

SUPREME COURT OF NEW MEXICO

State v. Ochoa

2017-NMSC-031 · No. S-1-SC-34630 · Decided October 23, 2017

SUMMARY

The New Mexico Supreme Court reviews whether a defendant’s constitutional right to a speedy trial was violated after approximately two years of pretrial incarceration, multiple continuances, a mistrial, and retrial. Applying the four-factor balancing test from *Barker v. Wingo*, the Court concludes that the delay was not extraordinary, the reasons for delay weighed only slightly against the State, and the presumed prejudice did not outweigh the other factors. The Court reverses the Court of Appeals and holds that no speedy-trial violation occurred.

CASE DETAILS

COURT	Supreme Court of New Mexico
WRITING FOR THE COURT	Barbara J. Vigil; Judith K. Nakamura; Petra Jimenez Maes; Edward L. Chávez; Charles W. Daniels
JURISDICTION	New Mexico
DECIDED	October 23, 2017
DOCKET	S-1-SC-34630
DISPOSITION	reversed
PROCEDURAL POSTURE	The Supreme Court of New Mexico granted the State's petition for certiorari to review the Court of Appeals' reversal of Defendant's convictions on speedy-trial grounds.
STANDARD OF REVIEW	The Supreme Court defers to the district court's factual findings in a speedy-trial analysis but weighs the Barker factors de novo.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	State of New Mexico v. John Eric Ochoa

TOPICS

[speedy trial](#) [criminal procedure](#) [sixth amendment](#) [appellate procedure](#) [standard of review](#)

PRACTICE AREAS

[criminal procedure](#) [constitutional law](#) [appellate procedure](#)

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the State violated Ochoa's constitutional right to a speedy trial when the length and reasons for delay did not weigh heavily against the State.
2. Whether the Court of Appeals improperly adopted a bright-line rule that more than twenty-two months of pretrial incarceration is unduly prejudicial even without a particularized showing of prejudice.
3. How a post-mistrial delay should be evaluated under the *Barker v. Wingo* four-factor balancing test.
4. Whether continuous pretrial incarceration for approximately two years permits a presumption of some prejudice despite the defendant's failure to present affirmative proof.

HOLDINGS

1. A speedy-trial claim must be evaluated under the flexible, case-specific four-factor balancing test of *Barker v. Wingo*: length of delay, reason for delay, assertion of the right, and prejudice to the defendant.
2. The twelve-, fifteen-, and eighteen-month periods for simple, intermediate, and complex cases are guidelines that trigger speedy-trial analysis; they are not bright-line rules establishing a violation.
3. A short-term furlough affecting public-defender support staff does not constitute a systemic breakdown in the public-defender system and, under the circumstances, the resulting delay is neutral rather than attributable to the State.
4. After a mistrial, the speedy-trial clock does not reset and the defendant is not subject to an inflexible statutory deadline; instead, the retrial must occur within a reasonable time, evaluated under the particular circumstances of the case.
5. Continuous pretrial incarceration for an extended period, including the approximately two years in this case, permits a court to presume that the defendant suffered some prejudice even without affirmative proof.
6. Ochoa's constitutional right to a speedy trial was not violated because the length of delay, reasons for delay, and assertion of the right did not weigh heavily in his favor, and the presumed prejudice from his continuous incarceration did not outweigh the other *Barker* factors.

KEY QUOTATIONS

“Ordinarily the court should schedule the retrial as soon as its docket permits unless the parties justifiably require additional pre-retrial discovery or motions practice.” (¶ 37)

“Therefore, we presume that Defendant was prejudiced simply by being continuously incarcerated for two years.” (¶ 57)

“Presumptive prejudice is not dispositive of the speedy trial claim.” (¶ 63)

“We reverse the Court of Appeals and reinstate Defendant’s convictions.” (¶ 67)

FACTUAL BACKGROUND

John Eric Ochoa was arrested on May 12, 2008, and remained incarcerated throughout the approximately two-year period before his retrial. Proceedings were delayed by administrative matters, defense preparation, a judge's family emergency, a state-employee furlough affecting public-defender support staff, and a mistrial caused by an inflammatory juror comment. He was convicted at retrial on May 20, 2010, and asserted that the delay violated his constitutional right to a speedy trial.

PROCEDURAL HISTORY

Ochoa was arrested and charged with multiple offenses. After approximately two years of pretrial incarceration, a first trial ended in a mistrial and a retrial resulted in convictions for two counts of criminal sexual contact of a minor and one count of interference with communications. The Court of Appeals reversed on speedy-trial grounds. The Supreme Court of New Mexico granted certiorari, reversed the Court of Appeals, and reinstated the convictions.

DISPOSITION

reversed

CASES CITED

- Barker v. Wingo, 407 U.S. 514 (1972)
- State v. Garza, 2009-NMSC-038, 212 P.3d 387
- State v. Spearman, 2012-NMSC-023, 283 P.3d 272
- Vermont v. Brillon, 556 U.S. 81 (2009)
- State v. Serros, 2016-NMSC-008, 366 P.3d 1121
- State v. Manzanares, 1996-NMSC-028, 121 N.M. 798, 918 P.2d 714
- State v. Rojo, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829
- State v. O'Neal, 2009-NMCA-020, 145 N.M. 604, 203 P.3d 135
- State v. Castro, 2017-NMSC-027
- State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061
- Doggett v. United States, 505 U.S. 647 (1992)
- Moore v. Arizona, 414 U.S. 25 (1973) (per curiam)
- State v. Moreno, 2010-NMCA-044, 148 N.M. 253, 233 P.3d 782
- State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591
- Reuster v. Turner, 250 So. 2d 264 (Fla. 1971)
- Kelly v. State ex rel. Morgan, 54 So. 2d 431 (Fla. 1951)
- People v. Dixon, 87 Ill. App. 3d 84, 410 N.E.2d 252 (2d Dist. 1980)
- United States v. Loud Hawk, 474 U.S. 302 (1986)
- United States v. Mendoza, 530 F.3d 758 (9th Cir. 2008)
- Jackson v. Ray, 390 F.3d 1254 (10th Cir. 2004)
- United States v. Serna-Villarreal, 352 F.3d 225 (5th Cir. 2003)

OPINION

PER CURIAM.

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO 2 Opinion Number: 3 Filing
Date: October 23, 2017 4 NO. S-1-SC-34630 5 STATE OF NEW MEXICO, 6 Plaintiff-Petitioner,
7 v. 8 JOHN ERIC OCHOA, 9 Defendant-Respondent. 10 ORIGINAL PROCEEDING ON
CERTIORARI 11 Stephen Bridgforth, District Judge 12 Hector H. Balderas, Attorney General 13
Sri Mullis, Assistant Attorney General 14 Santa Fe, NM 15 for Petitioner 16 Bennett J. Baur, Chief
Public Defender 17 Nina Lalevic, Assistant Appellate Defender 18 Santa Fe, NM 19 for
Respondent 1 OPINION 2 VIGIL, Justice.

3 {1} The right to a speedy trial is guaranteed by the Sixth Amendment to the United 4 States
Constitution and Article II, Section 14 of the New Mexico Constitution. 5 Defendant was arrested
on May 12, 2008, and charged with a number of offenses 6 relating to criminal sexual contact of a
minor. Prior to a mistrial on March 8, 2010, 7 trial was delayed for a number of reasons including
a furlough affecting the New 8 Mexico Public Defender Department (Public Defender
Department).

