ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to the Court of Appeals

Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

PETITIONER

APPELLATE CASE NO. 2015-000083

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in affirming the trial court's failure to dismiss the pending criminal charge against Petitioner where he was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Petitioner's arrest, violating his state and federal constitutional rights to a speedy trial?

STATEMENT

Petitioner was indicted by the Edgefield grand jury for murder (2002-GS-19-109) on March 25, 2002. R. 232. The prosecution, represented by Ervin Maye and Frank Young, called the case for trial on January 3, 2012 before the Honorable Clifton Newman. Michael Chesser represented Petitioner at the trial. R. 1. The jury found Petitioner guilty of murder. R. 198, lines 9-12. Judge Newman sentenced Petitioner to thirty-three years. R. 220, line 25 – R. 220, line 2; R. 234.

Petitioner filed a timely notice of appeal, which was perfected. After oral argument on September 9, 2014, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion on November 5, 2014. State v. Hunsberger, 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014); App. 1-8. On November 20, 2014, Petitioner filed a petition for rehearing. App. 9-15. On December 1, 2014, the state filed a return. App. 16-27. On December 17, 2014, the Court of Appeals denied the petition for rehearing. App. 28-29.

On January 16, 2015, Petitioner filed a petition for writ of certiorari. On May 20, 2015, this Court granted it, and this is the brief of petitioner.

ARGUMENT

The Court of Appeals erred in affirming the trial court's failure to dismiss the pending criminal charge against Petitioner where he was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Petitioner's arrest, violating his state and federal constitutional rights to a speedy trial.

Relevant facts

On January 25, 2002, the state arrested Petitioner for the murder of Samuel J. Sturrup, which the state alleged occurred on September 3, 2001. R. 2, lines 10-15; R. 7 , lines 14-15; R. 8, line 3; R. 29, lines 22-23; R. 232. Thereafter, the grand jury indicted him for murder on March 25, 2002. R. 7, lines 9-14; R. 232.

Pretrial Motions

On June 14, 2002, Petitioner was denied bail. Subsequently, a bond hearing was held before the Honorable William P. Keesley on April 29, 2004. Judge Keesley denied bail again; however, he provided that if the state failed to try Petitioner during the next term, then Petitioner could renew his motion. On November 17, 2004, Petitioner filed a motion to dismiss the charges against him or release him on a personal recognizance bond based upon the state's failure to give him a speedy trial, denial of due process, unreasonable confinement without bail, and a violation of S.C. Code Ann. § 17-23-90. Judge Keesley heard arguments on the motion in December 2004. R. 8, lines 4-16; R. 222.

By order filed December 3, 2004, Judge Keesley denied the motions. Nevertheless, he remarked: "the court is deeply concerned about the length of time that has transpired without bringing [Petitioner] to trial." Judge Keesley found "[t]here years in jail awaiting trial on this charge is clearly bordering on excessive." As a result, Judge Keesley offered to establish a special

term of court to resolve the case "during February." Judge Keesley provided that Petitioner could renew his motions if the case were not tried in February 2005. R. 8, lines 4-16; R. 224.

Judge Keesley's order recognized the Petitioner's criminal charge the involved of multiple co-defendants and jurisdictions and the possibility that South Carolina could seek the death penalty. Despite these challenges, Georgia "ha[d] disposed of the cases involving the co-defendants over a year ago." Additionally, the "court ha[d] instructed the Solicitor's office on at least two prior occasions that it must make a decision about whether to serve the death penalty notice." The court "again admonished [the state] that unless immediate steps [were] taken to bring this case to trial promptly, the court [would] have no option under the constitutions of the United States and South Carolina except to release the defendant from jail in South Carolina." R. 224.

Thereafter, Petitioner renewed his motion for dismissal of the charge based upon the state's failure to give him a speedy trial, denial of due process, unreasonable confinement without bail, and a violation of S.C. Code Ann. § 17-23-90. By order filed January 28, 2005, Judge Keesley denied the motion to dismiss, but granted Petitioner a personal recognizance bond in the amount of $50,000. His order noted that Petitioner would be released to Georgia due to the hold placed on him. According to the order, the prosecution informed the court that it would not "take advantage of the offer to create a special term" of court and had no intention of trying the case in February 2005. R. 8, lines 16-21; R. 226.

