No. 17-394

IN THE

SUPREME COURT OF THE UNITED STATES

TEXAS,
Petitioner,

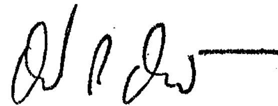
v.

JERRY HARTFIELD,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals of Texas, Thirteenth District

CERTIFICATE OF SERVICE

I certify that on the 16th day of October 2017, one copy of Mr. Hartfield's Brief in Opposition was mailed to Mr. Scott A. Keller, Solicitor General of Texas, P.O. Box 12548 (MC 059), Capitol Station, Austin, Texas, 78711-2548. All parties required to be served have been served. I am a member of the Bar of this Court.



David R. Dow*
Texas Bar No. 06064900
4604 Calhoun Rd
Houston, Texas 77204-6060
713-743-2171
713-743-2131 (fax)

Counsel for Jerry Hartfield
*Member, Supreme Court Bar

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
713-743-2171
713-743-2131 (fax)

Counsel for Jerry Hartfield
*Member, Supreme Court Bar

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Introduction

Jerry Hartfield was held in the custody of the State of Texas for three months shy of forty-one years. What makes this detention extraordinary is that for over thirty-two of those years (no less than 80% of the time he was incarcerated), Hartfield was being held under no conviction or sentence.

In 1977, Mr. Hartfield was convicted of capital murder. Three years later, Texas's highest criminal court – the Court of Criminal Appeals ("CCA") – reversed his conviction and ordered the State to give him a new trial. That court's decision became final when mandate issued on March 4, 1983. The State ignored that

mandate and instead, ten days after mandate issued, urged the governor and the Board of Pardons and Paroles to commute Hartfield's sentence. Of course, by that point, because mandate had issued, there was no sentence to commute. The State has attempted to justify its ignoring the CCA's mandate by claiming that its filing a clearly impermissible motion before mandate issued had the effect of nullifying the subsequently issued mandate.

Eventually a jailhouse lawyer assisted Hartfield, who is intellectually disabled, with calling his plight first to the attention of the state courts and then to that of a federal court. The federal court appointed counsel to represent Hartfield. The resulting litigation culminated with the CCA's acknowledging in 2013 that Mr. Hartfield had been held for thirty years under no valid conviction and that that court was aware that Hartfield was incarcerated under no valid conviction when he first asserted his right to a speedy trial seven years earlier.

Only after the CCA issued its 2013 opinion and only after Hartfield filed yet another document asserting that his right to a speedy trial had been violated did the State finally begin the process of giving him the new trial the CCA had ordered thirty years before. It was clear at the new trial that Mr. Hartfield's ability to defend himself had been greatly prejudiced by the State's thirty-year delay in bringing him to trial. However, even with the great advantage it appreciated due to its delay in bringing Hartfield to trial, the State was not able to win the capital murder conviction against Hartfield that it sought. Instead, Hartfield's jury, on August 19, 2015, found him guilty of the lesser-included offense of murder. It is that

conviction and the resulting life sentence that Hartfield appealed to the Texas Court of Appeals for the Thirteenth District.

After "considering the *unique facts and procedural posture* of this case and the record before" it, the court of appeals held that Hartfield's right to a speedy trial had been violated "due to the *unprecedented* amount of time Hartfield spent in prison without a conviction or sentence, as well as the serious negligence on the part of the State." Pet. App. 28a (emphasis added). The State asked the CCA to review the decision from the court of appeals, but that court refused review, and Hartfield was released from prison in June of this year.

The State has now asked this Court to grant certiorari to review the decision made by the intermediate court of appeals. This Court should deny certiorari for three reasons: first, because of the sheer factual uniqueness of this case, any decision rendered by this Court would not be widely applicable; second, because two of the three questions presented by the State essentially ask this Court to do nothing more than review a state procedural question, while the third is grounded in a mischaracterization of the procedural history of the case; and finally, because the court of appeals did not err.

Statement of the Case

A. 1977 – 1983: Hartfield's initial trial and direct appeal

Jerry Hartfield was convicted of the capital murder of Eunice Lowe and sentenced to death in June 1977. 2.CR.126, 141.[1] The State's theory at trial was that Hartfield had killed Ms. Lowe with a pickaxe, took money from the bus station she managed, and then absconded in her car. Mr. Hartfield appealed his conviction and sentence to the CCA on numerous grounds. On September 17, 1980, the court unanimously reversed his conviction and ordered a new trial. *Hartfield v. State*, 645 S.W.2d 436, 441 (Tex. Crim. App. 1980). The court held that the State had violated Mr. Hartfield's rights under the Sixth and Fourteenth Amendments by striking a juror for cause because of her reservations about the death penalty. *See Witherspoon v. Illinois*, 391 U.S. 510, 520-23 (1968); *see also Adams v. Texas*, 448 U.S. 38, 43-45 (1980) (applying *Witherspoon* to the specific procedure Texas employs in capital cases).

