

Nos. 1555100, 1555101, & 1555102

STATE OF TEXAS

v.

KENNETH WARREN PAXTON, JR.

In the 185th

Judicial District Court

Harris County

**Defendant's Motion to Dismiss the Indictments  
for Violation of the Right to a Speedy Trial**

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**I. Table of Appendix**

- Calculation of Speedy Trial tolling (App.001)

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**To the Honorable District Judge:**

Defendant Paxton files this Motion to Dismiss the Indictments for Violation of the Right to a Speedy Trial:

**II. Procedural History and Facts**

1. The procedural history and facts will be presented in the arguments below. Paxton incorporates the attached Speedy Trial Calculation sheet into this motion as though recited verbatim.

**III. Argument**

**1. The Barker balancing-test for speedy trial violations.**

2. The Sixth Amendment guarantees the right to a speedy trial. *Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (“[t]he balance arrived at in close cases ordinarily” should be respected...*Barker’s* formulation ‘necessarily compels courts to approach speedy trial cases on an ad hoc basis...and the balance arrived at in close cases ordinarily would not prompt this Court’s review.”); *Hopper v. State*, 520 S.W.3d 915, 923-924 (Tex.Crim.App. 2017). A speedy-trial claim is analyzed “on an ad hoc basis by applying a fact-specific balancing test” set forth in *Barker*, 407 U.S. at 530; *Henson v. State*, 407 S.W.3d 764, 766-767 (Tex.Crim.App. 2013) (discussion of the *Barker* balancing-test).

3. The purpose behind the constitutional right to a speedy trial is: “(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.” *Smith v. Hooey*, 393

U.S. 374, 377-378 (1969); *see also United States v. MacDonald*, 456 U.S. 1, 8 (1982) (“The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial...and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.”).

4. Under *Barker*, 407 U.S. at 530, in analyzing a speedy-trial claim, a court must balance:

(1) **the length of delay;**

(2) **the State’s reason for the delay** (deliberate attempts by the State to delay the trial to hamper the defense are weighed heavily against the State. Neutral reasons such as negligence or overcrowded courts are weighted less heavily but should be considered since the ultimate responsibility for such circumstances rests with the State rather than with the defendant. When the record is silent regarding the reason for the delay, a court may presume neither a deliberate attempt on the part of the State to prejudice the defense nor a valid reason for the delay);

(3) **defendant’s assertion of his right to a speedy trial** (Although the defendant has no duty to bring himself to trial, he does have the responsibility to assert his right to a speedy trial); and

(4) **prejudice to the defendant because of the length of delay** (i) preventing oppressive pretrial incarceration, (ii) minimizing anxiety and concern of the defendant, and (iii) most importantly, limiting the possibility that the defense will be impaired.

5. Under the balancing-test, no factor is a necessary or sufficient condition for a finding of a deprivation of the right to speedy trial. *Barker*, 407 U.S. at 533. Rather, the factors are interrelated and must be considered together with such other circumstances as may be relevant. The determination is made ad hoc and requires “a functional analysis of the [speedy trial] right in the particular context of the case.” *Id.* at 523, 530. “In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process....” 407 U.S. at 533.

6. Before a court analyzes each *Barker* factor, the defendant must “first make a threshold showing that ‘the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” *Doggett v. United States*, 505 U.S. 647, 651-652 (1992). Affirmative proof of prejudice is not essential to every speedy trial claim because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify, but the presumption of prejudice to a defendant’s ability to defend himself is extenuated by the defendant’s acquiescence in some or all the delay. *Id.*

**2. The Barker balancing factors all weigh heavily in favor of Paxton.**

**A. Barker balancing-test factor 1—the length of delay—weighs heavily against the State and in favor of Paxton.**

7. The length of the delay was excessive and weighs heavily against the State and in favor of Paxton. As the attached calculation pages shows, since the indictments were returned on August 18, 2015, only 562 days have tolled in favor of the State. On the other hand, 2,532 days have passed without tolling for a total of

84.4 months, or just over 7 years. Most of the delays were due to the State seeking to transfer the case from Collin County, opposing moving it back to Collin County, and more than any other cause, the pro tems seeking attorney's fees. None of these events or causes were Paxton's fault. Paxton did not acquiesce in any of these delays. See [Barker, 407 U.S. at 529](#). Thus, from the face of the record, *Barker* balancing-test factor 1—the length of delay—weighs heavily against the State and in favor of Paxton.

