No. 16-1087

In the
Supreme Court of the United States

JOHN JOSEPH CARVALHO, II,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina Court of Appeals correctly held that petitioner's Sixth Amendment right to a speedy trial was not violated where the trial court—faced with a defendant who put on no showing in support of his motion, and made no argument as to burden—weighed each of the factors under this Court's *Barker* test before concluding that the pre-trial dismissal of two murder charges was not warranted.

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The decision 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 superior court's order is reproduced in the Appendix to the petition. (Pet. App. 30a-38a)

STATEMENT

A. The *Barker* Test.

The Sixth Amendment to the United States Constitution provides a criminal defendant with the right to a speedy trial. This right is not only "'amorphous,' 'slippery,' and 'necessarily relative,'" but "'consistent with delays and depend[ent] upon circumstances.'" *Vermont v. Brillon*, 556 U.S. 81, 89 (2009) (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)). This Court has thus refused various inflexible approaches—*e.g.*, to quantify the right into a time certain, "hinge" it to an explicit request, or elevate prejudice over all other factors. *Id.*; *see also Doggett v. United States*, 505 U.S. 647, 655 (1992).

This Court instead favors the flexible balancing test first set forth in *Barker*. *Brillon*, 556 U.S. at 89. Under that test, the factors courts should weigh include "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. None of the four is dispositive; "they are related . . . and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities [and] courts must still engage in a difficult and sensitive balancing process." *Id.* at 533.

B. Facts.

1. On April 28, 2000, petitioner shot and killed George Kastansis shortly after he closed the Avondale Grocery in Monroe, North Carolina, for the night. Petitioner had the strong motives of resentment and monetary gain. The Grocery was less a rural convenience store, and more a front for an illegal video poker gaming operation run out of the back room. (Tr. 460, 471, 485-86, 693, 719-20)[1] Petitioner—an employee of the store—previously partnered with George in a scam using an electronic device to cheat the poker machines into giving large payouts. (Tr. 585-87, 610-15, 694, 701, 705, 976-77, 1001-02) That lucrative scam ended when George himself bought the store, fired petitioner, and would no longer allow him to use the device. (Tr. 977, 1002)

On the night of the murder, George not only had the monies from the day's take, he had an additional $12,000 in cash on him, reserved to buy additional poker machines for the gaming operation. (Tr. 563-71, 575, 610, 637-47) This money, as well as the payout money kept under the counter, the currency in the poker machines, and the money in the register till, was stolen. (Tr. 474, 487, 514-19, 701)

Petitioner proved to be the last person to see George alive. Petitioner borrowed a vehicle from his niece so that he could "go over and talk to George," "[knowing] that George closed the store around 9 p.m." (Tr. 812) When he arrived at closing, the only other person at the store was a regular, Don Griffin, who was playing a machine in the back room. (Tr. 649-56,

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[1] Citations to "Tr. ___" refer to the transcript of the trial proceeding in Union County, North Carolina Superior Court.

674, 697-98) Petitioner lingered, waiting for Griffin to leave.

When Griffin did leave at 9:05 p.m., George had already opened up the machines to clean them out for the night, and was counting money. (Tr. 657-60, 761-66, 814) Per petitioner, George then went behind the counter to count the money, as petitioner stayed, "sat on a bar stool next to the counter," and talked with George. (Tr. 815) This stool was found overturned the next morning, with a wrapper of petitioner's favorite bubblegum next to an ashtray on the counter above it. (Tr. 484, 487, 704) The other physical evidence showed that George was killed before he had a chance to clean up around the machines, which he did nightly at closing. (Tr. 581-84, 702-03)

After Griffin left, George received two phone calls. The first was from a regular; the second was from George's wife who wanted George to say goodnight to their children. This call was placed around 9:15 p.m., and lasted roughly five minutes. (Tr. 577-79, 592) Petitioner admitted that he was still present in the store during this call. (Tr. 813-14) What he did not know was that Lisa Yandle, a woman who lived nearby, returned home and stepped outside to smoke around 9:15 p.m. (Tr. 685-89) At that time, she heard "four or five shots" ring out from the direction of the Grocery. (Tr. 686-87)

After the murder, perhaps in an effort to create alibis, and out of character, petitioner drove the borrowed vehicle around to several places. This included a trip to the Food Lion across town, instead of the closer one; calling his niece from the pay phone at the Food Lion, instead of his cell phone, to pick her up to go to a bar around 10:30 p.m.; leaving her there after having one drink to travel to a strip-club where he sat

for hours drinking Coca-Cola; finally, leaving there around 2:00 a.m. to go to the Waffle House. (Tr. 768-79, 811-18) These attempted alibis might have held up had Yandle not heard the shots when petitioner was still at the Grocery.

George was found murdered the next morning by his employee, with the door locked to the outside, and the "Closed" sign still on the door. There were no signs of forced entry. (Tr. 491) There were also no fingerprints found at all on the doorway or countertop, which was unusual (Tr. 491-92, 525-27), suggesting these areas had been wiped down.