On October 2, 1980, the State sought leave to file a motion for rehearing, urging the court to reform the sentence to life imprisonment instead of remanding for a new trial. *See Hartfield*, 645 S.W.2d at 442. Alternatively, the State asked for a reasonable period of time to seek a commutation of Hartfield's sentence from the governor. *Id.* On November 26, 1980, the court granted the motion for leave to file

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[1] In this Brief in Opposition, Hartfield cites to the record in the court of appeals in the same manner as did Petitioner. *See* Pet. 2 n.1. Citations to Petitioner's Petition appear herein as Pet. [page number]. Citation to Petitioner's Appendix appear as Pet. App. [page number].

the motion for rehearing. 3.CR.472. The State could have sought to have Mr. Hartfield's sentence commuted at this time. It did not.

On January 26, 1983, the CCA issued its opinion on rehearing. Upon reconsideration, the court adhered to its original decision. *Hartfield v. State*, 645 S.W.2d 436, 441 (Tex. Crim. App. 1983) (reh'g op.). In other words, the disposition of the cause remained unchanged from the court's September 17, 1980 decision. Near the end of its opinion on rehearing, the court quoted Rule 310 of the then-existing Texas Criminal Rules of Appellate Procedure. *Id.* at 442. According to Rule 310, a decision from the CCA became final fifteen days after the rendition of the decision. *Id.*; Tex. Crim. App. R. 310 (attached as Appendix A). After quoting the rule, the court then applied the rule to Hartfield's case by writing "that the 15 day period between the rendition of our decision and the date that the mandate issues is a 'reasonable time to seek commutation of sentence from the Governor.'" *Hartfield*, 645 S.W.2d at 442. The Court did not mention a second motion for rehearing because the then-existing rules made clear that a second motion for rehearing was not permissible unless the court's "opinion on rehearing chang[ed] the disposition of the cause from that on original submission," which it had not. Tex. Cr. App. R. 309(f).

Not until January 31, 1983 – five days after the CCA issued its opinion on rehearing – did District Attorney Jack Salyer, 130th District Court Judge G.P. Hardy, and Matagorda County Sheriff Sammy Hurta write the Board of Pardons and Paroles (BPP) and request Hartfield's sentence be commuted. 3.CR.474. In

their letter to the BPP, these state officials conceded "it would be extremely difficult for the State to re-try him after over 6 years has passed." *Id.*

On February 10, the BPP had not acted and the State filed a motion for leave to file a second motion for rehearing. 3.CR.476. This was not a permissible filing because the ruling on the first motion for rehearing did not change the disposition of the case. Tex. Cr. App. R. 309(f); *Hartfield v. Thaler*, 403 S.W.3d 234, 236 n.1 (Tex. Crim. App. 2013). Consequently, the improperly filed *motion for leave to file* was denied on March 1, 1983. 3.CR.472. The CCA issued its mandate on March 4, 1983. 2.CR.190-91. "As soon as mandate issued, [Mr. Hartfield's] conviction and sentence were vacated, [the CCA's] order for a new trial became final, and the case was returned to the point it would have been had there never been a trial." *Hartfield*, 403 S.W.3d at 239.

The Wharton County District Clerk[2] received the mandate on March 9, 1983. 3.CR.478. Neither District Attorney Salyer nor Judge Hardy made any attempt to inform either the governor or the BPP that the CCA had issued its mandate; no State official made any attempt to do so. Far from informing the governor of the CCA's mandate, the State, on or around March 14, 1983, informed the governor that his deadline for commuting Hartfield's sentence was March 15. 3.Supp.RR.121-22 (State's Ex. 2). On March 15, 1983, the governor signed a document purporting to

[2] The crime for which Mr. Hartfield was convicted occurred in Matagorda County, Texas. His trial was convened in Wharton County, which is adjacent to Matagorda County, because the trial court granted his motion to change venue. The courts of Wharton County maintained jurisdiction of the case until July 2013, when the case was transferred back to Matagorda County. 2.CR.243.

commute Mr. Hartfield's sentence to life in prison. 2.CR.192. The Wharton County clerk returned a postcard to the clerk of the CCA saying the mandate had been carried out. 3.CR.483. However, "[b]ecause there was no longer a death sentence to commute, the governor's order had no effect." *Hartfield*, 403 S.W.3d at 239. The State made no attempt to correct the clerk's mistake. The CCA's mandate was not carried out. Mr. Hartfield, an illiterate man with an IQ in the 50s, 2.RR.224; 3.CR.485-86, remained imprisoned, unlawfully.

