7.3 Post-Accusation Delay

A. Constitutional Basis of Right

The defendant's right to a speedy trial is based on the Sixth Amendment and on article I, section 18 of the N.C. Constitution. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment speedy trial right applicable to states); *State v. Tindall*, 294 N.C. 689 (1978). North Carolina no longer has a speedy trial statute. The statutory speedy trial provisions of Article 35 of Chapter 15A (G.S. 15A-701 through G.S. 15A-710) were repealed effective October 1, 1989.

B. Test for Speedy Trial Violation

The leading case on the Sixth Amendment standard for assessing speedy trial claims is *Barker v. Wingo*, 407 U.S. 514 (1972). *Barker* held that four factors must be balanced in determining whether the right to speedy trial has been violated. These four factors are:

- length of the pretrial delay,
- reason for the delay,
- prejudice to the defendant, and
- defendant's assertion of the right to a speedy trial.

Barker emphasized that there is no bright-line test for determining whether the speedy trial right has been violated; the nature of the right "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id.* at 530. "No single [*Barker*] factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140 (1978). All the factors must be weighed and balanced against each other. *See State v. Groves*, 324 N.C. 360 (1989); *State v. Washington*, 192 N.C. App. 277 (2008) (court conducted analysis of four *Barker* factors and found constitutional violation).

Length of delay. The length of delay serves two purposes. First, it is a triggering mechanism for a speedy trial claim. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. 514, 530; *see also State v. Jones*, 310 N.C. 716 (1984) (length

of delay not determinative, but is triggering mechanism for consideration of other factors). In felony cases, courts generally have found delay to be "presumptively prejudicial" as it approaches one year. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992); *State v. Webster*, 337 N.C. 674 (1994) (delay of sixteen months triggered examination of other factors); *State v. Smith*, 289 N.C. 143 (1976) (delay of eleven months prompted consideration of *Barker* factors); *State v. Wilburn*, 21 N.C. App. 140 (1974) (ten months).

Second, the length of delay is one of the factors that must be weighed. The longer the delay, the more heavily this factor weighs against the State. *See Doggett v. United States*, 505 U.S. 647 (1992) (delay of eight years required dismissal); *State v. Chaplin*, 122 N.C. App. 659 (1996) (particularly lengthy delay establishes prima facie case that delay was due to neglect or willfulness of prosecution and requires State to offer evidence explaining reasons for delay and rebutting prima facie showing; constitutional violation found where case was calendared for trial every month for three years but was never called for trial and defendant had to travel from New York to North Carolina for each court date); *State v. Washington*, 192 N.C. App. 277 (2008) (four years and nine months between arrest and trial found to be unconstitutional delay in conjunction with other *Barker* factors); *State v. McBride*, 187 N.C. App. 496 (2007) (delay of three years and seven months did not violate right to speedy trial where the record did not show the reason for the delay and defendant did not assert the right until trial and did not show prejudice).

Practice note: In misdemeanor cases tried in district court, which the State is generally capable of disposing of in well less than a year, a shorter time period may be considered prejudicial for speedy trial purposes. *See generally Barker v. Wingo*, 407 U.S. 514, 531 (1972) ("the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"); *State v. Brooks*, 287 N.C. 392, 406 (1975) **(**"The purpose of our de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a 'speedy trial' in the District Court and to offer them an opportunity to learn about the State's case without revealing their own.").

In *State v. Friend*, 219 N.C. App. 338 (2012), the court of appeals measured the delay for speedy trial purposes from the time of the defendant's appeal to superior court to the time of trial in superior court. The court stated that it did not need to consider the delay in district court because the defendant did not make a speedy trial demand until after he appealed for a trial de novo in superior court; therefore, only the delay in superior court was relevant. This interpretation seems inconsistent with the four-factor analysis for speedy trial claims in *Barker v. Wingo*, 407 U.S. 514 (1972), under which a request for a speedy trial is one factor and not determinative. Notwithstanding its initial statement, the court in *Friend* went on to consider the entire delay in assessing and ultimately rejecting the defendant's speedy trial claim. In light of the court's initial statement, however, if counsel believes that the State has unduly delayed bringing a case to trial in district court, counsel should raise the speedy trial claim in district court as well as in superior court in the event of appeal. The defendant did so in the subsequent case of *State v. Sheppard*,

225 N.C. App. 655 (2013) (unpublished), a DWI case in which the defendant filed frequent requests for a speedy trial in district court and then in superior court after appealing for a trial de novo. The court of appeals upheld the superior court's dismissal of the charge on speedy trial grounds, basing its decision on the 14-month delay from the defendant's arrest to her trial in district court.