The state agreed to release custody of Petitioner to the State of Georgia. R. 8, line 22 – R. 9, line 20; R. 23, line 25 – R. 24, line 2; R. 30, lines 13-16. On September 12, 2006, Petitioner was tried and convicted in Georgia for kidnapping Sturrup. R. 9, lines 21-22; R. 23, lines 17-24.

At some point, the prosecutor learned that although Petitioner received a life sentence in Georgia, he was eligible for parole after service of a term of years. R. 3, line 24 – R. 4, line 4

(Prosecutor informed the judge that he received conflicting information from the Georgia authorities, but believed Petitioner would be eligible for parole "sometime within the next six, seven years."); R. 15 , line 16 – R. 18 , line 15. After Petitioner was tried and convicted in Georgia in 2006, the first attempt by the prosecutor to extradite Petitioner to South Carolina was "in the first part of 2011" following Barnes' conviction in November of 2010. R. 25, lines 21-23. The prosecutor claimed that South Carolina was unable to pick up Petitioner from Georgia in order to try him during the previous term of court, October of 2011. R. 25 line 25 – R. 26, line 9.

When the prosecutor was preparing the case against Barnes for trial, he sought Petitioner's cooperation. He asked Petitioner to testify against Barnes. Petitioner declined to assist the state in its prosecution of Barnes. According to the prosecutor, Solicitor Myers "did not know whether or not he would notice" Petitioner for death. Ultimately, the Solicitor elected not to seek Petitioner's death, and instructed the prosecutor to proceed against Petitioner on the outstanding murder charge. R. 4, lines 14-25; R. 25, lines 3-17; R. 29, lines 15-19.

Prior to the start of Petitioner's trial in South Carolina, Petitioner filed a written motion to dismiss the charge against him based upon the state's violation of his right to a speedy trial. As an initial matter, Petitioner explained the state set his trial a decade after his arrest. Petitioner argued the state's significant delay in calling his case for trial resulted in presumptive prejudice. R. 11, line 17 – R. 15, line 15; R. 2. Petitioner argued that he had "no burden of pointing to specific prejudice." R. 19, lines 12-24; R. 2. Nevertheless, Petitioner provided at least one example of prejudice - during the capital trial of Steven Barnes, Petitioner's co-defendant, a witness, Richard Cave, testified that his testimony was the result of what he actually remembered and what he read in transcripts and statements. R. 20, line 24 – R. 21, line 18.

The prosecutor countered that "[a]t the outset of this case, Solicitor Myers did determine that he intended to seek the death penalty against Mr. Barnes. Up until the time that Mr. Barnes was convicted in November of 2010, Solicitor Myers was not sure whether or not he intended to seek the death penalty against [Petitioner] or not. He delayed that decision until after Steven Louis Barnes' trial was finished and he was sentenced to death as to whether or not he was going to notice [Petitioner]." R. 23, lines 3-16.

The prosecutor also argued that Petitioner "knew this charge was outstanding against him in South Carolina" and that he could not "assert his right once or twice and then rest on his laurels and do nothing." R. 24, lines 12-20. According to the prosecutor, Petitioner did nothing in seven years, since 2005, "other than attempt to delay coming back here and being tried through his contesting extradition and not wanting us to proceed at the last term of court." R. 24, lines 21-25; R. 27, lines 6-11. According to the prosecutor, Petitioner was required to make "some continual effort" to assert his constitutional rights. R. 31, lines 2-10.

The prosecutor further argued that the delay was to Petitioner's benefit. He "felt like [Petitioner] should ... have the same opportunity to cooperate that the other codefendants in this case received." R. 26, lines 10-16; R. 26, line 24 – R. 28, line 10. The prosecutor claimed "it was the intent of the State at all times to proceed against [Petitioner], but [he] was over in Georgia serving a life sentence." R. 27, lines 3-6; R. 38, lines 18-23. He claimed "there was certainly no malice in any decision on the State to delay the prosecution.... It was my hope that they would testify against Mr. Barnes. I felt like they should receive the same opportunity as the other codefendants." R. 29, lines 10-15; R. 31, lines 10-12.