**B. *Barker* balancing-test factor 2—the State's reason for the delay—weighs against the State and in favor of Paxton.**

8. Again, most of the delays were due to the State seeking to transfer the case from Collin County, opposing moving it back to Collin County, and more than any other cause, the pro tems seeking attorney's fees. These delays have accrued to over 7 years, or 84.4 months. There has been no “[d]eliberate delay to hamper the defense is weighed heavily against the State” in deciding whether a defendant has been afforded a speedy trial. [Hopper, 520 S.W.3d at 924, 928](#). There is a general assumption that “the longer the delay beyond that which is ordinary, the more prejudicial that delay is to the defendant.” [Gonzalez v. State, 435 S.W.3d 801, 809 \(Tex.Crim.App. 2014\)](#). That assumption applies here.

9. What legitimate governmental purpose was served by the delays? There were none. See [Doggett, 505 U.S. at 656](#) (referring to fact that “[t]he government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down”). What occurred here was described by the Supreme Court of Tennessee in this language as the reason why the second *Barker*

factor weighed in the defendant's favor: "No explanation appears of record why the State failed to respond to the defendant's...request for a speedy trial...Although there is no clear evidence of bad faith by the State...there was no valid reason for the delay."

[State v. Wood, 924 S.W.2d 342, 347 \(Tenn. 1996\).](#)

**C. Barker balancing-test factor 3—assertion of the right to a speedy trial—weighs heavily against the State and in favor of Paxton.**

10. Paxton made numerous requests for a speedy trial and was ignored. The pro tems were far more concerned about being paid the \$300/hour fee—found to be invalid by the Texas Court of Criminal Appeals in 2018—than the pro tems were about Paxton's right to speedy trial. Paxton made prior assertions of this right to a speedy trial as follows:

- **March 13, 2017:** Paxton's Response to State's Motion for Continuance, page 2
- **March 15, 2017:** Paxton's Sur-Reply to State's Motion for Continuance, page 3
- **September 29, 2017:** State's Second Motion for Continuance, page 2 (State acknowledges Paxton has asserted his right to a speedy trial)
- **October 3, 2017:** Paxton's Another Response to Another State's Request for Another Continuance (Despite Repeated Denials), pages 4-6
- **July 22, 2019:** Paxton's Response to Motion for Ex Parte Determination Regarding Issuance of a New Order for Payment of Fees, page 9

11. Thus, the only possible remedy for the violation of his right to a speedy trial was to dismiss the prosecution. [Strunk v. United States, 412 U.S. 434, 440 \(1973\);](#) [State v. Johnson, 821 S.W.2d 609, 612 n.2 \(Tex.Crim.App. 1991\).](#) *Strunk* also refers to "the prosecutor's obligation to see to it that the case is brought on for trial" and

that “[t]he public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges.” *Id.* at 439. A court cannot ignore a defendant’s requests for speedy trial without violating the Sixth and Fourteenth Amendments. This is because “the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused’s defense.”

[\*United States v. Marion\*, 404 U.S. 307, 320 \(1971\).](#)

12. “[T]he Fourteenth Amendment...right to a speedy trial...[is] ‘one of the most basic rights preserved by our Constitution.’” [\*Smith\*, 393 U.S. at 374-375.](#) “The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution’s case, as is the defendant’s right, the time to meet them is when the case is fresh.” [\*Dickey v. Florida\*, 398 U.S. 30, 37 \(1970\).](#) *See also, e.g., State v. Zimmerman*, [328 P.3d 1132, 1139 \(Mont. 2014\)](#) (“[T]he prosecutor and the court have an affirmative constitutional obligation to try the defendant in a timely manner[,] and ... this duty requires a good faith, diligent effort to bring him to trial quickly.”).

**D. Barker balancing-test factor 4—prejudice to the defendant because of the length of delay—weighs in favor of Paxton.**

13. Once too much time has passed, the right to speedy trial is necessarily denied. There are few situations more prejudicial than a delay of 2,532 days (84.4 months) versus tolled time of only 562 days (18.7 months). As a matter of justice and due process, civil cases are routinely dismissed for want of prosecution that originates from inactivity by the plaintiff. Civil cases mostly deal with money. Here, a person’s

freedom and right from prolonged pretrial delay are concerned. The same concern given in civil cases should have bearing in criminal cases.

14. In [Turner v. State, 545 S.W.2d 133, 137-138 \(Tex.Crim.App. 1976\)](#), the TCCA found that “it can therefore be seen that the burden of excusing the delay rests with the State and that in light of a silent record or one containing reasons insufficient to excuse the delay, it must be presumed that no valid reason for delay existed.” This is just as true here. The *State* carries “the obligation of proving that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay.” [Ex parte McKenzie, 491 S.W.2d 122, 123 \(Tex.Crim.App. 1973\)](#); see also [State v. Guerrero, 110 S.W.3d 155, 162 \(Tex.App.-San Antonio 2003, no pet.\)](#) (a showing of actual prejudice is not required).