George had been shot six times (out of eight shots) with a .25 caliber gun while coming out from behind the counter, including three times to the chest and once to the top of the head. (Tr. 495-96, 500-07, 541-47) In his statement that day, petitioner slipped up, revealing that he knew George had not only been shot but shot in the head, prior to that information being disclosed to the public. (Tr. 700, 708, 819)

Petitioner later confessed the murder to his friend, William Anderson.[2] Its details proved it reliable, as

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[2] Petitioner offers Anderson as a "jailhouse informant," motivated solely by a reduction in prison sentence. Not so. Anderson was a long-time friend prior to prison: petitioner knew Anderson's family, and worked with his brother; he bought a truck from Anderson's father; they met a few times at a poker room, and Anderson had even visited the Grocery at least once before; in prison, they spoke "hundreds of times," worked out or played cards every day for over a year, and were such close friends they signed up to be transferred together. (Tr. 943-50) Anderson received no consideration in exchange for his testimony—despite his already testifying twice before—and in fact had 26 years left to serve. (Tr. 938-39) He testified because "[he] would

petitioner told Anderson about matters that he could not otherwise know, including precisely how he and George scammed the machines, and how the device worked; that he killed George because he stopped the scam, and was bragging about having a lot of money on him; his going to George's funeral, where he made a theatrical show of "the crucifix over [George's] body"; that he cursed him because George wouldn't "go down" easily, and he had to "put the [whole] clip in him" to kill him; that he used a small caliber pistol; and that "police had interrogated him and had shown him pictures of George's kids" to make him feel guilty. (Tr. 975-77, 990, 1001-03, 1018-19) All of these matters were corroborated by outside evidence and testimony, including witnesses who saw petitioner's odd actions at George's funeral. (Tr. 589, 627-28)

Anderson told SBI Agent Underwood about petitioner's confessions (Tr. 996-1004), and was willing to go to the extraordinary, and dangerous, step of not once but twice wearing a wire to corroborate the confession. (Tr. 948-60) Those taped statements proved petitioner had spoken to Anderson previously about the murder (a crime for which petitioner had not yet been charged, and Anderson would otherwise know nothing about), and they casually discussed, and captured, the motive on tape. (R88-89)[3] Petitioner discussed his actions at George's funeral, steering police to another suspect, and laughed about the victim's children not having a father. (R86, 88, 90) The tape

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want justice if somebody [had] done that to [his] family." (Tr. 981)

[3] Citations to "R" refer to the Record on Appeal filed in the North Carolina Court of Appeals.

was also notable for what it lacked—petitioner demanding to know why Anderson was discussing facts surrounding a murder that petitioner did not commit or had never discussed with Anderson.

When petitioner found the wire, not knowing that it was the only time Anderson successfully recorded him, his own words condemned him. Petitioner implored that "it [was his] life," "[t]he rest of [his] life," pleading that Anderson was the "only one in here [he] talk[ed] to . . . the only one here [he] trust[ed]." (R96)

Petitioner was charged with George's murder on November 16, 2004. Petitioner, having also made statements on the tape (redacted for this trial) about the murder of his brother-in-law, Richard Long, was also charged with the Long murder the same day.

2. On June 6, 2013, the superior court considered petitioner's speedy trial claim and found the following:

• Petitioner was convicted and in prison on unrelated charges from 2003 until November 5, 2009.[4] (Pet. App. 30a, 32a)

• Petitioner was charged with the two separate, and unrelated, murders in late 2004, and the matter was proceeding capitally. (*Id.* at 31a) Each case was "complex" but intertwined, and "significant amounts of discovery were generated"; "[p]rior to both trials . . . the State and defense engaged in substantial

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[4] Petitioner complains he "languished" in prison on this charge (Pet. 2), ignoring that he was already serving a prison sentence well before he was charged, and for five years thereafter.

plea negotiations in an effort to find a resolution that was mutually satisfact[ory]." (*Id.* at 36a, 38a)

• On December 19, 2008, petitioner's murder cases were declared non-capital—presumably to his benefit—and his second counsel was allowed to withdraw. (*Id.* at 31a)

• Less than a year later, on September 8, 2009, petitioner was tried for the murder of Richard Long; this first trial occurred while he was still serving his unrelated prison sentence. Then, approximately seven months later, on March 22, 2010, petitioner was retried for that same murder. (*Id.* at 31a-32a)

• After these mistrials, attempts were made to investigate other leads, as well as to enhance the inculpatory statements petitioner made to Anderson, a key witness in both cases. The audio was poor, and the State made efforts first through the SBI, and then with the FBI. The FBI was unable to clarify the audio in mid-2011, and recommended an outside agency, Target Forensic, which was able to clarify the recording in 2012. (R17-34; Pet. App. 32a-33a; *see also id.* at 36a; HT. 7-11, 31)[5]

• The State received this new evidence on April 24, 2012 (R18; HT. 11), and petitioner was provided it in discovery. (Pet. App. 33a) During this same time, the State was continuing to work on its case, including seeking to secure the testimony of Anderson against petitioner in the Kastansis case. (*Id.*; *see also* HT. 22-24, 27)

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[5] Citations to "HT. ___" refer to the transcript of the motions hearing held June 6, 2013 in Union County, North Carolina Superior Court.

