:

> Similarly, Pair's argument that pandemic-related delay should be weighed slightly against the Government is unavailing. In *Barker*, the Supreme Court reasoned that a "more neutral reason [for delay] such as

> negligence or overcrowded courts" should weigh against the Government "since the ultimate responsibility for such circumstances must rest with the government." In the case of the COVID-19 pandemic, the Government does not bear the ultimate responsibility for the pandemic; the pandemic is outside of the control of either the parties or the courts.

United States v. Pair, 522 F. Supp. at 194 (collecting cases, internal citations and emphasis omitted).

Similarly, the Western District of Washington has stated:

> The reason for the delay here is not an intentional effort by the Government; it is a factor far beyond its control. The COVID-19 global pandemic has significantly restricted all aspects of life for individuals in all but a handful of countries. The decision to halt court proceedings was made by the Court in response to the public health crisis in the Western District of Washington and the need for social distancing. The restrictions imposed by the Court were and continue to be based on the guidance of the CDC and state and local health officials. There is no evidence of an attempt by the Government to delay trial to hamper the defense following Mr. Critchell's arrest by the FBI, nor is there evidence of Government negligence. *See Doggett*, 505 U.S. at 647 (finding that the Government was to blame for the eight-and-a-half-year delay in arresting the petitioner after his indictment due to its negligence in pursuing him).

United States v. Critchell, No. CR-20-0086-RAJ, 2020 WL 6874690, at *4 (W.D. Wash. Nov. 23, 2020).

As of the end of October 2021, the CDC has confirmed that there have been over 45 million confirmed cases of COVID-19 and over 733,000 deaths in the United States alone. *See* https://covid.cdc.gov/covid-data-tracker/#datatracker-home. As the *Critchell* Court observed:

> The new coronavirus that causes COVID-19 spreads more easily than flu and causes more severe illnesses in some people. It can be insidious, infecting people who do not manifest symptoms but are highly contagious nonetheless. For these reasons, courts have been forced to upend their usual course of business to address the public health risk arising from permitting numerous people to spend extended periods together in a courtroom as required for jury trials. Given these circumstances, the period of nine months between Mr.

> Critchell's arrest by FBI and his anticipated trial date is not egregious and does not establish a deprivation of his speedy right trial.

United States v. Critchell, No. CR-20-0086-RAJ, 2020 WL 6874690, at *6 (footnotes omitted); *see also United States v. Smith*, 494 F.Supp.3d 772, 783 (E.D. Cal. Oct. 14, 2020) ("Instead, the Court's decision to take responsible, emergency health measures to limit the spread of COVID-19 is responsible for the delay. The Court's inability to safely conduct a jury trial is a good-faith and reasonable justification for the delay. One that does not weigh against the Government"), *mandamus denied, sub nom, In re Smith,* 854 Fed.Appx. 158 (9th Cir. April 23, 2021); *United States v. Leveille*, No. 1:18-CR-02945-WJ, 2020 WL 4698511, at *5 (D.N.M. Aug. 13, 2020) (rejecting Sixth Amendment claim and stating, in a case where a superseding indictment was filed, and where some delays attributable to motions to determine competency, that "an unprecedented worldwide pandemic has necessitated trial delays and has caused every step of the litigation to take longer than expected. The Government has no control over any of this"); *United States v. Hernandez*, No. 19 CR 97(VM), 2020 WL 4547900, at *3 (S.D.N.Y. Aug. 5, 2020) (dismissing a case without prejudice, under the federal Speedy Trial Act, and stating that "the temporary lack of vigilance with regard to the Speedy Trial Act clock in this case coincided with a period of drastic changes to the conduct of criminal proceedings in this District necessitated by the COVID-19 pandemic"); *United States v. Briggs*, 471 F.Supp.3d 634, 639 (E.D. Pa. July 9, 2020) (recognizing that "there is a substantial and compelling reason" to grant a continuance over a claimed violation of right to speedy trial based on the "public health crisis caused by the COVID-19 pandemic"). *See also Commonwealth v. Murphy*, 2021 WL

3501732 (Va. App., Aug. 10, 2021) (reversing dismissal of indictment on speedy trial grounds because trial court attributed pandemic delays to the government).

We are in accord with these other courts. The delay from March 12, 2020, the date of the first of Chief Judge Barbera's COVID-19 Administrative Orders, to October 8, 2020, the first day of trial, was entirely due to the coronavirus pandemic. This was a catastrophic and unique event beyond either party's control. We hold that the delay does not weigh against either party.

