No. _____

IN THE
Supreme Court of the United States

JOHN JOSEPH CARVALHO, II,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court established a four-factor balancing test for determining whether a defendant's Sixth Amendment right to a speedy trial has been violated, weighing the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. Here, petitioner was arrested and awaited trial for nearly *nine years*—a delay undisputedly caused by the State. The court below nonetheless denied speedy trial relief, holding that petitioner "failed to carry his burden of showing [that] the reasons for the delays stemmed from either negligence or willfulness on the part of the State," and that he failed to show "affirmative proof of prejudice." The questions presented are:

1. Whether the burden of proof concerning the reasons for pretrial delay rests (a) with the State, to show that the reasons for delay were justified, as eleven circuits and many state courts of last resort have held; or (b) with the defendant, to show that the reasons for delay were *un*justified, as the court below held.

2. Whether a defendant who was incarcerated during a nearly-nine-year pretrial delay must also produce "affirmative proof of prejudice" for *Barker*'s prejudice factor to weigh in his favor.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Joseph Carvalho, II respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals (Pet. App. 1a–28a) is reported at 777 S.E.2d 78 (N.C. Ct. App. 2015). The opinion of the North Carolina Supreme Court summarily affirming and dismissing the appeal (Pet. App. 29a) is reported at 794 S.E.2d 497 (N.C. 2016). The trial court's orders (Pet. App. 30a–39a) are unreported.

JURISDICTION

The North Carolina Court of Appeals entered its judgment on October 6, 2015. The North Carolina Supreme Court summarily affirmed and dismissed discretionary review on December 21, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

[1] Certiorari is properly directed to the North Carolina Supreme Court's judgment dismissing the appeal. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1370 n.* (2015) (per curiam); *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 138–39 (1986).

INTRODUCTION

Just last term, this Court explained that the Sixth Amendment's Speedy Trial Clause reflects "the concern that a presumptively innocent person should not languish under an unresolved charge." *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016). In this case, petitioner languished under an unresolved murder charge from his November 2004 arrest until his October 2013 trial—nearly *nine years*. And he did so behind bars.

This extraordinary delay was not at all due to petitioner; it was entirely caused by the State. Several years remain unexplained; some of the delay purportedly arose from unrelated trials; and a sixteen-month period involved the State's attempt to "clarify" an audio recording that it had obtained seven years earlier. Not until 2013 was the case even calendared for trial.

This case presents two important questions about the speedy trial framework established in *Barker v. Wingo*, 407 U.S. 514 (1972). *First*, the lower courts are deeply (and lopsidedly) divided over which party bears the burden of proof concerning the second *Barker* factor—the "reason for the delay." On one side is the court below, which reaffirmed North Carolina precedent holding that the defendant bears the "burden of showing [that] the reasons for the delays stemmed from either negligence or willfulness on the part of the State." Pet. App. 12a. Only after "a defendant shows a *prima facie* case for negligence or willfulness" must the State show that "there were reasonable circumstances surrounding the delay." *Id.* at 10a–11a.

This rule directly conflicts with the law in at least eleven federal circuits and many state courts of last resort, which hold that "the [S]tate, not the prisoner, bears the burden to justify the delay." *Hakeem v. Bey-*

er, 990 F.2d 750, 770 (3d Cir. 1993) (Hutchinson, J., joined by Alito and Seitz, JJ.). It also flouts *Barker* itself, which "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial" and thus considers "the reason the *government* assigns to justify the delay." 407 U.S. at 529, 531 (emphasis added). This conflict was acknowledged many years ago, and North Carolina appears to be the only jurisdiction where defendants bear the burden of proving unjustified reasons for pretrial delays in order for this important factor—the "flag all litigants seek to capture," *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)—to weigh in their favor.

Second, petitioner, who was incarcerated throughout the nearly-nine-year delay, was also faulted for failing to produce "affirmative proof of prejudice." Pet. App. 13a. That holding contravenes this Court's speedy trial precedents in two respects. To start, it ignores the Court's holding that prejudice may be presumed following excessive delay, for "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655 (1992). It also ignores the fact that petitioner's lengthy pretrial incarceration *is* affirmative proof of prejudice. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial," *United States v. MacDonald*, 456 U.S. 1, 8 (1982), and this Court has explained time and again that "a defendant confined to jail prior to trial is obviously disadvantaged by delay," *Barker*, 407 U.S. at 527. Requiring further "affirmative proof of prejudice" after many years of pretrial incarceration vitiates the core of the speedy trial guarantee.

This Court's review is warranted. The decision below cannot be reconciled with this Court's precedents. It directly conflicts with the law in most federal and state courts. And the massive delay in this case—all caused by the State—demonstrates the severity of North Carolina's aberrant approach to speedy trial claims, making this case a perfect vehicle for addressing two important issues of constitutional law.

STATEMENT OF THE CASE

A. *Barker* Speedy Trial Framework

In *Barker*, this Court set out a balancing test for evaluating Sixth Amendment speedy trial claims "in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. at 530. Four factors are considered: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* "[T]hese factors have no talismanic qualities," and none is "a necessary or sufficient condition to the finding of a deprivation of the right." *Id.* at 533. Rather, they must be collectively balanced "with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.*

"[T]o trigger a speedy trial analysis" under *Barker*, the defendant must first show that the length of delay "crossed the threshold dividing ordinary from 'presumptively prejudicial' delay," which is typically one year. *Doggett*, 505 U.S. at 651–52 & n.1. Once the length of delay crosses that threshold, "the extent to which [it] stretches beyond the bare minimum needed to trigger judicial examination" is then balanced with the remaining three factors. *Id.* at 652.

B. Factual Background and Timeline

Petitioner was arrested in November 2004 for the murders of George Kastansis (who died in 2000) and Richard Long (who died in 2002). These homicides were completely unrelated; the only link between them was the State's "primary witness"—a jailhouse informant who claimed that petitioner confessed to both murders while serving time for a drug charge. Following two mistrials in the Long case, petitioner moved to dismiss the Kastansis indictment on speedy trial grounds. The motion was denied, and petitioner was tried for the Kastansis murder in October 2013, nearly nine years after his arrest. The trial ended with a hung jury. He was retried, and convicted, in April 2014.

1. In April 2000, George Kastansis was killed at the grocery store he owned in Monroe, North Carolina. Pet. App. 1a. His store had been ransacked and all the cash stolen. Petitioner worked at the store up until a few weeks before Kastansis's death, and he was interviewed by the police soon after. Pet'r N.C. Br. 11–13.[2] No physical evidence from the crime scene linked anyone to the crime. *Id.*; *see* Heather Smith, *Plea Deal Plan in Murder Case Upsets Victim's Family*, Enquirer Journal (Apr. 6, 2013), https://goo.gl/F0hVOn.

Richard Long was murdered in December 2002. Pet. App. 30a. The homicide was completely unrelated to the Kastansis killing; Long was shot to death in his living room recliner with no sign of a struggle and nothing taken from his home. *Id.* at 5a; R14.

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[2] Briefs in the North Carolina Supreme Court ("N.C. Br.") are available on Westlaw and contain relevant transcript citations. The Record on Appeal ("R") is available as a PDF on Westlaw at 2014 WL 6710870.

In August 2003, petitioner was convicted on a drug charge (also unrelated to the Long and Kastansis cases) and incarcerated at Brown Creek Correctional, where William Anderson was also an inmate. Pet. App. 30a, 32a. Petitioner and Anderson knew one another through family connections, and Anderson was serving time for "obtaining property by false pretenses"—i.e., "lying to people to get something." Pet'r N.C. Br. 4. In early 2004, Anderson told an agent of the State Bureau of Investigation ("SBI") that petitioner purportedly confessed to the Long and Kastansis murders sometime while they were incarcerated together. Pet. App. 2a. Anderson's "sole intention," he later admitted, was to get help with pending charges. Pet'r N.C. Br. 5.

Several months later, the SBI agent convinced Anderson to wear a wire and try to get a recorded confession from petitioner. The quality of the recording was "very poor." Pet. App. 3a. It also contained no confession. *Id.* Instead, the recorded conversation "touched on the murders of [Long] and [Kastansis]" while also covering an array of "other potentially criminal acts," such as their plan to kill a "Gypsy" and steal his money as well as the mechanics of "dismember[ing] a body and feed[ing] it to catfish." *Id.* at 3a–4a.

Petitioner was arrested for the murders of Long and Kastansis on November 16, 2004, and counsel was appointed soon thereafter. *Id.* at 30a–31a. Petitioner was indicted by a grand jury on January 3, 2005, for first-degree murder and armed robbery in the Kastansis case and for first-degree murder in the Long case. *Id.* at 31a. Four days later, the State declared its intent to try both cases capitally, and a pretrial hearing was held in March 2005. *Id.*

2. On December 16, 2008—over four years after his arrest—petitioner was arraigned in the Long case.

Id. at 36a. The State filed a motion three days later to change both cases from capital to non-capital, which the court granted that same day. *Id.* at 31a.

Petitioner was not tried for the Long murder until September 2009. *Id.* Anderson testified that petitioner confessed to killing Long, and the wire recording was played for the jury. *Id.* at 2a–3a. The trial lasted a week and ended with a hung jury and a mistrial. *Id.* at 31a. Two months later, petitioner completed the sentence for his drug conviction and moved for bond, which was was set at $1 million. *Id.* at 32a. Petitioner could not post bond and thus remained incarcerated. *Id.* at 5a.

Petitioner was retried for the Long murder in March 2010. *Id.* at 32a. The recording was again played for the jury. Anderson, however, refused to testify. *Id.* at 2a. "[T]his case is years and years old," he explained at a pretrial hearing, and "y'all have come to me four or five years after this thing originally happened and I didn't even remember half of this testimony until you give it to me again, over and over and over." *Id.* at 43a. He acknowledged that "the first time [he] testified" he "had a lack of memory of a lot of the testimony"; it had been repeatedly "refreshed to [him] by several different people." *Id.* at 45a. He thus refused to "get up [t]here and just swear to something" that had "been put back in [his] memory by someone else." *Id.* Anderson tried to invoke the Fifth Amendment's privilege against self-incrimination based on his fear of "perjur[ing] [him]self," but the court informed him that none of his prior testimony was incriminating and that possible memory loss is not a valid reason for invoking the privilege. *Id.* at 44a–46a. He nonetheless refused to testify. The second trial, like the first, ended with a deadlocked jury and a mistrial. *Id.* at 32a.

3. In March 2011—a full year after the second mistrial—the State decided to have the wire recording "clarified." *Id.* at 3a. The State first asked the FBI for help; it declined. *Id.* A few months later, the State sent the recording off to an outside forensics lab. *Id.* The lab took more than nine months to complete its work on the recording, returning it to the State in April 2012. *Id.* Despite the enhancement, the recording was still difficult to understand. The State prepared a transcript of the recording with several portions designated as "inaudible." *Id.*

Meanwhile, in December 2011, investigators visited Anderson in a Virginia prison, where he was serving a thirty-five-year sentence, to "determine his willingness to testify in future trials." *Id.* at 4a, 33a; *see* R15–16 (SBI's report of the meeting). He ultimately agreed. When asked about his change of heart, Anderson failed to recall his original reason for refusing to testify—his memory loss—and instead attributed his prior refusal to "'the way he was treated' by Union County." Pet. App. 4a. He was thus willing to testify after the State "agreed to some of his stipulations." *Id.*; *see* R16 (requesting cigarettes and a contact visit with his family).

4. On December 3, 2012, petitioner moved to dismiss both cases for Sixth Amendment speedy trial violations. Pet. App. 5a; *see* R11–13 (motion to dismiss). Nearly three years had passed since the second Long mistrial, and neither of the cases appeared on the court's trial calendar. In fact, the Kastansis case had *never* been calendared for trial. And in the interim, petitioner's counsel had been able to try two other first-

degree murder cases in Union County that were years younger than the Kastansis case.[3] Pet'r N.C. Br. 8.

Petitioner's motion prompted unsuccessful plea negotiations that lasted until April 2013. Pet. App. 4a–5a. The trial court held a hearing on petitioner's speedy trial motion in June 2013 and denied the motion via email the following month. *Id.* at 34a, 37a.

5. Petitioner was tried for the Kastansis homicide for the first time in October 2013—nearly nine years after his November 2004 arrest. *Id.* at 7a. Before trial, petitioner moved *in limine* to exclude certain portions of the audio recording as well as the transcript of the recording in its entirety. R57–58. The court denied the motion with respect to the recording but granted the motion to exclude the transcript. R73–74.