For a further discussion of the district court's authority to address delay, see *infra* § 7.4E, District Court Proceedings.

Reason for delay. The length of delay must be considered together with the reason for delay. The court in *Barker* held that different weights should be assigned to various reasons for delay. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. 514, 531; *see also State v. Pippin*, 72 N.C. App. 387 (1985) (negligence by State may support claim; right to speedy trial violated where State issued three defective indictments before getting it right). North Carolina courts have held generally that the defendant has the burden of showing that trial delay is due either to neglect or willfulness on the part of the prosecution. *See State v. McKoy*, 294 N.C. 134 (1978); *State v. Chaplin*, 122 N.C. App. 659 (1996). However, an exception to the general rule lies where the delay is exceptionally long. Then the burden shifts to the State to explain the delay. *See State v. Branch*, 41 N.C. App. 80 (1979); *see also State v. Washington*, 192 N.C. App. 277 (2008) (constitutional violation found where reason for delay was not a neutral factor but instead resulted from the prosecutor's failure to submit evidence to SBI lab for analysis).

Establishing a violation of the defendant's constitutional right to a speedy trial does not require proof of an improper prosecutorial motive. A speedy trial claim may lie where the reason for the delay was administrative negligence. *See State v. Kivett*, 321 N.C. 404 (1988) (holding that the defendant's speedy trial rights were not violated where there was no evidence that: (1) other cases were not being tried, (2) the State was trying more recent cases while postponing the subject case, or (3) insignificant cases were being tried ahead of the subject case); *State v. Pippin*, 72 N.C. App. 387 (1985) (speedy trial violation found where State was negligent in obtaining valid indictment); s*ee also State v. Webster*, 337 N.C. 674, 679 (1994) (court "expressly disapprove[s]" of practice of repeatedly placing a case on the trial calendar without calling it for trial).

Valid administrative reasons, including the complexity of a case, congested court dockets, and difficulty in locating witnesses, may justify delay. *See State v. Smith*, 289 N.C. 143 (1976) (eleven month pretrial delay caused by congested dockets and difficulty in locating witnesses acceptable); *State v. Hughes*, 54 N.C. App. 117 (1981) (no speedy trial violation found where reason for delay was congested dockets and policy of giving priority to jail cases). However, overcrowded courts do not necessarily excuse delay. *See Barker*, 407 U.S. 514, 531 ("overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such

circumstances must rest with the government rather than with the defendant"); *State v. Williams*, 144 N.C. App. 526 (2001) (concurring opinion recognizes that congested dockets do not excuse violation of defendant's right to speedy trial), *aff'd per curiam*, 355 N.C. 272 (2002).

A common reason for delay is that the State is awaiting laboratory results from a crime lab. North Carolina courts have treated these delays as a neutral reason, at least where the defendant made no showing of negligence or purposeful delay by the State or lab. *State v. Johnson*, ___ N.C. App. ___, 795 S.E.2d 126 (2016) (concluding that 18-month delay for crime lab results was a neutral factor where the defendant failed to show delay was the result of negligence or intentional delay by the State). *Accord State v. Goins*, 232 N.C. App. 451 (2016). The approach of categorizing crime lab delays as a neutral reason for delay seems to conflict with the U.S. Supreme Court's directive that it is ultimately the State's responsibility to ensure that trial occurs in the timely manner. *Barker* commands that such administrative delays should be weighed less heavily against the prosecution than intentional delays, not that such delay is completely neutral. *See Barker* at 531. *Accord Strunk v. United States*, 412 U.S. 434 (1973).

