No. 16-1087

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents two important and recurring questions concerning the Sixth Amendment right to a speedy trial. The State barely confronts, let alone weakens, the petition's showing that both questions warrant this Court's review. On the first question, the State concedes the lower-court conflict on which party bears the burden of proving the reasons for delay. Its only response is to suggest that the courts below did not reach the issue, even though they held that defendants bear the burden; and to downplay the significance of that holding, even though the State asked for it. On the second question, the State avoids this Court's prejudice precedents with unfounded (and implausible) theories that it did not raise below. None of these arguments refutes the central point of the petition—that the decision below split from this Court and other courts on two questions of law governing the right to a speedy trial.

Moreover, the State does not deny the importance of these questions. As amici have explained, the massive delay in this case "is the disturbing but predictable result of North Carolina's law and common practices." NCAJ Amicus Br. 9. The presumptively innocent often await trial for years in North Carolina, subject to the whims of prosecutors who wield extraordinary power over pretrial delays. By raising insuperable barriers to speedy trial relief, the decision below insulates that power from constitutional scrutiny, reducing the Speedy Trial Clause to "little more[] than a solemn pageantry." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1785, at 662 (1833).

The petition should be granted.

I. THE FIRST QUESTION PRESENTS A CONCEDED LOWER-COURT SPLIT THAT WARRANTS REVIEW.

The State correctly concedes that the lower courts are divided on the first question presented: whether the State or the defendant bears the burden of proof regarding the reasons for pretrial delay. Opp. 15, 19. It nonetheless opposes review by suggesting that the courts below did not reach the issue, and by trying to minimize the significance of the conflict. Neither argument has merit.

1. The State first argues (Opp. 12–15) that the courts below did not address the question presented. That is incorrect. The issue was both "pressed" *and* "passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992).

First, the lower courts clearly "pass[ed] on this question." Opp. 13. Both the trial court and the court of appeals held—repeatedly—that defendants bear the burden to "demonstrate the delay stemmed from [the State's] negligence or willfulness." Pet. App. 10a; *id.* at 11a (petitioner "presented no evidence"); *id.* at 12a (petitioner "failed to carry his burden"); *id.* at 20a (same); *id.* at 35a ("defendant bears the burden"); *id.* at 38a (petitioner "failed to offer any evidence"). The state supreme court granted review of that holding, only to summarily dismiss.[1] *See* Opp. 11; Pet. 13. The inquiry

[1] The State needlessly quibbles (Opp. 14–15) with the precise effect of the state supreme court's dismissal. This Court's review would be warranted even if that court had declined review initially. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 922–23 (2011); Stephen M. Shapiro et al., *Supreme Court Practice* 179–80 (10th ed. 2013). The state supreme court has consistently reaffirmed its position on the burden issue. Pet. 18. And the State itself has cited the decision below in recent cases. *See, e.g.*, Brief for the State at 20, *State v. Howard*, No. COA17-77 (N.C. Ct. App. May 23, 2017), 2017 WL 2371269.

can end here—this Court's "practice 'permit[s] review of an issue not pressed so long as it has been passed upon.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Williams*, 504 U.S. at 41).

Second, petitioner also "pressed" the issue, as the State's own briefs admit. *See, e.g.*, State's N.C. Br. 42 ("[Petitioner] contends in his brief to this Court that if a delay is deemed 'particularly lengthy,' the burden of proof as to the reason-for-delay factor shifts to the State to show that it was not caused by its own neglect or willfulness."); State's N.C. Ct. App. Br. 20 ("[Petitioner] appears to believe that if a delay is presumptively prejudicial the burden somehow shifts to the State to show that it was not caused by neglect or willfulness; it does not."). Petitioner even identified cases from other jurisdictions holding that the State bears the burden. Pet'r N.C. Br. 52 (citing *State v. Valencia*, 224 P.3d 659, 665 (N.M. 2009); *Smith v. State*, 350 A.2d 628, 633 (Md. 1976)).

