SPEEDY TRIAL & RELATED ISSUES

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Contents

I. Related Materials. The North Carolina Defender Manual**,** Ch. 7, Speedy Trial and Related Issues (2d ed. 2013), http://defendermanuals.sog.unc.edu/pretrial/7-speedy-trial-and-related-issues, provides a comprehensive resource on speedy trial and related issues. The North Carolina Prosecutors' Trial Manual 169-27, *Speedy Trial Issues (Constitutional and Statutory) and Interstate Agreement on Detainers* (5th ed. 2012) also discusses these topics. I gratefully acknowledge the incorporation in part of excerpts from these publications.

II. Due Process Issue When Delay Occurs Before Arrest or Charge. Although the Sixth Amendment right to speedy trial does not attach before arrest, indictment, or other official accusation, a defendant is protected from unfair or excessive pre-accusation delay by the Due Process Clause of the Fifth and Fourteenth Amendments. *See* United States v. Lovasco, 431 U.S. 783, 788-89 (1977); United States v. Marion, 404 U.S. 307, 325 (1971).

A. Standard. In *Lovasco*, the Court emphasized that the due process right to timely prosecution is limited. A due process violation occurs only when the defendant's ability to defend against the charge is prejudiced by the delay, and the reason for the delay is improper. 431 U.S. at 790.

1. Prejudice. To establish a due process violation a defendant must demonstrate prejudice—that is, the defendant must show that the pre-indictment delay impaired his or her ability to defend against the charge. *See Lovasco*, 431 U.S. at 790; *Marion*, 404 U.S. at 324-25; State v. McCoy, 303 N.C. 1, 7 (1981).

General allegations that the passage of time has caused memories to fade are insufficient to establish prejudice. *See* State v.

Goldman, 311 N.C. 338, 345 (1984) (prejudice was not established by showing that defendant did not recall the date in question or could not account for his whereabouts on that date). Instead, the defendant must establish that pre-accusation delay caused the loss of significant and helpful testimony or evidence. *See* State v. Dietz, 289 N.C. 488, 493-94 (1976) (so stating; contrasting case at hand against federal case where prejudice existed because the defendant showed that he was precluded from offering testimony of specific alibi witness because of the witness's uncertainty about the events); State v. Jones, 98 N.C. App. 342, 344 (1990) (the defendant failed to show that significant evidence or testimony that would have been helpful to defense was lost due to the delay).

Counsel also may have an obligation to ameliorate prejudice if possible. *See* State v. Hackett, 26 N.C. App. 239, 243 (1975) (defense motion denied in part because the defendant who alleged pre-accusation delay had not tried to remedy memory loss regarding underlying incident by moving for a bill of particulars or moving for discovery of the information).

2. Reason for Delay Improper. A court reviewing pre-accusation delay not only must find actual prejudice, but also must consider the reason for the delay. See *Lovasco*, 431 U.S. at 790. Delay in prosecution might be attributable to investigation, negligence, administrative considerations, or an improper attempt to gain some advantage over the defendant. To establish a due process violation, the defendant must show that the delay was "unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant." *McCoy*, 303 N.C. at 7-8; *see also Goldman*, 311 N.C. at 345 (citing *McCoy* and concluding that pre-indictment delay was attributable only to an ongoing investigation of the case and thus not improper).

a. When Delay Violates Due Process. United States Supreme Court and North Carolina decisions generally require proof of intentional delay by the State to show a due process violation. *See* United States v. Gouveia, 467 U.S. 180, 192 (1984) (stating that due process requires dismissal of an indictment if the defendant proves that the government's delay caused actual prejudice and was a deliberate mechanism to gain an advantage over the defendant); State v. Graham, 200 N.C. App. 204, 215 (2009) (applying same two-pronged test). Cases finding a due process violation include:

- State v. Johnson, 275 N.C. 264, 273-75 (1969) (due process violated by four- to five-year delay in prosecuting the defendant when the reason for delay was law enforcement's hope to arrest an accomplice and to pressure the defendant to testify against the accomplice once he was arrested; the pre-accusation delay caused the defendant to serve a prison term that might otherwise have run concurrently with earlier sentence).
- Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) (due process violated where the state conceded that a several year delay in prosecuting the defendant resulted in a lost witness; the reason for delay was administrative convenience; the court

reached its conclusion by balancing prejudice and the reason for the delay).