B. 2006 – 2015: Hartfield asserts his right to a speedy trial

In 2006, another inmate incarcerated at the same facility as Mr. Hartfield began to assist Mr. Hartfield in obtaining the new trial that had been ordered by the CCA more than twenty years before. Consequently, Mr. Hartfield filed an application for a writ of habeas corpus pursuant to article 11.07 on November 14, 2006. Pet. App. 58a. He supplemented the application with a pleading titled "Mandatory Judicial Notice of Condition of Law Precedent Pursuant to F.R.E. 201(d)" filed on November 27, 2006. Pet. App. 59a. In the supplemental pleading, he raised a Speedy Trial claim. *Id.* The Wharton County District Clerk received a copy of this document. 2.CR.193. On January 31, 2007, the CCA denied the application without a written order. Pet. App. 58a. As the Court later explained, it denied Mr. Hartfield relief because his speedy trial claim was not cognizable in a post-conviction writ. *Hartfield v. Thaler*, 403 S.W.3d 234, 239 (Tex. Crim. App. 2013). Even though it did not analyze whether Hartfield's right to a speedy trial had been violated, the CCA considered this a decision on the merits because under that

court's precedent, cognizability is a merits question. *See, e.g.*, *Ex parte Aubin*, Nos. WR-49,980-12-16, 2017 WL 4159149, at *1 n.3 (Tex. Crim. App. Sept. 20, 2017). Issuing notice that a claim has been denied is, pursuant to the CCA's procedural rule, a proper way to show it was denied because it was not cognizable in the pleading in which it was raised. *See, e.g.*, *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

Mr. Hartfield also attempted to ask the CCA to compel a new trial through a petition for a writ of mandamus. 2.CR.199-203; Pet. App. 59a-60a. Hartfield clearly and unambiguously asked the CCA to "issu[e] an appropriate writ to require the [State] to obey the mandate of th[e] court by transferring [him] to the custody of the Sheriff of Wharton County Texas, and providing [him] a new trial of the offense of capital murder charged in the indictment or release him from custody." 2.CR.202-03. The district clerk received a copy of this petition. 2.CR.199 (indicating the Wharton County District Clerk received the petition, notwithstanding the trial court's finding the petition was not directed to the Wharton County court, *see* Pet. App. 60a). Mr. Hartfield attempted again to raise his claim in an application pursuant to 11.07, but that application was dismissed as successive on May 30, 2007.

Meanwhile, the State still took no action to carry out the mandate. It took no action to retry Mr. Hartfield.

On October 22, 2007, Mr. Hartfield filed a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of Texas raising two claims: that

his right to due process had been denied by the trial court's failure to retry him and that he was being detained by an illegal sentence. *See* Pet. App. 64a. That same day he also filed a petition for a writ of mandamus asking the federal district court to order the State to either retry him or release him. Pet. Writ Mandamus, *Hartfield v. Quarterman*, No. 6:09-cv-00098 (S.D. Tex. Oct. 31, 2007), ECF No. 4. In it, Hartfield clearly and unambiguously asked the district court to order the "State of Texas to immediately retry him or release him." *Id.* at 4. On January 29, 2009, the magistrate judge concluded that "Hartfield [was] *not* in custody pursuant to the judgment of a state court." Mem. & Recommendation at 21, *Hartfield v. Quarterman*, No. 6:09-cv-00098 (S.D. Tex. Jan. 29, 2009), ECF No. 23. The court accordingly construed Hartfield's habeas petition as being one filed under 28 U.S.C. § 2241 and transferred the case to the Eastern District of Texas because venue was not proper in the Southern District. That court eventually dismissed Hartfield's petition without prejudice because it found he had not exhausted state court remedies.

Both sides appealed to the Fifth Circuit. Finding no controlling state precedent regarding what the status of Mr. Hartfield's conviction and sentence was, the U.S. Court of Appeals certified the question to the CCA on November 28, 2012. *Hartfield v. Thaler*, 498 F. App'x 440, 445 (5th Cir. 2012). The CCA agreed to

answer the question. *Hartfield v. Thaler*, No. AP-76,926 (Tex. Crim. App. Dec. 19, 2012).[3]

The CCA heard argument on January 16, 2013, and answered the certified question on June 12, 2013. According to the court, "[t]he status of the judgment of conviction is that [Mr. Hartfield] is under no conviction or sentence." *Hartfield v. Thaler*, 403 S.W.3d 234, 240 (Tex. Crim. App. 2013). Regarding whether Mr. Hartfield had properly exhausted his speedy trial claim, the court wrote that Hartfield should have raised his speedy trial claim in either a motion to set aside the indictment or in a pretrial habeas application filed under article 11.08. *Id.* at 239-40.

Eight days after the CCA answered the certified question, on June 20, 2013, Mr. Hartfield heeded the suggestion of the CCA that he pursue relief with a pretrial writ, and he filed his application for a writ of habeas corpus pursuant to article 11.08 in 130th District Court. 2.CR.231-42 (application filed in 329th District Court), 243 (transferring proceedings to the Matagorda County court)).