The State's lone authority—*Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam)—is inapposite. *Howell* addressed a jurisdictional defect where the petitioner failed to cite "the Constitution or even any cases directly construing it" in the lower courts. *Id.* at 443. Here, however, the State does not and cannot dispute this Court's jurisdiction. The courts below undoubtedly decided petitioner's "federal [speedy trial] claim." Opp. 15 (quoting *Howell*, 543 U.S. at 443); *see* Pet. App. 8a–13a (deciding whether petitioner's "federal constitutional right to a speedy trial" was violated under *Barker v. Wingo*, 407 U.S. 514 (1972)). And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (quoting *Yee v. Escondido*, 503 U.S. 519,

534 (1992)). The first question presented is squarely before this Court.

2. The State next tries (Opp. 15–19) to minimize the "practical significance" of the conflict, claiming that the "difference between the approaches" to burden allocation is inconsequential.

That is surprising, because the State spilled a lot of ink below arguing that "the burden is on the defendant to establish the delay resulted from intentional conduct or neglect by the State," State's N.C. Br. 42; that this burden is "strong" and requires "specific proof of neglect or willfulness," *id.* at 47; and that petitioner "offered nothing to meet *his* burden," State's N.C. Ct. App. Br. 20 (emphasis in original). Even now, the State continues to fault petitioner for not "put[ting] on any evidence." Opp. 17. Parties do not typically advance extended arguments of minimal "practical significance."

Indeed, "where the burden of proof lies" is always significant and often "decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). That is why, regarding the reasons for delay, "[t]he initial question which must be asked"—and the question that is presented here—"is where the burden lies to supply the reasons in a particular case." 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.2(c) (4th ed. 2015).

Resolving the conflict on that question is critical for cases where the defendant "establishe[s] the timeline," Pet. App. 11a, and the State fails to explain most of it, *infra* pp. 5–6. In most jurisdictions, unexplained delay weighs against the State. Pet. 15–18; *see, e.g.*, *Jackson v. Ray*, 390 F.3d 1254, 1261–62 (10th Cir. 2004) (holding that the lower court ruled "directly contrary to *Barker*" by "plac[ing] the burden on [the defendant]" and "weigh[ing] the second *Barker* factor against him" for unexplained delays). Under "North Carolina's burden-

shifting scheme," it weighs against the defendant absent "evidence" of neglect. Opp. 15–16; *see* Pet. 18–19.

The State's efforts to downplay the conflict are makeweights. The State speculates (Opp. 16–17) that the state supreme court might someday refine its outlier "burden-shifting scheme." One wonders why that court would address an issue that according to the State makes no "practical difference," but the State's guesswork is irrelevant—in every other court in the country, the burden to explain the reasons for the delay *begins* with the State.

The State further speculates (Opp. 17–19) that, assuming it *loses* on the merits of the question presented, and *Barker* does "requir[e] allocating the burden of proof to the State," its burden would be satisfied here.

This argument has several problems. The dispositive one is that it was not reached below—the lower courts placed the burden on petitioner and held that he "failed to carry [it]." Pet. App. 12a. This remand-focused argument is also irrelevant to the purely legal question presented dividing the lower courts. This Court's resolution of that conflict will affect thousands of defendants who have been "waiting years for [their] case to be resolved." NCAJ Amicus Br. 4.

The argument is also meritless. At least six of the nearly nine years remain completely unexplained: the four-and-one-half years between the March 2005 pretrial hearing and the September 2009 mistrial; the year between the March 2010 mistrial and the March 2011 efforts to "clarify" the recording; and the seven months between the State's April 2012 receipt of the "enhanced" recording and petitioner's December 2012 motion to dismiss. *See* Opp. 6–8; Pet. 6–9. Moreover, the State's "reasons" (Opp. 18–19) comprise vague references to trial preparation not linked to concrete periods

of time, and many are not mentioned in the trial court's findings at all. For instance, the trial court never suggested that changing the case to non-capital caused any delay; or that "better technology" warranted the "concern[ing]" sixteen-month delay to clarify the recording, Pet. App. 12a. The Long mistrials were totally unrelated to this case, and thus unrelated to the delay. And plea negotiations lasted only four months, from December 2012 to April 2013.[2] Ultimately, this flimsy list of "reasons" exemplifies why the State should have borne the burden in the first place.