The trial began on October 7, 2013. Pet. App. 7a. The recording was played for the jury, and Anderson testified that petitioner confessed to killing Kastansis. Petitioner moved to impeach Anderson's testimony with his statements from the 2010 pretrial hearing about his memory loss, but the court denied the motion because "the Long and Kastansis cases 'ha[d] been separate and apart the entire time.'" Pet'r N.C. Br. 46–47 (quoting transcript). The jury deadlocked and a mistrial was declared on October 17, 2013. Pet. App. 37a.

6. On January 2, 2014, the trial court entered a written order denying petitioner's motion to dismiss on Sixth Amendment speedy trial grounds. *Id.* at 30a–38a. The court listed the following reasons "posited" by the State for the pretrial delay:

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[3] In *State v. Kelly*, No. 09 CRS 51741 (N.C. Super. Ct.), the defendant was arrested in April 2009 and tried in July 2011. In *State v. Boshers*, No. 09 CRS 53823 (N.C. Super. Ct.), the defendant was arrested in July 2009 and tried in March 2012.

- The "complex nature of the cases," which were "factually separate and distinct from one another" but "intertwined in that Bill Anderson [was] the key witness in each case,"
- The "significant amounts of discovery" generated by the "two separate murder charges,"
- The "substantial plea negotiations,"
- The two mistrials in the Long case,
- The State's efforts to "enhance" the recording, and
- The State's "[e]fforts to resolve issues with Bill Anderson to secure his testimony in future trials."

Id. at 36a–37a.

The court concluded that the length of delay was "sufficient enough" to "trigger analysis of the speedy trial factors" under *Barker* but that (1) petitioner "failed to offer any evidence to establish that neglect or willfulness by the State [was] the reason for delay"; (2) the State had "reasonable and valid justifications for the delay"; (3) petitioner did not assert his speedy trial right until December 2012; and (4) petitioner "failed to establish that he suffered actual, substantial prejudice as a result of the delay." *Id.* at 37a–38a.

7. Petitioner was retried in the Kastansis case in April 2014. *Id.* at 7a. Before trial, petitioner renewed his speedy trial motion to dismiss, which was denied. *Id.* at 39a. The trial began on April 1, 2014, and the evidence largely mirrored that presented in the first trial with one exception: To "supplement the inaudible portions" of the recording—which at that point was nearly ten years old—the State had Anderson "transcrib[e] the content of the conversation" by hand on a printed copy of the transcript. *Id.* at 3a. And when petitioner renewed his motion *in limine* to exclude the transcript,

the court reversed course from the first Kastansis trial and this time allowed the transcript—with Anderson's handwritten notes—to come in. *Id.* at 3a, 13a; *see* R84–97 (the marked-up transcript).

On April 7, 2014, more than nine years after his November 2004 arrest, petitioner was convicted of first-degree murder and armed robbery. *Id.* at 7a. He was sentenced to life imprisonment without parole. *Id.*

C. Proceedings on Appeal

1. The North Carolina Court of Appeals affirmed on the speedy trial issue after it "reviewed and considered each of the *Barker* factors." Pet. App. 13a.

For the first factor—the length of delay—the court concluded that the "extraordinary" nearly-nine-year delay in this case "clearly passes the demarcation into presumptively prejudicial territory and triggers the *Barker* analysis." *Id.* at 9a–10a (quoting *Doggett*, 505 U.S. at 652).

For the second factor—the reason for the delay—the court began by declaring that "[a] defendant must demonstrate the delay stemmed from either negligence or willfulness on the part of the State." *Id.* at 10a. That is so, the court reasoned, because "[a] speedy trial claim prevents only those delays that were 'purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.'" *Id.* (quoting *State v. Johnson*, 167 S.E.2d 274, 280 (N.C. 1969)). Only after "a defendant shows a *prima facie* case for negligence or willfulness" does "the State bea[r] the burden of showing there were reasonable circumstances surrounding the delay." *Id.* at 10a–11a.

Applying these principles, the court held that petitioner "failed to show the delay stemmed from either negligence or willfulness on the part of the State" be-

cause he "presented no evidence of negligence or willfulness by the State." *Id.* at 11a. Instead, he "merely established the timeline showing how the two murder cases had proceeded over time." *Id.* The court went on to list the "more significant elements" that it believed "contributed to" the delay:

> (1) changing the trials for Mr. Long's and Mr. Kastansis's murders from capital to non-capital; (2) plea discussions between [petitioner] and the State; (3) clarification of the audiotape and generation of a transcript, including seeking help from the SBI, the FBI and Target Forensic; (4) securing the testimony of the State's key witness, Anderson; and, (5) the interconnectedness of the two murders.

Id. at 11a–12a. While it was "concerned about the sixteen-month delay from enhancing the audiotape," the court ultimately held that petitioner "failed to carry his burden of showing the reasons for the delays stemmed from either negligence or willfulness on the part of the State." *Id.* at 12a, 20a.

For the third factor—assertion of the speedy trial right—the court began by explaining that petitioner's "failure to demand a speedy trial does not result in a waiver of the speedy trial violation." *Id.* at 12a (citing *Barker*, 407 U.S. at 528). Although petitioner argued that his trial counsel "had asked 'repeatedly' for information on the progression of the cases," the court found that "[n]o evidence in the record shows [petitioner] requested or moved for a speedy trial" before December 2012. *Id.* at 11a–12a.

Finally, for the fourth factor—prejudice to the defendant—the court held that petitioner failed to "sho[w] any affirmative proof of prejudice." *Id.* at 13a. His

"lengthy incarceration" was insufficient. *Id.* All told, the court concluded that "[e]ven with a troubling and 'extraordinary' almost nine-year delay," petitioner's "constitutional right to a speedy trial [was] not violated." *Id.* at 20a (quoting *Doggett*, 505 U.S. at 652).

2. The North Carolina Supreme Court granted discretionary review on March 17, 2016.[4] 782 S.E.2d 512 (N.C. 2016). After briefing and argument, the North Carolina Supreme Court summarily affirmed and dismissed discretionary review on December 21, 2016. Pet. App. 29a. This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents two compelling grounds for certiorari review. *First*, by saddling the defendant, rather than the State, with the burden of proof concerning the reasons for pretrial delay, the decision below conflicts with decisions of nearly every other court in the country that has considered this issue. *Second*, by requiring petitioner to produce "affirmative proof of prejudice" after nearly nine years of pretrial incarceration, the decision below cannot be squared with this Court's cases holding that prejudice should be presumed following excessive delay and that pretrial incarceration is itself a form of speedy trial prejudice. These issues strike at the core of the constitutional right to a speedy trial, and this case provides an ideal vehicle for addressing them. The petition should be granted.

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[4] An evidentiary issue was also raised in the court of appeals, which split the panel and produced a dissent. Petitioner appealed that issue to the North Carolina Supreme Court as a matter of right under N.C. Gen. Stat. § 7A-30(2), and he appealed the speedy trial issue under the court's discretionary jurisdiction, *id.* § 7A-31.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF MOST FEDERAL AND STATE COURTS BY PLACING THE BURDEN ON THE DEFENDANT TO PROVE UNJUSTIFIED REASONS FOR DELAY.

As the Court explained in *Barker*, "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." 407 U.S. at 527 (footnote omitted). The second of the four *Barker* factors thus considers "the reason the government assigns to justify the delay." *Id.* at 531. In applying this factor, "different weights should be assigned to different reasons," *id.*, and the inquiry turns on "whether the government or the criminal defendant is more to blame for th[e] delay," *Vermont v. Brillon*, 556 U.S. 81, 90 (2009) (quoting *Doggett*, 505 U.S. at 651).

The lower courts are divided over whether the State or the defendant bears the burden of proof with respect to the reasons for pretrial delay. At least eleven federal circuits and many state courts of last resort have held that the State bears the burden to justify pretrial delay and that unexplained delay weighs against the State. By contrast, the court below reaffirmed North Carolina precedent holding that the defendant bears the burden to prove that the reasons for delay stemmed from the State's negligence or willfulness. That conflict, which has been acknowledged multiple times, warrants this Court's review.

A. Eleven federal circuits and many state courts of last resort require the State to justify the reasons for delay.

The overwhelming majority of courts addressing the issue have held that the State must justify the reasons for pretrial delay.

1. The Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have squarely held that the burden is on the State to prove that its reasons for delay were justified.

The Third Circuit has repeatedly held that "once a delay is alleged and rises to the point where a *Barker* inquiry has commenced, the [S]tate, not the prisoner, bears the burden to justify the delay." *Hakeem*, 990 F.2d at 770; *see, e.g.*, *United States v. Velazquez*, 749 F.3d 161, 175 (3d Cir. 2014); *United States v. Battis*, 589 F.3d 673, 680 (3d Cir. 2009). The court in *Battis* explained how this works: "the amount of delay caused by the defendant" is subtracted "from the delay caused by the [g]overnment." 589 F.3d at 680. The remainder is "attributable to the [g]overnment," and the government bears the burden to justify it. *Id.*

Likewise, in the Tenth Circuit, "[t]he burden belongs to the government to provide an acceptable rationale for the delay." *United States v. Seltzer*, 595 F.3d 1170, 1177 (10th Cir. 2010); *see also Jackson v. Ray*, 390 F.3d 1254, 1261 n.3 (10th Cir. 2004) ("[E]very circuit court to address the question has held that *Barker* places the burden to explain the delay on the State."). In *Seltzer*, the court applied this principle when considering the government's asserted reason for a two-year delay—a "desire to complete the state proceedings on unrelated drug charges before continuing with federal charges"—and placed the burden on the government to "make a particularized showing of why the circumstances require the conclusion of the state proceedings before the federal proceedings can continue." 595 F.3d at 1177–78. "Requiring the federal government to affirmatively justify a need" for the delay "ensures protection of the public's and the defendant's interest in a speedy trial." *Id.* at 1179.

The Second Circuit reached the same conclusion decades ago, holding that "the burden is upon the government to prove that the delay was justified and that [the defendant's] speedy trial rights were not violated." *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979); *see also Rayborn v. Scully*, 858 F.2d 84, 89 (2d Cir. 1988) ("[B]ecause the amount of elapsed time between issuance of an arrest warrant and conviction was so substantial, at trial the government was required to justify the delay in order to defeat the defendant's speedy trial claim.").

The same goes for the Sixth Circuit, which has consistently held that "the prosecution has the burden of explaining the cause for pre-trial delay" and that "[u]nexplained delay is weighed against the prosecution." *Redd v. Sowders*, 809 F.2d 1266, 1269 (6th Cir. 1987); *see, e.g.*, *United States v. Jackson*, 473 F.3d 660, 666 (6th Cir. 2007); *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999). The Eleventh Circuit followed the Sixth Circuit's holding on this score. *United States v. Ingram*, 446 F.3d 1332, 1337 (11th Cir. 2006) ("[T]he burden is on the prosecution to explain the cause of the pre-trial delay." (quoting *Brown*, 169 F.3d at 349)).

After surveying decisions from other circuits, the Ninth Circuit "likewise h[e]ld that the prosecution bears the burden of explaining pretrial delays." *McNeely v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003). And after initially not "deciding who bears the burden of proof of showing the reason for delay," *United States v. Cardona*, 302 F.3d 494, 498 (5th Cir. 2002) (per curiam), the Fifth Circuit has since held that "[t]he burden is on the Government to 'assign[] reasons to justify the delay,'" *Amos v. Thornton*, 646 F.3d 199, 207 (5th Cir. 2011) (per curiam) (quoting *Barker*, 407 U.S. at 531).

Many state courts of last resort agree that the State bears the burden of proof concerning the reasons for delay. *See, e.g.*, *Ex parte Anderson*, 979 So. 2d 777, 780 (Ala. 2007); *Middlebrook v. State*, 802 A.2d 268, 274–75 (Del. 2002); *Ward v. United States*, 55 A.3d 840, 844–45 (D.C. 2012); *Bulgin v. State*, 912 So. 2d 307, 311–12 (Fla. 2005); *State v. Folk*, 256 P.3d 735, 742 (Idaho 2011); *People v. Crane*, 743 N.E.2d 555, 563 (Ill. 2001); *State v. Windish*, 590 N.W.2d 311, 316–17 (Minn. 1999); *Jenkins v. State*, 947 So. 2d 270, 276–77 (Miss. 2006); *State v. Velasquez*, 377 P.3d 1235, 1241 (Mont. 2016); *State v. Cahill*, 61 A.3d 1278, 1285 (N.J. 2013); *State v. Serros*, 366 P.3d 1121, 1135 (N.M. 2016); *State v. Oliveira*, 961 A.2d 299, 317 (R.I. 2008); *State v. Hunsberger*, 794 S.E.2d 368, 374 (S.C. 2016); *Shaw v. State*, 117 S.W.3d 883, 889 n.3 (Tex. Crim. App. 2003); *Fowlkes v. Commonwealth*, 240 S.E.2d 662, 766–67 (Va. 1978); *Durkee v. State*, 357 P.3d 1106, 1112 (Wyo. 2015).