Assertion of the right

The third *Barker* factor examines the "defendant's responsibility to assert his right." *Barker*, 407 U.S. at 531. This factor is "closely related" to the other three, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*. at 532. Appellant first requested a speedy trial in an omnibus motion filed on December 18, 2019, and made a written motion to like effect on July 2, 2020, which was heard by the court on August 5, 2020. This factor weighs in appellant's favor.

Prejudice

The final and "the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Phillips v. State*, 246 Md. App. 40, 67 (2020) (quotations and citation omitted). The prejudice factor is "weighed with respect to the three interests that the right to a speedy trial was designed to preserve": (1) avoiding "'oppressive pretrial incarceration"'; (2) minimizing "'anxiety and concern of the accused"'; and (3) limiting potential impairment of the defense. *Kanneh*, 403 Md. at 693 (quoting *Barker*, 407 U.S. at 532). "Of these, the most serious is the last, because the inability of a defendant

adequately to prepare his case skews the fairness of the entire system." *Id*. (quotations and citations omitted).

The record reveals that appellant was incarcerated from the time of his arrest on July 8, 2019 until the trial, which commenced on October 8, 2020, on a no bond status. We have little doubt the appellant sustained "anxiety and concern" during this period of incarceration, especially under the conditions necessitated by the coronavirus pandemic. However, we are not persuaded that there was any impairment of his defense. There was no evidence that witnesses were absent or that evidence had disappeared or been tampered with. *See Wheeler v. State*, 88 Md. App. 512, 525 (1991) ("Other than the fact of the incarceration itself, the record contains no evidence of prejudice"). As the Court of Appeals explained, "this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case." *Glover*, 368 Md. at 231 (quotations, citation, and emphasis omitted).

Balancing

Under the circumstances herein, when the *Barker* factors are all properly assessed and balanced, including a consideration whether there was actual prejudice, we are persuaded that appellant's constitutional speedy trial right under the Sixth Amendment was not violated. Accordingly, the lower court properly denied the motion to dismiss.

II.

Appellant next asserts the court abused its discretion in not striking the victim's testimony, in its entirety, after she invoked her Fifth Amendment right against self-

incrimination as to a number of questions during her cross-examination. Appellant suggests that this limited his right to confrontation under the Sixth Amendment and that reversal is required. The State responds that the court properly exercised its discretion because the victim invoked her privilege on a collateral matter and that appellant was not prejudiced by her invocation. We agree with the State.

Generally, under the Sixth Amendment, "[a] criminal defendant's right to cross-examine the prosecution's witnesses is protected by the Confrontation Clause that appears in both the federal and State constitutions." *Peterson v. State*, 444 Md. 105, 122 (2015) (footnote omitted). And "[t]he right of confrontation includes the opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely." *Martinez v. State*, 416 Md. 418, 428 (2010). However, pertinent to our discussion, the Fifth Amendment to the Constitution also guarantees a privilege against self-incrimination. *Gray v. State*, 368 Md. 529, 549-50 (2002). The privilege "permits a person to refuse to answer official questions at any proceeding where his answers might incriminate him in future criminal proceedings." *Simmons v. State*, 392 Md. 279, 297 (2006).

In this case, the prosecutor objected when defense counsel inquired whether the victim applied for federal benefits listing appellant as the father of her son. At a bench conference, the parties agreed that the victim needed to be advised of her Fifth Amendment rights against self-incrimination. Defense counsel proffered that she wanted to inquire about prior statements made by the victim with respect to her application, explaining that her benefits could be affected in some manner following allegations for rape or abuse, and

that the inquiry should occur in front of the jury. After the victim was allowed to consult with her attorney, the parties and the court agreed to defer the issue until other areas could be explored on further cross-examination.

After a luncheon recess, the victim's counsel advised the court that her client was going to invoke her Fifth Amendment right against self-incrimination. After agreeing that the questions were relevant, the parties then addressed whether the victim would invoke in front of the jury, with defense counsel arguing that the questions were not "collateral" and went "directly to motive" "credibility" and "bias." Counsel also argued that her client's Sixth Amendment right to confrontation was implicated.

After the court agreed that the questions and the victim's invocation could take place in front of the jury, the victim resumed the stand, and defense counsel inquired as follows:

> Q. [W]e left off this morning with some questions where the first question is, you applied for temporary assistance for needy families?
>
> A. I plead the Fifth.
>
> Q. Okay. And in order to apply for those benefits you had to fill out an application?
>
> A. I plead the Fifth.
>
> Q. And on that application you listed Mr. Callender as the father of your child?
>
> A. I plead the Fifth.
>
> Q. And as part of that application you became aware on January 18 of 2019 you stated, so basically for all TANF applicants they can make you apply for child support on the absentee parent. And if you don't give them the info on the other parent unless you're being abused or raped or are giving up the child for adoption they can deduct twenty-five percent of your benefits.