• On December 3, 2012, for the very first time, petitioner complained about delay in his cases. (Pet. App. 33a)

• He did so in conjunction with his desire for a plea deal, and instead of seeking trial, petitioner engaged in "extensive plea negotiations." These negotiations were delayed by defense counsel's need to consult with his client, delay in getting back to the State, and counsel's trial schedule. (R35-47; Pet. App. 33a-34a; *see also* HT. 6, 27) And it appeared petitioner wished to enter a guilty plea as late as April 9, 2013. (*See* R39-41) Petitioner himself "want[ed] to stay in custody for another 57 days or so before he plead[ed guilty]." (R39)

• Plea negotiations did not break down until May 2013. (Pet. App. 34a) Petitioner's motion was heard the next month.

The superior court acknowledged that *Barker* governed (*id.* at 35a), and considered each of the four factors, before denying the motion. The court first considered the length of delay. (*Id.* at 37a) As to the second factor, it found that petitioner "did not raise or argue" and failed to "allege any facts or accuse the State of [any] willful misconduct in the delay." (*Id.* at 35a) And it both found and concluded that while petitioner "appear[ed] to contend the State was negligent," he "failed to offer any evidence to establish that neglect or willfulness by the State [was] the reason for delay in each case." (*Id.* at 35a, 36a, 38a) Nevertheless, the court acknowledged the reasons given by the State explaining any delay, and it credited those reasons—set forth in finding of fact no. 47—as "valid" and "reasonable." (*Id.* at 38a) As to the third factor, the court found that petitioner never asserted his right to a speedy trial until December 3, 2012. (*Id.*) And as to the fourth and final factor, it concluded that petitioner

"failed to establish that he suffered actual, substantial prejudice as a result of the delay in the trial of his two murder cases." (*Id.*) "[I]n its evaluation and balancing of [these] four factors," the court concluded that petitioner's right to a speedy trial had not been violated. (*Id.*)

At the time of the hearing, trial was set for September 2013 (HT. 24-25), with petitioner actually tried on October 7, 2013. When that resulted in a mistrial, petitioner was tried again on March 31, 2014.

Petitioner did not seek to re-visit his evidentiary showing or argument after his motion was denied, and did not complain of any delay between the June 6, 2013 hearing and the second trial. At that trial, he renewed his earlier motion only for preservation purposes. (*See* Tr. 15) A jury convicted petitioner of first-degree murder and robbery with a firearm.

C. Lower Court Proceedings.

1. Petitioner appealed to the North Carolina Court of Appeals. There, he argued the speedy trial issue, a Rule 404(b) issue, and error with the closing argument; he did not contest the sufficiency or reliability of the evidence. The three-judge panel evaluated each of the *Barker* factors in light of the superior court's findings of fact, and unanimously held that no speedy trial violation occurred. (Pet. App. 8a-13a, 21a) First, the court considered the length of the delay, citing *Doggett*, and noting that "[a]s time passes, 'the presumption that pretrial delay has prejudiced the accused intensifies.'" (Pet. App. 9a) The court considered the length of the delay "extraordinary," but noted that it was not *per se* determinative of the issue, and "require[ed] careful analysis of the remaining factors." (*Id.* at 10a (citations omitted))

Second, the court considered the reasons for the delay, acknowledging that "[a] defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee . . . into a vehicle in which to escape justice." (*Id.* (citation omitted)) The court further acknowledged that "[o]nce 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." (Pet. App. 11a) The court discussed the lack of showing by petitioner at the hearing, before turning its attention to the reasons given by the State at the hearing. The court credited the State's reasons as the "more significant elements" that contributed to the delay, and ultimately found that these reasons did not show neglect. (*Id.* at 11a-12a) The court of appeals also specifically discredited petitioner's allegations—that he had "asked 'repeatedly'" about his case or to be tried earlier—as not supported by any evidence. (*Id.* at 11a)

Third, the court considered petitioner's assertion of the right, finding that he had not done so for eight years. "No evidence in the record shows Defendant requested or moved for a speedy trial any earlier than [December] 2012." (*Id.* at 12a)

Fourth, and finally, the court of appeals considered the allegations of prejudice resulting from the delay. It discussed the interests identified in *Barker* before ruling that petitioner had not shown any affirmative proof of prejudice, and had not even argued that "he was unduly anxious or that his case preparation was impaired by the delay." (Pet. App. 13a) The court offered as petitioner's "only" "assert[ion]" that his lengthy incarceration harmed his financial ability to make bond. (*Id.*)

After considering each of these factors, the court of appeals concluded that petitioner had not carried his burden to show a speedy trial violation. One judge dissented on the Rule 404(b) issue alone. (*Id.* at 21a)