2. Additionally, the Fourth, Seventh, Eighth, and D.C. Circuits have implicitly recognized that the burden to justify pretrial delay rests with the State, holding that unexplained delays will weigh against the State in the speedy trial calculus. *See West v. Symdon*, 689 F.3d 749, 752 (7th Cir. 2012); *United States v. Erenas-Luna*, 560 F.3d 772, 777–78 (8th Cir. 2009); *United States v. Lara*, 520 F.2d 460, 464 (D.C. Cir. 1975); *Ricon v. Garrison*, 517 F.2d 628, 633 (4th Cir. 1975).[5]

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[5] The only remaining circuit—the First Circuit—held in a pre-*Barker* case that the government does not have the burden to explain pretrial delays. *Schlinsky v. United States*, 379 F.2d 735, 737 (1st Cir. 1967). The First Circuit has not expressly addressed the issue since *Barker*, but it has indicated that unexplained delays presumably result from the State's negligence and thus weigh against the State. *See Rashad v. Walsh*, 300 F.3d 27, 37–38 (1st Cir. 2002).

Several state courts of last resort have held similarly. *See, e.g.*, *State v. Buckner*, 738 S.E.2d 65, 70 (Ga. 2013); *Smith v. Commonwealth*, 361 S.W.3d 908, 916 (Ky. 2012); *Jones v. State*, 367 A.2d 1, 7–9 (Md. 1976); *People v. Williams*, 716 N.W.2d 208, 218–19 (Mich. 2006); *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907, 912 (Mo. 2010); *Humphrey v. Cunningham*, 584 A.2d 763, 768 (N.H. 1990); *City of Grand Forks v. Gale*, 876 N.W.2d 701, 707–08 (N.D. 2016); *State v. Simmons*, 54 S.W.3d 755, 759–60 (Tenn. 2001).

B. The North Carolina Supreme Court requires the defendant to prove that the reasons for delay were unjustified.

In sharp conflict with most federal and state courts, the court below held that "[a] defendant must demonstrate the delay stemmed from either negligence or willfulness on the part of the State." Pet. App. 10a.

This holding reaffirms a rule in North Carolina that the "defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution." *State v. Spivey*, 579 S.E.2d 251, 255 (N.C. 2003); *see* Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 Campbell L. Rev. 101, 110 n.73 (2004) (collecting cases). Accordingly, "[o]nly after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay." *Spivey*, 579 S.E.2d at 255. If the defendant "fail[s] to present . . . evidence that the delay was caused by the State's neglect or willfulness," he has "failed to carry his burden," and the reason-for-delay factor weighs in favor of the State. *Id.* at 256. Thus, in this case, because petitioner "merely

established the timeline" and "presented no evidence of negligence or willfulness by the State," he "failed to carry his burden." Pet. App. 11a–12a.

The conflict is clear—while in North Carolina "the burden is upon the defendant to demonstrate the unreasonableness of the delay," in most jurisdictions the State bears the "burden of showing justification for the delay." *Fowlkes*, 240 S.E.2d at 664–65 (acknowledging the conflict and rejecting North Carolina's approach); *see also Dickey v. Florida*, 398 U.S. 30, 56 n.22 (1970) (Brennan, J., concurring) (noting the potential for a conflict before *Barker* was decided).[6] Had petitioner been tried just over the border in South Carolina, for example, "justifying the delay between charge and trial" would have been "the responsibility of the State," and any "justifications advanced by the State for its delay [that were] unsupported by the evidence" would have "weigh[ed] heavily against the State." *Hunsberger*, 794 S.E.2d at 374–75.

The State cannot seriously dispute this conflict. It fervently argued below that, "regardless of the length of the delay," the North Carolina Supreme Court has "rejected" the "argument that it [is] the State's burden to establish 'justifiable reason and cause' for the delay." State's N.C. Br. 42; *see id.* at 43–48 (similar). Despite petitioner's contrary assertions, the North Carolina Supreme Court summarily affirmed. This Court's intervention is needed to resolve the entrenched conflict.

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[6] North Carolina appears to stand alone in this respect. Aside from the First Circuit's decision in *Schlinsky*, 379 F.2d at 737, petitioner has not located a single case from any other jurisdiction (state or federal) holding that the defendant bears the burden to prove unjustified reasons for pretrial delay.

C. The North Carolina Supreme Court is wrong—the burden belongs to the State to justify the reasons for delay.

Certiorari is all the more warranted because the decision below is wrong. Placing the burden on the defendant to prove unjustified reasons for pretrial delay is inconsistent with this Court's precedents and with common sense.

1. Several of this Court's cases make clear that the burden belongs to the State to justify pretrial delay. To start, *Barker* itself characterized this factor as "the reason the *government* assigns to justify the delay," 407 U.S. at 531 (emphasis added), which "indicates that the burden is on the government." 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.2(c) (4th ed. 2015). Indeed, in the "excellent opinion" cited in *Barker* as "an example of how the speedy trial issue should be approached," 407 U.S. at 533 n.36, Judge Frankel found that the government's affidavits "reveal[ed] a total lack of justification" for the delay and that "[i]t [was] not even necessary for this conclusion to rest upon, or weigh, the reply affidavit of defense counsel." *United States v. Mann*, 291 F. Supp. 268, 271 (S.D.N.Y. 1968).

Likewise, in *Dickey*, the State failed to carry its burden of justifying a delay undertaken "exclusively for the convenience of the State." 398 U.S. at 38. After "[t]he State suggest[ed] no tenable reason for deferring the trial," the Court held that the delay was "intolerable as a matter of fact and impermissible as a matter of law." *Id.* at 36, 38. Justice Brennan explicitly recognized in his concurring opinion—an opinion setting forth the approach that was "[i]n essence" adopted in *Barker*, 407 U.S. at 530 n.30—that "the burden should . . . shift to the government to establish, if possible, that the delay was necessary, by showing that the reason for

it was of sufficient importance to justify the time lost." *Dickey*, 398 U.S. at 56 (Brennan, J., concurring).

In no case has this Court ever saddled the defendant with the burden of proving unjustified reasons for pretrial delay. *See also, e.g.*, *MacDonald*, 456 U.S. at 20 (Marshall, J., dissenting) ("[T]he government must affirmatively demonstrate a legitimate reason, other than neglect or indifference, for such a delay."); *Klopfer v. North Carolina*, 386 U.S. 213, 218 (1967) (observing that "no justification for [the delay] was offered by the State"). Rather, "[this] Court places the burden on the [S]tate to provide an inculpable explanation for delays in speedy trial claims." *Jackson*, 390 F.3d at 1261.

2. Even aside from these precedents, a rule requiring the defendant to first show "a *prima facie* case for negligence or willfulness" before the State needs to show "reasonable circumstances surrounding the delay" (Pet. App. 11a) makes no sense.

As a theoretical matter, it is unclear how the State could ever show that the circumstances were "reasonable" after the defendant was first required to show that those circumstances derived from the State's "negligence or willfulness." Those terms are mutually exclusive. *Cf. McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133–35 (1988) (contrasting willfulness, negligence, and reasonableness). If anything, the "*prima facie* case" would be the length of delay itself, which acts as a "triggering mechanism" for the speedy trial analysis. *Barker*, 407 U.S. at 530; *see Doggett*, 407 U.S. at 651–52.

Even more unclear is how the defendant would be able to learn why a pretrial delay occurred at all, let alone "presen[t] . . . evidence" that it was caused by the State's neglect or willfulness. Pet. App. 11a; *see* H. Richard Uviller, Barker v. Wingo*: Speedy Trial Gets a*

Fast Shuffle, 72 Colum. L. Rev. 1376, 1386–87 (1972) (questioning how "the defendant [could] prove why the prosecution failed to move his case for trial"). Should he conduct some sort of discovery? Subpoena the prosecutors, the judge, and the court administrator?

The State has the "obligation to see to it that the case is brought on for trial," *Strunk v. United States*, 412 U.S. 434, 439 n.2 (1973), and prosecutors in North Carolina control the criminal trial calendar and docketing, N.C. Gen. Stat. §§ 7A-49.4(a), 7A-61. Thus, the State properly bears the burden to justify pretrial delay "since it, far more than the defendant, is likely to know why the delay took place." *Dickey*, 398 U.S. at 56 n.22 (Brennan, J., concurring); *cf. Smith v. United States*, 133 S. Ct. 714, 720 (2013) ("'[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party,' that party is best situated to bear the burden of proof." (citation omitted)).

3. Once the burden is properly placed on the State, application of the second *Barker* factor in this case becomes straightforward—it must weigh against the State. The State was "more to blame" for all of the delay, *Brillon*, 556 U.S. at 90 (citation omitted), and it cannot possibly justify a delay of nearly nine years with vague hints of trial preparation. Certiorari is thus necessary to resolve the conflict and to reinforce what this Court held in *Barker*: "[T]he primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." 407 U.S. at 529.

II. The Decision Below Conflicts With This Court's Decisions By Requiring "Affirmative Proof Of Prejudice" After Nearly Nine Years Of Pretrial Incarceration.

In addition to wrongly shifting the burden onto petitioner to prove that the reasons for delay were unjustified, the court below also erred by construing *Barker*'s fourth factor—prejudice to the defendant—to require "affirmative proof of prejudice." Pet. App. 13a. This requirement flouts two of this Court's core speedy trial precedents: (1) affirmative proof of prejudice is not necessary after an excessive pretrial delay caused by the State, and (2) pretrial incarceration is a form of actual prejudice. Certiorari is therefore necessary to resolve this conflict as well. *See* Sup. Ct. R. 10(c).

1. The Speedy Trial Clause protects against three distinct forms of prejudice: "'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532).

This Court has repeatedly stressed that "affirmative proof of particularized prejudice is not essential to every speedy trial claim" and that prejudice may be presumed in certain circumstances. *Id.* at 655; *see also Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam) (explaining that *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial"); *Strunk*, 412 U.S. at 439 ("a prolonged delay may subject the accused to an emotional stress that can be *presumed* to result in the ordinary person" (emphasis added)); *Dickey*, 398 U.S. at 40 (Brennan, J., concurring) ("I do not read the Court's opinion as decid-

ing that . . . [the defendant] must prove actual prejudice . . . .”). In fact, this presumption of prejudice distinguishes the speedy trial inquiry from the due process inquiry, where the defendant must show *actual* prejudice to receive relief. *United States v. Marion*, 404 U.S. 307, 320–24 (1971). That distinction hinges on the fact that, for delays occurring outside the purview of the Speedy Trial Clause, “other mechanisms” can “guard against possible as distinguished from actual prejudice.” *Id.* at 322; *see United States v. Lovasco*, 431 U.S. 783, 789–90 (1977); *cf. Betterman*, 136 S. Ct. at 1617–18. Demanding proof of actual prejudice after many years of State-caused pretrial delay “in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006).

The need to presume prejudice is at its zenith when considering “the possibility that the defense will be impaired,” which is “the most serious” form of speedy trial prejudice because it “skews the fairness of the entire system.” *Barker*, 407 U.S. at 532; *see United States v. MacDonald*, 435 U.S. 850, 859–60 (1978) (“[A] central interest served by the Speedy Trial Clause is the protection of the factfinding process at trial.”). It is also “the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony ‘can rarely be shown.’” *Doggett*, 505 U.S. at 655 (quoting *Barker*, 407 U.S. at 532). These principles led the Court in *Doggett* to observe that “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” *Id.* Prosecutorial negligence is not “automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him,”

the Court explained, as "[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the [S]tate's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Id.* at 657. The Court held that the government's "egregious persistence in failing to prosecute" the defendant in that case for six years was "clearly sufficient" to warrant speedy trial relief without a showing of "particularized trial prejudice." *Id.* at 657–58.

The nearly-nine-year delay in this case went well beyond the six-year delay in *Doggett*, and several lower courts have applied *Doggett* to presume prejudice following delays far shorter than the one here.[7] *See, e.g.*, *Battis*, 589 F.3d at 683 (three years); *Erenas-Luna*, 560 F.3d at 779–80 (three years); *State v. Lattimore*, 696 S.E.2d 613, 615 (Ga. 2010) (five years); *see also United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) (collecting cases). If anything, presumed prejudice is even more appropriate in this case because petitioner would have had no way of showing "dimm[ed] memories and loss of exculpatory evidence," *Doggett*, 505 U.S. at 654, at his speedy trial hearing—it occurred months before his trial began.

