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Sep 17 2026

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENJAMIN WALTER DUBOIS III,

PETITIONER

APPELLATE CASE NO. 2023-001307

Appeal from Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 2026-UP-432

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Benjamin Walter Dubois, III, respectfully requests this Court grant rehearing. On September 2, 2026, this Court affirmed the murder conviction finding the trial court did not abuse its discretion in refusing to find that Petitioner's constitutional right to a speedy trial was violated. State v. Dubois, Op. No. 2026-UP-432 (S.C. Ct. App. filed September 2, 2026). Counsel respectfully submits that in affirming the conviction this Court misapprehended the factors provided by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Respectfully, counsel submits that this Court misapprehended time periods of delay that should have been weighed against the State,

misapprehended Petitioner's assertion of the right to a speedy trial, misapprehended prejudice, and overlooked the fact that prejudice, while demonstrated here, need not be shown to prevail on a speedy trial claim. Counsel respectfully seeks rehearing and a finding Petitioner's right to a speedy trial guaranteed by both the United States Constitution and the South Carolina Constitution was violated in the present case.

1. Reasons for Delay

The first delay period of two years and two months between arrest on August 15, 2017, and Petitioner's first hearing on October 31, 2019, should be wholly weighed against the State. This Court, however, initially found that only some of that time period should weigh against the State writing:

We find at least some of this period of delay should weigh against the State, although less heavily than an intentional delay." (citation omitted). See Hunsberger, 418 S.C. at 346, 794 S.E.2d at 374 ("[N]egligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility"); Pittman, 373 S.C. at 549, 647 S.E.2d at 155 ("Where the reason for the delay is more neutral, the court should weigh it less heavily against the State [than any intentional delays to impede the defense]."). We also note that Dubois asserted he never spoke to or met with his first attorney, so despite his personal eagerness to resolve his case, it is unlikely that the defense would have been in a position to try the case during this timeframe. See *id.* at 551, 647 S.E.2d at 156 ("While the ultimate responsibility for timely completion of the trial rests with the State, the defense's contributions to the delay cannot be ignored.").

State v. Dubois, No. 2023-001307, 2026 WL 2593340, at *3 (S.C. Ct. App. Sept. 2, 2026).

On September 13, 2017, Petitioner filed a letter with the Jasper County Clerk of Court asking for a public defender, requesting Rule 5 and Brady material, and noting, "I want to file for a fast and speedy trial. Because of this pending charge I now have to remain in security detention (Isolation) until this is resolved." (R. p. 1189). Petitioner was indicted on May 31,

2018. The time period when Petitioner was without representation after asking for a public defender should not be held against Petitioner and should be weighed against the State. See Vermont v. Brillion, 556 U.S. 81, 94, 129 S. Ct. 1283, 1292, 173 L. Ed. 2d 231 (2009)(“The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic “breakdown in the public defender system,” 183 Vt., at 479 – 480, 955 A.2d, at 1111, could be charged to the State. Cf. Polk County, 454 U.S., at 324–325, 102 S.Ct. 445.”). The whole first two-year delay should be weighed against the State.

This Court then found that the next three-year delay from October 31, 2019, until October 2022, was caused by the pandemic, a neutral reason that should not be weighed against the State. Respectfully, while part of this three-year period of delay was certainly caused by the pandemic, the whole three years is not reasonable, especially when Petitioner had already waited two years for a trial prior to the pandemic.

The final delay period from October 2022, until the trial on July 31, 2023, was caused by a defense continuance in October 2022, because defense counsel was sick, a prosecution continuance in November 2022, because the prosecution failed to analyze evidence, and a continuance in January of 2023, because the jail failed to provide correct medications. The eight-month delay period between November 2022, and the trial on July 31, 2023, should be weighed against the State. The initial two-year delay, some portion of the three-year delay, and the final eight-month delay should be weighed against the State.

This Court, however, wrote, “In total, we find the original two-year period of delay from arrest until October 31, 2019, should be weighed against the State, although with the caveat, as discussed above, that the defense was not prepared to proceed with a trial during the entirety of that period.” State v. Dubois, No. 2023-001307, 2026 WL 2593340, at *4 (S.C. Ct. App. Sept. 2,

2026). While the Court correctly weighed the initial two-year delay against the State, the caveat assuming that the defense was not prepared to proceed has no place in this analysis. As discussed above, the fact that Petitioner was denied representation during the first two-year delay should be weighed against the State. See Vermont v. Brillon, 556 U.S. 81, 94, 129 S. Ct. 1283, 1292, 173 L. Ed. 2d 231 (2009)(“The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic “breakdown in the public defender system,” 183 Vt., at 479 – 480, 955 A.2d, at 1111, could be charged to the State. Cf. Polk County, 454 U.S., at 324–325, 102 S.Ct. 445.”).