Two months 9 later, on May 17-20, 2010, Defendant was convicted of one count of interference
with 10 communications and two counts of criminal sexual contact of a minor. Defendant was 11
incarcerated for the entire pretrial period. 12 {2} Defendant appealed his convictions and the
Court of Appeals reversed on 13 speedy trial grounds. *State v. Ochoa*, 2014-NMCA-065, ¶¶ 1, 25-
26, 327 P.3d 1102.

14 The Court of Appeals determined that Defendant was prejudiced by his two-year 15 pretrial
incarceration, reasoning that “[t]his Court previously concluded that a delay 16 of twenty-two
months prejudiced a defendant.

Here, Defendant was incarcerated even 17 longer.” *Id.* ¶ 23 (citation omitted). 18 {3} We granted
certiorari and reverse, applying the four-factor balancing test from 19 *Barker v. Wingo*, 407 U.S.
514, 530 (1972). We conclude that neither the length of 1 delay, reason for delay, nor assertion of
the right to a speedy trial weigh heavily in 2 Defendant’s favor.

We presume that Defendant suffered some prejudice as a result 3 of his continuous pretrial
incarceration, but our presumption does not outweigh the 4 other three factors. See *State v. Garza*,
2009-NMSC-038, ¶ 1, 212 P.3d 387 (holding 5 that a defendant must generally show
particularized prejudice).

Thus, despite the 6 obvious prejudice to Defendant, his right to a speedy trial was not violated. 7 I.
BACKGROUND 8 A. The Right to a Speedy Trial 9 {4} In examining whether a defendant has
been deprived of his constitutional right 10 to a speedy trial, we use the four-factor test set forth in

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

See 407 U.S. at 530. We defer to the district court's factual findings in considering a speedy trial claim, but weigh each factor *de novo*. *State v. Spearman*, 2012-NMSC-023, ¶ 19, 283 P.3d 272. {5} The speedy trial analysis is not a rigid or mechanical exercise, but rather "a difficult and sensitive balancing process." See *Barker*, 407 U.S. at 533.

The speedy trial right is "amorphous, slippery, and necessarily relative." *Vermont v. Brillon*, 556 U.S. 81, 89 (2009) (internal quotation marks and citations omitted). We consider the factors on a case-by-case basis. See *Barker*, 407 U.S. at 533; see also *Garza*, 2009- 2 NMSC-038, ¶ 13 (stating that *Barker* "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis").

4 B. Timeline {6} We begin by setting forth the facts and circumstances surrounding the delays in bringing Defendant to trial and the role of each party in the delays. *Barker*, 407 U.S. at 530 ("The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed."). Defendant was arrested on May 12, 2008 and tried just over two years later, on May 17-20, 2010.

Defendant was incarcerated for this entire period. {7} Trial was reset on multiple occasions. The first, November 10, 2008, was vacated because November 11, 2008 was a holiday and the trial required a multi-day setting.

The second, December 17, 2008, was vacated when Defendant requested a continuance to review evidence acquired in delayed witness interviews. The third, March 4, 2009, was vacated due to a pending motion.¹ The fourth, May 26, 2009, was {8} Although the district court did not explain why this setting was vacated, the State asserted that it was vacated due to a "pending motion yet to be heard," most likely referring to Defendant's motion to sever, demand for discovery, motion to dismiss the indictment, or motion to compel disclosure filed between November 21, 2008 and December 5, 2008.

Defendant also filed a motion for an evidentiary hearing {9} vacated because it was incorrectly set for one day. The fifth, October 27, 2009, was unexpectedly continued when the judge's sister passed away. {10} Defendant moved to continue the sixth trial setting, January 13, 2010, because Governor Richardson ordered state employees to cease work for five days, including the third day of trial.

The furlough reduced the budget of the Public Defender Department due to a budget shortfall for fiscal year 2010. Despite the furlough, this Court ordered public defenders to appear for regularly scheduled court appearances. {11} The district court granted the continuance to ensure that

defense counsel had adequate support staff to prepare a defense. Trial finally began on the seventh setting, March 10, 2010.

However, the district court granted a mistrial because a juror made an inflammatory comment. Over the course of the proceedings, the State filed three petitions to extend the time to commence trial. See Rule 5-604(B) NMRA (2008) (“For good cause shown, the time for commencement of trial may be extended by the district court... [by] six (6) months.”).

Defendant opposed two out of three of the State’s petitions, but did not and forensic evaluation to determine witness competency on January 20, 2009. The State filed two requests to extend the time to respond to those motions, which were both granted.

The district court held a hearing on Defendant’s motions on February 2, 2009, but did not issue orders until March 5, 2009, May 5, 2009, October 26, 2009, and November 9, 2009. Defendant filed substantive responses to any of them. Each of the petitions was granted. Defendant filed five demands for a speedy trial and four motions to dismiss based on violation of the right. In its ruling on the first motion to dismiss, the district court found the case to be complex and that the length of pretrial delay was less than the eighteen months required to trigger the speedy trial analysis under Garza.

See 2009-NMSC-038, ¶ 2 (establishing the guideline as eighteen months for complex cases). In each motion to dismiss, Defendant stated that the length of pretrial incarceration was presumptively prejudicial, he had suffered undue anxiety and concern, and his defense was impaired by fading witness memories. Defendant did not present evidence to support his prejudice claims, but instead asserted that the State bore the burden of proving the absence of prejudice, citing *Salandre v. State*, 1991-NMSC-016, ¶¶ 25-28, 111 N.M.

422, 806 P.2d 562, holding modified by Garza, 2009-NMSC-038, ¶ 22. Defendant was finally tried on May 17-20, 2010, after two years of pretrial incarceration. On May 20, 2010, a jury convicted Defendant of two counts of criminal sexual contact of a minor and one count of interference with communications. Defendant filed the first of five demands for a speedy trial on January 28, 2009, followed by demands on June 22, 2009, September 9, 2009, September 17, 2009, and November 23, 2009.

Defendant filed his first motion to dismiss for violation of the right to a speedy trial on September 15, 2009, followed by motions on December 28, 2009, February 11, 2010, and April 20, 2010. Defendant appealed, and the Court of Appeals reversed, holding that Defendant’s right to a speedy trial was violated.

Ochoa, 2014-NMCA-065, ¶ 1. We granted certiorari on two issues: 1) Whether the Court of Appeals erred in holding that [the State denied Defendant] his constitutional right to a speedy trial when the length and reasons for the delay did not weigh heavily against [the State]. 2)

Whether the Court of Appeals erred in creating a bright-line rule that pre-trial incarceration over twenty-two months is unduly prejudicial even when [Defendant] failed to make a particularized showing of prejudice.

Applying the fluid, ad hoc approach of Barker to the facts of the instant case, we agree with the Court of Appeals that Defendant was prejudiced by his pretrial incarceration. However, neither the length nor reason for delay weighs heavily against the State.

Therefore, we conclude that Defendant's right to a speedy trial was not violated. II. DISCUSSION A. Length of Delay {12} The first factor, length of delay, is both the threshold question in the speedy trial analysis and a factor to be weighed with the other three Barker factors. State v. 6 1 Serros, 2016-NMSC-008, ¶ 22, 366 P.3d 1121.