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[3] Undersigned counsel requested oral argument when the case was before the CCA, and that request was incorporated into Hartfield's Brief filed on January 7. In the request for oral argument, counsel wrote that both the legal issue and procedural history of the case were complex. The State's Petition repeatedly refers to this request. Pet. 9, 26. However, before submitting Hartfield's reply brief on January 11 – eight days after beginning their work on the case (until January 3, Hartfield was represented by the Federal Public Defender of the Eastern District of Texas) – undersigned counsel obtained a copy of the rules of appellate procedure cited in the CCA's decision on direct appeal. *See* Reply Brief, *Hartfield v. Thaler*, No. AP-76,926, 2013 WL 364743 (Tex. Crim. App. Jan. 14, 2013). Rule 309 of those rules makes clear the legal issue was not complex: The State's motion for leave to file a second motion for rehearing was an impermissible filing.

The district court convened a hearing on December 19, 2013. Shortly before the hearing Hartfield filed a motion to dismiss the indictment (the second vehicle identified in the CCA's June 2013 opinion). Hartfield did not testify at the hearing. The State called the attorney who represented Hartfield in his initial direct appeal proceedings to testify. The State hoped to question that attorney about any communications he might have had with Hartfield after the governor attempted to commute his sentence. Recognizing the State's questions encroached on the attorney-client privilege, the attorney was reluctant to answer any such questions, and the trial court appropriately sustained objections made by undersigned counsel asserting that if there were any such communications, they were protected by the attorney-client privilege. The substance of the attorney's testimony is correct as reported in the State's petition: The attorney testified he believed the commutation was not effective but later learned he would not have to represent Hartfield in new trial proceedings. Pet. 10.

Mr. Hartfield's petition remained pending in the state trial court for almost ten months. On April 17, the court entered an order denying Mr. Hartfield relief on his pretrial habeas petition. 3.CR.664. In his findings of fact and conclusions on law, amended months after Hartfield's 2015 trial, the trial court held that Hartfield did not seek a speedy trial for strategic reasons. Pet. App. 65a-68a. The record contained no support for this finding.

Hartfield appealed his claim to the Court of Appeals for the Thirteenth District. That court concluded that Hartfield's claim was not cognizable in an

application filed pursuant to Article 11.08 (even though that had been one of the two vehicles identified in the CCA's 2013 opinion). *Ex parte Hartfield*, 442 S.W.3d 805, 817 (Tex. App.—Corpus Christi 2014, pet. ref'd). The court held the only proper vehicle to raise Hartfield's speedy trial claim was a motion to set aside the indictment, which could be appealed after trial on direct appeal. *Id.* at 814-15.

C. 2015: Hartfield's new trial

At trial, it was revealed that swabs taken from Ms. Lowe's vagina during her autopsy had been lost. 5.R.R.204. The loss of this evidence clearly prejudiced Hartfield's defense because the State alleged he sexually assaulted Ms. Lowe. The Wharton County District Clerk testified that the pickaxe the State alleged Hartfield used to kill Ms. Lowe had been lost. 6.R.R.199. Hartfield's 2015 trial attorneys were therefore unable to have this weapon analyzed to determine whether the person that killed Ms. Lowe left genetic material on the weapon. Among the other pieces of evidence the State lost was a Dr. Pepper bottle recovered from the scene on which the State claimed Hartfield's fingerprint had been found. 7.R.R.183. Several witnesses died during the time Hartfield was awaiting his new trial, and the memories of those that survived had, of course, faded during the thirty-nine years that had elapsed since the first trial. On August 19, 2015, Hartfield's jury did not find him guilty of capital murder as the State had asked it to, but instead found him guilty of the lesser-included offense of murder. 10.RR.59.

D. 2016-17: Hartfield's direct appeal

Hartfield raised four claims in his direct appeal brief, the first of which was that the State violated his Sixth Amendment right to a speedy trial by failing to bring him to trial until thirty years after the CCA's opinion ordering a new trial became final. Because the state appellate court granted Hartfield relief on his speedy trial claim, it did not address any of the other issues he raised. *See* Pet. App. 4a, 29a n.9.

As expected, both Hartfield and the State argued the merits of Hartfield's speedy trial claim by addressing each of the four factors of the speedy trial analysis dictated by this Court in its opinion handed down in *Barker v. Wingo*, 407 U.S. 514 (1972). Within its analysis of *Barker*'s second prong (the prong pertaining to which party is responsible for the delay in bringing the defendant to trial), the State cited this Court's opinion in *United States v. Loud Hawk*, 474 U.S. 302 (1986), for the proposition that if a defendant causes the delay, he can be found to have waived his right to a speedy trial under the standard waiver doctrine. State's Brief, *Hartfield v. State*, No. 13-15-00428-CR, 2016 WL 3410809, at *32 (Tex. App.—Corpus Christi 2014, pet. ref'd).