2. Petitioner appealed of right to the Supreme Court of North Carolina on the Rule 404(b) issue. He also filed a petition and notice seeking discretionary review of the speedy trial issue under North Carolina's statutory framework for doing so. *See Ross v. Moffitt*, 417 U.S. 600, 613-15 (1974) (explaining this framework). At first, the supreme court allowed the petition. After briefing and argument, however, the supreme court dismissed the petition—and thus the speedy trial issue—as improvidently granted, declining to reach the merits of the claim. (Pet. App. 29a) The court affirmed *per curiam* on the Rule 404(b) issue. (*Id.*)

REASONS FOR DENYING THE PETITION

No one disputes that the superior court and court of appeals applied the correct test, namely, the four-part balancing test enunciated in *Barker*. Petitioner contends, however, that the state courts misapplied two of the test's prongs. His claims do not warrant this Court's review for multiple reasons.

As to the first question presented, he failed even to suggest to the North Carolina courts that it was improperly placing on him the burden of proof on the reasons for delay. Beyond that, petitioner overstates the difference between North Carolina's approach and other courts' approach. North Carolina *does* place the burden on the State, after the defendant makes a *prima facie* showing that the delay was the State's fault. And any difference between the approaches was immaterial here. The superior court specifically found

that 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" (Pet. App. 38a), a conclusion the court of appeals affirmed.

Petitioner's arguments with respect to the prejudice prong are equally unavailing. The North Carolina Court of Appeals acknowledged that prejudice should sometimes be presumed—specifically citing *Doggett*—but reasonably concluded that such a presumption was not warranted here. Petitioner's contention that his ability to present a defense was presumptively harmed is belied by his failure to argue to the North Carolina Court of Appeals that "he was either unduly anxious or that his case preparation was impaired by the delay" (Pet. App. 13a); by his trial strategy, which emphasized the staleness of witnesses' recollections; and by his failure to offer even a single shred of evidence to support the claim. Petitioner's contention that his incarceration constituted *actual* prejudice fares no better. He was imprisoned on a different conviction for five of those years, and no decision of this Court supports his counterintuitive argument that courts should ignore that obviously relevant fact.

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION PRESENTED.

A. The First Question Presented Was Not Raised Or Squarely Ruled Upon Below.

Petitioner has never previously asserted that the North Carolina courts uniquely or improperly shifted the burden to him to show neglect. His claim that this "question[was] fully presented and addressed below" is simply wrong. (Pet. 27)

First, in the superior court he did not challenge whose burden it was to show neglect, apparently accepting that it was at least his to make out a *prima facie* case; he only argued that he had shown neglect on the State's part. (*See, e.g.,* HT. 57-59) And the superior court did not explicitly pass on this question. To the extent its order touches upon the "reasons for the delay," the court concluded that the reasons given by the State were "reasonable and valid justifications" (Pet. App. 38a), thus suggesting it had at least in part placed the burden upon the State to explain away any identified delay. As it was not asked to pass on the question of burden, the superior court's order does not present petitioner's first question.

Second, in his appeal to the court of appeals he did not argue that North Carolina uniquely or improperly shifted the burden to him; indeed, the word "burden" appears nowhere in his briefs. (*See* Pet'r N.C. Ct. App. Br. 14-25; N.C. Ct. App. Reply Br. 1-4)[6] To the contrary, he primarily complained that the trial court gave too much credit to the State's proffered reasons; *i.e.*, he assumed the burden had shifted.

Not surprisingly, then, the court of appeals did not squarely address this question. It merely cited other North Carolina cases (Pet. App. 10a-11a), before addressing in turn each of the *Barker* factors in light of the unchallenged findings of fact. As to the second factor, the court considered whether the State's reasons for any delay evinced neglect or were sufficient to jus-

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[6] Briefs in the North Carolina Court of Appeals ("N.C. Ct. App. Br.") are available on Westlaw or at: https://www.ncappellatecourts.org/

tify the challenged delay, crediting as the more "significant elements" those same reasons credited by the trial court. (*Id*. at 11a-12a)

Third, in his petition to the Supreme Court of North Carolina, he not only failed to challenge the State's burden rule, he undermined the argument he presents here. There, he cited North Carolina cases that shift the burden to the State, and offered that "[t]he State, the trial court, and the Court of Appeals appear to have accepted that Mr. Carvalho established a prima facie case of neglect due the inordinate length of the delay," shifting the burden to the prosecution, which then "offered several reasons for the lengthy delay." (N.C. Pet. 13)[7] While his petition went on to disparage as insufficient each of these reasons, it did not once contend that North Carolina, or the court of appeals, had imposed any inappropriate burden upon him, *prima facie* or otherwise. (*Id.* at 14-18) Most importantly, the petition never asked the state supreme court to consider the issue of burden, or to revisit or overrule any of its earlier cases he now claims conflict with *Barker*. (*See* Pet. 18)

Finally, petitioner incorrectly asserts that the state supreme court addressed and ruled upon his first question, "summarily affirm[ing]," and "entrench[ing]" the supposed conflict. (Pet. 19; *see also* Pet. 20 ("The North Carolina Supreme Court is wrong")) The North Carolina Supreme Court did not rule upon the merits of the speedy trial claim at all,

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[7] The petition ("N.C. Pet.") is available on Westlaw and at: https://www.ncappellatecourts.org/show-file.php?docment_id = 179596

dismissing it instead as improvidently allowed. Its decision only addressed the Rule 404(b) issue.[8]

"[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). It should refuse to do so here.