The Barker Court deferred to the 2 states to prescribe reasonable guidelines for bringing a case to trial. 407 U.S. at 523. 3 This Court prescribed such guidelines in Garza. See 2009-NMSC-038, ¶ 2. The 4 applicable guideline is dependent upon the complexity of the case: twelve months for 5 a simple case, fifteen months for an intermediate case, and eighteen months for a 6 complex case.

Id. 7 {13} Consistent with Barker, this Court in Garza emphasized that the guidelines are 8 not bright-line tests. See Barker, 407 U.S. at 523 ("We find no constitutional basis for 9 holding that the speedy trial right can be quantified into a specified number of days 10 or months."); see also Garza, 2009-NMSC-038, ¶ 49 (explaining that the guidelines 11 are not bright-line tests).

The guidelines are designed to prompt the district court to 12 conduct a speedy trial analysis, and do not dispose of the claim itself. Id. ¶ 2. As 13 explained in Garza, it would be contrary to the flexible, fact-specific nature of the 14 Barker approach to presume that there was a violation of the right based on the length 15 of delay alone. See Garza, 2009-NMSC-038, ¶ 13.

The Barker Court "specifically 16 reject[ed] inflexible, bright-line approaches to analyzing a speedy trial claim." Garza, 17 2009-NMSC-038, ¶ 13 (citing Barker, 407 U.S. at 529-30). 18 {14} When the length of delay exceeds a guideline, it must be weighed as one factor 7 1 in determining whether there has been a violation of the right to a speedy trial, Serros, 2 2016-NMSC-008, ¶ 22, and the burden of persuasion rests on the State to demonstrate 3 that, on balance, there was no violation of the right to a speedy trial.

Garza, 2009- 4 NMSC-038, ¶ 22. As the delay lengthens, it weighs increasingly in favor of the 5 accused. Id. ¶ 24. In other words, a delay barely crossing the guideline "is of little 6 help" to the defendant's claim, while a delay of extraordinary length weighs heavily 7 in favor of the defendant. Serros, 2016-NMSC-008, ¶ 26. 8 {15} We defer to the district court's finding of complexity,³ which was supported 9 by the number of charges and nature of the allegations.

See *State v. Manzanares*, 10 1996-NMSC-028, ¶ 9, 121 N.M. 798, 918 P.2d 714; see also *State v. Rojo*, 11 1999-NMSC-001, ¶ 52, 126 N.M. 438, 971 P.2d 829 (explaining that the complexity 12 of the case is best determined by the district court, which must consider both the 13 nature and complexity of the crime). This was a complex case which, under *Garza*, 14 should have been brought to trial within eighteen months.

See 2009-NMSC-038, ¶ 2. 15 {16} Defendant was arrested on May 12, 2008. Twenty-two months later, the first 3 16 Defendant faced one count of kidnapping, two counts of attempt to commit 17 criminal sexual penetration in the first degree (child under thirteen), one count of 18 interference with communications, ten counts of criminal sexual contact of a minor 19 in the second degree (child under thirteen), and two counts of criminal sexual contact 20 of a minor in the third degree (child under thirteen).

8 1 trial resulted in a mistrial. This period alone was sufficient to raise speedy trial 2 concerns, unlike cases in which the mistrial occurred within the speedy trial 3 guideline. See, e.g., *State v. Castro*, 2017-NMSC-027, ¶ 20, ___ P.3d ___ (noting that 4 the mistrial occurred within the prescribed period for a simple case). By the time of 5 the retrial on May 17-20, 2010, the case had been pending for a total of two years; six 6 months past the *Garza* deadline.

See 2009-NMSC-038, ¶ 48. 7 {17} Nevertheless, while sufficient to trigger the speedy trial analysis, the two-year 8 delay was not extraordinary. See, e.g., *Serros*, 2016-NMSC-008, ¶ 24 (holding that 9 a delay of four years and three months was extraordinary and weighed heavily in the 10 defendant's favor); see also *Doggett v. United States*, 505 U.S. 647 (1992), 657-58 11 (describing an eight and one-half year delay between the defendant's indictment and 12 arrest as extraordinary).

Thus, the length of delay weighs only slightly against the 13 State. 14 B. Reason for the Delay 15 {18} The second Barker factor requires us to evaluate the reason for the delay. 407 16 U.S. at 530-31. We begin by calling to mind the three types of delay identified in 17 *Barker*. See *id.* at 531.

First, “[a] deliberate attempt to delay the trial in order to 18 hamper the defense should be weighted heavily against the government.” *Id.* Second, 9 1 negligent or administrative delay weighs less heavily but nevertheless weighs against 2 the State because “the ultimate responsibility for such circumstances must rest with 3 the government rather than with the defendant.” *Id.* Third, neutral delay, or delay 4 justified by a valid reason, does not weigh against either party.

See *id.* (stating that 5 “a valid reason... should serve to justify appropriate delay”); see also *State v. O’Neal*, 2009-NMCA-020, ¶¶ 20-21, 145 N.M. 604, 203 P.3d 135 (describing a 7 mistrial and inclement weather as “purely neutral circumstances” and holding that the 8 resulting delays did not weigh against either party).

In addition, delay initiated by 9 defense counsel generally weighs against the defendant. See Serros, 2016-NMSC- 10 008, ¶ 46 (“[T]he actions of defense counsel ordinarily are attributable to the 11 defendant.”). 12 {19} Because there was a mistrial in this case, the pre-trial delay falls into two 13 separate periods.

Before the mistrial, trial was postponed for a number of reasons, 14 including a furlough affecting the New Mexico Public Defender Department (Public 15 Defender Department). The mistrial itself caused an additional two months of delay, 16 what we determine to be a reasonable length of time.

For reasons we explain below, 17 we determine that the delay was primarily neutral and administrative. 18 1. Pre-Mistrial delay 10 1 a. Eighteen months of administrative delay 2 {20} The first four trial settings were postponed for administrative reasons, resulting 3 in nearly eighteen months of pretrial delay. 4 {21} The prosecution moved along expeditiously for the first six months following 5 Defendant’s arrest.⁴ The delays began when the district court vacated the first trial 6 setting of November 10, 2008 because the second day of trial fell on a state holiday.

7 This resulted in a one-month delay. The district court then vacated the second trial 8 setting of December 17, 2008 to allow Defendant to conduct witness interviews. This 9 caused a delay of two and one-half months.

The district court vacated the third trial 10 setting of March 4, 2009 due to a pending motion. This resulted in a three-month 11 delay. The district court continued the fourth setting of May 26, 2009 because the trial 12 was set for only one day instead of three days. This led to a five-month delay. 13 {22} The State argues that, because Defendant asked the district court to vacate the 4 14 For the reader’s convenience, periods of delay are rounded to the nearest half 15 month.

The respective periods of delay are May 12, 2008 to November 10, 2008 (five 16 months, 29 days); November 10, 2008 to December 17, 2008 (one month, seven 17 days); December 17, 2008 to March 4, 2009 (two months, 15 days); March 4, 2009 18 to May 26, 2009 (two months, 22 days); May 26, 2009 to October 27, 2009 (five 19 months, one day); October 27, 2009 to January 13, 2010 (two months, 17 days); 20 January 13, 2010 to March 8, 2010 (one month, 23 days); and March 8, 2010 to May 21 17, 2010 (two months, nine days).