In *Johnson*, the court distinguished backlogs at the crime lab from overcrowded court calendars, finding that the prosecution had direct control over court calendars but not the crime lab. 795 S.E.2d at 132; *see also State v. Dorton*, 172 N.C. App. 759 (2005). Courts in other jurisdictions have treated the crime lab as an extension of the State and weighed this reason against the State. *See State v. Magnusen*, 646 So. 2d 1275 (Miss. 1994); *State v. Torolito*, 950 P.2d 811 (N.M. 1997). Other factors also may be appropriate to consider, such as delays in sending the evidence the lab, the typical time it takes to complete testing, the availability of alternative testing options, whether a request to expedite testing was made by the prosecutor, delays following the return of the test results, and the sheer length of delay at the crime lab. *See generally Doggett v. U.S.*, 505 U.S. 647, 657 (1992) ("official negligence compounds with time").

If the defendant causes the delay, the defendant is unlikely to succeed in claiming a violation of speedy trial rights. *See State v. Groves*, 324 N.C. 360 (1989) (no speedy trial violation where defendant repeatedly asked for continuances); *State v. Tindall*, 294 N.C. 689 (1978) (delay caused largely by defendant's fleeing the state and living under an assumed name); *State v. Leyshon*, 211 N.C. App. 511 (2011) (delay caused by defendant's failure to state whether he asserted or waived his right to counsel at four separate hearings); *State v. Pippin*, 72 N.C. App. 387 (1985) (speedy trial claim does not arise from delay attributable to defense counsel's requested plea negotiations; State has burden of establishing delay attributable to that purpose). Where the State and the defendant share responsibility for the delay, courts have subtracted the amount of time attributable to the defendant's acts from the total, leaving open a viable claim based on the delay attributable to the State. *See, e.g. State v. Ward*, 597 N.W.2d 614 (Neb. 1999).

Public defenders and counsel appointed to represent defendants are not state actors for purposes of a speedy trial claim, and the State ordinarily is not responsible for delays they cause. *See Vermont v. Brillon*, 556 U.S. 81 (2009) (delay caused by appointed defense

counsel not attributable to State when determining whether a defendant's speedy trial right violated; State may be responsible if there is an institutional breakdown of the public defender system, however).

Prejudice to defendant. To prevail on a speedy trial claim, defendants must show that they were prejudiced by the delay. *Barker*, 407 U.S. 514, 532, identified three types of prejudice that may result from a delayed trial:

- oppressive pretrial incarceration;
- the social, financial, and emotional strain of living under a cloud of suspicion; and
- impairment of the ability to present a defense.

The strongest prejudice claims are those in which a defendant can show that his or her ability to defend against the charges was impaired by the delay. *See, e.g.*, *State v. Chaplin* 122 N.C. App. 659 (1996) (loss of critical defense witness); *State v. Washington*, 192 N.C. App. 277 (2008) (witnesses' memories of key events had faded, interfering with defendant's ability to challenge their reliability; witnesses also were allowed to make in-court identifications of defendant nearly five years after the date of offense, which increased the possibility of misidentification). However, courts have found prejudice where a defendant was subjected to oppressive pretrial incarceration or where delay resulted in financial loss or damage to the defendant's reputation in the community. *See United States v. Marion*, 404 U.S. 307, 320 (1971) (formal accusation may "interfere with defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, . . . and create anxiety in him, his family and his friends"); *State v. Pippin*, 72 N.C. App. 387 (1985) (dismissal of charges upheld despite no real prejudice to defense where negligent delay in prosecuting case caused drain on defendant's financial resources and interference with social and community associations); *Washington*, 192 N.C. App. at 292 (that defendant was incarcerated for 366 days as a result of pretrial delay was an "important consideration"). For incarcerated defendants with pending charges, prejudice may occur in relation to the defendant's custody classification within the prison, which can impact the defendant's ability to participate in prison programs and limit or prevent the defendant's accumulation of "gain time" credit. *See State v. Armistead*, ___ N.C. App. ___, 807 S.E.2d 664 (2017) (considering but rejecting this argument as unsupported by the record). In some cases, courts have found delay to be so long, or so inexplicable, that prejudice is presumed. *See Doggett v. United States*, 505 U.S. 647 (1992) (prejudice assumed where trial delayed for over eight years); *State v. McKoy*, 294 N.C. 134 (1978) (willful delay of ten months outweighed lack of real prejudice to defendant; speedy trial violation found).