Tellingly, the court below did not even mention *Doggett* in its prejudice analysis, *see* Pet. App. 12a–13a,

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[7] Some courts have relied on dictum in *Reed v. Farley*, 512 U.S. 339, 353 (1994), that "[a] showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause." *See, e.g.*, *United States v. Mallett*, 751 F.3d 907, 914 (8th Cir. 2014). That statement appears to conflict with *Doggett* and with the Court's admonition in *Barker* that "none of the four factors" is "either a necessary or sufficient condition to the finding of a [speedy trial violation]." 407 U.S. at 533; *see* 5 LaFave et al., *supra*, § 18.2(e) (noting the apparent conflict).

even though petitioner pressed it at every step in this case. Instead, the court below merely reaffirmed North Carolina precedent holding that a defendant must show "affirmative proof of prejudice." *Id.* at 13a; *see, e.g.*, *Spivey*, 579 S.E.2d at 257 ("A defendant must show actual, substantial prejudice."). That constrained view of *Barker*'s prejudice factor is demonstrably incorrect.

2. The court below compounded its error by failing to recognize that petitioner's "lengthy incarceration" prior to trial itself constitutes "affirmative proof of prejudice." Pet. App. 13a.

"[O]ppressive pretrial incarceration" is a fundamental form of speedy trial prejudice. *Barker*, 407 U.S. at 532; *see, e.g.*, *MacDonald*, 456 U.S. at 8 ("The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial . . . and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."). Indeed, the "major evils protected against by the speedy trial guarantee" involve the deprivation of the defendant's liberty, which can "disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Marion*, 404 U.S. at 320. In addition, when "a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker*, 407 U.S. at 533. Prejudice is thus "inevitably present in every case" where the defendant is "incarcerated pending trial." *Moore*, 414 U.S. at 27 (quoting *Barker*, 407 U.S. at 537 (White, J., concurring)); *see also Dickey*, 398 U.S. at 53 (Brennan, J., concurring) (noting that prejudice is "obvious . . . if the accused has been imprisoned for a lengthy period awaiting trial").

Here, petitioner was incarcerated for the entirety of the nearly-nine-year delay before his 2013 trial. The fact that a portion of this pretrial incarceration was concurrent with a prior sentence is of no moment, as this Court has already rejected the argument that "a man already in prison under a lawful sentence" cannot "suffer from 'undue and oppressive incarceration prior to trial.'" *Smith v. Hooey*, 393 U.S. 374, 378 (1969). Moreover, petitioner's prior sentence ended in 2009, and he thus sat in jail for over four years solely on pending charges. The idea that "lengthy [pretrial] incarceration" does not amount to "affirmative proof of prejudice" (Pet. App. 13a) ultimately condones what the Speedy Trial Clause condemns: that the presumptively innocent "shall not be worn and wasted by long imprisonment" prior to trial. *Betterman*, 136 S. Ct. at 1614 (citation omitted).

In sum, the nearly-nine-year delay in this case—all caused by the State—warrants a presumption of prejudice, and petitioner's extended pretrial incarceration serves as proof of actual prejudice. By requiring more, the court below ignored several of this Court's precedents and profoundly distorted the speedy trial guarantee. Its holding reflects "a fundamental error in its application of *Barker* that calls for this Court's correction." *Brillon*, 556 U.S. at 91.

III. This Case Is An Ideal Vehicle For Resolving The Important Questions Presented.

Certiorari is especially warranted because this case presents a perfect opportunity to resolve two important questions of constitutional law.

1. To start, this case is an ideal vehicle. Both questions were fully presented and addressed below. The trial court detailed its findings of fact in a written

order denying petitioner's speedy trial motion. The North Carolina Court of Appeals accepted those findings, conducted a *Barker* analysis, and held that petitioner (1) failed to meet his burden of "present[ing] . . . evidence of negligence or willfulness by the State" and (2) failed to produce "affirmative proof of prejudice." Pet. App. 11a–13a; *see also* Pet. App. 20a (concluding that petitioner "failed to carry his burden of showing either any negligence or willfulness by the State caused the length of delay in his trial"). After briefing and oral argument, the North Carolina Supreme Court summarily dismissed. The case is still on direct appeal, carrying none of the complications often associated with habeas review. And the pertinent facts are undisputed: there was a nearly-nine-year delay, petitioner did not cause any of it, and he was incarcerated during all of it.

2. Moreover, the questions presented are critically important. As "one of the most basic rights preserved by our Constitution," the Sixth Amendment right to a speedy trial reflects the "basic demands of criminal justice in the Anglo-American legal system." *Smith*, 393 U.S. at 375, 378 (citation omitted). This case directly concerns two of the four factors that implement this bedrock guarantee, and "[b]ecause the *Barker* factors must be viewed collectively," the legal errors below "could very well have affected the outcome." *Boyer v. Louisiana*, 133 S. Ct. 1702, 1707 (2013) (Sotomayor, J., dissenting).

Indeed, the North Carolina Supreme Court's gloss on *Barker* has allowed the State to impose significant pretrial delays with impunity. For example, despite this Court's clear admonition that "delays caused by overcrowded court dockets" weigh against the State, *Strunk*, 412 U.S. at 436 (citing *Barker*, 407 U.S. at 531), North Carolina "courts have consistently recognized

congestion of criminal court dockets as a valid justification for delay." *Spivey*, 579 S.E.2d at 254–55 (four-and-one-half-year delay); *see State v. Hammonds*, 541 S.E.2d 166, 173 (N.C. Ct. App. 2000), *aff'd*, 554 S.E.2d 645 (N.C. 2001) (four-and-one-half-year delay); *State v. Strickland*, 570 S.E.2d 898, 903 (N.C. Ct. App. 2002) (two-and-one-half-year delay); *State v. Spinks*, 523 S.E.2d 129, 132 (N.C. Ct. App. 1999) (five-year delay). Other "valid" reasons for delay in North Carolina include crime lab backlog, *State v. Goins*, 754 S.E.2d 195, 198 (N.C. Ct. App. 2014) (two-year delay), and transcript preparation, *State v. Berryman*, 624 S.E.2d 350, 358 (N.C. 2006) (six-year delay).

The importance of *Barker*'s framework is amplified by the fact that defendants in some states—including North Carolina—have no other safeguard against lengthy pretrial delays. North Carolina repealed its Speedy Trial Act almost thirty years ago, *see* N.C. Gen. Stat. § 15A-701 *et seq.* (repealed 1989), making the constitutional right to a speedy trial the only mechanism for ensuring that charges against the presumptively innocent are speedily discharged. In fact, before the Act was repealed, "the State ha[d] the burden" in statutory speedy trial claims "of going forward with evidence to show that periods of time should be excluded from the computation." *State v. Kivett*, 364 S.E.2d 404, 406 (N.C. 1988). That, of course, is no longer the case, and having conflicting constitutional frameworks in the lower courts means that similarly-situated defendants enjoy widely disparate protections against pretrial delay based solely on geography.

Finally, lower courts continue to struggle with "the confusing web of federal discussion in this area." *Gonzales v. State*, 435 S.W.3d 801, 814 (Tex. Crim. App. 2014); *see also, e.g.*, *United States v. Ferreira*, 665 F.3d

701, 711 (6th Cir. 2011) (Kethledge, J., dissenting) ("[w]e need more guidance than we now have"). Granting this petition would allow the Court to correct the decision below, provide some much-needed guidance to lower courts, and reiterate its "recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Barker*, 407 U.S. at 533.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS
OF NORTH CAROLINA

No. COA14-1251

Filed: 6 October 2015

Union County, Nos. 04 CRS 56522, 05 CRS 17

STATE OF NORTH CAROLINA

v.

JOHN JOSEPH CARVALHO, II

Appeal by defendant from judgment entered 7 April 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 1 June 2015.

TYSON, Judge.

John Joseph Carvalho, II ("Defendant") appeals from judgment entered upon jury verdicts finding him guilty of first-degree murder and of robbery with a dangerous weapon. We find no error in Defendant's conviction or judgment entered thereon.

I. Factual Background

The evidence tended to show: On 28 April 2000, George N. Kastansis ("Mr. Kastansis") died of multiple gunshot wounds at his place of business, Avondale Grocery, located in Monroe, North Carolina. A warrant was issued for Defendant's arrest on 16 November 2004, over four and one-half years later, for the murder of Mr. Kastansis. The grand jury indicted Defendant for first-degree murder and robbery with a firearm on 3 January

2005. Defendant knew Mr. Kastansis through an illegal gambling partnership they had run out of Avondale Grocery. The State's theory of guilt was that Defendant killed Mr. Kastansis, because he was preventing Defendant from continuing his involvement in their gambling partnership, costing Defendant "thousands of dollars."

On the same date, the State also charged Defendant with the murder of Robert Long ("Mr. Long"). The grand jury indicted him for the first-degree murder of Mr. Long on 3 January 2005. The State initially filed an intention to seek the death penalty for both murders, but later requested that the trial court try both cases as non-capital. The trial court ordered both cases against Defendant be tried non-capitally on 19 December 2008.

The State tried Defendant for the death of Mr. Long in 2009. The trial court declared a mistrial after the jury deadlocked. The State tried Defendant for the murder of Mr. Long a second time in 2010 and the trial court again declared a mistrial because of a deadlocked jury.

The State's primary evidence against Defendant in both murders of Mr. Long and Mr. Kastansis was the testimony of an informant, William C. Anderson ("Anderson"). Anderson was incarcerated with Defendant in 2004. Anderson testified that during his incarceration with Defendant, Defendant purportedly confessed to killing both Mr. Long and Mr. Kastansis. Anderson testified at Defendant's first trial for the murder of Mr. Long. At Defendant's second trial for the murder of Mr. Long, Anderson invoked his Fifth Amendment right against self-incrimination and refused to testify. Anderson said he believed that if he testified he might say something incorrectly and perjure himself.

When Anderson testified at Defendant's first trial for the murder of Mr. Long, the State also entered into evidence an audiotaped conversation between Anderson

and Defendant ("the audiotape"). The audiotape did not contain an actual confession, but rather a wide-ranging conversation, which touched on the murders of Mr. Long and Mr. Kastansis, as well as other potentially criminal acts. The sound quality of the audiotape was very poor and the State Bureau of Investigation ("SBI") made efforts to clarify the audiotape.

After Defendant's two mistrials for the murder of Mr. Long, the State again sought to secure the testimony of Anderson and to improve the quality of the audiotape. The SBI first contacted the Federal Bureau of Investigation ("FBI") for its assistance to clarify the audiotape on 24 March 2011. On 26 April 2011, the FBI stated it could not clarify the audiotape due to internal policies prohibiting such action and relinquished custody of the audiotape on 6 July 2011. The FBI recommended the SBI hire the Target Forensic Services Laboratory ("Target Forensic"). An SBI agent sent the audiotape to Target Forensic on 28 July 2011. Target Forensic completed work on the audiotape and sent the SBI a clarified version on 24 April 2012.

Some portions of the audiotape remained inaudible. Anderson made handwritten notes transcribing the content of the conversation on a printed copy of the transcript to supplement the inaudible portions of the audiotape. The SBI prepared a transcript of the conversation that occurred between Anderson and Defendant during their incarceration.

The conversation between Anderson and Defendant did not include a confession to the murders of either Mr. Long or Mr. Kastansis. The conversation contained details of the events surrounding Mr. Kastansis's death, including the following: (1) Defendant attended Mr. Kastansis's funeral and blessed the body with a "very . . .

theatrical movement[;]" (2) Defendant mentioned investigators had charged the wrong man in connection with Mr. Kastansis's murder; (3) Defendant's knowledge of and involvement in an illegal poker scam that Defendant and Mr. Kastansis ran out of Avondale Grocery; and, (4) Defendant's comment after investigators showed Defendant a picture of Mr. Kastansis's children, in which Defendant stated "he didn't care about [Mr. Kastansis's] kids."

The remainder of the conversation covered a wide range of criminal activity, including stealing money, acting as hitmen, using firearms to kill, killing a "Gypsy," how to attain serial killer status, committing murder "with control," and how to dismember a body and feed it to catfish. The conversation ended soon after Defendant suspected Anderson was wearing a wire, and said: "[I]t [sic] my life. The rest of my life . . . you're the only one in here I talk to . . . you're the only one here I trust only one I trust . . . you don't think they know that?"