11 1 second trial setting in order to enable him to conduct witness interviews, the Court 2 of Appeals wrongly attributed the delay following the second trial setting of 3 December 17, 2008 to the State. We disagree with the State and affirm the Court of 4 Appeals on this issue. See Ochoa, 2014-NMCA-065, ¶ 11.

The basis for the 5 continuance was to enable Defendant to adequately prepare for trial. Defendant 6 needed time to conduct witness interviews, which had been postponed three times. 7 This was a legitimate reason for Defendant to seek to postpone the second trial 8 setting, and the resulting two

and one-half month delay does not weigh against him. 9 See Garza, 2009-NMSC-038, ¶ 11 (“ ‘[I]f either party is forced to trial without a fair 10 opportunity for preparation, justice is sacrificed to speed.’ ”).

Further, the State did 11 not oppose Defendant’s request to continue the second trial setting. This period of 12 delay was necessary to enable Defendant to adequately prepare for trial, and the 13 request does not weigh against him under these circumstances. 14 {23} The foregoing continuances resulted in almost eighteen months of delay, all of 15 which were caused by negligent or administrative reasons.

See Barker, 407 U.S. at 16 531 (explaining that such delay should be weighed less heavily but nevertheless 17 weighs against the State). “As the length of delay increases, negligent or 18 administrative delay weighs more heavily against the State.” Serros, 2016-NMSC- 12 1 008, ¶ 29 (citing Garza, 2009-NMSC-038, ¶ 26 (quoting Barker, 407 U.S. at 531)). 2 Here, the length of delay caused by negligent or administrative reasons was seventeen 3 and one-half months—just under the Garza guideline for a complex case.

See Garza, 4 2009-NMSC-038, ¶ 48. In other words, the majority of delay in this case falls into the 5 “more neutral” category described in Barker. See 407 U.S. at 531. As such, we weigh 6 this period slightly against the State. 7 b. Four and one-half months of neutral delay 8 {24} The fifth and sixth trial settings were vacated for reasons we determine to be 9 “neutral.” The resulting delay amounted to four and one-half months of neutral delay.

10 {25} The fifth trial setting of October 27, 2009 was vacated because the district 11 court judge’s sister died, causing two and one-half months of delay. This delay is a 12 classic example of what we consider “neutral” delay that weighs against neither party. 13 See, e.g., O’Neal, 2009-NMCA-020, ¶¶ 20-21. 14 {26} The sixth trial setting of January 13, 2010 was delayed at Defendant’s urging, 15 as a furlough of employees of the Public Defender Department was expected to take 16 effect on the third day of trial.

In his motion to continue, Defendant stated that 17 Governor Richardson had designated Friday, January 15, 2010 as a mandatory 18 furlough day for all state employees and that defense counsel, a public defender, was 13 1 subject to the mandatory furlough. Defendant also noted that this Court, contrary to 2 the Governor’s mandate, had ordered public defenders to appear at hearings 3 scheduled on the furlough day.

Even so, Defendant asserted that defense counsel 4 would be without support staff and unable to provide effective assistance at trial. 5 {27} The district court granted the request to continue the trial “to ensure the 6 [d]efense [c]ounsel ha[d] adequate support staff to prepare a defense.” Defendant 7 argued that the “mandatory furlough is an action by the State” and any resulting delay 8 to the proceedings should weigh against the State.

The Court of Appeals agreed with 9 Defendant and weighed the ensuing months against the State. See *Ochoa*, 2014- 10 NMCA-065, ¶ 10. We disagree with attributing this delay to the State for the 11 following reasons. 12 {28} In *Vermont v. Brillon*, the Supreme Court of the United States established the 13 general rule that “delays caused by defense counsel are properly attributed to the 14 defendant, even where counsel is assigned.” 556 U.S. at 94; *id.* at 85 (“[D]elays 15 sought by counsel are ordinarily attributable to the defendants they represent.”).

16 However, the *Brillon* Court foresaw an exception to the general rule where the delay 17 results from a “systemic breakdown in the public defender system.” See *id.* at 94 18 (internal quotation marks and citation omitted).

The *Brillon* Court did not define the 14 1 contours of this exception.⁵ See *id.* Thus, we must decide whether the furlough, which 2 affected staff at the Public Defender Department for only one day of trial, constitutes 3 a “systemic breakdown in the public defender system.” See *id.* (internal quotation 4 marks and citation omitted).

We conclude that it does not. 5 {29} Other courts have interpreted “systemic breakdown in the public defender 6 system” to describe problems that are not only institutional in origin, but sufficiently 7 serious to justify weighing the delay against the government. See, e.g., *Weis v. State*, 8 287 Ga. 46, 694 S.E.2d 350, 354-55 (2010) (holding that funding problems did not 9 amount to a breakdown of the entire public defender system when “lack of funding 10... was not the sole factor contributing to the delay”), *cert. denied*, *Weis v. Georgia*, 11 562 U.S. 850 (2010); cf. *United States v. Young*, 657 F.3d 408, 414-15 (6th Cir.

2011) 12 (rejecting the argument that the district court’s untimeliness was a “systemic failure” 13 that should weigh against the State). We agree with this interpretation, and conclude 14 that a “systemic breakdown in the public defender system” must be based upon 5 15 The Court granted certiorari to determine whether a state’s failure to fund 16 counsel for an indigent defendant weighs against the State in *Boyer v. Louisiana*, 133 17 S. Ct.

1702, 1702 (2013) (per curiam), dismissing cert. as improvidently granted. 18 However, the Court dismissed the writ as improvidently granted after determining 19 that the record did not squarely present that issue. See *id.* at 1703 (concluding that 20 most of the delay resulted from defense requests for continuances, other defense 21 motions, and events beyond the control of either party).

15 1 problems that are both institutional in origin and debilitating in scope. 2 {30} In the instant case, the furlough was initiated by the Governor and resulted 3 from events beyond the control of the defense and the prosecution. Cf. *Brillon*, 556 4 U.S. at 94 (“The effect of these earlier events should have been factored into the 5 court’s analysis of subsequent delay.”).

Thus, the period of delay caused by the 6 furlough was institutional in origin. However, the furlough was not so debilitating as 7 to justify attributing the delay to the government. 8 {31} The importance of adequately funding the institutions obligated to fulfill our 9 constitutional responsibilities to accused persons cannot be overstated. See *Kerr v. 10 Parsons*, 2016-NMSC-028, ¶ 40, 378 P.3d 1 (Vigil, J., specially concurring).

11 However, we do not consider the delay caused by the instant furlough to be 12 sufficiently onerous to constitute a “systemic breakdown of the public defender 13 system.” See *Brillon*, 556 U.S. at 94 (internal quotation marks and citation omitted). 14 The furlough, which impacted only one day of a three-day jury trial and resulted in 15 just two months of the entire two-year delay, is not the type of “systemic breakdown” 16 contemplated by the *Brillon* Court.

Cf. *State v. Brown*, 2015 WI App 90, ¶ 46, 365 17 Wis. 2d 608, 871 N.W.2d 867 (non-precedential) (concluding that there was no 18 systemic breakdown when its public defender department left an unlicensed attorney 16 1 on a case for a short period of the delay). 2 {32} Consistent with *Brillon*, we note that the “contrary conclusion could encourage 3 appointed counsel to delay proceedings by seeking unreasonable continuances, 4 hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds.” See 5 *Brillon*, 556 U.S. at 93.