A. I plead the Fifth.[18]

With respect to the issue presented, whether the court erred in not striking the victim's direct examination in its entirety based on her invocation of her Fifth Amendment privilege, the court denied appellant's motion on that ground, stating:

> All right. The reason, for the record, that I am denying is I did look at what you were submitting. And the situations in which the direct testimony was being stricken was when, for example, the State called the witness to the stand for the sole purpose of invoking the Fifth Amendment right -- that's not what was here. Or when the invocation of the Fifth Amendment right implicates your client's guilt because they're so closely aligned -- I find that is not the situation here.
>
> And, in fact, one of the treatises that you sent was -- basically it said but cross-examination that merely focuses on collateral matters which bear only on the general credibility of the witness the witness's legitimate invocation will not require his direct examination testimony to be stricken.
>
> And I do find -- I mean, it is integral, it is relevant for the jury. But whether she is subjecting herself to some sort of prosecution with regards to the getting of federal benefits I think isn't as related to -- it is a collateral matter when you look at it and we're talking about this incident.
>
> And so for those reasons I am going to deny striking the direct testimony in its entirety.

Thereafter, the court instructed the jury as follows:

> During her testimony, [the victim] responded to questions by invoking her Fifth Amendment right. All citizens are given the right to remain silent and the right against compelled self-incrimination under the Fifth Amendment to the Constitution. As you judge [the victim's] credibility, it is

[18] "TANF" appears to stand for "Temporary Assistance for Needy Families." *See* U.S. Department of Health & Human Services, Office of Family Assistance, Programs, TANF, available at https://www.acf.hhs.gov/ofa/programs/temporary-assistance-needy-families-tanf (last visited October 20, 2021).

> up to you, members of the jury to decide what weight, if any to give to [the victim's] invocation of these rights.[19]

The parties agree that *Thomas v. State*, 63 Md. App. 337 (1985), guides our analysis. There, Terry Thomas was convicted of the first degree murder and related charges of Dwayne Matthews. As part of the State's case, there was evidence that Thomas and his cousin, Ricky Reese, went to the victim's residence with Angelo Johnson, purportedly to buy cocaine but with the real intention of robbing Matthews. *Thomas*, 63 Md. App. at 341. Johnson, testifying at trial under a plea agreement, provided details of that meeting and its aftermath when Thomas confessed to shooting Matthews during the course of the robbery. *Id*. This evidence was corroborated by Johnson's wife, Victoria, who testified that appellant confessed to her as well. *Id*. at 342.

Pertinent to our discussion, the State also presented evidence from two other witnesses, Dexter Marshall and Nathan Lee. Marshall testified that he knew the victim, Matthews, and had been at his residence the night before the murder with Thomas's cousin, Reese. Marshall also testified that he discovered Matthews' lifeless body the next day. *Id*. at 340. Lee also testified that he knew Matthew and Reese, and that he had previously seen Thomas in the company of Reese on a prior occasion. *Id*. Both Marshall and Lee invoked their right against self-incrimination when they were questioned on cross-examination about their involvement in the alleged drug operation. *Id*.

[19] Appellant maintained his objection to not striking the victim's testimony in its entirety.

One issue on appeal concerned the trial court's denial of his motion to strike the testimony of Marshall and Lee, based on their invocation of their Fifth Amendment rights. *Thomas*, 63 Md. App. at 342-43. After concluding that Thomas's complaint with respect to Lee was unpreserved, *id*. at 343, this Court affirmed the trial court's ruling. Recognizing that there may be instances where the rights afforded under the Fifth Amendment and Sixth Amendment may be in conflict, *see Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965), this Court cited approvingly the following analysis from *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 822 (1963):

> Since the right to cross-examine is guaranteed by the Constitution, a federal conviction will be reversed if the cross-examination of government witnesses has been unreasonably limited. However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, *a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination*. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part[.]

Cardillo, 316 F.2d at 611 (emphasis added, internal citations omitted). *See generally*, Jezic, et al., *Maryland Law of Confessions*, § 28:22.Unexpected invocation by a witness, § 28:22 (2020 ed.); 6 McLain, *Maryland Evidence*, § 514:4 – Invocation of privilege by prosecution

or defense witness (3d ed. 2013).