b. Excusable delay. Courts have not found a due process violation when a delay in prosecuting a case is attributable to the exigencies of the investigation. *See Lovasco*, 431 U.S. at 795-96 (investigative delay acceptable; investigation before indictment should be encouraged); *Goldman*, 311 N.C. at 345 (delay of more than six years between the crime and the indictment did not result in due process violation when delay was attributable to ongoing investigation and the defendant failed to show actual or substantial prejudice resulting from delay); State v. Netcliff, 116 N.C. App. 396, 401 (1994) (pre-indictment delay was acceptable, based in part on end date of undercover drug operation in relation to date of indictment), *overruled in part on other grounds by* State v. Patton, 342 N.C. 633 (1996); State v. Holmes, 59 N.C. App. 79, 83 (1982) (delay excusable when necessary to protect identity of undercover officer).

Courts also have declined to find a due process violation when the delay in a prosecution is the result of delay in reporting crimes to law enforcement. *See* State v. Martin, 195 N.C. App. 43, 48 (2009) (delay of six years before Department of Social Services reported sexual offenses against child; DSS is not the prosecution or a law enforcement agency for purposes of delay inquiry); State v. Stanford, 169 N.C. App. 214, 216 (2005) (fifteen year delay before the victim filed report of sexual offenses committed when she was thirteen and fourteen years old); State v. Everhardt, 96 N.C. App. 1, 8-9 (1989) (offense reported three years after commission), *aff'd*, 326 N.C. 777 (1990); State v. Hoover, 89 N.C. App. 199, 202 (1988) (sexual offense against child not reported for six years, then prosecuted promptly).

Other cases not finding a due process violation on grounds of excusable delay or lack of prejudice include:

- State v. Goldman, 311 N.C. 338, 345 (1984) (six-year investigative delay in obtaining indictment; only prejudice was the defendant's assertions of faded memory about dates and events in question).
- State v. McCoy, 303 N.C. 1, 12-13 (1981) (eleven-month delay between the offense and trial; reasons for the delay were the defendant's hospitalization and overcrowding of court docket; court also held that the defendant was unable to show prejudice).
- State v. Dietz, 289 N.C. 488, 492-93 (1976) (four and one half-month delay between the offense and indictment; reason for the delay was to protect identity of undercover officer and only claim of prejudice was faded memory; court applied balancing test between reason for delay and prejudice).
- State v. Graham, 200 N.C. App. 204, 215 (2009) (general assertion of prejudice based on faded memory does not show

actual prejudice; the defendant did not assert that any particular witness would give testimony helpful to him).

- State v. Everhardt, 96 N.C. App. 1 (1989) (spouse abuse case where three-year delay in initiating prosecution was caused primarily by the victim's procrastination in reporting abuse; the defendant showed witness unavailability but did not prove that witnesses would have been available at an earlier time), *aff'd*, 326 N.C. 777 (1990).
- State v. Hackett, 26 N.C. App. 239, 243 (1975) (six-month delay in prosecuting the defendant to protect identity of undercover agent).

B. Procedure.

1. Defendant's Motion. A motion to dismiss for untimely prosecution may be brought under G.S. 15A-954(a)(4), which provides that the court must dismiss the charges in a criminal pleading if violation of the defendant's constitutional rights has caused irreparable prejudice. State v. Parker, 66 N.C. App. 293, 294 (1984) (court cites this statutory provision as well as G.S. 15A-954(a)(3) (dismissal for denial of speedy trial)).

G.S. 15A-954(c) permits a motion to be made "at any time." However, to avoid the risk of waiver, defendants typically make a motion before or at trial.

2. Hearing. When there are contested issues of fact regarding a motion to dismiss, the defendant is entitled to an evidentiary hearing, State v. Goldman, 311 N.C. 338, 346-47 (1984), but a defendant must specifically request a hearing. *See Dietz*, 289 N.C. at 494 (failure to hold hearing not error absent defense request).