Such a rule could create perverse incentives for defense 6 counsel seeking to secure dismissal of a case. See *id.* In turn, “[t]rial courts might well 7 respond by viewing continuance requests made by appointed counsel with skepticism, 8 concerned that even an apparently genuine need for more time is in reality a delay 9 tactic.” *Id.* Defendant specifically asserted that he would lack the support of 10 paralegals, secretaries, and investigators on the third day of trial.

To weigh the 11 ensuing delay against the State could fault the State for delay initiated by any defense 12 attorney whose support staff were unavailable for trial. This result would be 13 inappropriate where the State diligently persevered in moving the case forward, as in 14 the instant case. 15 {33} We also do not consider the fact that Defendant sought the continuance—due 16 to the furlough—to be dispositive of this issue.

As stated in *Brillon*, courts must 17 account for the earlier factors in a sequence of events when determining the reasons 18 for delay. *Id.* at 94 (“The effect of these earlier events should have been factored into 17 1 the court’s analysis of subsequent delay.”).

The district court was justified in granting 2 the continuance in anticipation of the furlough day. See *id.* We do not weigh this 3 delay against a defendant “for the simple reason that an indigent defendant has no 4 control over whether a [s]tate has set aside funds to pay his lawyer.” Cf. *Boyer*, 133 5 S. Ct. at 1707 (Sotomayor, J., dissenting from dismissal of writ of certiorari).

This 6 analysis leads us to conclude that the two months following the furlough do not 7 weigh against either party. We therefore conclude that this was a neutral delay. 8 2. Delay following the

mistrial 9 {34} We proceed to consider the period after the mistrial.

The mistrial occurred on 10 March 8, 2010, two months before Defendant was convicted in a retrial. The district 11 court found this period to be neutral, consistent with precedent then in force. See 12 O’Neal, 2009-NMCA-020, ¶ 21 (weighing the period after a mistrial neutrally 13 because it “[bore] no fault attributable to the parties”). Since then, this Court has 14 announced that after a mistrial “the speedy trial clock does not begin to run 15 anew—that is, the court does not have another [eighteen] months to schedule a 16 [complex] case for retrial.” Castro, 2017-NMSC-027, ¶ 21.

17 {35} In Castro, we rejected the approach under which the speedy trial “clock” resets 18 and runs anew from the date of the mistrial. *Id.*; see, e.g., *State v. Strong*, 258 Mont. 18 1 48, 50, 851 P.2d 415 (1993). The “clock” approach does not adequately protect 2 incarcerated defendants in the event of successive mistrials. *Reuster v. Turner*, 250 3 So. 2d 264, 267 (Fla.

1971) (“A construction allowing for a continuing series of new 4 demand periods reinstated in the event of each mistrial would... do violence to our 5 organic guarantee of speedy trial....”), overruling *Kelly v. State ex rel. Morgan*, 54 6 So. 2d 431, 432 (Fla. 1951). It is also inconsistent with our obligation to consider the 7 unique circumstances underlying each speedy trial claim, including the particularized 8 prejudice facing each defendant.

See *Barker*, 407 U.S. at 522 (“[A]ny inquiry into a 9 speedy trial claim necessitates a functional analysis of the right in the particular 10 context of the case.”); see also *Garza*, 2009-NMSC-038, ¶ 13 (“Violation of the 11 speedy trial right is only determined through a review of the circumstances of a case, 12 which may not be divorced from a consideration of... the harm to the 13 defendant.... ”).

14 {36} Nor did we adopt a second approach under which a mistrial is not a “trial” for 15 speedy trial purposes, and defendants must be tried by a statutory deadline or 16 released. See, e.g., *Rider v. State*, 118 S.E.2d 749, 750 (Ga. Ct. App. 1961).

The 17 second approach conflicts with *Garza*, which “specifically rejects inflexible, bright- 18 line approaches to analyzing a speedy trial claim.” See 2009-NMSC-038, ¶ 13. It also 19 1 conflicts with our rejection of the presumption that the right to a speedy trial has been 2 violated when the delay crosses a threshold of “presumptive prejudice.” See *id.* ¶ 21.

3 Like the “clock” approach, the second approach prevents a court from examining the 4 particular circumstances of each case. We reject both of these approaches as 5 inconsistent with our speedy trial jurisprudence. 6 {37} Castro embodies a third approach. “Ordinarily the court should schedule the 7 retrial as soon as its docket permits unless the parties justifiably require additional 8 pre-retrial discovery or motions practice.” Castro, 2017-NMSC-027, ¶ 21.

In other 9 words, a defendant must be brought to trial within a reasonable time following a 10 mistrial. See, e.g., *People v. Dixon*, 87 Ill. App. 3d 84, 43 Ill. Dec. 252, 410 N.E.2d 11 252, 256 (2d Dist. 1980) (concluding that the constitutional right to a speedy trial was 12 not violated when the defendant was retried within a reasonable time). This approach 13 is consistent with both Barker and Garza.

In the event of a mistrial, district courts 14 must consider and weigh the ensuing developments in accordance with the 15 particularized circumstances of each case. See Garza, 2009-NMSC-038, ¶ 13; see 16 also Barker, 407 U.S. at 530-31 (explaining that the speedy trial inquiry “is 17 necessarily dependent upon the peculiar circumstances of the case”). 18 {38} In *Castro*, we were “particularly disturb[ed]” by a thirty-two month post- 20 1 mistrial delay.

Castro, 2017-NMSC-027, ¶ 21. In contrast, the retrial occurred just 2 two months after the mistrial in this case. No one can reasonably contend that the 3 retrial did not occur in a reasonable amount of time. 4 {39} We emphasize, however, the importance of timely disposition of cases. 5 Boundless pretrial delay caused by the inefficiencies of those responsible for the fair 6 and timely administration of justice has significant adverse consequences to the 7 community and victims, as well as the accused.

Barker, 407 U.S. at 519 (“[T]here is 8 a societal interest in providing a speedy trial which exists separate from, and at times 9 in opposition to, the interests of the accused.”). The effect of extended delay on 10 determinations of truth and reliability “is a two-edged sword. It is the Government 11 that bears the burden of proving its case beyond a reasonable doubt.

The passage of 12 time may make it difficult or impossible for the Government to carry this burden.” 13 Doggett, 505 U.S. at 659 (O’Connor, J., dissenting). When the regular course of 14 prosecution is interrupted by an unexpected turn of events, it should be rescheduled 15 in the manner best designed to foster expeditious resolution of a case. See *Castro*, 16 2017-NMSC-027, ¶ 21.

17 {40} In sum, under the second Barker factor, just under eighteen months of delay 18 were caused by administrative reasons. This falls within the guidelines for a complex 21 1 case and therefore weighs only slightly against the State. See Garza, 2009-NMSC- 2 038, ¶ 2 (setting eighteen months as the guideline for a complex case); *id.* ¶ 26 (“The 3 degree of weight we assign against the State for [administrative] delay is closely 4 related to the length of delay[.]”).

Further, the four and one-half month delay caused 5 by the unforeseen death and the furlough of the employees of the Public Defender 6 Department is neutral delay and does not weigh against either party. Finally, the State 7 brought Defendant to trial within a reasonable time after the mistrial.

Therefore, the 8 second factor does not weigh heavily against the State. 9 C. Assertion of the Right to a Speedy Trial 10 {41} The third Barker factor asks us to consider whether Defendant asserted the 11 right to a speedy trial. 407 U.S. at 531-32.