While the court of appeals did not directly address the standard waiver doctrine in its analysis of *Barker*'s second prong, consistent with precedent from the CCA, the court found Hartfield could not be found to be responsible for the delay because the record is devoid of any actions taken by either his or his attorneys to cause the delay. Pet. App. 16a. This decision was consistent with the trial court's

ruling on *Barker*'s second prong.[4] It is also consistent with this Court's precedent because this Court has made clear that a court cannot presume wavier when the record is silent. *Barker v. Wingo*, 407 U.S. 514, 526 (1972).

The court of appeals found the State was negligent in not bringing Hartfield to trial more quickly, as had the trial court. Pet. App. 21a. The court of appeals noted that this Court held in *Doggett v. United States*, 505 U.S. 647 (1992), that the degree to which negligence can be tolerated varies inversely with the amount of delay. Pet. App. 22a. Because the State delayed thirty years in bringing Hartfield to trial, the court of appeals found this factor weighed heavily against the State. Pet. App. 22a ("The State's negligence in this case created a criminal justice nightmare for Hartfield and the system-at-large, as he sat in the custody of the Texas Department of Criminal Justice for thirty-two years without a conviction."). While it weighed this factor heavily against the State, the court was nonetheless cognizant that the weight it assigned to this prong was not as heavy as it would have been had the court found the State acted in bad faith. *See* Pet. App. 17a. This Court has never held that negligence cannot weigh heavily against the State. It has only held

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[4] The State's assertion that the court of appeals cited *Barker*'s rejection of the demand-waiver rule in response to its standard waiver argument is incorrect. Pet. 19. The court of appeals mentioned the demand waiver rule in its analysis of *Barker*'s third factor (whether the defendant asserted his right to a speedy trial), as one would expect. Pet. App. 23a. The State's standard waiver argument was contained in its analysis of *Barker*'s second prong. State's Brief, 2016 WL 3410809, at *32. The court's analysis of the second prong does not mention the demand-waiver rule. It does mention and analyze *Vermont v. Brillon*, 556 U.S. 81 (2009), which counsel believe to be the most recent case from this Court addressing the standard waiver doctrine's applicability to speedy trial claims. *See infra* Part II.A.

that negligence cannot weigh against the State as heavily as would a deliberate delay.

In a cross-point on appeal, the State asked the court of appeals to consider an affidavit from Hartfield's previous direct appeal attorney that the trial court had found to be inadmissible. The court refused to consider this affidavit because, under state law, a court of appeals reviewing a trial court's decision on a speedy trial claim is to consider only the evidence that was before the trial court when it made its decision. Pet. App. 25a n.7 (citing *Gonzales v. State*, 435 S.W.3d 801 (Tex. Crim. App. 2014)).

The State then asked the CCA to review the decision made by the intermediate court of appeals. That court (Texas's highest criminal court) refused to review the opinion.

Reasons for Denying the Writ

I. Any decision rendered in Hartfield's case would not be broadly applicable.

Jerry's Hartfield's speedy trial claim is, as the court of appeals recognized, unprecedented. Contained within Petitioner's second question presented (which is addressed further below, *see infra* Part II.B) is a suggestion that this Court should grant certiorari to address the proper weight a court should assign to each of *Barker*'s four factors. The sheer factual uniqueness and unprecedented nature of Hartfield's case makes his case a poor vehicle by which to address the weight a reviewing court should assign to each of *Barker*'s four factors.

Regarding *Barker*'s first prong – the length of the delay – the State failed to give Hartfield the new trial the CCA had ordered for thirty-two years after the order became final. Counsel is aware of no other speedy trial claim in which the State's delay in bringing a defendant to trial approaches anything close to thirty years. At the outset of their representation of Hartfield, counsel was aware of no speedy trial cases that addressed a delay of longer duration than the 8 1/2 year delay addressed by this Court in *Doggett*. Counsel recently became aware of a case in which the delay was 18 1/2 years, but counsel is aware no cases, besides Hartfield's, in which the alleged delay exceeds this length of time.[5]

Second, while there is no evidence on the record that proves the State acted deliberately in delaying Hartfield's trial, it is difficult to imagine a case in which the State was more negligent. The State ignored the CCA's mandate. It claimed it was justified in doing so by its filing a pleading which was clearly impermissible under the then-existing state procedural rules. It then kept Hartfield incarcerated in its custody for over thirty years under no conviction or sentence. When he asserted his right to a speedy trial with the assistance of a fellow prisoner, the State ignored his assertions of the right. As the record demonstrates, at least two of these documents were received by the county that had jurisdiction over his case. Nevertheless, the State put off giving Hartfield the new trial he was due for almost seven years after it received these documents that made clear he did not acquiesce to the delay.

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[5] While some such cases likely exist, there can be no doubt that they are exceedingly rare.