15. Here, as in [Dickey](#), “no valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law.” [Dickey, 398 U.S. at 38](#). This is true even though “[i]n the absence of an assigned reason for the delay, a court may presume neither a deliberate attempt on the part of the State to prejudice the defense nor a valid reason for the delay.” [Dragoo v. State, 96 S.W.3d 308, 314 \(Tex.Crim.App. 2003\)](#). If the State does not offer a reason for the delay, this weighs against the State, even if attributable only to negligence or indifference. [Hopper v. State, 495 S.W.3d 468, 475 \(Tex.App.-Houston \[14th Dist.\] 2016\)](#), affirmed, [520 S.W.3d at 923-924](#); [Hull v State, 699 S.W.2d 220, 224](#)

[\(Tex.Crim.App. 1985\)](#) (dismissal for violation of speedy trial ordered after conviction “even though the showing of prejudice [was] slight”).

16. And here, as in [State v. Wei, 447 S.W.3d 549, 557-558 \(Tex.App.-Houston \[14th Dist.\] 2014, pet. ref.\)](#), because Paxton plainly did not acquiesce in the delay, “it was the State’s burden to rebut the presumption of prejudice because [he] was ‘absolved from the requirement to demonstrate prejudice.’...[and] “[b]ecause the State failed to affirmatively prove that the excessive delay did not impair [his] ability to defend himself, the presumption of prejudice was not rebutted.” (citation omitted).

17. At minimum, the State’s or trial court’s conduct, or both, could be described as “*outsized* inattention” or a demonstrable “lackadaisical or lax [attitude] with regard to the case.” See, e.g., [United States v. Teman, No. 19 Cr. 696, 2019 U.S. Dist. LEXIS 220054, \\*24-25 \(S.D.N.Y. Dec. 20, 2019\)](#) (order on motion to dismiss). Moreover, “the greater the State’s...official negligence and the longer its [inaction or lack of care] delay[s] a trial, the less a defendant must show actual prejudice...” [Murphy v. State, 280 S.W.3d 445, 450-451 \(Tex.App.-Fort Worth 2009, pet. ref.\)](#). In general, courts deem delays approaching one year to be “unreasonable enough to trigger” the *Barker* balancing-test inquiry. [Balderas v. State, 517 S.W.3d 756, 768 \(Tex.Crim.App. 2016\)](#), quoting [Dragoo, 96 S.W.3d at 314](#). “Whether a delay is presumptively prejudicial depends, in part, on the charges involved” because “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.” [Barker, 407 U.S. at 531](#). See also [Zamorano v. State, 84 S.W.3d 643, 649 \(Tex.Crim.App. 2002\)](#). (The nature of the charged offense

must be considered). It is not necessary for a defendant to show that the testimony of a missing witness (such as Elliott) would have been favorable to the defense, but just that it would have been relevant and material. [Phillips v. State, 650 S.W.2d 396, 403 \(Tex.Crim.App. 1983\)](#).

18. In assessing the weight of the fourth *Barker* factor, one of New York's intermediate appellate courts found pertinent to the facts: "The question posed by a motion for a dismissal based upon a denial of the right to a speedy trial is whether events as of the time of the trial court's decision of the motion should bar further proceedings in the prosecution of criminal charges against the defendant. His guilt or innocence is not at issue in deciding such a motion and is not a balancing factor in reaching a decision." [People v. Ranellucci, 53 A.D.2d 384 \(N.Y.S.2d 1976\) \(Herlihy, J. dissenting\)](#), reversed, [People v. Ranellucci, 374 N.E.2d 1246 \(N.Y.2d 1978\)](#) (reversed based on the dissenting opinion of the intermediate appellate court). As the dissent observed, "There is no indication that delay was in any way necessary to perfect the prosecution. Furthermore, while there is no showing of any attempt on the part of the prosecution to delay for the purpose of hindering the defense, the subsequent delay...must be deemed equivalent to a deliberate refusal to acknowledge the right of the defendant." [53 A.D.2d at 389-390](#).