The district court has the discretion to 12 weigh a defendant's assertion based on the circumstances of the case. *Id.* at 528-29. 13 The frequency and force of the objections can be taken into account in considering 14 the defendant's assertion, as well as whether an assertion is purely pro forma. *Id.* at 15 529. Pro forma assertions are sufficient to assert the right, but are given little weight 16 in a defendant's favor.

State v. Urban, 2004-NMSC-007, ¶ 16, 135 N.M. 279, 87 P.3d 17 1061. 18 {42} In evaluating the third factor, this Court has also noted the importance of 22 1 closely examining the circumstances of each case. *Garza*, 2009-NMSC-038, ¶ 33. 2 This includes accounting for a defendant's actions with regard to the delay, such as 3 filing frivolous motions or procedural maneuvers.

See *id.* ¶ 32. On one hand, a single 4 demand for a speedy trial is sufficient to assert the right. See, e.g., *id.* ¶ 34. On the 5 other hand, a defendant's assertion can be weakened by a defendant's acquiescence 6 to the delay. *Id.* We also consider the consistency of a defendant's legal positions 7 with respect to the delay. See *id.* ¶ 33. 8 {43} In the instant case, Defendant filed five demands and four motions to dismiss 9 for violation of the right to a speedy trial.

These filings were interspersed with 10 Defendant's requests to continue the second and sixth trial settings. However, 11 Defendant failed to respond to the State's three petitions to extend the time to 12 commence trial. 13 {44} The State argues that Defendant weakened his assertion by requesting two 14 continuances.

We disagree. The Court of Appeals correctly concluded that the 15 continuances sought by Defendant were the result of legitimate concerns in securing 16 a fair trial for two reasons. *Ochoa*, 2014-NMCA-065, ¶ 19. The first was to ensure 17 adequate time to prepare and review newly disclosed information. See *id.* ¶ 11.

The 18 second was because the third day of trial fell on a furlough day. See *id.* ¶ 19. We do 23 1 not expect a defendant to choose between a speedy trial and an adequate defense. See 2 *Garza*, 2009-NMSC-038, ¶ 32 (citing *McNeely v. Blanas*, 336 F.3d 822, 831 (9th Cir. 3 2003)). Defendant did not weaken his assertion of the right to a speedy trial by 4 requesting two continuances.

See *Urban*, 2004-NMSC-007, ¶ 16 (holding that the 5 defendant's request for a continuance did not "erase" his assertion of the right). 6 {45} Defendant did, however, dilute the strength of his assertion by failing to 7 respond in a substantive manner to the State's three requests to extend the "six-month 8 rule." See Rule 5-604(B)-(C) (Rule 5-604, the "six-month rule," requires the State to 9 bring a defendant to trial within six months, but permits the district court to grant an 10 extension for good cause.).

Defendant did not file a response to any of these petitions. 11 The first petition states that Defendant did not oppose the extension. The second 12 petition states that Defendant opposed the extension and would file a response—but 13 Defendant never did so.

The third petition states that Defendant opposed the 14 extension but “no hearing [was] necessary.” 15 {46} Substantive responses are necessary to adequately inform the district court of 16 each party’s position so it can fully and fairly consider the merits of the request. By 17 failing to assert a consistent position on the issue, Defendant acquiesced to the delay.

18 Garza, 2009-NMSC-038, ¶ 34 (explaining that a defendant’s “acquiescence to the 24 1 delay” can mitigate the strength of the assertion). Therefore, Defendant’s lack of 2 response to the State’s three requests to extend the six-month rule tempered his 3 assertion of the right to a speedy trial. 4 {47} Further, given the timing of the State’s petitions, Defendant’s silence muted his 5 demands for a speedy trial.

See Garza, 2009-NMSC-038, ¶ 33. Just one month before 6 Defendant filed his first demand for a speedy trial, Defendant did not oppose the 7 State’s first petition for an extension. One day after filing his second demand for a 8 speedy trial, Defendant did not respond to the State’s second request for an extension. 9 Finally, just days before filing his fifth demand for a speedy trial, Defendant did not 10 respond to the State’s third request for an extension.

The timing of these demands, in 11 relation to Defendant’s acquiescence to the State’s requests to continue the trial 12 settings, is “reminiscent of Penelope’s tapestry.”⁶ Therefore, we decline to weigh the 13 third Barker factor in Defendant’s favor. 14 D. Prejudice 15 {48} The final Barker factor requires us to examine the prejudice to Defendant. 407 6 16 United States v. Loud Hawk, 474 U.S. 302, 314 (1986) (quoting Homer, *The 17 Odyssey*, Book II, lines 91-105) (Richmond Lattimore trans., 1965) (comparing a 18 defendant’s actions to those of Penelope, the wife of Odysseus, who claimed she 19 would accept a suitor when she finished a tapestry, but unraveled part of the tapestry 20 every night)).

25 1 U.S. at 532. “Prejudice, of course, should be assessed in the light of the interests of 2 defendants which the speedy trial right was designed to protect.” *Id.* These interests 3 are preventing oppressive pretrial incarceration, minimizing anxiety and concern of 4 the accused, and limiting the possibility that the defense will be impaired. *Id.* We 5 examine these interests in light of the specific facts and circumstances of each case.

6 See *id.* at 522. 7 {49} We begin our analysis of the prejudice factor by noting two important facts. 8 First, Defendant was incarcerated for two years before he was ultimately tried and 9 convicted. Second, Defendant did not offer proof in the form of affidavits, testimony, 10 or other documentation to support his prejudice claim.

Thus, we are compelled to 11 assess the prejudice factor with little assistance from Defendant. See Garza, 2009- 12 NMSC-038, ¶ 35 (“[W]e will not speculate as to the impact of pretrial incarceration 13 on a defendant or the degree of anxiety a defendant suffers.”). 14 {50} On appeal, the State asserts that the Court of Appeals erred in creating a bright- 15 line rule that twenty-two months of pretrial incarceration is unduly prejudicial even 16 when a defendant fails to make a particularized showing of prejudice.

The State 17 asserts that the Court of Appeals wrongly emphasized the length of delay in 18 concluding that Defendant was prejudiced: 26 1 “With respect to pretrial incarceration, the question is whether the length 2 of time was unacceptably long in that it became unduly prejudicial so as 3 to factor into the analysis.” State v. Laney, 2003-NMCA-144, ¶ 29, 134 4 N.M.

648, 81 P.3d 591. This Court previously concluded that a delay of 5 twenty-two months prejudiced a defendant. See State v. Moreno, 2010- 6 NMCA-044, ¶¶ 36-37, 148 N.M. 253, 233 P.3d 782 (considering 7 twenty-two months of pretrial incarceration as the main factor in 8 determining that the defendant was prejudiced).

Here, Defendant was 9 incarcerated even longer. This is the “precise kind” of prejudice the 10 speedy trial right was intended to prevent. 11 Ochoa, 2014-NMCA-065, ¶ 23. For the reasons that follow, we reject the State’s 12 argument and agree with the Court of Appeals on this issue.

In doing so, we address 13 three interrelated issues: (1) What is the role of the length of pretrial incarceration in 14 determining whether a defendant suffered prejudice; (2) Can we presume that a 15 defendant suffered particularized prejudice when, as here, he failed to present 16 affirmative proof in support of his prejudice claim; and (3) If so, what is the weight 17 of such a presumption in the overall balancing test?