3. The State's defense on the merits of North Carolina's "two-part approach" (Opp. 19–21) furnishes no reason to deny review. It is also unpersuasive.

The State points to *Batson*, a context where, unlike here, this Court has actually prescribed a burden-shifting framework. But even *Batson*'s first step is not "so onerous" that it requires a defendant to present facts that "are impossible for the defendant to know with certainty." *Johnson v. California*, 545 U.S. 162, 170 (2005).

The State also argues that defendants should bear the burden so prosecutors can determine "what specific time periods are targeted or in dispute." But that should be self-evident—if the State is going to bring criminal charges, it should be able to account for the entire interval "from arrest or indictment through conviction." *Betterman v. Montana*, 136 S. Ct. 1609, 1613–14

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[2] The State's representation (at 18–19) that there were plea discussions before the Long mistrials is wrong and unfaithful to its admission below: "[T]he parties [never] engaged in 'substantial plea negotiations' prior to the Long trials, and thus, there is a slight misstatement in the trial court's findings of fact number 47(3)." State's N.C. Br. 49 n.5. Plea negotiations only "occurr[ed] between December 2012 and April 2013." *Id.*; *see* Pet. 9.

(2016). That the State needs defendants to carve the delay into "specific time periods" only highlights the routineness of long delays in North Carolina, *see* NCAJ Amicus Br. 3–5, and underscores the need for this Court's review.

II. The Second Question Presents A Direct Conflict With This Court's Decisions That Warrants Review.

The State fares no better on the second question presented—the court below flouted this Court's precedents by insisting on "affirmative proof of prejudice" following a nearly-nine-year delay behind bars. This "fundamental error" of law warrants certiorari review, especially given that the State "itself has conceded that this is a close case under *Barker*." *Moore v. Arizona*, 414 U.S. 25, 26–27 (1973) (per curiam); *see* Opp. 28.

1. As the petition shows (at 23–26), the first problem with demanding "affirmative proof of prejudice" is that "affirmative proof of particularized prejudice is not essential," because "prejudice is not limited to the specifically demonstrable." *Doggett v. United States*, 505 U.S. 647, 655 (1992). The State's efforts to sidestep this conflict are unavailing.[3]

The State first claims (Opp. 23) that the issue was "not even before the court of appeals," knowing full well that *Doggett* was heavily argued in every court below. At the speedy trial hearing, petitioner's counsel quoted several passages from *Doggett* and even handed a copy

[3] The court below did not, as the State suggests, find "that petitioner's claim was 'presumptively prejudicial'" for purposes of *Barker*'s prejudice factor. Opp. 22 (quoting Pet. App. 10a). The court below used that "term . . . in th[e] threshold context" of determining whether the length of delay "trigger[ed] the *Barker* enquiry." *Doggett*, 505 U.S. at 652 n.1.

of the opinion to the judge. *See* 6/6/13 Hearing Tr. 43–47. In both the court of appeals and the state supreme court, petitioner contended that the lower court had failed to "address the correct inquiry under *Doggett*." Pet'r N.C. Ct. App. Br. 23–25; *see* Pet'r N.C. Br. 56–59 (contending that the court of appeals "wholly ignored *Doggett*").

The State next asserts (Opp. 23) that "petitioner did not present *any* evidence on the issue." Neither did the defendant in *Doggett*. 505 U.S. at 650, 655. To obscure that direct parallel, the State posits that prejudice may be presumed for defendants who "attempt to show actual prejudice" and "come up short," but it may not be presumed for those who do not "try."