The prosecutor claimed Petitioner contested extradition. R. 25, lines 23-24. On this issue, Petitioner testified that in September 2011, his prison counselor presented him with a form

explaining that if he signed the form, he would be consenting to extradition to South Carolina. If he chose not to sign the form, then he would have twenty days to file a writ of habeas corpus to contest extradition. Petitioner did not sign the form, explaining he wanted to speak with his attorney to determine any impact upon his appeal, which was pending in Georgia. Petitioner did not file any paperwork or make any motions to contest extradition. Petitioner stated unequivocally that he was willing to go to South Carolina. R. 35, line 6 - R. 38, line 9.

When the judge asked the prosecutor to explain why the case was not called for ten years, the prosecutor explained the prosecution "intended to proceed against Steven Louis Barnes first." R. 30, lines 6-12. He further stated "in all candor, the State tried for years to try Steven Louis Barnes and eventually it took another judge being assigned to the case in order for us to get it tried." R. 30, lines 20-24; R. 31, lines 12-14.

According to Judge Newman, this was the first case he had where ten years had passed between the arrest and trial. R. 39, lines 6-9. He described it as a unique situation because of the "cross-border issues" of Georgia and South Carolina wanting to pursue cases against the same individuals, of each defendant asserting individual constitutional rights, and of the prosecution wanting to pursue a capital case. R. 41, line 24 – R. 42, line 6. Judge Newman refused to presume prejudice "given the facts." He found the prosecutor "ha[d] demonstrated legitimate reasons for the delay given the complex nature of the cases, the problems involving prosecutions in multiple jurisdictions." R. 42, line 20 – R. 43, line 2. In a later discussion, Judge Newman characterized the case as follows: "what I heard from the solicitor is that they wanted to first do the capital trial and that they delayed this case to do the capital trial and it was their hope and desire that [Petitioner] would testify in that case." R. 48, lines 15-19.

Testimony of Richard Cave

At the trial, the prosecution presented testimony from Richard Cave, an individual charged in Georgia and South Carolina regarding criminal acts against Sturrup. R. 95, lines 16-25; R. 96, lines 1-5. Cave testified that he was friends with Barnes and that on Labor Day weekend of 2001, he and Antonio Griffin were with Barnes and others at a house in Georgia. R. 73, line 5 – R. 74, line 2; R. 75, lines 7-10. Cave observed Barnes arguing and fighting with Sturrup. R. 74, line 18 – R. 75, line 6; R. 76 line 16 – R. 77, line 9. Later, Petitioner and his brother arrived at the house in Augusta. R. 79, lines 12-14. Everyone got into cars and arrived at a field in South Carolina. R. 82, lines 1-8; R. 82, line 24 – R. 83, line 1; R. 85, lines 15-18. Cave observed Sturrup exit the trunk of the car in which the Hunsbergers (Petitioner and Julio Hunsberger) were traveling. R. 86, lines 9-13. The group walked to a wooded area where Barnes instructed each person to shoot Sturrup. R. 86, lines 17-25; R. 88, line 18 – R. 89, line 1. Cave testified that after Charlene Thatcher shot Sturrup, he shot Sturrup. R. 89, lines 3-12. He and Thatcher left the area. He heard four more shots, but did not see the shooter. R. 89, lines 15-20.

On cross-examination, Cave agreed that he had testified in 2006 in a trial against Petitioner in Georgia and in 2010 against Barnes regarding the events of that evening. R. 97, lines 14-16. He admitted that his testimony during the 2006 and 2010 trials was different from his testimony in 2012 in at least one respect – whether any one conversed after the shooting. R. 98, line 11 – R. 100, line 19; R. 112, lines 12-23.