Finally, with respect *Barker*'s fourth prong, it is difficult to imagine a case in which a defendant has been prejudiced to a greater extent than was Hartfield. The State alleged he: 1) killed Ms. Lowe with a pickaxe, 2) sexually assaulted her, and 3) absconded in her car. By the time of his 2015 trial the State had: 1) lost the pickaxe, 2) lost the slides containing biological material from Ms. Lowe's vagina, and 3) given her car to her family. The number of witnesses who died during the thirty-nine years that elapsed between Hartfield's first and second trials is as high as the Court would expect, as is the degree to which the memories of the surviving witnesses faded.

For all these reasons, Mr. Hartfield's speedy trial claim is unlike any speedy trial claim of which counsel is aware and almost certainly fundamentally different from any speedy trial claim that has ever been or will ever be raised. Its unprecedented nature makes Hartfield's case inappropriate for certiorari.

Moreover, the error the State alleges the court of appeals made was not, in fact, error. The court of appeals weighed the State's negligence in bringing Hartfield to trial heavily against it. This decision is not inconsistent with this Court's precedent – precedent acknowledged by the court of appeals – that negligence weighs less heavily that deliberate delay. Especially given this Court's holding in *Doggett* that the degree to which negligence can be tolerated varies inversely with the amount of the delay, the court of appeals decided this issue in a manner consistent with this Court's precedent.

II. The State's questions presented are either requests for this Court to review Texas's procedural rules or are grounded in a mischaracterization of the facts.

A. The State's first question presented involves one or two state procedural questions and not a federal question.

The State's first question asks the Court to review whether Hartfield waived his right to a speedy trial under the standard waiver doctrine. It appears to be the case, as the court of appeals believed, that a defendant must take some action to be held to be responsible for the delay, and to therefore waive his right to a speedy trial under the standard waiver doctrine. As the court of appeals and trial court both correctly noted, the defendant in *Vermont v. Brillon*, 556 U.S. 81 (2009), (the case counsel believes to be the most recent speedy trial case in which this Court addressed the standard waiver doctrine) took affirmative steps to cause the delay. Pet. App. 15a-16a, 46a-48a. Most notably, Brillon contributed to the delay by dismissing several attorneys and also by requesting continuances. Texas courts – including the Thirteenth Court of Appeals – routinely find defendants who cause the delay by firing their attorneys or by requesting continuances to be responsible for the resulting delay. As both the trial court and court of appeals correctly noted, Hartfield took no similar action. Pet. App. 16a, 48a-49a. The decision from the court of appeals is consistent with *Brillon* – this Court's most recent opinion addressing the standard waiver doctrine's applicability to speedy trial claims.

The State asserts a defendant can waive his right to a speedy trial without taking any affirmative steps to cause the delay. *See* Pet. 20-22. While this Court's opinion in *Barker* finding the standard waiver doctrine applies to speedy trial

claims could possibly mean that a defendant can waive his right without taking any action, the case cited repeatedly by the State – *New York v. Hill*, 528 U.S. 110 (2000) – does not so hold. Hill expressly agreed to a trial date that was later than the time by which he should have been tried under the IAD. *New York v. Hill*, 528 U.S. 110, 112-13 (2000). Texas courts – including the Thirteenth Court of Appeals – routinely hold Defendants are responsible for delays when they agree to a later trial date or file motions to continue the trial. *See, e.g.*, *Cooley v. State*, No. 13-15-00611-CR, 2016 WL 4578387, at *3 (Tex. App.—Corpus Christi 2016, no pet.). *Hill* holds a defendant can waive his rights under the IAD without expressly saying "I waive my rights under the IAD." Nothing in the opinion from the court of appeals suggests it believed Hartfield would have had to make such a statement to waive his right to a speedy trial. That court routinely holds that defendants who cause delays in ways similar as did Hill are responsible for the delay.

The Ninth Circuit case cited by Petitioner – *United States v. Sandoval*, 990 F.2d 481 (9th Cir. 1993) – similarly provides no support for Petitioner's assertion. Sandoval, who had been released on bond pending trial, failed to appear in court for his arraignment and remained at large for twenty-one years. *United States v. Sandoval*, 990 F.2d 481, 482 (9th Cir. 1993). Texas courts routinely find defendants responsible for the delay resulting from their absconding from the jurisdiction. And of course, Hartfield took no such action. The State held him in its custody during the entire thirty-year period during which it took no action toward giving him the new trial the CCA had ordered. No cases cited by the State support its assertion

that a defendant can be found to have waived his right to a speedy trial under the standard waiver doctrine without taking any affirmative action to cause the delay.