B. Petitioner Overstates The Degree, And Practical Significance, Of Any Difference Between North Carolina's Approach And Other Courts' Approach.

1. North Carolina's burden-shifting approach reasonably places the burden of proof on the State after a minimal *prima facie* showing by the defendant. Admittedly, many federal and state courts take a slightly different approach, and at the outset place the burden to justify delay upon the prosecution. (*See* Pet. 14-17) But it is far from clear this difference matters in practice. North Carolina's burden-shifting scheme does not, as petitioner puts it, "saddle" defendants with an onerous burden to prove that the second *Barker* factor weighs in their favor. (Pet. 13)

While the defendant does have an initial burden of proof, that burden is minimal, requiring only that he offer "*prima facie* evidence showing that the delay was

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[8] In North Carolina, where appeal is taken to the North Carolina Supreme Court based upon the dissent, "[that c]ourt's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from the opinion of the majority," and does not address questions upon which "the . . . panel agreed." *See State v. Hooper*, 351 S.E.2d 286, 287 (N.C. 1987) (citations omitted).

caused by the neglect or willfulness of the prosecution." *State v. Spivey*, 579 S.E.2d 251, 255 (N.C. 2003). After the defendant tenders *prima facie* evidence, the burden shifts to the State, which is then required to "offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Spivey*, 579 S.E.2d at 255; *State v. McKoy*, 240 S.E.2d 383, 390 (N.C. 1978). In other words, the ultimate burden for explaining the delay *does* fall on the State, and is no different in this regard than the cases upon which petitioner relies.

In fact, in some of those cases, the government gave its reasons for the delay only *after* the defendant made some evidentiary showing. *See, e.g., State v. Buckner*, 738 S.E.2d 65, 72 n.2 (Ga. 2013); *Smith v. Commonwealth*, 361 S.W.3d 908, 915-17 (Ky. 2012) (weighing the evidence given by both parties); *Ward v. United States*, 55 A.3d 840, 845-47 (D.C. 2012) (same); *see also United States v. Doggett*, 906 F.2d 573, 577 & 579 (11th Cir. 1990) (It was undisputed that Doggett had returned to the United States and was easily found, living "freely in the community using his real name and making no attempt to conceal his identity," *etc.*) Indeed, this Court in *Doggett* criticized the government for trying to "revisit the facts" where Doggett had put forth evidence that went unrebutted below. 505 U.S. at 652-53. The "conflict" may be more apparent than real.

Beyond that, there may be disagreement in the North Carolina Court of Appeals about what amount of evidence is necessary to shift the burden. *See State v. Strickland*, 570 S.E.2d 898, 902 (N.C. Ct. App. 2002) ("If a defendant proves that a delay was particularly lengthy, the defendant creates a *prima facie* showing that the delay was caused by the negligence of the

prosecutor."); *State v. Chaplin*, 471 S.E.2d 653, 655-56 (N.C. Ct. App. 1996) (same); *State v. Pippin*, 324 S.E.2d 900, 904 (N.C. Ct. App. 1985) (same). Petitioner believed below that the burden had shifted under this line of cases, with both the superior court and court of appeals proceeding to address and credit the State's given reasons. The state's highest court has not been asked to address this potential conflict between different panels of the state court of appeals, lending further support for denial of review here. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.8, at 257 (10th ed. 2013).

2. This case illustrates the small to nonexistent practical difference between the approaches. Petitioner would not have prevailed even under other courts' approach. This is primarily so because the State actually did put forth its reasons for the delay on the record. It explained the period of delay specifically targeted by defense counsel—the time following the first two trials (HT. 47)—and introduced at least some documentary evidence in support. These reasons were specifically credited by the superior court as "valid" (Pet. App. 36a, 38a), which did not likewise credit many of the unsworn, unsupported, and vague oral assertions of petitioner. Although his state appeal primarily disputed the State's given reasons, petitioner did not contest the superior court's findings, or complain that they were incomplete. *See King v. Bryant*, 795 S.E.2d 340, 348 (N.C. 2017) (holding that where findings of fact are not challenged below, the findings are "presumed to be supported by competent evidence and [are] binding on appeal.").

By contrast, and despite seeking to have two separate murder charges dismissed, petitioner declined to put on any evidence in support of his motion. (HT. 4)

He did not offer a single documentary exhibit—not an affidavit, email or phone records, his own contemporaneous notes or any portion of his case file, court docket sheets, dockets of other cases in the Union County courts involving the prosecutor, or any other evidence related to any of the *Barker* factors. He did not show cursory evidence of any earlier inquiry or desire to be tried. The court of appeals specifically commented on this failure. (Pet. App. 11a ("Defendant did not present any evidence regarding those inquiries."))