Some North Carolina cases have stated that where there is a legitimate reason for the delay of prosecution, the defendant is required to show "actual or substantial prejudice resulting from the delay," a statement that appears to conflate the standards for a claim for pre-accusation delay under the Due Process Clause with a Sixth Amendment speedy trial claim. *See State v. Armistead*, ___ N.C. App. ___ (2017) (citing *State v. Goldman*, 311 N.C. 338 (1984) (a case involving a due process claim on pre-accusation delay). The language may mean only that in balancing the *Barker* factors, the court may consider the

strength of the defendant's showing of prejudice when the State's reason for delay is legitimate. To the extent the language establishes a higher standard, it appears to be inconsistent with U.S. Supreme Court case law.

Assertion of right. *Barker* rejected a demand-waiver rule for speedy trial claims—that is, the court rejected a rule whereby a defendant who failed to demand a speedy trial would waive his or her right to one. Instead, *Barker* held that the defendant's assertion of or failure to assert his or her right to a speedy trial is one factor to be weighed in the inquiry into the deprivation of the right. 407 U.S. 514, 528. This factor will be weighed most heavily in favor of defendants who have repeatedly asked for a trial and who have objected to State motions for continuances. *See State v. McKoy*, 294 N.C. 134 (1978) (defendant asked eight or nine times for trial date and moved to dismiss for lack of speedy trial); *State v. Raynor*, 45 N.C. App. 181 (1980) (stressing importance of objecting to State's continuance motions). Conversely, the failure to assert the right to a speedy trial will weigh against a defendant. Failing to assert the right in a timely manner may be interpreted by reviewing courts as consent or complicity by the defendant in the delay. *See State v. Farmer*, ___ N.C. App. ___, 822 S.E.2d 556 (2018) ("Thus, the defendant himself acquiesced in the delay by waiting almost five years after indictment to assert a right to speedy trial."); *State v. Webster*, 337 N.C. 674 (1994); *State v. McCollum*, 334 N.C. 208 (1993) (defendant made no attempt to assert right to speedy trial for thirty-two months; factor weighed against defendant); *cf. State v. Washington*, 192 N.C. App. 277 (2008) (this factor weighed in favor of defendant, although defendant did not formally assert right until two years and ten months after indictment; assertion was still one year and eight months before trial began, and defendant complained about delay in examination of physical evidence before formal assertion). Therefore, if a speedy trial is to a defendant's advantage, counsel should assert the right whenever possible.

C. When Right Attaches

Defendant must be charged with crime. The Sixth Amendment right to a speedy trial attaches at arrest, indictment, or other official accusation, whichever occurs first. *See Doggett v. United States*, 505 U.S. 647 (1992); *Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam); *State v. McKoy*, 294 N.C. 134 (1978). Even when the defendant is unaware that he or she has been charged with a crime, the defendant's speedy trial right attaches and the clock begins to run on issuance of the indictment or other official accusation. *See Doggett*, 505 U.S. at 653 (defendant unaware of indictment until arrest eight years later); *see also State v. Kelly*, 656 N.E.2d 419 (Ohio Ct. App. 1995) (citing both *Doggett* and an earlier North Carolina case, *State v. Johnson*, 275 N.C. 264 (1969), for the proposition that delay in arresting defendant following indictment was subject to speedy trial protection).[1] However, lack of knowledge can affect the prejudice analysis in

1. *Doggett* makes it clear that speedy trial rather than due process protections apply once a person has been indicted *or* arrested. In *State v. McCoy*, 303 N.C. 1 (1981), issued before *Doggett*, the N.C. Supreme Court left open the question of whether speedy trial protections attached when an arrest warrant has been issued but the defendant has not yet been arrested. Although the language in *Doggett* suggests that speedy trial protections apply after any formal accusation is issued, jurisdictions have reached differing results on this question. *See Williams v. Darr*, 603 P.2d 1021 (Kan. Ct. App. 1979) (speedy trial right attaches on issuance of arrest warrant, which commences prosecution); *see also generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 121 (4th ed. 2015)

a speedy trial claim. A defendant who does not know of an indictment or arrest warrant cannot claim anxiety or disruption of social relationships as a source of prejudice. On the other hand, since the defendant cannot make a demand for a speedy trial in this situation, the lack of a demand does not hurt the defendant in the speedy trial analysis.