3. Judge's Ruling. The judge should make findings of facts and conclusions of law when issuing a ruling granting or denying a motion. *Cf.* State v. Clark, 201 N.C. App. 319, 328-29 (2009) (court states that when an evidentiary hearing is required for a motion to dismiss for lack of a speedy trial, the trial court must make findings of fact and conclusions of law to support its order). The *Clark* statement would clearly apply to due process challenges as well.

III. Federal and State Constitution Right to Speedy Trial.

A. Basis of Constitutional Right to Speedy Trial. The defendant's right to a speedy trial is based on the Sixth Amendment to the United States Constitution and on Article I, Section 18 of the North Carolina Constitution. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (Sixth Amendment speedy trial right applicable to states); State v. Tindall, 294 N.C. 689, 693 (1978) (noting state constitutional provision). North Carolina no longer has a speedy trial statute; the statutory provisions of Article 35 of Chapter 15A (G.S. 15A-701 through G.S. 15A-710) were repealed effective October 1, 1989.

B. Scope of Right. The Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution. Betterman v. Montana, ___ U.S. ___, 136 S. Ct. 1609, 1612 (2016). North Carolina appellate courts have not addressed whether the state constitution's speedy trial provision (Art I, Sec. 18) applies to the sentencing phase. "For inordinate delay in sentencing, . . . a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clause." *Id*. The *Betterman* Court reserved

the question of whether the speedy trial clause "applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings)." *Id*. at 1613 n.2. Nor did it decide whether the speedy trial right "reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence." *Id*.

C. Standard. The leading case on the Sixth Amendment standard for assessing speedy trial claims is *Barker v. Wingo*, 407 U.S. 514 (1972). North Carolina appellate courts apply the same standard under the North Carolina Constitution. State v. Spivey, 357 N.C. 114, 118 (2003). *Barker* held that the following four factors must be balanced to determine whether the right to speedy trial has been violated:

- 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 not a bright-line test to determine 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); *Barker*, 407 U.S. at 533 (none of the four factors are either a necessary or sufficient condition to finding a speedy trial violation). All the factors must be weighed and balanced against each other. *See* State v. Groves, 324 N.C. 360, 365-67 (1989) (court conducted analysis of four *Barker* factors and did not find a constitutional violation); State v. Washington, 192 N.C. App. 277, 283-97 (2008) (court conducted analysis of four *Barker* factors and found a constitutional violation).

1. 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. at 530; *see also* State v. Jones, 310 N.C. 716, 721 (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" when it exceeds one year. *See* Doggett v. United States, 505 U.S. 647, 652 n.1 (1992); State v. Webster, 337 N.C. 674, 679 (1994) (delay of sixteen months triggered examination of other factors); State v. Smith, 289 N.C. 143, 148 (1976) (delay of eleven months prompted consideration of *Barker* factors); State v. Pippin, 72 N.C. App. 387, 392 (1985) (fourteen months). *But see* State v. McCoy, 303 N.C. 1, 12 (1981) (delay of eleven months was not presumptively prejudicial).

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*, 505 U.S. at 657 (1992) (delay of eight

years required dismissal); State v. Chaplin, 122 N.C. App. 659, 663 (1996) (particularly lengthy delay establishes prima facie case that delay was due to neglect or willfulness of prosecution and requires the State to offer evidence explaining the reasons for delay and rebutting the prima facie showing; constitutional violation found when the case was calendared for trial every month for three years but was never called for trial and the defendant had to travel from New York to North Carolina for each court date); State v. Washington, 192 N.C. App. 277, 297 (2008) (four years and nine months between arrest and trial constituted an unconstitutional delay in conjunction with other *Barker* factors); State v. McBride, 187 N.C. App. 496, 498-99 (2007) (delay of three years and seven months did not violate right to speedy trial when the record did not show the reason for the delay and the defendant did not assert the right until trial and did not show prejudice).

a. **De Novo Appeals**. In *State v. Friend*, 219 N.C. App. 338, 344 (2012), the court measured delay for speedy trial purposes from the time of the defendant's appeal to superior court for trial de novo 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. Despite this statement, the *Friend* court considered the entire delay in assessing and ultimately rejecting the defendant's speedy trial claim. *See also* State v. Sheppard, 225 N.C. App. 655, *6 (2013) (unpublished) (in this DWI case, 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 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).

