

STATE OF NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
XXCRXXXXX

STATE OF NORTH CAROLINA, )  
)  
vs. )  
)  
XXXXXXXXXXXXXXXXXX, )  
)  
Defendant. )

**MOTION TO DISMISS**  
*For Violation of Defendant's*  
*Right to a Speedy Trial*

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NOW COMES the Defendant, by and through counsel, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution; Article One, Section Eighteen of the North Carolina Constitution; and N.C.G.S. 15A-954(3), who moves this Court to dismiss the charge against him of Indecent Liberties With a Child arising out of an arrest that took place on November 16, 2015 because his constitutional right to a Speedy Trial has been denied. In support of this motion, on information and belief from the court record and statements from the Defendant and Law Enforcement Officers, it is alleged as follows:

1. The offense sate in the above-captioned case is alleged to have occurred between May 31<sup>st</sup>, 2015 and July 30<sup>th</sup>, 2015.
2. The Defendant was arrested on November 16, 2015 and the case was indicted on January 4<sup>th</sup>, 2016.
3. The Defendant filed a discovery request on February 25<sup>th</sup>, 2016.
4. The Defendant has appeared for over a dozen court dates.
5. As of the date of this filing, it has been a staggering 4 years, 4 months, and 8 days since arrest with no case disposition in sight despite attempts by defense counsel to request trial dates.
6. The reason for the delay rests solely on the State of North Carolina.
7. The Defendant has suffered actual prejudice in the form of repeated court dates, mental anguish and lost and limited job opportunities due to having been subject to over a dozen court dates for a criminal charge that has been pending for almost 4 and a half years.
8. Other prejudice includes, but is not limited to:
  - a. Lost his job at Diebold when he was arrested.

- b. Opportunity to move out of state.
- c. Lost wages due to voluminous court appearances.
- d. Exacerbated Post Traumatic Stress Disorder flare-ups that he has been diagnosed with since he served honorably in the United States Military from 2007 to 2011.
- e. Societal stigma from having a pending Indecent Liberties charge for 4 and half years.

### MEMORANDUM OF LAW

The United States and North Carolina Supreme Courts have consistently held that a defendant has right to a speedy trial that is guaranteed by Sixth and Fourteenth Amendments of the United States Constitution. *See Barker v. Wingo*, 407 U.S. 514 (1972) and *State v. McKoy*, 294 N.C. 134 (1978). This right is also enshrined in the North Carolina Constitution in Article One, Section Eighteen. By North Carolina General Statute, the remedy for a violation of this right is dismissal. *N.C.G.S. §15A-954(3)*.

The Court makes a determination of whether or not a Defendant's right to a Speedy Trial has been violated by analyzing four factors and balancing them in favor of the defendant or the State. The factors must considered in light of the facts of each particular case. These factors are: the length of the delay, the reason for the delay, the timeliness of asserting the right, and whether the defendant has suffered any prejudice due to the delay. *See Barker; McKoy; State v. Groves*, 324 N.C. 360 (1989); and *State v. Washington*, 192 N.C. App. 277 (2008).

#### 1. The Length of the Delay

The length of the delay is considered for two reasons. First, it is considered a "triggering mechanism" before inquiring into the remaining factors. If the delay is not sufficiently long enough, the court will usually not delve into further analysis of the factors. "Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker* 407 U.S. at 530. Generally, a delay of one year has been found to trigger analysis. *See 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); *State v. Wilburn*, 21 N.C. App. 140 (1974) (ten months).

If the rest of the inquiry is triggered, the second purpose of this factor is for it to be weighed alongside the remaining three. The longer the delay, the more heavily this factor weighs against the State. *See Doggett v. United States*, 505 U.S. 647, 652 (1992). A shorter delay in District Court should be considered prejudicial for a Defendant where the State is more than capable of disposing of misdemeanor cases. *See Barker*, 407 U.S. at 531 ("the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"). *See also, 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 an unpublished opinion, the North Carolina Court of Appeals found that a delay of fourteen months between arrest and trial for a DWI in District Court was “presumptively prejudicial.” *State v. Sheppard*, \_\_ N.C. App. \_\_, 738 S.E.2d 453 (February 19, 2013).

## 2. The Reason for the Delay

The second factor to be considered is the reason for the delay. The *Barker* court held that different reasons for the delay should be assigned different weights when balancing the factors. “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 since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.” *Barker* at 531.