Petitioner did not allege any willful misconduct, *see Barker*, 407 U.S. at 531 (misconduct is "weighted heavily" in the *Barker* analysis; negligence less so), conceded that he had not invoked the right earlier than December 2012, and while he vaguely alleged neglect, he made no efforts to make any basic showing to this end—even under what he now decries is his unique burden in North Carolina.

Whether the initial burden had shifted under North Carolina's scheme, the State's given reasons were the only ones for which some evidence was submitted, and were specifically credited by the superior court. (Pet. App. 38a (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")) The court of appeals' analysis likewise considered those reasons, and also credited them as sufficient to explain much of what petitioner claimed was neglect.

These "more significant" reasons included that: the two murder cases had previously been proceeding capitally, but that status had changed; petitioner had already been twice tried; each case was "complex," and "[w]hile factually separate" they were "interconnect[ed]"; thousands of pages of discovery had been produced and shared; and there were "substantial

plea discussions" both prior to and following the Long mistrials. (*See* Pet. App. 10a, 12a, 36a) Following the mistrials, the State made "efforts to clarify the audio recording," "seeking help from the SBI, the FBI and Target Forensic" and to "secure the testimony of the State's key witness, Anderson," who refused to testify in the second Long trial. (*Id.*)

Clarification of the audiotape was no small matter. It could only be accomplished when "a lot of better technology filtration equipment [became] available," (Tr. 1022-23; *see also* R17-18, 29-34), adding fifty percent—approximately ten pages—to what ended up a crucial 28 page document. (HT. 11) Nor were the State's efforts to secure its key witness insignificant (HT. 21-24), and "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531. Other contributors included petitioner's own counsel trying other cases, and the prosecutor's involvement in the State's complex Racial Justice Act litigation. (HT. 9-10, 53-54)

Thus, contrary to what petitioner asserts (s*ee* Pet. 19), the conflict petitioner highlights is neither presented by this case nor affected the outcome. Even if the application of *Barker* required allocating the burden of proof to the State as to the second factor, the record in this case establishes no error under *Barker*.

3. Finally, North Carolina's two-part approach makes sense; similar approaches have proven workable in other constitutional contexts. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, ____, 195 L. Ed. 2d 1, 12 (U.S. 2016) (explaining the shifting inquiry in *Batson* claims). First, the burden usually lies upon a moving party. But petitioner below chose not to put on any evidence at all in support of his motion. (HT. 4) He instead pretends (Pet. 21-22) that experienced defense

counsel are powerless—despite their experience with their local courts or prosecutor's offices, and knowledge of the scheduling in that jurisdiction—and simply unable to document their allegations or offer any cursory evidence to make a case for neglect.

Petitioner and *amici* also argue that because prosecutors in North Carolina have statutory control over the calendar it is impossible for any onus to fall to him. (Pet. 22; Brief of *Amici Curiae,* pp. 5-10) To be sure, the district attorney has general responsibility for scheduling, but judges every day set matters for either trial or hearings, and the parties regularly confer, and cooperate to place matters on a calendar convenient for both; nothing prevented petitioner from moving to be heard earlier or documenting his concerns. Such an argument is equivalent to the claim that "[a] defendant has no duty to bring himself to trial." *Barker*, 407 U.S. at 527. Yet *Barker* itself counts acquiescence among the most important considerations. The statute is beside the point.

Second, as a practical matter, asking for a minimal showing by the movant allows the prosecutor to know what to answer, what specific time periods are targeted or in dispute, and thus what evidence to bring to the attention of the superior court at the hearing. Petitioner here specifically targeted only the time following the two Long murder trials, and the prosecutor answered the same.

Finally, North Carolina's approach is perfectly consistent with *Barker*. *Barker*'s second prong looks to "the reason the government assigns," which affords the government an opportunity to show that a reason is "valid" and therefore "justif[ies] appropriate delay." 407 U.S. at 531. As this case shows, North Carolina

courts look to the State's "reason" and apply the second prong accordingly.

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION PRESENTED.

The North Carolina courts reasonably concluded that, although petitioner was presumptively prejudiced so as to trigger the other *Barker* factors, he failed to show actual prejudice for purposes of the fourth factor. That holding does not present a legal question worthy of this Court's review.

A. The North Carolina Court of Appeals' Finding That Petitioner Was Not Presumptively Prejudiced For Purposes Of The Fourth Barker Factor Does Not Conflict With This Court's Precedents.

Petitioner maintains that the North Carolina Court of Appeals erred by failing to presume that the delay in bringing his case to trial "'impaired'" his ability to present a defense. (Pet. 24 (quoting *Barker*, 407 U.S. at 532)) The court had ample reason not to entertain that presumption.