2. **Reason for Delay.** The length of delay must be considered together with the reason for delay. The *Barker* Court 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. at 531; *see also* State v. Pippin, 72 N.C. App. 387, 395 (1985) (negligence by the State may support a claim; the right to a speedy trial was violated when the State issued three defective indictments before issuing a valid indictment).

North Carolina courts generally have held that the defendant has the burden of showing that the trial delay was due either to neglect or willfulness on the part of the prosecution. *See* State v. McKoy, 294 N.C. 134, 141 (1978). However, there is a modification of this general rule when the delay is exceptionally long. Once the defendant has shown prima facie evidence to meet this burden, then the State must offer evidence to explain the delay to rebut the defendant's prima facie evidence. *See* State v. Branch, 41 N.C. App. 80, 85-86 (1979) (when the

defendant showed a seventeen month delay after his request for a speedy trial, the State should have presented evidence fully explaining reasons for the delay, which it failed to do); *Washington*, 192 N.C. App. at 283 (the State did not rebut the defendant's prima facie evidence when the reason for a four year, nine month delay was not a neutral factor, but was repeated neglect and underutilization of court resources by the district attorney's office).

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 violation can be found when the reason for the delay was administrative negligence. *Pippin*, 72 N.C. App. at 398 (speedy trial violation found when the State was negligent in obtaining a valid indictment); s*ee also Webster*, 337 N.C. at 679 (1994) (court "expressly disapprove[s]" of practice of repeatedly placing a case on the trial calendar without calling it for trial, but ultimately does not find a speedy trial violation). *But see* State v. Kivett, 321 N.C. 404, 409 (1988) (holding that the defendant's speedy trial rights were not violated when 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).

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, 148 (1976) (eleven month delay caused by congested dockets and difficulty in locating witnesses was acceptable); State v. Hughes, 54 N.C. App. 117, 119 (1981) (no speedy trial violation found when 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. at 531 ("[O]vercrowded 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.").

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, 366 (1989) (no speedy trial violation when the defendant repeatedly asked for continuances); State v. Tindall, 294 N.C. 689, 695-96 (1978) (no violation when the delay was caused largely by the defendant's fleeing the state and living under an assumed name); State v. Leyshon, 211 N.C. App. 511, 524 (2011) (no violation when the delay was caused by the defendant's failure to state whether he asserted or waived his right to counsel at four separate hearings); *Pippin*, 72 N.C. App. at 394 (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).

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, 92-93 (2009) (delay caused by appointed defense counsel is not attributable to the state when determining whether a defendant's speedy trial right is violated; however, the state may be responsible if there is a breakdown in the public defender system).

3. Prejudice to the Defendant. The *Barker* Court, 407 U.S. at 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, 665 (1996) (loss of critical defense witness); State v. Washington, 192 N.C. App. 277, 293-97 (2008) (the State's witnesses' memories of key events had faded, interfering with the defendant's ability to challenge their reliability; the State's witnesses also were allowed to make in-court identifications of the defendant nearly five years after the date of offense, which increased the possibility of misidentification).

Courts also have found prejudice when a defendant was subjected to oppressive pretrial incarceration or when 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 the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, . . . and create anxiety in him, his family and his friends"); *Pippin*, 72 N.C. App. 387, 396-98 (1985) (dismissal of charges upheld despite no real prejudice to defense when 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 (fact that the defendant was incarcerated for 366 days as a result of pretrial delay was an "important consideration").

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, 655-56 (1992) (prejudice presumed when the trial delayed for over eight years); *McKoy*, 294 N.C. at 143 (willful delay of ten months outweighed lack of real prejudice to defendant; speedy trial violation found).

4. Assertion of Speedy Trial 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. *Barker*, 407 U.S. at 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 McKoy*, 294 N.C. at 142 (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, 184 (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. *See* State v. Webster, 337 N.C. 674, 680 (1994); State v. McCollum, 334 N.C. 208, 231 (1993) (where the

defendant made no attempt to assert his right to a speedy trial for thirty-two months, this factor weighed against the defendant). *Cf. Washington*, 192 N.C. App. at 290-91 (this factor favored the defendant when although the defendant did not formally assert the right until two years and ten months after indictment, the assertion was still one year and eight months before trial began, and defendant complained about delay in examination of physical evidence before formal assertion); *Chaplin*, 122 N.C. App. at 664-65 (with delay of almost three years, charge dismissed for speedy trial violation although the defendant did not assert right until 30 days before trial when defendant suffered great prejudice).