Investigators met with Anderson on 9 December 2011 to determine his willingness to testify at Defendant's trial for the murder of Mr. Kastansis. Anderson told investigators he had refused to testify in Defendant's second trial for Mr. Long's murder "because of the way he was treated" by Union County, while in its custody. Anderson was concerned for his safety because Union County held him with other inmates, who knew he was testifying against someone in a murder trial. Anderson agreed to testify after investigators agreed to some of his stipulations. Anderson reiterated everything he had said during Defendant's trial for the murder of Mr. Long.

The State initiated plea bargain discussions with Defendant in December 2012. The State and Defendant did not reach a plea agreement and discussions ended on 9

April 2013. Defendant filed a motion to dismiss the charges based upon a speedy trial violation on 3 December 2012, before the State began plea negotiations with Defendant. In his motion, Defendant asserted he was denied his constitutional right to a speedy trial due to the overall length of his imprisonment, as well as a lack of evidence sufficient to obtain a conviction due to Anderson's unwillingness to testify. Defendant also alleged his lengthy imprisonment had "crushed" any ability to post his one million dollar bond. Defendant stated defense counsel had "repeatedly" asked about the State's intentions regarding his cases, but Defendant had "received no definitive answer."

The State provided the following reasons for the potential delay at the hearing on Defendant's motion to dismiss:

> (1) The complex nature of the cases. While factually separate and distinct from one another the two cases are intertwined in that Bill Anderson is the key witness in each case.
>
> (2) That with two separate murder charges significant amounts of discovery were generated.
>
> (3) Prior to both trials (Long and Kastansis) the State and defense engaged in substantial plea negotiations in an effort to find a resolution that was mutually satisfying to each Party.
>
> (4) The defendant was arraigned on the Long murder on December 16, 2008; tried in this case on September 9, 2009 which resulted in a hung jury and a mistrial on September 15, 2009.
>
> (5) The defendant was retried on the Long murder on March 22, 2010 which resulted in a hung jury and a mistrial on March 30, 2010.

> (6) Following the mistrial on March 30, 2010, the State sought to enhance the quality of the audio tape conversation between the defendant . . . and Bill Anderson.
>
> (7) The efforts to clarify the audio recording began in March 2011 and were completed in July 2012.
>
> (8) Efforts to resolve issues with Bill Anderson to secure his testimony in future trials.

On 6 June 2013, the trial court held a hearing on Defendant's motion to dismiss and entered an order denying Defendant's motion on 2 January 2014. In its written order, the trial court made the following conclusions of law:

> 2. The length of delay 4 years 10 months (November 16, 2004 to September 8, 2009) and 5 years 4 months (November 16, 2004 to March 22, 2010) between the date the defendant was charged and his two trials in Richard Long's murder cases and a period of 8 years 7 months (November 16, 2004 to June 6, 2013) between the date the defendant was charged and the hearing on defendant's Motion to Dismiss (Speedy Trial) is sufficient enough in each case to trigger analysis of the speedy trial factors.
>
> 3. The defendant . . . has failed to offer any evidence to establish that neglect or willfulness by the State is the reason for delay in each case.
>
> 4. The State's reasons for the delay in the trial of each murder case . . . are reasonable and valid justifications for the delay in each case.
>
> 5. The defendant . . . until his Motion to Dismiss filed on December 3, 2012, never asserted his right to a speedy trial.

> 6. The defendant . . . failed to establish that he suffered actual, substantial prejudice as a result of the delay in the trial of his two murder cases.
>
> 7. The Court in its evaluation and balancing of the four factors enumerated in Baker v. Wingo, concludes as a matter of law that the defendant's right to a speedy trial has not been violated.

The State tried Defendant for the murder of Mr. Kastansis and robbery with a firearm on 7 October 2013. The trial court declared a mistrial after the jury deadlocked. Six months later, Defendant was tried a second time for the murder of Mr. Kastansis and robbery with a firearm on 1 April 2014. Defendant moved to dismiss the charges at the close of the State's evidence, and again at the close of all of the evidence. The trial court denied Defendant's motions.

A jury found Defendant guilty of first-degree murder and robbery with a firearm on 7 April 2014. The trial court arrested judgment on Defendant's conviction for robbery with a dangerous weapon and sentenced Defendant to life imprisonment without parole on the first-degree murder conviction.

Defendant gave notice of appeal in open court.

II. Issues

Defendant asserts three arguments on appeal: (1) that the almost nine years between his arrest in 2004 and his trial for the murder of Mr. Kastansis in 2013 violated his constitutional right under the Sixth Amendment to the United States Constitution and Article I, Section 8 of the North Carolina Constitution; (2) that the trial court should have denied admission of a jailhouse audiotape and corresponding transcript because of its irrelevancy and unfairly prejudicial effect; and (3) that the trial court should have intervened in the State's closing arguments

because the State used evidence, limited by the trial court to a narrow purpose, as substantive proof of Defendant's guilt.

III. Analysis

A. Speedy Trial

Defendant first contends the State violated his state and federal constitutional rights to a speedy trial because an almost nine-year delay occurred between his 2004 indictment for the murder of Mr. Kastansis and Defendant's motion to dismiss in 2012.

1. Standard of Review

This Court applies a *de novo* standard of review for a constitutional issue on appeal. *See State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). It is a defendant's burden to demonstrate prejudicial and reversible error. If the appellate court finds error, the State carries the burden to rebut by showing the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443 (2013).

2. Analysis

The Supreme Court of the United States established a four-factor balancing test to assess a potential violation of a defendant's right to a speedy trial, as cited by the trial court. *See Barker v. Wingo*, 407 U.S. 514, 530–33, 33 L. Ed. 2d 101, 115–19 (1972). These factors are: (1) the "[l]ength of delay;" (2) "the reason for the delay[;]" (3) "the defendant's assertion of his right[;]" and, (4) "prejudice to the defendant." *Id.* at 530, 33 L. Ed. 2d at 117.

"[N]one of the four factors identified [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 533, 33 L. Ed. 2d at 118. While the four factors guide the process, "these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.*

The right to a speedy trial is unique among other constitutional guarantees "in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself[.]" *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978). "[I]t is impossible to determine precisely when the right has been denied; . . . and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial." *Id.*

(a) Length of Delay

In order to "trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial." *Doggett v. United States*, 505 U.S. 647, 651–52, 120 L. Ed. 2d 520, 528 (1992) (internal quotation marks omitted). As time passes, "the presumption that pretrial delay has prejudiced the accused intensifies." *Id.* at 652, 120 L. Ed. 2d at 528. "Depending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." *Id.* at 652 n.1, 120 L. Ed. 2d at 528 n.1.

Here, almost nine years elapsed between the time the State indicted Defendant in 2004 and the time of the June 2013 hearing on his motion to dismiss. This delay clearly

passes the demarcation into presumptively prejudicial territory and triggers the *Barker* analysis. *See State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997) (explaining "presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry" (internal quotation marks omitted)), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *see, e.g.*, *Doggett*, 505 U.S. at 652, 120 L. Ed. 2d at 528 (calling an eight-and-one-half-year-long delay "extraordinary").

The almost nine-year delay, while also "extraordinary," "is not *per se* determinative of whether a speedy trial violation has occurred," and requires careful analysis of the remaining factors. *Id.* *See State v. Webster*, 337 N.C. 674, 678-79, 447 S.E.2d 349, 351 (1994) (deciding sixteen-month delay from arrest to trial did not presumptively indicate a speedy trial violation had occurred, but was enough to "trigger examination of the other factors").

(b) Reason for Delay

A defendant must demonstrate the delay stemmed from either negligence or willfulness on the part of the State. *State v. Marlow*, 310 N.C. 507, 521, 313 S.E.2d 532, 541 (1984). Ordinary or reasonable delays do not create prejudice. *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969). A speedy trial claim prevents only those delays that were "purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *Id.*

"A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *Id.* at 269, 167 S.E.2d at 278. Once a

defendant shows a *prima facie* case for negligence or willfulness, the State bears the burden of showing there were reasonable circumstances surrounding the delay. *See McKoy*, 294 N.C. at 143, 240 S.E.2d at 390.

Defendant has failed to show the delay stemmed from either negligence or willfulness on the part of the State. *Compare Webster*, 337 N.C. at 679, 447 S.E.2d at 351 (finding a sixteen-month delay, where the district attorney calendared the trial six different times, did not demonstrate negligence or willfulness), *with McKoy*, 294 N.C. at 141–42, 240 S.E.2d at 389 (finding delay factor in favor of defendant because defendant presented evidence that the "failure to bring defendant to trial during the next ten months . . . was due to the willful neglect of the prosecution and could have been avoided by reasonable effort"). Defendant presented no evidence of negligence or willfulness by the State in his motion to dismiss, or at the hearing on his motion.

Defendant merely established the timeline showing how the two murder cases had proceeded over time. As discussed *supra*, the length of delay alone does not prove the State denied Defendant a speedy trial. *See Webster*, 337 N.C. at 678, 447 S.E.2d at 351. Although Defendant asserted in his motion to dismiss that defense counsel had asked "repeatedly" for information on the progression of the cases and had received "no definitive answer," no other motions were filed and Defendant did not present any evidence regarding those inquiries.

Evidence described the timelines of all four trials and the actions the State took to bring the two distinct murder cases to trial. The more significant elements that contributed to the length of the proceedings were: (1) changing the trials for Mr. Long's and Mr. Kastansis's murders from capital to non-capital; (2) plea discussions between Defendant and the State; (3) clarification of the

audiotape and generation of a transcript, including seeking help from the SBI, the FBI and Target Forensic; (4) securing the testimony of the State's key witness, Anderson; and, (5) the interconnectedness of the two murders. While we are concerned about the sixteen-month delay from enhancing the audiotape previously used at Defendant's trials for the murder of Mr. Long, Defendant has failed to carry his burden of showing the reasons for the delays stemmed from either negligence or willfulness on the part of the State.

(c) Assertion of the Right

Defendant's failure to demand a speedy trial does not result in a waiver of the speedy trial violation. *See Barker*, 407 U.S. at 528, 33 L. Ed. 2d at 115. While a "[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Flowers*, 347 N.C. at 28, 489 S.E.2d at 407. Defendant first asserted his right to a speedy trial on 3 December 2012, some eight years after Defendant was first indicted in 2004. No evidence in the record shows Defendant requested or moved for a speedy trial any earlier than in 2012.

(d) Prejudice Resulting from Delay

Prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118. The identified interests the constitutional right to a speedy trial protects are: (1) avoiding prolonged imprisonment; (2) reducing anxiety of the accused; and (3) creating the opportunity for the accused to assert and exercise their presumption of innocence. *See id.* The last of these interests is the most important

aspect to the speedy trial right, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Defendant has not shown any affirmative proof of prejudice. He asserts only his lengthy incarceration "crushed" any financial ability to post his one million dollar bond. Defendant does not argue he was either unduly anxious or that his case preparation was impaired by the delay. *Compare Flowers*, 347 N.C. at 29, 489 S.E.2d at 407 (finding that defendant failed to show prejudice when he was already incarcerated, alleviating concerns over oppressive pretrial incarceration, and any allegation of impairment to his defense was not supported by the record), *with State v. Chaplin*, 122 N.C. App. 659, 665, 471 S.E.2d 653, 657 (1996) (finding prejudice when the defendant could no longer find his key witness).

We have reviewed and considered each of the *Barker* factors. Defendant failed to carry his burden to demonstrate a speedy trial violation. We affirm the trial court's ruling denying Defendant's motion to dismiss. We hold the trial court did not err after it determined the State did not violate Defendant's state or federal constitutional right to a speedy trial. Defendant's argument is overruled.

B. Admission of Audiotape and Corresponding Transcript

Defendant argues the trial court erred in admitting, over his objection, portions of the audiotape and corresponding transcript, which included a conversation between Defendant and Anderson, while both men were incarcerated.

Defendant challenges portions of the audiotape and transcript in which Defendant discusses: (1) plans to commit a future armed robbery and murder; (2) how

many killings it takes to become a serial killer; (3) becoming a hitman; (4) committing murder "with control;" and (5) dismembering a body and feeding it to catfish. Defendant contends the evidence was irrelevant under Rules 401 and 404(b) and unfairly prejudicial under Rule 403, and should have been excluded. We disagree.