1. This case does not remotely resemble the principal case upon which petitioner relies, *Doggett v. United States*, *supra*. The *Doggett* Court reversed a ruling that an individual could prevail on a speedy trial claim *only* by affirmatively proving actual prejudice. *Doggett*, 505 U.S. at 651, 655. The Eleventh Circuit had elevated this factor over all others, and held it conclusive. So too did the government, which argued "that Doggett fails to make out a successful speedy trial claim"—even though all the other *Barker* factors supported him—"because he has not shown precisely

how he was prejudiced by the delay between his indictment and trial." *Id*. at 654. This Court disagreed, holding "that affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Id.* at 655. Neither lower court here held otherwise.

To be sure, *Doggett* stated that in extreme circumstances "consideration of prejudice is not limited to the specifically demonstrable," and that it will sometimes presume that a delay could affect a trial. *Id.* at 655. But here, too, neither the superior court nor the North Carolina Court of Appeals held otherwise. Rather, the court of appeals expressly recognized that "[a]s time passes, 'the presumption that pretrial delay has prejudiced the accused intensifies.'" (Pet. App. 9a (quoting *Doggett*, 505 U.S. at 652)) The court went on to hold that petitioner's claim was "presumptively prejudicial" so as to "trigger[ ] the *Barker* analysis." (Pet. App. 10a) The superior court likewise acknowledged *Doggett* in its findings. (Pet. App. 35a) The courts thus made that consideration "part of the mix of relevant facts," as *Doggett* requires. *See* 505 U.S. at 656. In so holding, the courts acted consistent with state practice. *See, e.g., State v. Webster*, 447 S.E.2d 349, 351 (N.C. 1994); *State v. Goins*, 754 S.E.2d 195, 199 (N.C. Ct. App. 2014) (weighing presumptive prejudice among other factors); *State v. Washington*, 665 S.E.2d 799, 808 (N.C. Ct. App. 2008) ("the need to demonstrate prejudice diminishes as the egregiousness of the delay increases" (citation omitted)).

2. Petitioner nevertheless insists that, in the circumstances of this case, the North Carolina Court of Appeals should have ruled that the fourth *Barker* factor weighs in his favor because he was presumptively impaired in presenting his defense. Three factors, however, militated against that claim. First, the

North Carolina Court of Appeals concluded that petitioner "does not argue he was either unduly anxious or that his case preparation was impaired by the delay." (Pet. App. 13a) The specific type of prejudice that *Doggett* held should be presumed in some circumstances was therefore not even before the court of appeals.

Second, petitioner did not present *any* evidence on the issue. He did not call even himself to, for example, allege his own lapse of memory, his financial inability related to these charges, or any anxiety due specifically to these additional charges (rather than, say, his seven years' long imprisonment on an unrelated conviction). Nor did he call or introduce affidavits from family or friends, counsel's assistant or another lawyer, from any courthouse or clerk's office witness, or any supposed alibi witness or other witness to the crime or the alleged delay. He thus did absolutely nothing to show his ability to present a defense was impaired. He did not even articulate how his bare claim to presumed prejudice should be weighed in the analysis. (HT. 44-46) He believed years alone should be dispositive. The superior court correctly found that he "offered no other evidence or argued any other fact that the delay . . . has prejudiced [him]." (Pet. App. 34a)

It is one thing to attempt to show actual prejudice, come up short, and have that failure effectively excused because of the evidentiary challenges. That is what happened in *Doggett*. *See Doggett*, 906 F.2d at 581-82 (describing the arguments Doggett made to the magistrate on prejudice). It is quite another to not even try. As Justice Kagan put it at oral argument in *Betterman v. Montana,* No. 14-1457 (Oral Argument Tr., March 28, 2016, pp. 34-35), "that's why

Barker . . . left things flexible and said[,] in most cases we really are going to look at prejudice. We're going to see what you have to say for yourself."

That connects to the third factor militating against petitioner's claim: Although we cannot know for certain what was in his mind without more, the record strongly suggests that he not only acquiesced in the delay—it was his sole strategy and defense to George's murder.[9] *Barker* itself made clear that, where a defendant "did not want a speedy trial," that counts heavily against him. *Barker*, 407 U.S. at 534; *see also id.* at 521 ("deprivation of the right may work to the accused's advantage," and "[d]elay is not an uncommon defense tactic"). Moreover, *Doggett* itself stated that any potential presumption of prejudice can be "extenuated . . . by the defendant's acquiescence." 505 U.S. at 658.

Petitioner counted on (even at the earlier Long murder trials) "witnesses to become unavailable" or "their memories to fade." *Barker*, 407 U.S. at 521. In fact, Anderson had earlier refused to testify because of the passage of time, and two State's witnesses in this case died before trial. *State v. Hammonds*, 541 S.E.2d 166, 174-75 (N.C. Ct. App. 2000) (The death or impaired memory of a State's witness "is generally not considered by defendants to be bad news."), *aff'd,* 554

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[9] It is notable that petitioner failed to make any claim of ineffectiveness below, in which his desire or specific strategy to have the case delayed might be examined, and a reviewing court better understand why petitioner either declined to put on evidence, or failed to timely assert the right. *See Barker*, 407 U.S. at 534 ("No question is raised as to the competency of such counsel."). Without such evidence, the record suggests only that he knowingly acquiesced in the delay, and did so as a specific defense strategy.