D. When Speedy Trial Right Attaches.

1. Defendant Must Be Charged with a 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, 655 (1992); Dillingham v. United States, 423 U.S. 64, 65 (1975) (per curiam); *McKoy*, 294 N.C. at 140; State v. Friend, 219 N.C. App. 338, 343 (2012). This standard is highly likely to be adopted under the North Carolina Constitution because North Carolina appellate courts already apply the four-factor *Barker* standard under the North Carolina Constitution. *See* State v. Spivey, 357 N.C. 114, 118 (2003).

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, 420-23 (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 a delay in arresting defendant following indictment was subject to speedy trial protection).

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, 10 (1981), issued before *Doggett,* the North Carolina 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* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 121-22 (4th ed. 2015) (noting that jurisdictions have reached differing results; stating as a general proposition, 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); *see also* Williams v. Darr, 603 P.2d 1021, 1024 (Kan. Ct. App. 1979) (speedy trial right attaches on issuance of arrest warrant, which commences prosecution).

However, lack of knowledge can affect the prejudice analysis in 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, because the defendant cannot make a demand for a speedy trial in this situation, the lack of a demand may not harm the defendant in the speedy trial analysis.

2. 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). *See* State v. Muncy, 79 N.C. App. 356, 360 (1986).

After charges are dismissed pursuant to G.S. 15A-931, the defendant's Sixth Amendment speedy trial rights are in abeyance until the State brings later charges. *See* United States v. Loud Hawk, 474 U.S. 302, 310-12 (1986) (no Sixth Amendment right to speedy trial after dismissal, even if the government is appealing the dismissal); United States v. MacDonald, 456 U.S. 1, 8-9 (1982) (Sixth Amendment right to speedy trial not implicated during four years between dismissal and reinstatement of charges). Undue delay in reprosecuting the charge could result in a due process violation, however. *See supra* Section II.

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. Pippin, 72 N.C. App. 387, 391 (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.").

3. 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). 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, 641 (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 when the delay is caused by the defendant's own actions. *See* Barker v. Wingo, 407 U.S. 514, 531 (1972); State v. Tindall, 294 N.C. 689, 695-96 (1978) (delay caused by the defendant fleeing the 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, 221 (1967) (former North Carolina 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)); *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).

4. **Prisoner's Right to 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, 377-78 (1969); State v. Wright, 290 N.C. 45, 54 (1976); State v. Johnson, 275 N.C. 264, 278 (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, 181 (1978); State v. McQueen, 295 N.C. 96, 116-17 (1978), *overruled on other grounds by* State v. Peoples, 311 N.C. 515 (1984). A defendant 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, 275 (1969) (due process violated by four to five year delay in prosecuting the defendant when the reason for the delay was law enforcement's hope to arrest an accomplice and pressure the defendant to testify against the accomplice once he was arrested; court found prejudice when pre-accusation delay led to the defendant serving a prison term that might otherwise have run concurrently with earlier sentence). Concerning a prisoner's statutory method to obtain a trial, see Section V., below.

E. Case Summaries.

1. **Speedy Trial Violation Found.** A speedy trial violation was found in the following cases:

   - Doggett v. United States, 505 U.S. 647, 655 (1992) (8½ year delay between indictment and trial, largely because of the prosecution's negligence in locating the 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, 143 (1978) (22-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 the defendant when the defendant requested that 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 where the defendant was charged in September 2010 with impaired driving; case was repeatedly continued, once for the defendant to confer with counsel after initial appointment and remaining times at the State's request; the defendant filed numerous speedy trial requests 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 the defendant the same day; the defendant made further requests for a speedy trial and moved for dismissal on speedy trial grounds,