That distinction is nonsensical. The whole point of the presumption is to "recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* at 655. It does not hinge on whether the defendant futilely tried to prove the unprovable. Justice Kagan crystalized this point at the *Betterman* oral argument, a discussion the State quotes (Opp. 23–24) out of context:

> It's often hard to show that people have forgotten things .... So unless there's something like a witness dying, it's very difficult to make the kind of showing that you are suggesting. And 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. *In some extreme cases, we're not going to do that.*

Tr. of Oral Argument at 34–35, *Betterman*, 136 S. Ct. 1609 (No. 14-1457) (emphasis added). Prejudice is thus

presumed, she explained, "where the delay is super-long," like "a delay of eight or ten years." *Id.* at 39.[4]

The State finally suggests (Opp. 24–26) that petitioner *wanted* the massive delay in this case. The Court should disregard this argument, as it is completely new. It was neither raised nor addressed below; accordingly, it is "forfeited." *United States v. Jones*, 565 U.S. 400, 413 (2012). And there is a reason why this claim has never before been made—the State does not "know for certain" whether it is remotely true. Opp. 24.

Remarkably, the State instead asks this Court to infer from the absence of an ineffective assistance claim that petitioner "acquiesced in the delay." *Id.* at 24 n.9. The State then speculates that, assuming this baseless inference is correct, the delay was petitioner's "specific defense strategy." *Id.*

The State should not be offering raw factual speculation for the first time in a Supreme Court brief. The record does not even hint that "delay" was petitioner's "strategy." As his lawyer explained at the speedy trial hearing, "there's absolutely nothing that indicates the defense has ever, not once[,] asked for more time." 6/6/13 Hearing Tr. 45–46. Nor did petitioner have any way of "clearly acquiesc[ing] in the major delays" in the way that *Barker* contemplates, because the delays did not "t[ake] place only upon formal requests to which [petitioner] had opportunity to object." 407 U.S. at 514 (White, J., concurring). Rather, this case was not calendared until 2013—more than eight years after peti-

[4] The certiorari petition in *Brown v. Haas*, No. 16-1373 (filed May 16, 2017), highlights (at 2) the "confusion, discord, and uncertainty" in applying *Doggett* to shorter delays. But one thing from *Doggett* is clear: prejudice should be presumed when the State "causes delay six times as long as that generally sufficient to trigger judicial review." 505 U.S. at 658. Here, it was almost nine.

tioner's arrest. And the very premise of the State's speculation ignores the "accepted practice" of raising ineffectiveness claims "in post-conviction proceedings, rather than on direct appeal." *State v. Jester*, 790 S.E.2d 368, 378 (N.C. Ct. App. 2016). "[H]aving never before been made in the nearly [thirteen]-year history of this litigation," the State's unfounded claim "reeks of afterthought." *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (citation omitted).

2. The court below also departed from this Court's precedents by holding that petitioner's "lengthy incarceration" does not amount to "affirmative proof of prejudice." Pet. 26–27.

The State answers (Opp. 27) with the unremarkable point that "concurrent imprisonment"—which accounts for only slightly more than half of the delay here—"bear[s] on the prejudice analysis." But that does not respond to the question whether, after nearly nine years of pretrial incarceration, a defendant has suffered "actual prejudice." And as the Court explained in *Smith v. Hooey*, 393 U.S. 374, 378 (1969), a person "already in prison under a lawful sentence" can still "suffer from 'undue and oppressive incarceration prior to trial,'" because "delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." Indeed, "even a convict" is presumed innocent of "an outstanding untried charge" and thus "has a right to be speedily brought to trial on [that] charge." *Betterman*, 136 S. Ct. at 1615 n.5 (quoting *Smith*, 393 U.S. at 379).

The State also glosses over the fact that, for more than four years, petitioner was locked up on *only* unresolved charges. Suggesting that no "actual prejudice" results from pretrial incarceration lasting longer than

an entire college education effectively reads "lengthy pretrial incarceration" out of *Barker*'s prejudice inquiry altogether. 407 U.S. at 532.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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