We hold that Defendant was 18 prejudiced as a result of his continuous pretrial incarceration, although this 19 presumption does not dispose of the speedy trial claim. 20 {51} Defendant was continuously incarcerated during the two years leading up to 21 trial.

As the Barker Court recognized: 22 [There are] societal disadvantages of lengthy pretrial incarceration, [and] 23 obviously the disadvantages for the accused who cannot obtain his 27 1 release are even more serious.

The time spent in jail awaiting trial has 2 a detrimental impact on the individual. It often means loss of a job; it 3 disrupts family life; and it enforces idleness.... The time spent in jail 4 is simply dead time.

Moreover, if a defendant is locked up, he is 5 hindered in his ability to gather evidence, contact witnesses, or 6 otherwise prepare his defense. Imposing those consequences... is 7 serious. 8 407 U.S. at 532-33 (footnotes omitted). “The oppressive nature of the pretrial 9 incarceration depends

on the length of incarceration, whether the defendant obtained 10 release prior to trial, and what prejudicial effects the defendant has shown as a result 11 of the incarceration.” Garza, 2009-NMSC-038, ¶ 35 (citing Barker, 407 U.S. at 532- 12 33).

Because some degree of oppression and anxiety is inherent in every 13 incarceration, “we weigh this factor in the defendant’s favor only where the pretrial 14 incarceration or anxiety suffered is undue.” Id. ¶ 35 (citation omitted). 15 {52} Consistent with Barker and Garza, the Court of Appeals properly considered 16 the length of incarceration in determining whether there was oppressive pretrial 17 incarceration.

See Barker, 407 U.S. at 532-33; Garza, 2009-NMSC-038, ¶ 35 (citing 18 Barker, 407 U.S. at 532-33). Although a defendant bears the burden of proving 19 prejudice, this burden varies with the length of pretrial incarceration. See Garza, 20 2009-NMSC-038, ¶ 35 (explaining that a defendant “bear[s] the burden of production 21 on this issue” (internal quotation marks and citation omitted)); see, e.g., id. ¶ 37 28 1 (concluding that the defendant made no showing of prejudice when he spent only two 2 hours in jail and apparently offered no proof in support of his prejudice claim); see 3 also Spearman, 2012-NMSC-023, ¶¶ 3, 39 (concluding that the record was too 4 limited to determine whether there was prejudice when the defendant spent only one 5 day in jail); see Serros, 2016-NMSC-008, ¶¶ 21, 90 (considering the defendant’s 6 testimony in its conclusion that four years of pretrial incarceration resulted in extreme 7 prejudice).

8 {53} Generally, mere allegations are insufficient to prove prejudice. *Jackson v. Ray*, 9 390 F.3d 1254, 1264 (10th Cir. 2004) (stating that “[t]he burden of showing all types 10 of prejudice lies with the individual claiming the violation and the mere ‘possibility 11 of prejudice is not sufficient’ ”).

For example, the defendant in Garza spent only two 12 hours in jail and did not offer proof in support of his prejudice claim. 2009-NMSC- 13 038, ¶ 37. We held that the defendant “made no showing of prejudice” cognizable 14 under the fourth Barker factor. Id. Likewise, the defendant in Spearman asserted that 15 he lost employment opportunities, had to move, and eventually suffered bankruptcy 16 due to the pending charges.

2012-NMSC-023, ¶¶ 38, 39. He offered no evidence in 17 support of his assertions and spent only one day in jail. Id. ¶¶ 3, 39. This Court 18 concluded that it could not determine whether the defendant was prejudiced due to 29 1 the lack of evidence in the record. See id. ¶ 39. 2 {54} However, lengthy and onerous pretrial incarceration may render affirmative 3 proof unnecessary to find that the defendant suffered prejudice.

See, e.g., Serros, 4 2016-NMSC-008, ¶ 90; *State v. Brown*, 2017-NMCA-046, ¶ 37, 396 P.3d 171 5 (rejecting the State’s argument that a defendant incarcerated for thirty-three months 6 did not suffer particularized prejudice).

In Serros, for example, the defendant testified 7 that he was incarcerated for more than four years in custodial segregation. See 2016- 8 NMSC-008, ¶ 88. We noted that “[the d]efendant’s testimony easily establishes that 9 the delay... caused him to suffer oppressive pretrial incarceration.” Id. ¶ 90. 10 However, we also acknowledged that the defendant’s testimony was not essential to 11 our conclusion that he suffered oppressive pretrial incarceration.

See id. (describing 12 the length of incarceration as “oppressive on its face”). Independent of the testimony 13 describing his specific circumstances, the oppressive nature of the incarceration was 14 self-evident based on the sheer length of incarceration. See id. Thus, the length of 15 incarceration is a counterweight to a defendant’s burden of production.

16 {55} The State incorrectly assumes that a court cannot find that a defendant has 17 suffered prejudice when the defendant fails to present affirmative proof in support of 18 his prejudice claim. Despite the emphasis in our recent jurisprudence on a defendant’s 30 1 burden in showing prejudice, we have also acknowledged that a defendant need not 2 always present affirmative proof in support of a prejudice claim.

Garza, 2009-NMSC- 3 038, ¶ 39 (stating that “in some circumstances, prejudice may be presumed” and that 4 “[t]he presumption that pretrial delay has prejudiced the accused intensifies over 5 time” (alteration in original) (internal quotation marks and citations omitted)); id. 6 (recognizing that a defendant need not show prejudice when the other three Barker 7 factors weigh strongly in his favor (citing *United States v. Mendoza*, 530 F.3d 758, 8 764 (9th Cir.

2008))); see also *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam) 9 (“*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of 10 prejudice was necessary to prove a denial of the constitutional right to a speedy 11 trial[.]”). 12 {56} The United States Supreme Court has expressly held that “consideration of 13 prejudice is not limited to the specifically demonstrable[.]” *Doggett*, 505 U.S. at 655.

14 In *Doggett*, the Court held that the defendant suffered presumptive prejudice as a 15 result of an eight and one-half year delay. Id. at 655-58. “[E]xcessive delay 16 presumptively compromises the reliability of a trial in ways that neither party can 17 prove or, for that matter, identify.” Id. at 655.

Although the *Doggett* Court addressed 18 the third type of prejudice—impairment of the defense—its reasoning is persuasive 31 1 with respect to Defendant’s other prejudice claims. Pursuant to *Doggett*, a court can 2 under certain circumstances presume that a defendant suffered some degree of 3 prejudice even without affirmative proof. Id. at 655 (presuming that a defendant 4 suffered prejudice and noting that certain forms of prejudice “can rarely be shown”).

5 {57} We agree with the Court of Appeals that Defendant’s two-year incarceration 6 resulted in prejudice. *Ochoa*, 2014-NMCA-065, ¶ 23. Continuous pretrial 7 incarceration is obviously

oppressive to some degree, even in the absence of 8 affirmative proof. See *Barker*, 407 U.S. at 532-33 (describing disadvantages for the 9 accused as “obvious”). When, as in this case, a defendant was continuously 10 incarcerated for an extended period of time, it requires no speculation to determine 11 that the defendant suffered some prejudice.