Effect of dismissal. G.S. 15A-931 permits the State to take a voluntary dismissal of charges. Refiling of the same or a different charge is permitted following dismissal as long as jeopardy has not attached (and, in a misdemeanor case, the statute of limitations is not a bar).[2] *See State v. Muncy*, 79 N.C. App. 356 (1986).

However, if the State rearrests or reindicts the defendant for the same offense, the defendant can add together the pretrial periods following each arrest or indictment for speedy trial purposes. *See State v. Sheppard*, 225 N.C. App. 655 (2013) (unpublished) (adding together periods of delay before State took voluntary dismissal and after State refiled charges); *State v. Pippin*, 72 N.C. App. 387 (1985) (reindictment case); *United States v. Columbo*, 852 F.2d 19, 23–24 (1st Cir. 1988) ("Were it otherwise, the government would be able to nullify a defendant's speedy trial right by the simple expedient of dismissing and reindicting whenever speedy trial time was running out on its prosecution."); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 121-22 (4th ed. 2015) (date of original arrest or charge is usually controlling for speedy trial purposes, although time between dismissal and recharging are not counted).

For a further discussion of possible barriers to refiling of charges, see *infra* § 7.4E, District Court Proceedings.

Dismissal with leave under G.S. 15A-932. G.S. 15A-932 permits the prosecutor to take a dismissal with leave when a defendant has failed to appear in court (or pursuant to a deferred prosecution agreement). *See also* G.S. 15A-1009 (permitting dismissal with leave after finding of incapacity to stand trial [repealed effective for offenses committed on or after Dec., 1, 2013]). A case dismissed with leave is removed from the trial calendar. However, the criminal prosecution is not terminated; the indictment remains valid, and charges may be reinitiated without a new indictment. *See State v. Lamb*, 321 N.C. 633 (1988).

A defendant whose case is dismissed with leave pursuant to G.S. 15A-932 still has a speedy trial right, although the courts generally will not find a constitutional violation

(at the least, if a charging document short of an indictment is sufficient to give a court jurisdiction to proceed to trial, such as an arrest warrant for a misdemeanor to be tried in district court, speedy trial right attaches when charging document is issued regardless of whether defendant is aware of charge).

2. The procedure in G.S. 15A-931 differs from North Carolina's former nolle prosequi statute, which permitted the State to dismiss cases with leave and then restore them to the trial docket without filing new charges. In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), the U.S. Supreme Court held that the nolle prosequi procedure violated the defendant's speedy trial rights because the charges against the defendant remained pending, the prosecutor could restore them to the calendar for trial at any time, and there was no means for the defendant to obtain dismissal of the charges or have them called for trial. Now, the State may only take a dismissal with leave in narrow circumstances, discussed later in the text.

when the delay is caused by the defendant's own actions. *See Barker v. Wingo*, 407 U.S. 514 (1972); *State v. Tindall*, 294 N.C. 689 (1978) (delay caused by defendant fleeing jurisdiction; no speedy trial violation). Once the defendant has been arrested or otherwise appears, he or she has the right to proceed to trial; the State may not unduly delay calendaring the case for trial or refuse to calendar the case altogether. *See generally Klopfer v. North Carolina*, 386 U.S. 213 (1967) (discussed *supra* note 2 in "Effect of dismissal" in this subsection C.); *see also* G.S. 20-24.1(b1) (if defendant has failed to appear on motor vehicle offense, which results in revocation of license, he or she must be afforded an opportunity for a trial or hearing within a reasonable time of his or her appearance).