Even if the Court wished to address whether a defendant can waive his right to a speedy trial without taking an affirmative action to cause the delay, Hartfield's would not be the appropriate case by which to address this issue. It would not be the appropriate case because, as this Court made clear in *Barker*, "presuming waiver from a silent record is impermissible." *Barker v. Wingo*, 407 U.S. 514, 526 (1972). The record is silent in Hartfield's case. His direct appeal attorney testified only that he thought the commutation was ineffective and subsequently learned he would not have to try Hartfield's case again. Pet. 20. Nothing in the record supports the trial court's finding that Hartfield made a strategic choice not to ask for a new trial. This Court's precedent makes clear it would have been impermissible for the court of appeals to find Hartfield waived his right to a speedy trial pursuant to the standard waiver doctrine.

The State's question essentially asks this Court to review one or both of two questions related to Texas procedural law. First, the State appears to ask the Court to review the amount of deference a Texas appellate court must give to a Texas trial court's findings that are not supported by the record. That is a state procedural question, not a federal question, and is therefore not a question for which this Court should grant certiorari to answer. In Texas, a court should give almost total deference to a trial court's findings that are supported by the record. *See, e.g.*, *Gonzales v. State*, 435 S.W.3d 801, 808 (Tex. Crim. App. 2014). However, a

reviewing court need not afford near total deference to a trial court's findings that are not supported by the record. *See, e.g.*, *Reed v. State*, No. AP-77,054, 2017 WL 1337661, at *8 (Tex. Crim. App. Apr. 12, 2017). Because the trial court's finding that Hartfield acted strategically was not supported by the record, the court of appeals did not defer to the trial court's finding. The decision by the court of appeals not to defer to the trial court's findings is one that was made independently of federal law and based entirely on state procedural and evidentiary law.

The second question that the State is apparently asking this Court to review within its first question presented is whether an appellate court should consider evidence that was not before the trial court when it made its decision. As noted above, the State asked the court of appeals to consider an affidavit that was not considered by the trial court when it made its decision on Hartfield's speedy trial claim. The court of appeals refused to do so because the CCA has held that a reviewing court can only consider the evidence that was before the trial court when it made its decision. *Gonzales*, 435 S.W.3d at 809. This, too, is a decision that is independent of federal law and therefore not one for which this Court should grant certiorari to review.

B. The State's second question presented similarly involves state procedural questions and not a federal question.

The second question presented by the State asks the Court to find whether the court of appeals erred in holding it responsible for the delay because it claims it acted in good faith and because it claims the status of Hartfield's conviction was unclear. Whether the state court's decision conflicts with this Court's opinions in

United States v. Loud Hawk, 474 U.S. 302 (1986), and *United States v. Ewell*, 383 U.S. 116 (1966), turns on whether the status of Hartfield's conviction was clear before the CCA issued its June 2013 opinion. That is a question of state procedural, not federal, law. And Texas's highest criminal court plainly answered the question in June 2013, after being asked to do so by the Court of Appeals for the Fifth Circuit, which correctly recognized the question was a state law question.

The State's question asks this Court to find it was unclear whether it could file a second motion for rehearing after the CCA ordered it to give Hartfield a new trial. That is a question of state procedural law. And it is one that was clearly answered by Rule 309: The State could not file a second motion for rehearing because the opinion on rehearing did not change the disposition of the case.

The State's question asks this Court to find it was unclear what the CCA meant when it denied Hartfield's speedy trial claim. What that court means when it says it has denied a claim is a question of state procedural law. While it could have meant the court analyzed merits of the claims by utilizing the four *Barker* factors, it could have meant (and did mean) that the claim was not cognizable in the document in which it was presented. *See, e.g.*, *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).[6]

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[6] And because the court denied the claim by simply issuing a post-card denial, the claim's having denied based on cognizability would have been a far more reasonable way to interpret the denial. Had the CCA weighed the merits of Hartfield's speedy trial claim using this Court's *Barker* factors, it likely would have issued a written opinion.

C. The State's third question presented is grounded in a mischaracterization of the facts and is meritless.

The State's third question is grounded in a mischaracterization of the facts. Hartfield did not only seek dismissal of the indictment. Pet. I. Hartfield clearly and unambiguously asked for a new trial on multiple occasions. 2.CR.199-203; Pet. Writ Mandamus, *Hartfield v. Quarterman*, No. 6:09-cv-00098 (S.D. Tex. Oct. 31, 2007), ECF No. 4. He did not only seek dismissal. The State's question appears to suggest that in order to count as an assertion of the right, a document filed by a defendant must be one in which a speedy trial claim is cognizable.[7] That is incorrect according to both state and federal law. *See, e.g.*, *Goodrum v. Quarterman*, 547 F.3d 249, 260 (5th Cir. 2008) (finding letters sent to the district attorney constitute assertions of the right); *Turner v. State*, 545 S.W.2d 133, 136-38 (Tex. Crim. App. 1976) (finding a letter sent to the court constitutes an assertion of the right); *State v. Trigo*, No. 13-11-00474-CR, 2012 WL 2608104, at *2 (Tex. App.—Corpus Christi July 5, 2012, no pet.) (finding a motion filed in a justice of the peace court constitutes an assertion of the right). The state court's decision that a document can be an assertion of the right even if it is not one in which a speedy trial claim is cognizable is not in conflict with this Court's precedent, and for that reason, the Court should not grant certiorari to review it.