Cf. *Loud Hawk*, 474 U.S. at 304, 315 12 (1986) (holding that the prejudice to respondents who were neither under indictment 13 nor subject to official restraint was too speculative to weigh in their favor). Therefore, 14 we presume that Defendant was prejudiced simply by being continuously incarcerated 15 for two years. 16 {58} We are unpersuaded by the State’s argument that the length of delay is too 17 short to presume prejudice.

In support of this argument, the State relies on cases in 18 which the defendants did not suffer oppressive pretrial incarceration. See *Barker*, 407 32 1 U.S. at 533-34 (finding no prejudice when the defendant was incarcerated for just ten 2 months of the five-year delay); *Jackson*, 390 F.3d at 1258, 1263-65 (declining to 3 presume prejudice when the defendant was incarcerated for just one year and nine 4 months out of the four-year delay, without considering whether the defendant 5 suffered oppressive pretrial incarceration); *United States v. Serna-Villarreal*, 352 6 F.3d 225, 232-33 (5th Cir.

2003) (holding that a delay of three years and nine months 7 was too short to presume prejudice, without addressing whether the defendant was 8 continuously incarcerated). These cases are distinguishable from the instant case. 9 {59} Nor are we convinced that the prejudice to Defendant is too speculative to 10 consider in the speedy trial analysis. See, e.g., *Loud Hawk*, 474 U.S. at 314.

In *Loud Hawk*, a split court held that the mere possibility of prejudice was not sufficient to 12 support the respondent’s assertion that their speedy trial rights were violated. See *id.* 13 at 315. The *Loud Hawk* respondents—unlike Defendant—were unconditionally 14 released from custody. *Id.* at 308. Indeed, *Loud Hawk* expressly holds that the speedy 15 trial right applies when defendants are subject to substantial restrictions on their 16 liberty.

Id. at 312 (“[T]he Speedy Trial Clause’s core concern is impairment of 17 liberty[.]”). We agree with the Court of Appeals that Defendant suffered “the ‘precise 18 kind’ of prejudice” the speedy trial right is meant to prevent. See *Ochoa*, 2014- 33 1 NMCA-065, ¶ 23. 2 {60} But our inquiry does not end there. Though it is obvious that Defendant was 3 prejudiced by virtue of his continuous incarceration, absent affirmative proof, we can 4 only speculate as to the specific circumstances of his incarceration.

See *Garza*, 2009- 5 NMSC-038, ¶ 35. In *Serros*, for example, the defendant’s testimony supported our 6 determination that the pretrial incarceration resulted in extreme prejudice. See 2016- 7

NMSC-008, ¶¶ 88-90 (“[The d]efendant’s testimony easily establishes that the delay 8 in his case caused him to suffer oppressive pretrial incarceration.”).

However, a 9 defendant could conceivably suffer oppressive pretrial incarceration in a much shorter 10 time, or suffer less prejudice during a longer period of incarceration. These particulars 11 are unknowable in the absence of affirmative proof. With affirmative proof, 12 Defendant could have provided the Court with a basis for concluding that he suffered 13 extreme prejudice.

14 {61} Similarly, we can presume that Defendant suffered some degree of anxiety and 15 concern, but can only speculate as to whether such prejudice was undue. See 16 Spearman, 2012-NMSC-023, ¶ 39 (declining to hold that the defendant suffered 17 undue anxiety based on the bare allegations of defense counsel); see also Garza, 18 2009-NMSC-038, ¶ 35 (requiring the anxiety to be undue in order to weigh in the 34 1 defendant’s favor).

Defendant did not offer affidavits, testimony, or documentation 2 with respect to his specific circumstances of anxiety. Rather, Defendant argued that 3 the State bore the burden of showing that he had not suffered anxiety or concern. 4 Without this showing, we decline to speculate as to the particularized anxiety or 5 concern he may have suffered. See Garza, 2009-NMSC-038, ¶ 35.

6 {62} We also presume that there was some impairment of the defense. Doggett, 505 7 U.S. at 655 (explaining that impairment of the defense may be impossible to prove). 8 The Doggett Court explicitly recognized the concept of presumptive prejudice in the 9 form of impairment of the defense, *id.* at 655, and the Barker Court described this as 10 the “most serious” form of prejudice because “inability of a defendant adequately to 11 prepare his case skews the fairness of the entire system.” 407 U.S. at 532.

Fading 12 witness memories are just one collateral effect of prolonged pretrial delay. See *id.* 13 (noting the possibility that the defense could also be impaired by loss of exculpatory 14 evidence). Nevertheless, Defendant was obligated to state “with particularity what 15 exculpatory [evidence] would have been offered[.]” Serros, 2016-NMSC-008, ¶ 85 16 (first alteration in original) (internal quotation marks and citations omitted).

Here, 17 Defendant asserted that the memories of the alleged victims exhibited significant 18 discrepancies over the course of the delay, and that one of the witnesses changed her 35 1 story. Defendant did not state with particularity what exculpatory evidence may have 2 been offered. 3 {63} Finally, we must determine the weight of our presumption in the overall 4 balance.

Presumptive prejudice is not dispositive of the speedy trial claim. See 5 Doggett, 505 U.S. at 656. “[P]resumptive prejudice cannot alone carry a Sixth 6 Amendment claim without regard to the other Barker criteria.” *Id.* Rather, “it is part 7 of the mix of relevant facts, and its importance increases with the length of delay.” 8 *Id.* 9 {64} In conclusion, we presume that Defendant was prejudiced by his two-year, 10 continuous incarceration.

This prejudice is obvious and would be unjust to ignore. Cf. 11 Serros, 2016-NMSC-008, ¶ 27 (“To weigh a delay of over four years against [the 12 d]efendant—even slightly—[would be] simply unjust....”). However, without 13 knowing his specific circumstances, we would be strained to conclude that this 14 prejudice prevails over the other three factors. Defendant bore the burden of showing 15 particularized prejudice, Garza, 2009-NMSC-038, ¶ 35, which would enable this 16 Court to weigh this factor more strongly in his favor.

In the absence of such proof, 17 this factor does not tip the scale in Defendant’s favor. See Doggett, 505 U.S. at 656. 18 E. Balancing the Barker Factors 36 1 {65} We conclude that, while Defendant was prejudiced by his two-year pretrial 2 incarceration, neither the length of delay, reasons for delay, nor assertion of the right 3 to a speedy trial weigh in his favor.

We presume prejudice based on Defendant’s 4 continuous incarceration for an extended period before trial. Defendant’s burden of 5 showing particularized prejudice was counterbalanced by the length of his pretrial 6 incarceration. Nevertheless, this presumption does not weigh strongly in Defendant’s 7 favor in this case.

Thus, Defendant was not deprived of his right to a speedy trial. 8 {66} In short, our presumption that Defendant was prejudiced is simply not enough 9 to tip the scale in favor of Defendant’s speedy trial claim. Despite the prejudice to 10 Defendant, the other factors do not weigh strongly in his favor.

We therefore 11 conclude that Defendant’s right to a speedy trial was not violated. 12 III. CONCLUSION 13 {67} We reverse the Court of Appeals and reinstate Defendant’s convictions. 14 {68} IT IS SO ORDERED. 15 _____ 16 BARBARA J. VIGIL, Justice 37 1 WE CONCUR: 2 _____ 3 JUDITH K. NAKAMURA, Chief Justice 4 _____ 5 PETRA JIMENEZ MAES, Justice 6 _____ 7 EDWARD L. CHÁVEZ, Justice 8 _____ 9 CHARLES W. DANIELS, Justice 38