Prisoners' right to a speedy trial. Defendants who have been convicted of an unrelated crime do not lose the Sixth Amendment right to a speedy trial while in prison. *See Smith v. Hooey*, 393 U.S. 374 (1969); *State v. Wright*, 290 N.C. 45 (1976); *State v. Johnson*, 275 N.C. 264 (1969). However, courts have held that prisoners cannot claim prejudice based solely on pretrial incarceration, reasoning that they would have been incarcerated in any event. *See State v. Vaughn*, 296 N.C. 167 (1978); *State v. McQueen*, 295 N.C. 96 (1978). A defendant also may argue that he or she was prejudiced by losing the opportunity to serve sentences concurrently, a type of prejudice that has been recognized in the pre-accusation delay context. *See State v. Johnson*, 275 N.C. 264 (1969) (due process violated by four to five year delay in prosecuting defendant where reason for delay was that law enforcement hoped to arrest an accomplice and pressure defendant to testify against the accomplice once he was arrested; court found prejudice where pre-accusation delay led to defendant serving a prison term that might otherwise have run concurrently with earlier sentence); *see also supra* § 7.1E, Rights of Prisoners (discussing prisoners' statutory rights).

Three-recently enacted statutes may strengthen a prisoner's speedy trial claim in cases in which the State fails to serve an outstanding warrant while the prisoner is in custody. The statutes direct law enforcement agencies, the Division of Adult Correction, prosecutors, and the courts to identify and attempt to resolve outstanding warrants while other charges are pending or the defendant is in custody. *See* John Rubin, *What to Do about Outstanding Arrest Warrants*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 5, 2016) (discussing G.S. 15A-301.1(o) on obligations of law enforcement, G.S. 15A-301.1(p) on obligations of courts [amended in 2017 to apply to in-custody defendants only), and G.S. 148-10.5 on obligations of corrections). Although the statutes do not mandate service of outstanding warrants or identify remedies for violations, they recognize the importance of resolving pending criminal proceedings. Thus, the failure to serve an outstanding warrant on a prisoner may strengthen a claim of prejudice. Further, because the statutes require that notice of the defendant's location be given to the law enforcement agency responsible for any unserved warrants, it may be more difficult for the State to justify delays in service. The failure to serve and proceed on outstanding process also may support a Due Process claim based on pre-accusation delay. *See supra* n.1 in this subsection B. (discussing potential applicability of Due Process to delay in arrest after issuance of arrest warrant).

D. Case Summaries on Post-Accusation Delay

Speedy trial violation found.

Doggett v. United States, 505 U.S. 647 (1992) (speedy trial violation found where there was an eight and one-half year delay between indictment and trial, largely because of prosecution's negligence in locating defendant; excessive delay is presumptively prejudicial as it "compromises the reliability of a trial in ways that neither party can prove or . . . identify")

State v. McKoy, 294 N.C. 134 (1978) (twenty-two month delay between arrest and trial, with ten months of delay attributable to willful negligence by prosecution; speedy trial violation found despite minimal prejudice to defendant where defendant requested he be brought to trial eight or nine times)

State v. Sheppard, 225 N.C. App. 655 (2013) (unpublished) (court of appeals upheld the dismissal of case on speedy trial grounds in the following circumstances: defendant was charged in September 2009 with impaired driving; case was continued multiple times, once for defendant to confer with counsel after initial appointment and remaining times at the State's request; defendant filed numerous requests for a speedy trial in district court and, when the State requested another continuance after an 11-month delay since defendant's arrest, the district court denied the continuance; the State took a voluntary dismissal and recharged and rearrested defendant the same day; defendant made further requests for a speedy trial and moved for dismissal on speedy trial grounds, which the district court denied; defendant was tried and convicted in district court after a total of 14 months from her arrest to trial; defendant appealed for a trial de novo, made additional speedy trial requests, and then prevailed on her speedy trial motion; the court of appeals held that the four *Barker* factors supported the superior court's ruling and ruled, among other things, that defendant did not waive her speedy trial rights by objecting to the chemical analyst's affidavit and asserting her right to confront the analyst, recognizing that a defendant may not be required to give up one constitutional right to assert another)

State v. Washington, 192 N.C. App. 277 (2008) (speedy trial violation where trial was delayed nearly five years, reason for delay was repeated neglect and underutilization of court resources on part of prosecutor's office, much of delay was caused by State's failure to submit physical evidence to SBI lab to be examined, there was no indication that delay was caused by factors outside of prosecution's control, delay resulted in actual particularized prejudice to defendant, and defendant asserted his right to speedy trial)