S.E.2d 645 (N.C. 2001). Petitioner's *only* strategy was to highlight the delay—arguing the staleness of the State's witnesses' testimony, inconsistencies between Anderson's earlier statements and given testimony, and that this was the only evidence the State could offer despite the passage of time. (*See* Tr. 402-04 (petitioner's opening statement); 1052-54 (closing argument)) He did not put on any other defense.

Petitioner's protestations—that he was always ready and demanding trial, or his pretense that he repeatedly made inquiry *not* of the prosecutor assigned to the case but to another in passing (HT. 38)—were not supported by a shred of evidence. And the superior court did not either believe, or lend any credence to, them. Petitioner thus conceded the third *Barker* factor as "[o]ne for the State" (HT. 38; *see also* HT. 46 (stipulating the same)), and was bound by this concession on appeal.

Perhaps the best evidence that petitioner was more than happy to let the time pass was that he did so, without complaint, for eight years. There is no evidence petitioner ever wrote a note, made a call, or emailed his counsel inquiring about the case; there is no evidence he complained even to a family member; and, despite being represented by experienced counsel, counsel could not offer a single email of his own—a text, a notation, or *any* intimation, let alone a filing—of the desire to be tried sooner. And when he made his first speedy trial assertion in December 2012, it was only in conjunction with an attempt to force a plea offer. Months into this round of negotiations—itself taking five or six months—counsel nevertheless disclosed that petitioner himself wished to wait another two months before taking the plea. (R39)

Only after negotiations "fell apart" did he insist to be heard on this claim. (HT. 7)

As the court of appeals recognized, "[a] defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee . . . into a vehicle in which to escape justice." (Pet. App. 10a (citation omitted)) Such tactics regularly "enable[] defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system." *Barker,* 407 U.S. at 519. *Barker* well permits the trial court to "attach a different weight" not only to the counseled failure to object, but to the context in which he made his first objection. *Id.* at 529; s*ee also id.* at 535-36 (noting that the start of Barker's objections coincided with the Commonwealth's case getting better).

Suffice it to say, none of these facts bear any resemblance to what transpired in *Doggett*. Unlike here, the government was found to have been negligent for a full six years of delay, having never bothered to locate him. *Doggett*, 505 U.S. at 648-50. Because he was neither arrested nor knew of the outstanding indictment, Doggett was not represented by counsel during this time and had no reason to assert his right to a speedy trial in the first instance. Whereas acquiescence did not "extenuate" Doggett's claim of presumptive prejudice, it undermined petitioner's claimed prejudice.

B. The North Carolina Court Of Appeals' Finding That Petitioner Did Not Show Actual Prejudice Here Does Not Conflict With This Court's Precedents.

Finally, petitioner cursorily argues (at 26-27) that his "'lengthy incarceration' prior to trial itself constitutes 'affirmative proof of prejudice.'" Specifically, he alleges that his employment might have been disrupted, his financial resources drained, his associations curtailed, or that it created anxiety and harmed his ability to present a defense. (Pet. 26 (citing *United States v. Marion*, 404 U.S. 307, 320 (1971); *but see* Pet. App. 13a (the court of appeals noting that petitioner "does not argue he was either unduly anxious or that his case preparation was impaired by the delay.")) But petitioner was already imprisoned on a separate conviction well before these murder charges were sought. He thus did not "suffer" imprisonment on these charges alone for the first *five* years of the eight he challenges. He characterizes this concurrent imprisonment as "of no moment," relying on a gloss of *Smith v. Hooey*, 393 U.S. 374, 378 (1969). (Pet. 27) But *Hooey* says nothing of the sort. There, this Court held only that a person already imprisoned must still be brought to a speedy trial upon his demand, *id.* at 381-83, not that concurrent imprisonment has no bearing on the prejudice analysis. Of course it does.

In this light, the court of appeals did not err in rejecting petitioner's claim of actual prejudice above and beyond its prior finding of presumptive prejudice sufficient to trigger the *Barker* factors. Both the superior court and court of appeals properly considered the lack of identified actual prejudice as one factor in the *Barker* analysis.

* * *

The most that can be said is that this case was a close call. The delay was long, but petitioner did not allege willful misconduct by the State, the courts accepted the State's explanations for the delays, petitioner failed to assert his rights for many years, and he failed to offer any evidence to support his claim. Even if the lower courts reached the wrong result under this Court's flexible balancing test—and we do not believe they did—any such errors do not warrant review. This is especially so given the "difficult and sensitive . . . process" bestowed to the lower courts under the *Barker* framework. *"Barker*'s formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,' and the balance arrived at in close cases" should not "ordinarily . . . prompt this Court's review." *Brillon*, 556 U.S. at 91 (citations omitted).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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