which the district court denied; the defendant was tried and convicted in district court 14 months after her arrest; the defendant appealed for a trial de novo, made additional speedy trial requests, and then prevailed on her speedy trial motion in superior court; the *Barker* factors supported the superior court's ruling; the 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) (trial was delayed nearly five years; reason for delay was repeated neglect and underutilization of court resources by the prosecutor's office, with much of delay caused by the State's failure to submit physical evidence to SBI lab for analysis; no indication that the delay was caused by factors outside of the prosecution's control; the delay resulted in actual particularized prejudice to the defendant, and the defendant asserted his right to speedy trial).
- State v. Chaplin, 122 N.C. App. 659 (1996) (trial was delayed for almost three years, even though the defendant did not assert the right until less than 30 days before trial; the case was repeatedly calendared but not called and, according to the defendant's unrefuted allegation, State waited for a defense witness to be paroled, making it more difficult for the defendant to secure that witness's testimony).
- State v. Pippin, 72 N.C. App. 387 (1985) (trial was delayed for fourteen months based primarily on the State's repeated mishandling of process of obtaining indictment; prejudice to the defendant was anxiety and drain on family's financial resources).

2. No Speedy Trial Violation Found. No speedy trial violation was found in the following cases:

- Barker v. Wingo, 407 U.S. 514, 533-36 (1972) (five-year delay so that the State could obtain a conviction of a co-defendant and use the co-defendant as witness against the defendant; court found minimal prejudice and that the defendant had acquiesced in delay).
- State v. Webster, 337 N.C. 674 (1994) (16-month delay but no showing of an improper purpose or motive by the State or prejudice to the defendant).
- State v. Groves, 324 N.C. 360, 365-67 (1989) (26-month delay; the defendant had not objected to the delay and had asked for 13 continuances; the defendant could not show prejudice beyond stating that delay resulted in the State having additional jailhouse witnesses against him).
- State v. Smith, 289 N.C. 143, 146-49 (1976) (11-month delay; no showing that delay was purposeful or oppressive or reasonably could have been avoided by State; the delay was due to congested dockets, understandable difficulty in locating out-of-

state witnesses, and good faith efforts to obtain an absent co-defendant).

- State v. Kpaeyeh, ___ N.C. App. ___, 784 S.E.2d 582, 584-86 (2016) (3-year delay when changes in the defendant's representation caused much of the delay as well as miscommunication between the defendant and his first two lawyers, or neglect by these lawyers, and the defendant failed to show prejudice).
- State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78, 83-85 (2015) (while 9-year delay was extraordinary, delay was not determinative and examination of *Barker* factors was required; delay did not stem from the State's negligence or willfulness; the defendant asserted speedy trial right 8 years after indictment; and the defendant failed to show prejudice).
- State v. Friend, 219 N.C. App. 338, 343-46 (2012) (the 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 the State; in July 2007, when the State was not ready to proceed, district court refused to continue case and State took voluntary dismissal and refiled charges nine days later; the district court dismissed the 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; the length of delay was not caused by the State because the continuances in district court were attributable to both parties and proceedings to review dismissal order was neutral factor).
- State v. Lee, 218 N.C. App. 42, 52-54 (2012) (22-month delay, including 10-month delay in holding of capacity hearing after the defendant's psychiatric evaluation, prompted consideration of *Barker* factors, but no speedy trial violation when record was unclear about the reasons for delay; courts stated that while troubled by delay in holding of capacity hearing, it could not conclude that delay was due to the State's willfulness or negligence when, among other things, the defendant repeatedly requested removal of trial counsel and the victim was out of country for medical treatment for injuries).
- State v. Branch, 41 N.C. App. 80, 85-87 (1979) (2-year delay was presumptively unreasonable and burden shifted to the State to explain delay; no constitutional violation found because the defendant failed to show sufficient prejudice; the defendant failed to make a record about testimony that lost witness would have given).

F. Remedy for Speedy Trial Violation. Dismissal of the charge with prejudice (which means the charge cannot be tried again) is the only remedy for violation of a defendant's constitutional right to a speedy trial. *See Barker*, 407 U.S. at 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, 438-40 (1973) (court cannot remedy violation of right to speedy trial by reducing the defendant's sentence); State v. Wilburn, 21 N.C. App. 140, 142 (1974) (recognizing that dismissal is the only remedy after a determination that constitutional right to speedy trial has been violated).