As to the second three- year delay period, respectfully, this Court misapprehended this time frame by not weighing some of the three-year delay from October 31, 2019, until October 2022, against the State when the whole three-year period should not be attributed to the pandemic. Additionally, this Court misapprehended the final time frame by not weighing the eight-month delay period between November 2022, and the trial on July 31, 2023, against the State when continuances were needed because the State failed to analyze evidence and the jail failed to provide correct medications. The initial two-year delay, some portion of the three-year delay, and the final eight-month delay of the overall almost six-year delay in trying the case is wholly attributable to the State and that delay should be weighed heavily against the State.

2. The Accused’s Assertion of the Right to a Speedy Trial

As to the third Barker factor, the accused’s assertion of the right to a speedy trial, Petitioner first asserted his right to a speedy trial in his letter to the clerk of court dated September 13, 2017. In the letter Petitioner wrote, “I want to file for a fast and speedy trial.

Because of this pending charge I now have to remain in security detention (Isolation) until this is resolved.” (R. p. 1189). It is unclear when counsel was appointed, but Petitioner was effectively without representation for two years despite his request for representation in his letter to the Jasper County Clerk of Court filed September 13, 2017, and numerous attempts to contact the public defender. (R. p. 1189; R. p. 6, lines 5-12). In a subsequent letter to the clerk of court dated September 13, 2019, Petitioner wrote that he had filed a motion for a speedy trial two years earlier. He also wrote that had never met or heard back from his public defender. (R. p. 1191).

The judge failed to address the two *pro se* letters in the written order denying defendant’s motion to dismiss. (R. p. 1201, Order Denying Defendant’s Motion to Dismiss). The judge erred in refusing to consider the *pro se* assertion of the right to a speedy trial when Petitioner was effectively deprived representation. In the written order the judge referenced the hearing before Judge Cothran on October 31, 2019, where the State indicated the plan to try the case in the first six months of 2020. (R. p. 1205). The judge wrote:

Of course, neither the State nor Judge Cothran were aware that we would enter a global pandemic in that time frame.

The Court notes that since that time, even following a resumption of jury trials as the pandemic began to wane, the Defense has never filed a written motion for a speedy trial. The Defendant has made reference to his desire for one during several bond hearings, but the present motion to *dismiss* the case is the first filing on the subject.

I find the Defendant has asserted his right, but that the State has never been subject to an order to try the case by a particular date. I also find that the Defendant and his counsel were satisfied with the previous trial dates in November of 2022, December of 2022, and January of 2023, prior to the continuances which were granted on each occasion.

(R. p. 1205). The judge correctly found that Petitioner asserted his right to a speedy trial. The judge erred in not weighing this factor in favor of Petitioner. Defense counsel did not need to file a written motion for a speedy trial when Petitioner had already requested a speedy trial.

There is no requirement that a judge order the State to try the case by a particular date in order to prevail on a motion to dismiss based on a speedy trial violation. There is no requirement that a defendant assert the right to a speedy trial, although the Petitioner in the present case asserted his right and then filed a motion to dismiss based on the violation of the speedy trial right.

In Barker the Court wrote:

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Barker v. Wingo, 407 U.S. 514, 528-529, 92 S.Ct. 2182, 2191 (1972).

Petitioner asserted his right to a speedy trial on September 13, 2017, following his arrest in August of 2017. (R. p. 1189). Two years later on September 13, 2019, Petitioner, having not received any response from the public defender, wrote to the clerk of court again and advised that he moved for a speedy trial two years ago. (R. p. 1191). The written order denying the motion to dismiss references the fact that Petitioner expressed his desire for a speedy trial during bond hearing. As the South Carolina Supreme Court in Hunsberger wrote, citing Barker, "The accused's assertion of the right, however, is entitled strong evidentiary weight in determining whether the accused is being deprived of the right. Barker, 407 U.S. at 531-32, 92 S.Ct. 2182." 418 S.C. at 349, 794 S.E.2d at 375. Petitioner asserted his right to a speedy trial and the assertion of the right weighs in favor of Petitioner.