North Carolina courts have generally held that the defendant has the burden of showing that the trial delay is due to neglect or willfulness on the part of the prosecution. See *McKoy* and *State v. Chaplin*, 122 N.C. App. 659 (1996). There is an exception however, when the delay is exceptionally long. In these cases, the burden is on the prosecution to explain the reason for the delay. See *State v. Branch*, 41 N.C. App. 80 (1979). Even in the absence of prosecutorial neglect, neutral reasons do not always justify the delay. See *Barker* at 531.

## 3. The Timeliness in Asserting the Right

*Barker* rejected a rule where a defendant is required to raise a speedy trial claim or lose it. There is no bright line rule, however, for how to weigh this factor. This factor will be heavily weighted in favor of Defendants who have repeatedly asked for a trial and who have objected to State motions for continuances. *State v. McKoy*, 294 N.C. 134 (1978) (defendant asked 8 or 9 times for a trial date and moved to dismiss for lack of a speedy trial).

## 4. Prejudice to the Defendant

The *Barker* court identified three types of prejudice that may result from a delayed trial: oppressive pretrial incarceration; social, financial, and emotional strain of living under a cloud of suspicion; and the impairment of the ability to present a defense. *Barker* at 532. Courts have found that the strongest prejudice arguments are in cases where a delay has impaired the ability to prepare a defense. See *State v. Chaplin*, 122 N.C. App. 659 (1996) (loss of critical defense witness) and *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).

Courts have also found prejudice where a defendant suffered financial loss or damage to their 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”). See also, *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.)

In some cases, the delay is so long that prejudice is found to be presumed. *See, e.g., State v. McKoy*, 294 N.C. 134 (1978) (“So it comes to this: Does the prosecution's wilful delay for ten months in bringing defendant to trial outweigh minimal prejudice to defendant occasioned by such delay? On the facts and circumstances revealed by this record the answer is yes.”)

## **ARGUMENT**

With respect to the first *Barker* factor as a triggering device for further analysis, there can be no doubt that a delay of 52 months between arrest and the writing of this motion triggers a Speedy Trial motion analysis. If a year is generally the prerequisite for inquiring into the *Barker v. Wingo* factors, then a period of over four times that should be sufficient to proceed.

Weighing this factor independently, a delay of at least 52 months should weigh against the State of North Carolina.

The second factor, the reason for the delay, also weighs heavily against the State of North Carolina. The entire reason for the delay of the Defendant's trial rests solely on the State's inability to call this case for trial. The Defendant recognizes that the court system is backlogged with cases, but it is not his Sixth Amendment rights that must suffer because of the system's inadequacies. The fact that the State is not acting maliciously does not absolve it of its responsibility to prioritize calling the case of a Defendant who has asserted his request for a trial repeatedly.

The third factor should weigh against the state as well. The Defendant has made repeated requests to the District Attorney's office that he wants a trial. He is not requesting a dismissal the moment the case has gotten old. He has timely asserted his request. The Defendant has also asserted his right to a Speedy Trial through this motion.

Finally, the Defendant is entitled to a presumption of prejudice at this point, due to the State's inexcusably lengthy delay of nearly four and a half years. As the old saying goes, “justice delayed is justice denied.” For over 4 years, the Defendant has been unable to press forward with getting meaningful employment. For over 4 years, the Defendant has missed invaluable opportunities with his child and family. For over 4 years, the Defendant has had the mental anxiety and anguish of having a criminal charge pending over his head. For over 4 years, his lost income due to an exorbitant amount of trial dates has shifted the burden of providing for his family onto other members of his family.

The delay has caused numerous lost and limited opportunities for the Defendant as well as undermines the public's confidence in the criminal justice system. The only remedy for this injustice is dismissal.

**WHEREFORE**, the Defendant, respectfully moves that this Honorable Court enter the following relief:

1. That this Court issue an order dismissing the present case with prejudice.

2. That this Court provide for such relief further and other relief it deems just and proper.

This the 24<sup>th</sup> day of March, 2020.

By:

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Brennan Aberle  
Aberle & Wall, LLC  
220 North Eugene Street  
Greensboro, NC 27402  
*Attorney for Defendant*

### **Certificate of Service**

This shall certify that a copy of the foregoing *Motion to Dismiss* was this day served upon the District Attorney by the following method:

- \_\_\_\_\_ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- \_\_\_\_\_ by personally serving the Office of the District Attorney via hand delivery
- \_\_\_\_\_ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or
- \_\_\_\_\_ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 24<sup>th</sup> day of March, 2020.

By:

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*Attorney for Defendant*