1. Standard of Review

Our Supreme Court held:

> when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

2. Analysis

(a) 404(b) Evidence

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a

defendant's prior crimes, statements, actions and conduct is admissible, if relevant to any fact orissue other than the defendant's character. *Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159. North Carolina Rules of Evidence 404(b) is a rule of inclusion, not exclusion. *Id.* at 131, 726 S.E.2d at 159. *See also State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

> The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial] . . . .

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

Our Supreme Court has ruled Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (emphasis in original)(citation omitted).

The trial court found the audiotape and transcript of portions of Defendant's conversations with Anderson served a "proper purpose," in that "these statements are necessary to show the full context of the confidential relationship between Mr. Anderson and [Defendant]."

Anderson's credibility was crucial to the State's case and this finding clearly falls within the purview of admissible evidence under Rule 404(b). *See State v. White*, 340 N.C. 264, 285-86, 457 S.E.2d 841, 853 (1995) (holding "knowledge of the relationship between [the witness] and defendant was necessary in order for the jury to assess [the witness's] credibility and determine what weight to

give his testimony"); *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (noting 404(b) evidence is admissible if it serves to enhance the natural sequence or development of facts).

This evidence was properly admitted under the North Carolina Rules of Evidence, Rule 404(b). *Coffey,* 326 N.C. at 278-79, 389 S.E.2d at 54 (holding Rule 404(b) is a rule of inclusion). The trial court also gave the jury a limiting instruction regarding the purpose for which the jury could consider the evidence. The jury is presumed to have followed these instructions. *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (citation omitted) ("We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with th[e limiting] instruction by the court.").

Defendant's conversation with Anderson was not admitted to show Defendant had a propensity to commit crimes. Rather, the challenged portions of the conversation were admitted for the limited purposes to show: (1) Defendant trusted and confided in Anderson; (2) the nature of their relationship, in that Defendant was willing to discuss the commission of murder and robbery with Anderson; and (3) relevant factual information to Defendant's murder charge for which he was on trial. The challenged portions of the conversations bolstered Anderson's credibility as a witness. The trial court did not err in concluding that Rule 404(b) permitted admission of these statements into evidence.

(b) Rule 403 – Unfair Prejudice

The trial court's admission of portions of the audiotape and transcript alsodid not violate Rule 403. "Evidence which is probative of the State's case necessarily

will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted). The trial court determined the probative value of this evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on Defendant "based on the State's purpose for offering this evidence."

The trial court also gave a specific limiting instruction to the jury, both at the time the audiotape was played before the jury and during the instruction to the jury. This limiting instruction stated:

> Evidence has also been received tending to show that Bill Anderson and the defendant . . . engaged in conversations concerning the future commission of criminal acts, serial killing, and the dismembering of a body. *This evidence was received solely for the purpose of showing the nature and context of the relationship between Bill Anderson and . . . [Defendant].*

(emphasis supplied).

The trial court redacted some of the transcript, balanced the factors to allow admission of the remaining portions, and found the admission of the audiotape and transcript was for a permissible purpose under Rule 404(b). The trial court also specifically limited its use in its instructions to the jury. Defendant has failed to show the trial court's process or admission of this evidence constitutes an abuse of discretion.

Defendant argues any relevance of this evidence was outweighed by "danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Under the applicable standard of review, this Court cannot substitute its own judgment for that of the trial court. Given the importance of the credibility of Anderson's testimony to the State's case, we cannot conclude the trial court was manifestly

unreasonable in determining the relevance of the redacted version of the transcript, when combined with the limiting instruction, substantially outweighed any unfair prejudice to Defendant. When combined with the trial court's limiting jury instruction, the probative value substantially outweighed any unfair prejudice to Defendant. *Id.* Defendant has failed to show the admission of this evidence violated Rule 403. *State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602 (2004) (citation and internal quotation marks omitted) ("In each case, the burden is on the defendant to show there was no proper purpose for which the evidence could be admitted [under Rule 404(b)]."). Defendant's argument is overruled.

C. Closing Arguments

Defendant asserts the State's closing arguments were "grossly improper," and warrant a new trial. We disagree.

1. Standard of Review

"The standard of review when a defendant fails to object at trial is whether the closing argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. McCollum*, 177 N.C. App. 681, 685, 629 S.E.2d 859, 861-62 (2006) (citation and internal quotation marks omitted).

"In determining whether the prosecutor's argument was . . . grossly improper, this Court must examine the argument in the context in which it was given and in the light of the overall factual circumstances to which it refers." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and cor-

recting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *Id.* (citation and internal quotation marks omitted).

2. Analysis

The Supreme Court of the United States held for a new trial to be granted for remarks made during closing arguments,

> it is not enough that the prosecutor['s] remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor['s] comments so infected the trial court with unfairness as to make the resulting conviction a denial of due process.

Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (citations and internal quotation marks omitted).

The State used evidence from the audiotape and transcript throughout its closing argument. However, the State did not mention nor discuss Defendant's conversations with Anderson about: (1) the commission of criminal acts in the future; (2) serial killing; (3) being a hitman; or, (4) dismembering a body and feeding it to the catfish. These portions of Defendant's and Anderson's conversation were admitted into evidence solely for the limited purposes stated above.

The State did not ask the jury to use the challenged evidence to convict Defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner.

To the extent Defendant's remark that murder must be committed with "control," which occurred during his discussion of serial killers and hitmen, fell within the

scope of the trial court's limiting instruction, we cannot conclude the State's references to this statement were so grossly improper that the trial court should have intervened *ex mero motu*. *See State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003) (prosecutor's comments during closing argument to effect that inculpatory statement murder defendant made to sheriff deputy, offered to impeach defendant, should be considered as substantive testimony, was not so grossly improper that trial court abused its discretion in failing to intervene *ex mero motu*; instruction given was adequate to advise jury that defendant's statement, which he denied making, was being admitted for limited purpose of impeaching defendant's truthfulness).

Defendant failed to object to the State's closing arguments at trial. It is difficult, now on appeal, to credit and accept his argument that the State's closing argument constituted "an extreme impropriety." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001).

Defendant has failed to establish any gross or plain error or impropriety in the State's closing arguments to warrant a new trial. The State's closing arguments did not "so infect[] the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

IV. Conclusion

Defendant failed to carry his burden of showing either any negligence or willfulness by the State caused the length of delay in his trial. Even with a troubling and "extraordinary" almost nine-year delay, Defendant's state and federal constitutional right to a speedy trial

were not violated. *Doggett*, 505 U.S. at 652, 120 L. Ed. 2d at 528.

The challenged portions of the audiotaped conversation between Defendant and Anderson were relevant and properly admitted into evidence under Rules 401, 403, and 404(b). Defendant has failed to demonstrate that the trial court abused its discretion in determining the probative value of the audiotaped conversation substantially outweighed any unfair prejudice.

Defendant has failed to carry his burden of showing any gross or plain error or impropriety in the State's use of the audiotaped conversation during closing arguments.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judge GEER concurs.

Chief Judge McGEE concurs in part and dissents in part in a separate opinion.

McGEE, Chief Judge, concurring in part, dissenting in part.

I concur in the majority's opinion that Defendant failed to carry his burden to demonstrate that the State violated his constitutional right to a speedy trial and that Defendant failed to carry his burden of showing any gross or plain error or impropriety in the State's closing arguments. However, I respectfully dissent from the majority's determination that the challenged portions of the audiotape and corresponding transcript were properly admitted as evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b).

As the majority recognizes, the North Carolina Supreme Court recently held that N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403 require "distinct inquiries with different standards of review." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Specifically, "[w]e review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

Rule 404(b) generally is a "rule of *inclusion*" and "evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (internal quotation marks omitted). While evidence is not admissible to prove the character of the accused, it ordinarily is admissible for purposes such as "to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment, or accident," as well as for other purposes not enumerated in the rule. *State v. Cashwell*, 322 N.C. 574, 578, 369 S.E.2d 566, 568 (1988). For instance, our Supreme Court has concluded that a defendant's inculpatory statements to another may be properly admitted under Rule 404(b) where such testimony is necessary to "show a confidential relationship between th[at] witness and the defendant," when knowledge of such a relationship "was necessary in order for the jury to assess [the testifying witness's] credibility and determine what weight to give his testimony concerning [the] defendant's confession to th[e] crime." *State v. White*, 340 N.C. 264, 285–86, 457 S.E.2d 841, 853, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

In support of Defendant's assertion that the trial court erred by admitting the challenged portions of the audiotape and transcript in which Defendant and Anderson discussed plans to commit a future armed robbery

and murder, how many killings it takes to become a serial killer, becoming a hitman, committing murder "with control," and dismembering a body and feeding it to catfish, Defendant directs this Court's attention to *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988), and *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995).

In *Cashwell*, the defendant was charged with two counts of first-degree murder. *Cashwell*, 322 N.C. at 574, 369 S.E.2d at 566. While the defendant was in jail for an unrelated charge of the attempted murder of his girlfriend, the defendant told a fellow inmate about the charge for which he was then presently in jail and, about a month later, made incriminating statements to the same inmate concerning the details of the first-degree murder charges. *See id.* at 575–76, 369 S.E.2d at 567. At trial, the State introduced evidence from the inmate and from a detective corroborating the inmate's testimony that the defendant said he was in jail for the attempted murder of his girlfriend. *See id.* at 576, 369 S.E.2d at 567. The State argued that the inmate's testimony and the detective's corroborating testimony about the attempted murder charge "were competent for the purpose of showing the relationship between [the inmate] and [the] defendant that led up to [the] defendant's inculpatory statements a month later" concerning the first-degree murder charges. *Id.* at 577, 369 S.E.2d at 568.

However, the *Cashwell* Court determined that, in accordance with the definition of "relevant evidence" under N.C. Gen. Stat. § 8C-1, Rule 401, "the testimony of these two witnesses that [the defendant] was in jail on a charge of attempted murder of his girlfriend [wa]s not relevant," because this statement by the defendant "[did] not go to prove the existence of any fact that [wa]s of consequence in the determination of the two charges of murder on which defendant was found guilty." *Id.* The *Cashwell* Court further determined that such evidence "was not

relevant to any fact or issue other than the character of the accused[,]" contrary to the proscription of N.C. Gen. Stat. § 8C-1, Rule 404. *Id.* at 578, 369 S.E.2d at 568. Because the Court concluded "[t]he challenged testimony in no way was necessary to show the full context of [the] defendant's confession, nor was it required in order to show any confidential relationship between [the] defendant and [the testifying inmate,]" *id.*, the Court found this testimony to be "irrelevant and immaterial to the later inculpatory statements made by [the] defendant to [the inmate about the first-degree murder charges.]" *Id.* Accordingly, after determining that the admission of such testimony constituted prejudicial error, the *Cashwell* Court held that the defendant was entitled to a new trial. *Id.* at 580, 369 S.E.2d at 569.

In *White*, the defendant was tried in 1993 for the first-degree murder of her four-year-old stepson. *White*, 340 N.C. at 270–71, 457 S.E.2d at 845. After the child's death in 1973, which was originally determined to be accidental, the medical examiner "extracted a large piece of a plastic laundry bag from the child's throat," which "was tightly wadded up," "came out in one piece," and "was large enough to cover [an adult's] hand and three-fourths of [an adult's] arm." *Id.* at 271–72, 457 S.E.2d at 845. Almost twenty years later, the defendant was alleged to have conspired to kill her husband. *Id.* at 272, 457 S.E.2d at 846. During one of the six meetings the defendant had with her co-conspirators to allegedly discuss her husband's murder, one of the co-conspirators "expressed hesitation about taking someone's life, and [the] defendant encouraged [him] to murder her husband" by telling him: "'[I]t's not that hard to do. I had a step-child. I put a bag over it until it stopped breathing. It was better off.'" *Id.*

At the defendant's trial in *White* for the murder of her stepson, the defendant moved to exclude the evidence of her alleged involvement in her husband's murder on the grounds that the admission of this evidence would violate Rules 404(b) and 403, which motion was denied. *Id.* at 281, 457 S.E.2d at 851. The defendant argued that "the only probative value of this evidence was to show that she had the propensity to commit murder and that because she had conspired to murder her husband, she must also have murdered her stepson twenty years before." *Id.* at 283, 457 S.E.2d at 852.