In affirming this Court wrote:

However, despite defense counsel's assertions that she repeatedly asked the State about the status of this case amid multiple continuances, she did not file a formal motion to dismiss until almost three-and-a-half years later in May 2023, although she was unquestionably on notice of this issue from the time of her appointment. Additionally, Dubois's trial was held within two-and-a-half months after he filed his motion. See State v. Robinson, 335 S.C. 620, 626, 518 S.E.2d 269, 272 (Ct. App. 1999) (“Robinson maintains he first asserted his right to a speedy trial in 1994 by writing letters to the solicitor and Chief Administrative Judge indicating he was ready for trial. However, we conclude Robinson first asserted his right to a speedy trial in May 1995 when he filed the formal motion to dismiss. Robinson's trial began only ten months after his first motion was filed.”); State v. Barnes, 431 S.C. 66, 88, 846 S.E.2d 389, 400 (2020), *aff'd as modified*, 436 S.C. 202, 871 S.E.2d 421 (2022) (indicating the fact that Barnes was tried approximately two months after he filed his motion to dismiss contributed to a finding that his rights were not violated). Thus, we find the defense's failure to diligently pursue a formal hearing on the speedy trial issue weighs against a finding that Dubois's rights were violated. See, e.g., Waites, 270 S.C. at 108-09, 240 S.E.2d at 653 (“Apart from [Waites's] initial request for a preliminary hearing, there is no record of an actual demand by Waites for a speedy trial. We think it significant that Waites, represented by counsel, waited approximately twenty-eight months before claiming he had been denied his constitutional right to a speedy trial.”).

State v. Dubois, No. 2023-001307, 2026 WL 2593340, at *4 (S.C. Ct. App. Sept. 2, 2026).

Respectfully, while this Court acknowledged the September 13, 2017, *pro se* letter to the clerk, this Court misapprehended its significance by not considering the letter an assertion of Petitioner's speedy trial right. Petitioner's letter stating he wanted to file for a fast and speedy trial is distinguished from the letter in Robinson that just indicated he was ready for trial. In State v. Waites, 270 S.C. 104, 109, 240 S.E.2d 651, 653 (1978), the Court wrote, “We do not believe respondent's request for a preliminary hearing substitutes as a demand for a speedy trial. As stated by the Illinois Court in People v. Wyatt, 47 Ill.App.3d 686, 8 Ill.Dec. 135, 137, 365 N.E.2d 373, 375 (1977): ‘Merely indicating readiness to proceed with trial does not in itself constitute a formal demand for trial.’ ” Petitioner's letter was an assertion of his right to a speedy

trial, not an indication of readiness to proceed to trial as in Robinson and not a request for a preliminary hearing as in Waites.

The present case is clearly distinguished from Barnes where Barnes argued he first asserted his right to a speedy trial in his previous trial that was reversed. The Court disagreed and found Barnes first asserted his speedy trial rights for the retrial on August 14, 2017, and the retrial occurred approximately two months later. Petitioner asserted his right to a speedy trial in September of 2017, and was not tried until July of 2023.

3. Prejudice

This Court addressed prejudice writing:

Here, Dubois asserts he suffered “actual prejudice in the form of oppressive pre-trial incarceration ... as well as presumptive prejudice because of the almost six-year delay.”³ We acknowledge the United States Supreme Court's reminder in Smith v. Hooey “that delay in bringing [an incarcerated] person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge.” 393 U.S. 374, 378 (1969). We note, however, that although Dubois asserted in his pro se letters that he was being held in a more restrictive setting due to his arrest on this charge, he offered no other evidence of “oppressive pre-trial incarceration.” Further, Dubois has not asserted that this circumstance made him unable to assist in preparing his defense; in fact, it is clear from the record that he was able to send letters and communicate with counsel throughout his incarceration. Moreover, as discussed above, we do not attribute the entirety of that delay to the State, and presumptive prejudice alone is insufficient. See Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376 (“[P]resumptive prejudice cannot alone support a speedy trial claim”).

State v. Dubois, No. 2023-001307, 2026 WL 2593340, at *5 (S.C. Ct. App. Sept. 2, 2026).