State v. Chaplin, 122 N.C. App. 659 (1996) (speedy trial violation found where trial was delayed for almost three years, even though the defendant did not assert the right until less than 30 days before trial, where the case was repeatedly calendared but not called and, according to defendant's unrefuted allegation, State waited for defense witness to be paroled, making it more difficult for defendant to secure that witness's testimony)

State v. Pippin, 72 N.C. App. 387 (1985) (upholding trial court's finding that speedy trial right denied where trial was delayed for fourteen months based primarily on State's repeated mishandling of process of obtaining indictment; prejudice to defendant was anxiety and drain on family's financial resources)

No speedy trial violation found.

Betterman v. Montana, 578 U.S. ___, 136 S. Ct. 1609 (2016) (Speedy Trial Clause does not apply after the defendant has pled guilty or been found guilty at trial; no violation where defendant spent 14 months in jail awaiting sentencing after pleading guilty; due process may still protect against "inordinate delay" in sentencing)

Barker v. Wingo, 407 U.S. 514 (1972) (no speedy trial violation despite five year delay in bringing case to trial where State delayed so that it could obtain conviction of co-defendant and use co-defendant as witness against defendant; court found minimal prejudice and found that defendant had acquiesced in delay)

State v. Webster, 337 N.C. 674 (1994) (no speedy trial violation despite sixteen month delay where there was no showing of an improper purpose or motive by the State and the defendant could not show concrete prejudice)

State v. Groves, 324 N.C. 360 (1989) (twenty-six month delay in bringing case to trial did not deny defendant right to speedy trial where defendant had not objected to delay and had asked for thirteen continuances; defendant also could not show prejudice beyond stating that delay resulted in State having additional jailhouse witnesses against him)

State v. Smith, 289 N.C. 143 (1976) (no constitutional violation where trial was delayed eleven months and there was no showing that delay was purposeful or oppressive or reasonably could have been avoided by State; delay was due to congested dockets, understandable difficulty in locating out-of-state witnesses, and good faith efforts to obtain absent co-defendant)

State v. Evans, ___ N.C. App. ___, 795 S.E.2d 444 (2017) (nearly three year delay in misdemeanor prosecution was enough to trigger review of other *Barker* factors; defendant has the burden to make a prima facie showing that the delay was attributable to the willful or negligent acts of the State, a burden not carried here; while demand was timely, defendant failed to show prejudice based on pretrial incarceration where he was also incarcerated for other, unrelated charges)

State v. Armistead, ___ N.C. App. ___, 807 S.E.2d 664 (2017) (no violation for 4 year delay between indictment and trial in driving while impaired case; delay was presumptively unreasonable and attributable to the negligence of the State where prosecutor removed case from docket after defendant failed to appear and prosecutor by "reasonable effort" could have located defendant, who was serving an active sentence in North Carolina state prison; however, there was no demand for a speedy trial for more than three years and an insufficient showing of prejudice)

State v. Kpaeyeh, 246 N.C. App. 694 (2016) (3 year delay in child sex abuse case did not violate speedy trial right where delay due in large part to substitutions of defense counsel; prejudice argument rejected where defendant claimed loss of ability to locate alibi witnesses, but DNA results showed he was the father of the child born of the victim)

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (2016) (28 month delay sufficient to trigger review of other *Barker* factors but most of that delay was attributable to the crime lab backlog; defendant conceded that "it is unclear the State had the ability to speed up" the testing process; some of the additional delay was caused by the defendant's indecision about defense counsel and defense counsel's schedule; no proper demand for speed trial was made for more than 24 months; evidence of prejudice was speculative)

State v. Friend, 219 N.C. App. 338 (2012) (case involved following sequence: defendant was charged in March 2006 with impaired driving; case was continued 11 times, six of which were attributable to defense, two of which were by consent, and three of which were attributable to State; in July 2007, when State was not ready to proceed, district court refused to continue case and State took voluntary dismissal and refiled charges nine days later; district court dismissed case in October 2007 in light of its earlier refusal to grant continuance; and case moved between district and superior court until February 2010 for review of dismissal order and trial in district and superior court; under these circumstances, court of appeals found that length of delay, one of the four factors in speedy trial analysis, was not caused by State because continuances in district court were attributable to both defendant and State and proceedings to review dismissal order was neutral factor)