However, in *White*, the trial court found that the evidence of the defendant's "involvement in the conspiracy" to murder her husband "was necessary for the natural development of the facts and to complete the story of this murder for the jury, in particular, to explain the context of [the] defendant's confession to [the co-conspirator] that she murdered her stepchild by smothering him with a plastic bag." *Id.* at 284, 457 S.E.2d at 853. Our Supreme Court agreed that the defendant's confession to her co-conspirator "would have been difficult to understand without the historical details and context giving rise to the statement," *id.*, and determined that, "[a]bsent evidence of [the] defendant's relationship with [the co-conspirator], the jury would have been unable to determine [the witness's] credibility or what weight to give his testimony." *Id.* Thus, the Court concluded that, "[e]ven though the two incidents were separated by nineteen years, they were inextricably intertwined, and it would have been impossible to develop this relationship for the jury without revealing [the] defendant's participation in the conspiracy to murder her husband." *Id.* at 284–85, 457 S.E.2d at 853. Accordingly, the Court held that this evidence "was not merely probative of [the] defendant's propensity to commit murder and was properly

admitted under Rule 404(b)." *Id.* at 285, 457 S.E.2d at 853.

In *White*, the Court distinguished *Cashwell* by recognizing that, in *Cashwell*, in order to show a confidential relationship between the witness and the defendant, the defendant's "inculpatory statement to his cellmate about the attempted murder of the defendant's girlfriend" was "not necessary to show the context" in which the "additional inculpatory statements to his cellmate about a different crime, a double murder, for which he was eventually tried," were made, because the first statement was "irrelevant and immaterial to the subsequent inculpatory statement." *White*, 340 N.C. at 285, 457 S.E.2d at 853. However, the Court determined that, in *White*, "knowledge of the relationship between [the co-conspirator] and [the] defendant was necessary in order for the jury to assess [the witness's] credibility and determine what weight to give his testimony concerning [the] defendant's confession to th[e] crime." *Id.* at 285–86, 457 S.E.2d at 853. The Court further determined that the defendant's statement was "inextricably intertwined with the evidence of [the] defendant's alleged involvement in her husband's murder and could not be meaningfully isolated." *Id.* at 286, 457 S.E.2d at 853–54. Thus, the *White* Court concluded that the challenged testimony was properly admitted under Rule 404(b), and that the trial court did not abuse its discretion under Rule 403 "by concluding that the probative value of the *interwoven evidence* of [the] defendant's confession and involvement in her husband's murder outweighed any prejudicial effect such evidence might have had against her." *Id.* at 286, 457 S.E.2d at 854 (emphasis added).

In the present case, Defendant objected to portions of the transcript that dealt with plans to commit a future armed robbery and murder, how many killings it takes to become a serial killer, becoming a hitman, committing

murder "with control," and dismembering a body and feeding it to catfish. As the majority recognizes, "[t]he trial court found the audiotape and transcript of portions of Defendant's conversations with Anderson served a 'proper purpose,' in that 'these statements [we]re necessary to show the full context of the confidential relationship between [Anderson] and [Defendant].'" However, I disagree with the majority's conclusion that "this finding clearly falls within the purview of admissible evidence under Rule 404(b)." Without the challenged portions of the audiotape and transcript, the remaining conversation between Defendant and Anderson would have been sufficient to demonstrate the confidential nature of their relationship. In the unchallenged portions of the audiotape and transcript, Defendant and Anderson openly discussed elements surrounding Mr. Kastansis's death, including Defendant's "theatrical" blessing of Mr. Kastansis's body, Defendant's attempt to implicate a man who sold cigarettes at Avondale Grocery as Mr. Kastansis's murderer, Defendant's knowledge and involvement in the illegal poker scam run out of Avondale Grocery, and Defendant's lack of empathy towards Mr. Kastansis's children. Furthermore, additional testimony at trial established that Anderson and Defendant knew each other before their incarceration through family connections and by Defendant's habit of frequenting Avondale Grocery. Thus, unlike *White*, the challenged portions of the audiotape and transcript in the present case were not so "inextricably intertwined" as to require their admission, nor were they "necessary in order for the jury to assess [Anderson's] credibility and determine what weight to give his testimony[.]" *See White*, 340 N.C. at 285–86, 457 S.E.2d at 853. Instead, as in *Cashwell*, "[t]he challenged testimony in no way was necessary . . . in order to show any confidential relationship between

[D]efendant and [Anderson.]" *See Cashwell*, 322 N.C. at 578, 369 S.E.2d at 568.

Therefore, while I agree with the majority that "Anderson's credibility was crucial to the State's case," because I believe the challenged evidence was irrelevant and immaterial and not admitted for a proper purpose under N.C. Gen. Stat. § 8C-1, Rule 404(b), I must respectfully dissent.

APPENDIX B

IN THE SUPREME COURT
OF NORTH CAROLINA

No. 369A15

Filed 21 December 2016

STATE OF NORTH CAROLINA

v.

JOHN JOSEPH CARVALHO, II

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 78 (2015), finding no error after appeal from a judgment entered on 7 April 2014 by Judge Christopher W. Bragg in Superior Court, Union County. On 17 March 2016, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 12 October 2016.

PER CURIAM.

As to the issue before this Court under N.C.G.S. § 7A-30(2), the decision of the Court of Appeals is affirmed. Further, we conclude that the petition for discretionary review as to the additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

APPENDIX C

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
UNION COUNTY		SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	04 CRS 56520, 56522
	)	
	)	ORDER ON MOTION
Vs.	)	TO DISMISS (SPEEDY
	)	TRIAL)
JOHN JOSEPH CARVALHO,	)	
	)	
Defendant		

This matter coming before the undersigned Superior Court Judge during a regularly scheduled session of Criminal Superior Court for Union County, North Carolina, with the State represented by Assistant District Attorneys Jonathan Perry and Thomas Leitner and the Defendant represented by Robert Trobich. The Court following a review of the court file, evidence presented and arguments of counsel makes the following.

FINDINGS OF FACT

1. On April 28, 2000, George N. Kastansis is murdered.
2. On December 4, 2002, Richard Long is murdered.
3. On August 15, 2003, the Defendant, John Joseph Carvalho begins serving an active prison sentence on unrelated drug charges.
4. On November 16, 2004, the Defendant, John Joseph Carvalho, is charged with First Degree Murder in the deaths of George Kastansis (04 CRS 56522) and Richard Long (04 CRS 56520).

5. On November 19, 2004, IDS Director Robert Hurley assigns attorney Robert Trobich to represent the Defendant, John Joseph Carvalho.
6. On January 3, 2005, the Defendant, John Joseph Carvalho is indicted by the Union County Grand Jury on two counts of First Degree Murder for the deaths of George Kastansis and Richard Long.
7. On January 7, 2005, the State files Application for Rule 24 Pre-Trial Conference and announces intention to seek the death penalty.
8. On March 10, 2005, the Rule 24 Pre-Trial Conference was held before the Honorable Christopher Collier, Superior Court Judge.
9. During the Rule 24 hearing the State announced its intent to seek the death penalty and Judge Collier ordered the Capital Defender to appoint the Defendant, John Joseph Carvalho, a second attorney.
10. On July 13, 2005, IDS Director Robert Hurley assigns Scott Gsell as second attorney to represent the Defendant, John Joseph Carvalho.
11. On December 19, 2008, the State filed a second Rule 24 Pre-trial Conference Motion and declared its intention to NOT seek the death penalty.
12. On December 19, 2008, the Honorable Richard T. Brown, Superior Court Judge, signed an order declaring each of the Defendant's cases to be non-capital and attorney Scott Gsell was allowed to withdraw.
13. On September 8, 2009, the Defendant, John Joseph Carvalho, is tried for the murder of Richard Long (04 CRS 56520).
14. On September 15, 2009, the Honorable W. David Lee, Superior Court Judge, determines the jury is hopelessly deadlocked and declares a mistrial.

15. On November 5, 2009, the defendant, John Joseph Carvalho, is released from the North Carolina Department of Corrections, and is transferred to the Union County Jail.

16. On December 3, 2009, the Honorable W. David Lee, Superior Court Judge, after a bond hearing sets bond at $1,000,000 for the Defendant, John Joseph Carvalho.

17. On March 22, 2010, the Defendant, John Joseph Carvalho, is retried for the murder of Richard Long (04 CRS 56520).

18. In the retrial of the defendant, John Joseph Carvalho, a key witness for the State, Bill Anderson, who testified in the first trial, invoked his 5th Amendment right against self-incrimination and refused to testify.

18. On March 30, 2010, the Honorable W. David Lee, Superior Court Judge, determines the jury is hopelessly deadlocked and declares a mistrial.

19. Following the second mistrial in the Long case, the State, through the actions of the North Carolina State Bureau of Investigation, took further efforts to enhance the audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson.

20. The audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson took place in September 2004 while both individuals were incarcerated at Brown Creek Correctional Institution.

21. The quality of the audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson can be best described as poor.

22. Following the March 30, 2010, mistrial, the North Carolina State Bureau of Investigation through the efforts of Target Forensic Services Laboratory in Minnesota was able to enhance and clarify the audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson.

23. Based on the enhanced audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson the North Carolina State Bureau of Investigation prepared a transcript of said conversation.

24. In July 2012, the enhanced and clarified audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson was provided to the defendant's attorney, Robert Trobich, as part of ongoing discovery.

25. While the State was working to enhance the quality of the audio taped conversation between the defendant, John Joseph Carvalho, and Bill Anderson, prosecutors were also meeting with Bill Anderson to determine his willingness to testify in future trials.

26. After discussions with Bill Anderson by prosecutors, he agreed to, and did, testify against the defendant, John Joseph Carvalho.

27. On December 3, 2012, by and through his attorney, the defendant, John Joseph Carvalho, filed a Motion to Dismiss based on his denial of a speedy trial.

28. Prior to his Motion to Dismiss, the defendant, John Joseph Carvalho, by and through counsel had not filed a request for a speedy trial.

29. From December 2012, to April 2013, the State and the Defendant engaged in extensive plea negotiations, and at one time in April 2013, had approached the undersigned presiding judge to determine if the Court would accept the proposed plea agreement.

30. The Court was informed in May 2013, that plea negotiations had broken down and a hearing on the Motion to Dismiss (speedy trial) was scheduled for hearing on June 6, 2013.

31. The Court on June 6, 2013, held a hearing on Defendant's Motion to Dismiss which is based on the denial of defendant's right to a speedy trial.

32. The Court received exhibits, memorandum of law, case law and heard the oral arguments of counsel.

33. In his argument to the Court and in his Motion to Dismiss, counsel for the defendant argues that extensive pretrial confinement "crushed" any financial ability the defendant may have had to post bond pending trial of the Long and Kastansis.

34. Other than the prolonged period of pretrial confinement, the defense offered no other evidence or argued any other fact that the delay in prosecuting his cases has prejudiced the defendant, John Joseph Carvalho.

35. The defendant was charged with the murder of Richard Long on November 16, 2004, and was tried for this murder in Union County Criminal Superior Court on September 8, 2009, and March 22, 2010.

36. A period of approximately 4 years 10 months (November 16, 2004, to September 8, 2009) and 5 years 4 months (November 16, 2004, to March 22, 2010) exits between the date the defendant was charged and his two trials in Richard Long's murder cases.

37. A period of 8 years 7 months (November 16, 2004, to June 6, 2013) exists between the date the defendant was charged and the hearing on his Motion to Dismiss (Speedy Trial) in the George Kastansis murder case (04 CRS 56522).

39. The United States Supreme Court in Baker v Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972) identified four factors to consider in determining whether a defendant has been denied his right to a speedy trial:

    (1) Length of delay
    (2) Reason for delay
    (3) Defendant's assertion of his right
    (4) Prejudice to the defendant

40. To trigger a speedy trial analysis "an accused must allege that the interval between accusation and the trial has crossed the threshold dividing ordinary from presumptively prejudicial delay" Doggett v. United States, 505 U.S. 647, 652 (1992).

41. The North Carolina Supreme Court and the North Carolina Court of Appeals have held that a 16 month delay, State v. Webster, 337 N.C. 647, 679 (1994), and a 20 month delay, State v Dorton, 172 N.C. App. 759, 763 (2005), are presumptively prejudicial to trigger examination of the remaining speedy trial factors of Baker.

42. The defendant bears the burden of showing that the delay was caused by neglect or willfulness of the prosecution, State v. Jones, 310 N.C. 716, 721 (1984); see also State v Spivey, 357 N.C. ·114 (2003); State v. McBride, 187 N.C. App. 496 (2007).

43. The defendant's Motion to Dismiss does not allege any facts or accuse the State of willful misconduct in the delay of bringing the defendant's case to trial.

44. The defendant in oral arguments to the Court on this Motion to Dismiss did not raise or argue any acts of willful misconduct by the State in the delay of bringing the defendant's case to trial.