G. Procedure.

1. Defendant's 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, it typically is made before trial. *See* State v. Joyce, 104 N.C. App. 558, 568-69 (1991) (making motion for speedy trial at trial reduced issue to mere formality); *see also* State v. Thompson, 15 N.C. App. 416, 418 (1972) (speedy trial claim cannot be raised for first time on appeal).

2. Hearing; Court's Ruling. 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, 495 (1976); State v. Chaplin, 122 N.C. App. 659, 663 (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, 397-98 (1985).

IV. Out-of-State Prisoner's Right to Trial under Interstate Agreement on Detainers.

A. Trial Within 180 Days From Time When Out-of-State Prisoner Notifies Prosecutor. Article III(a) of the Interstate Agreement on Detainers (G.S. 15A-761) provides that an out-of-state prisoner against whom a detainer has been lodged must be tried within 180 days after the prisoner has "caused to be delivered" to the prosecutor and court written notice of the place of his or her imprisonment and a request for a final disposition to be made of the criminal charge. State v. Ferdinando, 298 N.C. 737, 740 (1979) (prisoner's request for a speedy trial before a detainer was lodged against him was ineffectual to trigger the interstate agreement); State v. Parr, 65 N.C. App. 415, 417 (1983) (the interstate agreement only applies to those charges that are the basis for the issuance of a detainer); State v. Vaughn, 296 N.C. 167, 176-77 (1978) (a prisoner's request was ineffectual because it failed to provide the information required by law); State v. Schirmer, 104 N.C. App. 472, 476 (1991) (similar ruling).

Continuances may be granted that extend the time in which the State may prosecute the charge. G.S. 15A-761, Article III; State v. Capps, 61 N.C. App. 225, 231 (1983). If a trial is not begun within the appropriate time period, the charge must be dismissed with prejudice, which means that the charge may not be tried again.

The beginning date for the 180-day period is when the prosecutor actually received the request, not when the prosecutor should have received the request. State v. Treece, 129 N.C. App. 93, 95-96 (1998) (the defendant mailed the request on January 16, 1996, but the request was not delivered to the district attorney's office until March 18, 1996; the latter date is the beginning of the 180-day period); State v. McQueen, 295 N.C. 96, 112 (1978) (no evidence that the district attorney's office received defendant's request), *overruled on other grounds by* State v. Peoples, 311 N.C. 515 (1984).

If a prisoner is released from prison before the expiration of the 180-day period, the interstate agreement no longer provides a defendant with the right to a speedy trial. State v. Dunlap, 57 N.C. App. 175, 177-78 (1982).

An order for arrest following an indictment by a State grand jury that is served on a defendant in federal custody does not constitute a "detainer" that subjects the State to requirements of the Interstate Agreement on Detainers when the order is not filed directly with federal Bureau of Prisons or any federal institution, and the State does not request federal officials to hold the defendant at end of the defendant's federal sentence or to notify the State of the defendant's release. State v. Prentice, 170 N.C. App. 593, 600 (2005).

The agreement does not apply to a North Carolina prisoner who has criminal charges pending in a North Carolina state court. State v. Dammons, 293 N.C. 263, 267-68 (1977). For such a prisoner, see Section V., below.

B. Trial within 120 Days of Prisoner's Arrival in the State. Article IV(c) of the Interstate Agreement on Detainers, G.S. 15A-761, provides that a prisoner in another state against whom a detainer has been lodged must be tried within 120 days of the prisoner's arrival in North Carolina when the State had requested the prisoner for trial. Continuances may granted that extend the time in which the State may prosecute the charge. G.S. 15A-761; Article IV(c). For cases upholding State's continuances or excluding time from the 120-day time limitation because of a defendant's continuances, *see* State v. Lyszaj, 314 N.C. 256, 262-63 (1985); State v. Vaughn, 296 N.C. 167, 178 (1978); *Capps*, 61 N.C. App. at 231; State v. Collins, 29 N.C. App. 478, 481 (1976).

If a trial is not begun within the appropriate time period, the charge must be dismissed with prejudice, which means that the charge may not be tried again.