This Court determined that Marshall could properly assert his Fifth Amendment right and that Thomas was not denied his right to confrontation when the court denied his motion to strike Marshall's direct examination. *Thomas*, 63 Md. App. at 346. Marshall's responses all related to collateral matters and "were designed to explore Marshall's general credibility, rather than to test the truth of his direct testimony or to seek to establish Marshall's untruthfulness in testifying to specific events of the crime charged." *Id*.

Appellant in this case argues that *Thomas* is inapposite because, unlike that case, here, the questions were not an attack on the victim's general credibility but, instead, "were an attempt to show that the witness had reason to fabricate these specific accusations against Mr. Callender." *See Johnson v. U.S.*, 418 A.2d 136, 141-42 (D.C. 1980) (remanding for a new trial where trial court did not strike testimony of a prosecution witness, the complainant, where that witness's invocation of the Fifth Amendment right precluded inquiry concerning her bias or motive to testify falsely). Appellant explains that, although "information about a fraudulent application for government benefits could in many cases be merely collateral evidence of a witness's general credibility, here, the questions posed by defense counsel related to the application were closely related to the allegations in the case." We are not persuaded. As the State observes, "[t]he four questions asked about that topic did not explore the details of the victim's direct testimony" concerning the events on the evening in question. They were, instead, questions that went

to the victim's credibility in general, and, more specifically, to her truthfulness on the federal application for benefits.[20]

We also are not persuaded that appellant was unfairly prejudiced by the court's denial of his motion to strike. Notably, appellant was convicted of second degree assault and two counts of violating an out-of-state protective order. As to the latter, defense counsel conceded in opening statement that appellant was guilty of violating an out-of-state protective order. And the evidence was clear that appellant was in contact with the victim throughout the day in question. As for the charge of second degree assault, in addition to the victim's testimony, there was corroborating medical evidence that she sustained an injury to the left side of her jaw.

We also do not find that the appellant was prejudiced by the court's ruling. Defense counsel impeached the victim with evidence that: (1) she contacted the appellant first; (2) that she voluntarily smoked marijuana with him and stayed with him overnight; (3) that she never actually said "no," to the sexual acts; and (4) that she made a number of prior inconsistent statements. Moreover, defense counsel repeatedly referred to the victim's invocation of her right against self-incrimination during closing argument to challenge her overall credibility. Counsel argued:

> You are being asked to believe the allegations of a woman who exerted her Fifth Amendment right when she was asked the following questions. You recall I asked [the victim] if she received federal benefits. She invoked her Fifth. You recall that I asked [the victim] if she applied for those benefits, a

[20] We also note that, even accepting *arguendo* appellant's contention that the victim may have been less than truthful on the application for federal benefits about appellant's paternity of her child, the victim testified that she told appellant he was the father and that she listed the appellant's name on the child's birth certificate.

> federal document. She invoked her Fifth. You recall that I asked [the victim] if when she applied for those benefits she listed Sean Callender as the father of her child on a federal document. And she invoked her Fifth against incriminating herself.
>
> And then when asked whether she made this statement, so basically for all (Unintelligible word) applicants, they make you apply for child support on the absentee parent. And if you don't give them the info on the other parent unless you say you are being abused or raped or you are giving the child up for adoption they can deduct 25% of your benefits. And ladies and gentlemen, when I asked her that question, just like the three before, she invoked her Fifth Amendment right against incriminating herself. That says it all.
>
> I didn't ask those questions to bully [the victim]. I asked those questions because they go to the heart of the matter. You are being asked to believe her. You're being asked to judge her credibility. These questions determine whether she's willing to lie on federal documents. Whether she's receiving federal benefits because of what she claimed, and she invoked her Fifth Amendment right against incriminating herself. Just sit on that for a minute. . . .
>
> Counsel continued:
>
> Ladies and gentlemen, I did not ask her if she was invoking her Fifth because she was lying. I asked her questions about why, what benefits she was receiving, what was happening from her claims, and she invoked her Fifth. Think about why she would do that.
>
> This case comes down entirely to the credibility of a woman that has every motivation to lie and benefit herself, and weaponize the judicial system to her benefit. Outside of her extremely questionable motivation, her credibility as a witness was challenged throughout the trial. . . .

In sum, pursuant to *Thomas*, *supra*, the victim's invocation of her Fifth Amendment right concerned collateral matters and appellant was not prejudiced by the ruling. We

conclude that appellant's Sixth Amendment right to confrontation was not infringed and that the court did not err in not striking the victim's direct examination.

JUDGMENTS FOR THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE ASSESSED TO APPELLANT.