State v. Lee, 218 N.C. App. 42 (2012) (twenty-two month delay, including ten-month delay in holding of capacity hearing after psychiatric evaluation of defendant, prompted consideration of *Barker* factors, but no speedy trial violation where record was unclear as to reasons for delay; courts states that while troubled by delay in holding of capacity hearing, it could not conclude that delay was due to State's willfulness or negligence where, among other things, defendant repeatedly requested removal of trial counsel and victim was out of country for medical treatment for injuries)

State v. Branch, 41 N.C. App. 80 (1979) (two year delay was presumptively unreasonable and burden shifted to State to explain delay, but no constitutional violation found because defendant failed to show sufficient prejudice; defendant failed to make record about testimony that lost witness would have given)

E. Remedy for Speedy Trial Violation

Dismissal is the only remedy for violation of a defendant's constitutional right to a speedy trial. *See Barker*, 407 U.S. 514, 522; G.S. 15A-954(a)(3) (court must dismiss charges if defendant has been denied constitutional right to speedy trial); *see also Strunk v. United States*, 412 U.S. 434 (1973) (court cannot remedy violation of right to speedy trial by reducing defendant's sentence); *State v. Wilburn*, 21 N.C. App. 140 (1974)

(recognizing that dismissal is only remedy after determination that constitutional right to speedy trial has been violated).

F. Motions for Speedy Trial

To assert the right to a speedy trial, the defendant should (1) demand a speedy trial, and (2) move to dismiss the charges for lack of a speedy trial. To enhance the chances of having charges dismissed, the demand and motion to dismiss should be made repeatedly, as often as every sixty to ninety days.

Timing of motion. G.S. 15A-954(c) states that a defendant may make a motion to dismiss for lack of a speedy trial at any time. However, for the motion to have a meaningful chance of success, and to avoid the risk of waiver, it should be made before trial. *See State v. Joyce*, 104 N.C. App. 558 (1991) (making motion for speedy trial at trial reduced issue to mere formality); *see also State v. Thompson*, 15 N.C. App. 416 (1972) (speedy trial claim cannot be raised for first time on appeal). As a practical matter, counsel will want to raise the issue as soon as he or she is ready for trial. The more demands a defendant makes for a speedy trial, the more likely his or her chances of obtaining a dismissal for lack of a speedy trial.

Content of speedy trial motion. The motion to dismiss should articulate the effect of pretrial delay on each of the factors enumerated in *Barker*. *See State v. Groves*, 324 N.C. 360 (1989) (defendant has burden of showing prejudice, history of assertions of right, and negligence or willfulness of State; in this case, defense motion failed to establish prejudice to preparation of defense); *State v. Lyszaj*, 314 N.C. 256, 262 (1985) ("bald contentions" of prejudice and improper reasons for delay not sufficient to support speedy trial claim). A sample motion to dismiss for a speedy trial violation is available in the noncapital motions bank on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

Hearing on motion. If the defendant's motion presents questions of fact, the court is required to conduct a hearing and make findings of fact and conclusions of law. *See State v. Dietz*, 289 N.C. 488 (1976); *State v. Chaplin*, 122 N.C. App. 659 (1996). If there is no objection, the evidence may consist of statements of counsel; however, the North Carolina courts have clearly expressed that the better practice is to present evidence and develop the record through affidavits or testimony. *See State v. Pippin*, 72 N.C. App. 387 (1985); *see also State v. Sheridan*, ___ N.C. App. ____, 824 S.E.2d 146 (2019) (trial court erred by not considering all the *Barker* factors and failing to make findings; remanded for proper *Barker* analysis); *State v. Wilkerson*, ___ N.C. App. ___, 810 S.E.2d 389 (2018) (following remand of case to resolve speedy trial motion, trial court failed to allow parties to present new evidence or arguments; where defendant makes a prima facie showing of speedy trial violation, an evidentiary hearing should be held and an order with findings on the *Barker* factors should be made).