If a trial is begun within 120 days and results in a mistrial, the State is not required to try the defendant again within the 120-day period. The State only is required to use due diligence in trying the defendant again. State v. Williams, 33 N.C. App. 344, 347-48 (1977).

The State has a duty to try an out-of-state prisoner before returning the prisoner to the other jurisdiction (federal or state prison). For example, in *Alabama v. Bozeman*, 533 U.S. 146, 152-56 (2001), an Alabama prosecutor requested and received custody, under Article IV of the Interstate Agreement on Detainers, of a prisoner in a Florida federal prison (for whom the state had filed a detainer) and arraigned him and appointed counsel on criminal charges in an Alabama state court. After spending one day in an Alabama jail, the prisoner was returned to the Florida federal prison. He later was returned to Alabama for trial. The court ruled that the act of bringing the federal prisoner to Alabama triggered Alabama's duty under subsection (e) of Article IV (see G.S. 15A-761, Article IV(e) for North Carolina's similar provision) to try the prisoner before returning him to the Florida prison. The Court affirmed the dismissal of the Alabama charges, rejecting Alabama's argument that dismissal is inappropriate for a "technical" violation. The Court stated in dicta that a prisoner could waive the right to trial under subsection (e) of Article IV.

V. North Carolina Prisoner or Jail Inmate Requesting Trial in North Carolina State Courts. North Carolina statutes provide methods for a person incarcerated in a North Carolina prison or jail to accelerate the process to dispose of a pending criminal charge.

A. **G.S. 15A-711.** G.S. 15A-711(a) and -711(c) provide that a written request to be produced for trial filed with the clerk of court where charges are pending by (i) a North Carolina prisoner serving a sentence, or (ii) a North Carolina defendant in custody awaiting trial, requires the State to file a request to the custodian of the prisoner or inmate for his or her temporary release to the State within six months from the date when the prisoner or inmate filed his or her request. G.S. 15A-711(a) authorizes the prosecutor to make a written request to the custodian of the institution where the prisoner is located to release the prisoner for a period of 60 days for trial.

If the State does not comply within the six-month time period to make the written request to the custodian for the prisoner's release for trial, then the charges must be dismissed with prejudice. In *State v. Doisey*, 162 N.C. App. 447, 450 (2004), the court made clear that the dismissal of charges is based solely on whether the State failed within six months of the defendant's request to be produced for trial to request the defendant's release from a penal institution for trial. The dismissal of charges is not based on the State's failure to try the defendant within a particular time period. The court distinguished statements made in *State v. Dammons*, 293 N.C. 263 (1977). *See also* State v. Turner, 34 N.C. App. 78, 84-85 (1977) (State proceeded within the six months' limitation when it requested the defendant from the state prison; a trial is not required within six months); State v. Williamson, 212 N.C. App. 393, 396 (2011) (the court noted that G.S. 15A-711 is not a speedy trial statute; the State satisfies its statutory duty when a properly-served prosecutor timely makes a written request for the defendant's transfer).

A prisoner's failure to serve a copy of his or her written request on the prosecutor in the manner provided by Rule 5(b) of the Rules of Civil Procedure, *see* G.S. 15A-711(c), bars the dismissal of charges. Thus, a defendant is not entitled to relief if the request is not properly served. State v. Pickens, 346 N.C. 628, 648 (1997); State v. Hege, 78 N.C. App. 435, 437 (1985).

B. **G.S. 15-10.2.** G.S. 15-10.2 provides that a prisoner serving sentence in the North Carolina prison system who has lodged against him or her a detainer for a criminal charge pending in state court must be brought to trial within eight months after the prisoner has sent by registered mail to the district attorney a request for final disposition of the charge. However, the statute provides that a court may grant a continuance for good cause.

For cases on this statutory provision, see *State v. McKoy*, 294 N.C. 134, 143-44 (1978) (the defendant was not entitled to relief when he did not send the district attorney a notice and request for trial by registered mail as required by the statute), and *State v. Dammons*, 293 N.C. 263, 266 (1977) (the defendant was not entitled to relief when the defendant's pro se request for trial was not sent by registered mail; additionally, the defendant was tried within eight months of the request).