Respectfully, this Court overlooked the fact that a defendant is not required to show prejudice affirmatively to win a speedy trial claim. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6th Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5th Cir. 2009); United States v. Frith, 181 F.3d 92 (4th Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11th Cir. 1996). In Doggett v. United States, 505 U.S. 647,

112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the Court granted relief while noting that Doggett “did indeed come up short” in making “any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.” As a result, the Court explained “we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify.” In light of the difficult nature of proving prejudice, the Court held that the importance of presumptive prejudice increases with the length of delay. Doggett, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state’s negligence and a substantial delay will compel relief unless the presumption of prejudice is either “extenuated, as by the defendant’s acquiescence, or persuasively rebutted” by the prosecution. Id. at 658. The presumption of prejudice in the present case was neither extenuated by Petitioner’s acquiescence, nor persuasively rebutted by the prosecution. Prejudice should be presumed because of the excessive almost six-year delay.

In Barnes this Court wrote:

“[A]n accused can assert actual prejudice or presumptive prejudice as the result of the State’s violation of his right to a speedy trial.” Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376. “Actual prejudice occurs when the trial delay has weakened the accused’s ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.” Id. “The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify.” Id. “While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time.” Id.

431 S.C. at 89, 846 S.E.2d at 401. Petitioner showed presumptive prejudice because of the almost six-year delay.

Additionally, Petitioner showed actual prejudice in the form of oppressive pre-trial incarceration because of the State’s violation of Petitioner’s speedy trial rights. As a result of

the pending charge, Petitioner's conditions in prison on the unrelated charge worsened. In his letter filed with the clerk dated September 13, 2017, Petitioner wrote, "Because of this pending charge I now have to remain in security detention (Isolation) until this is resolved." (R. p. 1189). In his letter filed with the clerk dated September 13, 2019, two years after the first letter and after not receiving any response from the public defender, Petitioner wrote, "I am way past sick and tired of being on lock up for a crime I did not commit and being denied proper legal counsel." (R. p. 1191). Petitioner suffered prejudice from the delay in the form of oppressive pre-trial incarceration that required lock down while serving the sentence on the unrelated charge.

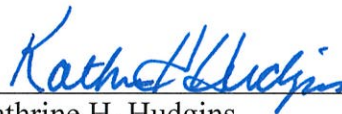
Respectfully, this Court misapprehended the prejudice showing by seeming to require that Petitioner show the oppressive pre-trial incarceration prevented him from assisting in his defense. This Court wrote, "Further, Dubois has not asserted that this circumstance made him unable to assist in preparing his defense; in fact, it is clear from the record that he was able to send letters and communicate with counsel throughout his incarceration." First, as discussed above, a defendant is not required to show prejudice affirmatively to win a speedy trial claim. Second, in Smith v. Hooey, 393 U.S. 374, 378–79, 89 S. Ct. 575, 577, 21 L. Ed. 2d 607 (1969) (n. 7, 8 omitted), the United States Supreme Court wrote:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

And while it might be argued that a person already in prison would be less likely than others to be affected by ‘anxiety and concern accompanying public accusation,’ there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.

Petitioner’s letters demonstrated oppressive pre-trial incarceration as discussed in Smith v. Hooey.

Balancing the Barker factors, the initial two-year delay, some portion of the three-year delay, and the final eight-month delay of the overall almost six-year delay in trying the case is wholly attributable to the State and that delay should be weighed heavily against the State. The reasons for the delay must be weighed against the State. Petitioner’s assertion of his right to a speedy trial weighs in Petitioner’s favor. Petitioner showed actual and presumptive prejudice, weighing in Petitioner’s favor. The weighing of the Barker factors shows that the State violated Petitioner’s speedy trial rights. The violation requires dismissal of the charges. Counsel respectfully requests rehearing and asks this Court to reverse the decision of the circuit court to deny the motion to dismiss based on the violation Appellant’s right to a speedy trial.



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ATTORNEY FOR PETITIONER

This 17th day of September, 2026.

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Sep 17 2026

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN WALTER DUBOIS III,

PETITIONER

APPELLATE CASE NO. 2023-001307

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Benjamin Walter Dubois, #295690, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 17th day of September, 2026.


Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

Stock, Chris

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Sep 17 2026

From: Stock, Chris
Sent: Thursday, September 17, 2026 4:28 PM
To: Melody Brown; Angela Brown
Cc: Hudgins, Kathrine
Subject: 2023-001307 - Benjamin W. Dubois, III - Petition for Rehearing
Attachments: 2023-001307 - Benjamin W. Dubois, III - Petition for Rehearing.pdf

SC Court of Appeals

Ms. Brown,

Please find attached for service the Petition for Rehearing for Benjamin Walter DuBois' appeal which will be filed today with the Court of Appeals.

Thank you.

Chris Stock
Administrative Coordinator
Commission on Indigent Defense
Appellate Division
(803) 734-1330