19. At minimum, the State's inactivity imposed additional and entirely foreseeable—and unnecessary—worry, anxiety, employment and financial difficulties, and frustration upon Paxton. This is something the *Barker* court said should be minimized. [407 U.S. at 532-533](#); [United States v. Loud Hawk, 474 U.S. 302,](#)

[312 \(1986\)](#) (“the Sixth Amendment’s guarantee of a speedy trial ‘is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the *possibilities* that long delay will impair the ability of an accused to defend himself” [emphasis added]). Appellate courts have recognized that excessive delay presumptively compromises the reliability of a trial in ways neither party can prove or identify.

20. The more time that passed, the less the additional time that should be allowed to expire before trial. A trial needed to occur far sooner than it did, something that the trial court was obliged to make happen if the “right to a speedy trial” has any meaning. As the dissenters in *Loud Hawk* observed, “the right protects both the defendant’s interest in fairness and society’s interest in providing swift justice. Courts as well as prosecutors must necessarily work to promote those interests if they are to have any vitality.” [Loud Hawk, 474 U.S. at 324-325](#) (Marshall, J., with Brennan, Blackmun, and Stevens, JJ., dissenting). Application of the *Barker* factors here should be governed by these principles stated in a published case from the First Court of Appeals in 2022:

Unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State’s criminal justice system are limited and that each case must await its turn, as that approach would subvert[] the State’s own goals in seeking to enforce its criminal laws...[T]he weight [courts] assign to official negligence compounds over time as the presumption of evidentiary prejudice grows, and...toleration of such negligence varies inversely with its protractedness... The defendant’s assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant has been deprived of that right...Repeated requests for a speedy trial weigh heavily in favor of the defendant...[A] defendant’s

claim of a speedy trial violation need not necessarily demonstrate prejudice to his ability to present defensive matters.

*State v. Moreno*, 651 S.W.3d 399, 412 (Tex.App.-Houston [1st. Dist.] 2022). (internal quotation marks and citations omitted).

#### IV. Conclusion and Prayer

Defendant Paxton prays that this Court grants this Motion to Dismiss the Indictments for Violation of the Right to a Speedy Trial and dismiss the indictments with prejudice.

Respectfully submitted,

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**V. Certificate of Service**

I certify that on February 6, 2024, a copy of this document and its appendix was served on pro tems Brian Wice and Kent Schaffer by efile or email.

**/s/ Philip H. Hilder**  
**Philip H. Hilder**

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# Appendix

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**Ken Paxton Speedy Trial Calculation**

**State v. Paxton, Nos. 1555100, 1555101, & 1555102 (185th Dist. Ct. Harris Co.)**

<b>Event</b>	<b>Date of Event</b>	<b>Days Until Next Event</b>	<b>Tolled</b>	<b>Not Tolled, delay favors Paxton</b>
Indictment	8/18/2015	76	76	
Application for Writ of Habeas Corpus	11/2/2015	40		40
Order Denying Application for Writ of Habeas Corpus	12/12/2015	19	19	
Notice of Appeal	12/31/2015	7	7	
Order Staying Further Proceedings	1/7/2016	146	146	
Opinion 5th Court of Appeals on Habeas Application	6/1/2016	314	314	
Order Granting State's Motion to Transfer Venue to Harris Co.	4/11/2017	132		132
Opinion 5th Court of Appeals on Attorneys Fees Issue filed by Collin Comm. Court 528 S.W.3d 807	8/21/2017	39		39
State's Second Motion for Continuance	9/29/2017	418		418
TCCA Opinion on Attorney's Fees Issue, 581 S.W.3d 189	11/21/2018	300		300
State's Motion to hold Art. 26.05 Unconstitutional	9/17/2019	282		282
Order Granting Motion to Transfer Venue back to Collin Co. (Johnson)	6/25/2020	120		120
Order Granting Motion to Transfer Venue back to Collin Co. (Luong)	10/23/2020	216		216
Opinion of the First Court of Appeals in Mandamus Proceeding regarding Venue	5/27/2021	19		19
Order Granting State's Motion to Stay Proceedings in Trial Court, First Court of Appeals in Mandamus Proceeding regarding Venue	6/15/2021	86		86
Order denying Motion for Reconsideration in Mandamus Proceeding, First Court of Appeals, regarding Venue	9/9/2021	6		6
Order Granting State's Motion to Stay Proceedings in Trial Court, Court of Criminal Appeals in Mandamus Proceeding regarding Venue	9/15/2021	637		637
Opinion, Court of Criminal Appeals in Mandamus Proceeding regarding Venue	6/14/2023	224		224
Order Denying State's Mandamus filed in Texas Court of Criminal Appeals regarding fees	1/24/2024	13		13
Today (February 6, 2024)	2/6/2024			

**Total Days** **562** **2,532**

**Total Months** **18.7** **84.4**

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