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[7] Given that the State objects to Hartfield's motions to dismiss the indictment against him, its position here is untenable. The court of appeals identified that as being the only document in which a speedy trial claim is cognizable.

Conclusion and Prayer for Relief

Hartfield's speedy trial claim is unlike any other speedy trial claim and for that reason alone is not one which this Court should grant certiorari to review. Moreover, the questions presented in the State's petition do not involve questions of federal law, but instead ask this Court to review Texas procedural law. Accordingly, this Court should refuse certiorari review.

DATE: October 16, 2017

Respectfully submitted,

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
Tel. (713) 743-2171
Fax (713) 732-2131

Counsel for Jerry Hartfield
*Member of the Supreme Court Bar

Appendix A

failure to receive notice will not necessarily prevent or defeat the submission of the case on the day on which it is set. Within 15 days of the mailing of the notice of the setting, all counsel of record will acknowledge receipt of such notice and advise the Clerk whether oral argument is desired. Failure to so advise the Clerk will constitute a waiver of oral argument. Provided, however, that the Court may direct that a particular case be argued orally.

Rule 306. Briefs on the Merits

(a) If review is granted, the petitioning party (or, if there was no petition, the party who lost in the court of appeals) shall file a brief within 30 days after the granting of review.

(b) The opposing party shall file a brief within 30 days after the filing of the petitioning party's brief.

(c) Briefs shall comply with Rule 202(a). Copies shall be filed and served as required by Rule 304(i).

Rule 307. Oral Arguments

Unless extended by the Court of Criminal Appeals in a special case, the total maximum time for oral argument shall be 20 minutes per side. Counsel for the appellant or petitioner is entitled to open and conclude the argument. Counsel will not be permitted to read at length from the briefs, records, or authorities. Counsel may make an oral correction to his brief, but multiple additional citations should not be made orally; they should be reduced to writing and filed with the Clerk.

Rule 308. Opinions

(a) A majority of the judges shall determine whether opinions delivered by the Court of Criminal Appeals shall be signed by a judge or be issued per curiam and whether they shall be published.

(b) Unpublished opinions shall neither be deemed nor cited as precedent.

(c) On the date of delivery of any opinion or order the Clerk of the Court of Criminal Appeals shall mail copies of said opinions or orders to (1) counsel of record for the appellant, (2) counsel of record for the State, (3) the State Prosecuting Attorney, (4) the clerk of the trial court, and (5) the clerk of the court of appeals which rendered the decision below.

Rule 309. Rehearings

(a) A motion for rehearing may be filed with the Clerk of the Court of Criminal Appeals within 15 days after the initial opinion or

order is delivered, unless the time is shortened or enlarged by the Court. However, no motion for rehearing will be received from an order granting discretionary review.

(b) The motion for rehearing must briefly and distinctly state its grounds, together with any supporting arguments. A reply to the motion need not be filed unless requested by the Court. An original and 10 copies of the motion and any reply thereto shall be filed. Copies of the motion and any reply shall be delivered to the opposite party and the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711. Any motion for rehearing or reply thereto may be amended or supplemented with leave of the Court at any time prior to final disposition. A motion for rehearing or a reply thereto is not subject to oral argument.

(c) If five members of the Court are of the opinion that a rehearing should be granted in whole or in part, the motion will be granted and the cause will be thereafter set for submission to the Court. Otherwise, the motion for rehearing will be denied.

(d) The Clerk will give all parties notice of the disposition of the motion.

(e) If a motion for rehearing is granted, the Court may resubmit the case without oral argument. If oral argument is permitted, counsel will be limited to 15 minutes per side. The movant is entitled to open and conclude the argument. The Clerk will notify all parties of the time for such resubmissions.

(f) If the Court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission, the losing party may file a motion for rehearing within 15 days after said opinion is delivered. In such event, the procedures outlined in (a) through (e) above will be followed.

Rule 310. Mandate

When a decision of the Court of Criminal Appeals becomes final, the Clerk of the Court shall issue a mandate to the court below. A decision of the Court shall be final at the expiration of 15 days from the ruling on the final motion for rehearing or from the rendition of the decision if no motion for rehearing is filed. See Article 44.02a, Code of Criminal Procedure.

Rule 311. Stay of Mandate

The Court of Criminal Appeals may stay the mandate of the Court for not more than 60 days on verified motion of a party to permit the timely filing of an appeal or petition for writ of certiorari to the United States Supreme Court. After the expiration of the time mentioned in this rule, the mandate of the Court shall issue.