45. The defendant appears to contend the State was negligent in failing bring the defendant's case to trial.

46. The defendant alleges in his Motion to Dismiss

    (1) That no new discovery was provided in either case (Long, Kastansis) for several years
    (2) No further investigation in either case had occurred in several Years
    (3) The State's failure to bring the case to trial is recognition of insufficient evidence against the defendant.

47. The State posited the following reasons for delay

    (1) The complex nature of the cases. While factually separate and distinct from one another the two cases are intertwined in that Bill Anderson is the key witness in each case.
    (2) That with two separate murder charges significant amounts of discovery were generated.
    (3) Prior to both trials (Long and Kastansis) the State and defense engaged in substantial plea negotiations in an effort to find a resolution that was mutually satisfying to each Party.
    (4) The defendant was arraigned on the Long murder on December 16, 2008; tried in this case on September 9, 2009 which resulted in a hung jury and a mistrial on September 15, 2009.
    (5) The defendant was retried on the Long murder on March 22. 2010 which resulted in a hung jury and a mistrial on March 30, 2010.
    (6) Following the mistrial on March 30, 2010, the State sought to enhance the quality of the audio tape conversation between the defendant, John Joseph Carvalho, and Bill Anderson.

(7) The efforts to clarify the audio recording began in March 2011 and were completed in July 2012.

(8) Efforts to resolve issues with Bill Anderson to secure his testimony in future trials.

48. The Court in an email to the State and defense dated July 25, 2013, informed counsel of its decision to deny defendant's Motion Dismiss based on a violation of his right to a speedy trial.

49. The defendant, John Joseph Carvalho was tried for the murder of George Kastansis (04 CRS 56522) on October 7, 2013.

50. The defendant's trial for the murder of George Kastansis ended on October 17, 2013, when the undersigned presiding judge determined the jury was hopelessly deadlocked and declared a mistrial.

51. A special session of Superior Criminal Court for Union County is scheduled for February 3, 2014, for the retrial of the defendant, John Joseph Carvalho, for the murder of George Kastansis (04 CRS 56522).

Based on the foregoing Findings if Fact the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has personal as well as subject matter jurisdiction to determine the issue presented.

2. The length of delay 4 years 10 months (November 16, 2004 to September 8, 2009) and 5 years 4 months (November 16, 2004 to March 22, 2010) between the date the defendant was charged and his two trials in Richard Long's murder cases and a period of 8 years 7 months (November 16, 2004 to June 6, 2013) between the date the defendant was charged and the hearing on defendant's Motion to Dismiss (Speedy

Trial) is sufficient enough in each case to trigger analysis of the speedy trial factors.

3. The defendant, John Joseph Carvalho, has failed to offer any evidence to establish that neglect or willfulness by the State is the reason for delay in each case.
4. The State's reasons for the delay in the trial of each murder case (see Finding of Fact 47) are reasonable and valid justifications for the delay in each case.
5. The defendant, John Joseph Carvalho, until his Motion to Dismiss filed on December 3, 2012, never asserted his right to a speedy trial.
6. The defendant, John Joseph Carvalho, failed to establish that he suffered actual, substantial prejudice as a result of the delay in the trial of his two murder cases.
7. The Court in its evaluation and balancing of the four factors enumerated in Baker v. Wingo, concludes as a matter of law that the defendant's right to a speedy trial has not been violated.

Based on the foregoing Findings of Fact and Conclusions of Law the Court

ADJUDGES, DECREES and ORDERS

1. The defendant's Motion to Dismiss, based on a denial of his right to a speedy trial, filed December 3, 2012, is denied.

Entered this the 31 day of December 2013.

/s/
C.W. Bragg
Superior Court Judge

[Filed: January 2, 2014]

APPENDIX D

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
UNION COUNTY		SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	04 CRS 56522, 05CRS17
	)	
	)	JUDGEMENT/ORDER
Vs.	)	OR OTHER
	)	DISPOSITION
JOHN JOSEPH CARVALHO, II, Defendant	)	

Defendant's Motion for Complete Recordation & Sequestration of Witnesses is granted. Sequestration of witnesses will apply for both State & defense; State may have lead investigator to remain in the courtroom.

Defense Motion About Accommodations for Mr. Anderso – State states that Mr. Anderson is only receiving the regular accommodations as all inmates of the Union County Jail & nothing more.

Defense renews Motion to Dismiss on the grounds of Speedy Trial – Motion is denied.

Date: 3/31/14

/s/

Hon. Christopher W. Bragg
Presiding Judge

APPENDIX E

NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
UNION COUNTY		SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
	)	
VS.	)	TRANSCRIPT
	)	
JOHN CARVALHO Defendant.	)	

Transcript of the testimony of William Charles Anderson, held on March 26, 2010, in Superior Court, Union County, Monroe, North Carolina, before The Honorable W. David Lee, Judge Presiding.

PAGES 1 – 14

ORDERED: March 26, 2010
DELIVERED: March 26, 2010

APPEARANCES

Stephen Higdon and Jonathan Perry
Assistant District Attorneys
Union County District Attorney's Office
P.O. Box 1065
Monroe, North Carolina 28111
(On Behalf of the State)

Robert K. Trobich
Attorney at Law
(On Behalf of the Defendant)

WILLIAM CHARLES ANDERSON, AFTER BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS DURING DIRECT EXAMINATION BY MR. HIGDON: (VOIR DIRE)

Q Mr. Anderson, can you hear me all right, sir?

A Yes, sir.

Q Okay.

THE COURT REPORTER: Can I get his name?

Q Could you just give us your full name, sir?

A William Charles Anderson.

Q Okay. Now you've had an opportunity to speak to Mr. Brown today, is that correct?

A Yes, sir.

Q Okay. And you understand -- you're not -- you're not having any physical problems or anything like that, that would prohibit you from testifying today, is that correct?

A Yes, sir.

Q Okay. You're able to understand what I'm saying and hear me all right, is that correct?

A Yes, sir.

Q Okay. And you're telling us at this point that you're making a decision based on what you understand your Fifth Amendment Right to be, that you're making a decision not to testify, is that correct?

A Yes, sir.

Q Okay. And you understand that to mean that you're -- you're not testifying because you do not want to testify and say anything that might incriminate yourself in any way, is that correct?

A Yes, sir.

Q Okay. I believe that's all, Your Honor.

THE COURT: Mr. Trobich, any questions?

MR. TROBICH: No questions, Your Honor.

(Discussion between the parties and the Court, not transcribed at this time.)

REDIRECT EXAMINATION BY MR. HIGDON: (VOIR DIRE)

Q Mr. Anderson, what would you testify to in here that could possibly inculpate you in anything?

A (No response.)

Q Do you understand that we're saying? What -- what in these transcripts has to do with anything that could get you in anymore trouble?

A So much has happened and y'all have quizzed and been at me from so many angles and so many different district attorneys and police, I might perjure myself through this mess. I don't know -- I'm so confused now, I don't know what's going on anymore.

Q Okay. Well, you understand you're in a courtroom in a murder trial, you understand that?

A Yes, sir, I understand it.

Q Okay. And you understand that the testimony that we're expecting to ask of you would be virtually the same questions that were asked of you at a prior trial. Do you understand that?

A Yes, sir.

Q Okay. And you've had an opportunity to review the transcript from the prior trial, is that correct?

A Yes, sir.

Q Okay. Did you get a chance to do that today with your attorney?

A No, sir. I didn't review it with him.

Q Okay. But you've had an opportunity to review it before, haven't you?

A Yes, sir.

Q Okay. So you're familiar with the questions and answers that would -- would come out of your testifying. Isn't that correct?

A Pretty much so.

Q Okay. Can you tell us how any of those questions and answers could possibly get you in any more trouble?

A As I said, my testimony could possibly perjure myself.

Q Can you explain what you mean by that?

A I mean this case is years and years old and that y'all have come to me four or five years after this thing originally happened and I didn't even remember half of this testimony until you give it to me again, over and over and over.

Q Are you saying that you're just going to refuse to answer any questions that are asked about the subject matter?

A If that simplifies this process, yes, sir, that's what I'm saying.

Q Well, I'm asking you for the truth. I'm not asking you the simplest way to get on out of here. I'm asking you for the truth, Mr. Anderson.

A I thought I just give you the truth, that I really don't even know what to testify to anymore. Y'all have kept coming at me after I had forgotten most of this stuff I testified to. The only reason I remember this is because y'all keep refreshing my memory. When you've got four and five different people telling you he said this

and he said that, over and over and over, and convincing you of it, but I don't know. I'm not going to perjure myself.

Q I understand. Have you to your knowledge, have you perjured yourself before in this --

A To my knowledge, no, sir.

Q Okay. When you came down here earlier in the week, did you intend to testify then?

A I didn't even know I was coming down here.

Q Okay. But when you were on the way down, you knew what you were down here for, right?

A Yes, sir. I knew what I was coming for.

Q Okay. And at that time did you intend to testify then?

A Yes, sir.

Q Okay. But you're saying you don't intend to testify now?

A Yes, sir, that's exactly what I'm saying.

Q Okay.

MR. HIGDON: I don't think I have anything more, Your Honor.

THE COURT: Any questions, Mr. Trobich?

MR. TROBICH: I think so. I think so, Your Honor.

CROSS EXAMINATION BY MR. TROBICH: (VOIR DIRE)

Q Mr. Anderson, and -- and I don't want to put words in your mouth. I'm trying to understand what -- what you just said to Mr. Higdon about possibly perjuring yourself and -- and coming at you with information, okay; so I want to make sure I understand, okay. Is it your belief at this point that there is the possibility that

should you testify today or tomorrow or in this trial currently, that that testimony would substantially differ from what you gave in September?

A Yes, it's possible.

MR. TROBICH: I have no further questions, Your Honor.

THE COURT: All right. Mr. Anderson, let me ask a few questions because we're all trying to understand what the basis of your concerns are, and I want to be sure that I understand what you've said to this point. With respect to your last response, that your testimony could be substantially different than it was back in September, is that because you simply have a lack of memory as to what you said then, or is it a matter of you truly don't want to testify?

A Your Honor, I -- honestly, I -- the first time I testified, I didn't -- I had a lack of memory of a lot of the testimony.

THE COURT: All right.

A It was refreshed to me by several different people over and over and over.

THE COURT: Right.

A And, you know, I'm not going to get up here and just swear to something and just knowing that -- you know what I mean, that it's been put back in my memory by someone else.

THE COURT: Right. Do you understand that these attorneys, if you choose to testify, can refresh your memory by making reference to this earlier transcript? And to the extent that this earlier testimony either conflicts with or is consistent with what you said before, you -- you would be able to respond as to those matters.

A Yes, sir.

THE COURT: All right. Are you willing to do that? Are you willing to answer questions, understanding that these attorneys can cross examine you with respect to either any consistency or inconsistency with your earlier testimony?

A Your Honor, with no disrespect to the Court, I just don't wish to testify in this trial any longer. It's been -- I've been through this for six years now, and it's just an ongoing process.

THE COURT: All right. I have reviewed the transcript, and I think as I've already indicated earlier to these lawyers, I don't think there's anything in your earlier testimony that incriminates you or could lead to evidence that would incriminate you with respect to these pending charges.

A Yes, sir.

THE COURT: And it's my understanding that you're Fifth Amendment privilege arises because you've got these other charges pending.

A Yes, sir.

THE COURT: So if there's no privilege there, then it gets to be a question in my mind of whether there's simply a refusal on your part to testify. I take what you said to be a refusal, or at least, I think as you expressed it, a wish not to testify further.

A Yes, sir.

THE COURT: You wish not to do that. I am compelled to tell you that if the questions are posed to you that are within what's set forth in this transcript and you do not respond or if you tell me now you're unwilling to respond, then you may be held in contempt.

A Yes, sir.

THE COURT: And I know that your attorney I'm sure has discussed that with you, and the penalty for contempt is thirty days in prison, five hundred dollar fine, or both. With that understanding and recognizing that at this point I consider your wish not to testify to be a refusal on your part not to testify, is it still your intent not to testify?

A Yes, sir.

THE COURT: All right.

(End of matters requested.)

CERTIFICATE

STATE OF NORTH CAROLINA

COUNTY OF UNION

I, Melody C. Trout, the officer before whom the foregoing proceeding was taken do hereby certify that said hearing, pages 1 through 14 inclusive, is a true, correct and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, nor employed by any of the parties of the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the trial.

Whereas spellings of proper names, places, etc., could not be obtained by the court reporter, said spellings are spelled phonetically.

/s/

MELODY C. TROUT
OFFICIAL COURT REPORTER