Testimony of Antonio Griffin

Antonio Griffin testified against Petitioner as well. He testified similarly to Cave regarding how the two arrived at Barnes' house and what they observed. R. 125, lines 8-24; R. 126, lines 6-19; R. 128, lines 1-25. Griffin testified that Barnes instructed him to fight Sturrup. Griffin and

Sturrup fought for about twenty seconds before Barnes broke it up. R. 126, line 20 – R. 127, line 4. According to Griffin, Petitioner and his brother arrived after the fight. R. 132, lines 8-12. In line with Cave's testimony, Griffin testified that everyone got in to cars, left Georgia, and went to South Carolina. R. 133, lines 2-6. Barnes instructed everyone to exit the cars at gunpoint. R. 135, lines 9-11. Griffin also observed Sturrup exit the trunk of the car. R. 135, lines 11-24.

According to Griffin, everyone walked through the woods to an open space. Barnes told everyone they would shoot Sturrup. When Thatcher resisted shooting Sturrup, Barnes threatened to shoot her if she disobeyed him. Griffin testified that after Thatcher shot Sturrup, one of the Hunsbergers grabbed the gun from her and shot Sturrup. Someone thrust the gun at Griffin who "shot at the ground." Cave got the gun, but Barnes instructed them to go to the car. While walking across the field, Griffin heard another shot. R. 138, line 25 –R. 138, line 13.

At the time of Petitioner's trial, Griffin had pled guilty to assault in Georgia and received an eighteen year sentence for his involvement in the beating of Sturrup, but he had "potential charges for the events that occurred related to the murder" in South Carolina. R. 143, lines 1-11.

Griffin did not remember everything he said in his statement to law enforcement on January 23, 2002. R. 143, line 19 – R. 144, line 1. He agreed that his testimony had been different from his statement regarding which of the Hunsbergers he observed do what. R. 144, lines 2-24. Griffin testified against Petitioner in 2006 in Georgia. His testimony was different then as well. R. 143, line 25 – R. 146, line 11.

Testimony of Charlene Thatcher

Charlene Thatcher testified similarly to Cave and Griffin. She was a prostitute from Massachusetts who moved to Augusta, Georgia in August of 2001. R. 160, lines 3-10. She was with Barnes on Labor Day weekend of 2001. R. 160, lines 19-25. She observed Barnes, Griffin,

Cave, William Harris, and Sturrup outside the green house. She and Sturrup were beaten for allegedly stealing money. R. 161, lines 1-24. She testified that Petitioner and his brother, Julio, arrived after the beatings. R. 162, lines 14-16. Barnes instructed Sturrup to get into the trunk of the Hunsbergers' car. The others got into vehicles and left the area. R. 163, lines 7-22. When the cars stopped, she saw Sturrup get out of the trunk. The group then walked into the woods. Barnes instructed Sturrup to pick a place to die. R. 164, line 7 – R. 165, line 9. After the group stopped, they "shot him, each one time." She shot Sturrup first in the stomach, then Barnes shot Sturrup in the head. She "freaked out and got crazy" and did not remember anything else. R. 165, lines 11-19.

On cross-examination, Thatcher testified that it was difficult to remember what she said ten years ago. R. 172, lines 7-14. After being confronted with her statement to police, she admitted that she had engaged in multiple armed robberies with Barnes. R. 172, line 15 – R. 173, line 13. Initially, she denied that Barnes threatened everyone present that if they did not shoot Sturrup, then he would shoot the resister. R. 181, lines 4-7; R. 181, lines 21-23; R. 184, lines 10-24. However, when she was confronted with her testimony from Barnes' trial, she agreed she had testified that Barnes threatened everyone. R. 185, line 8 –R. 186, line 17.

At the time of Petitioner's trial, Thatcher had pleaded guilty to aggravated assault in relation to beating Sturrup in Georgia. She understood she faced potential charges for her conduct in South Carolina. R. 168, lines 1-6; R. 179, lines 2-6. She had been convicted of armed robbery on August 26, 2003 and of prostitution on January 1, 2002. R. 170, lines 5-21.

Renewal of Motion

Petitioner renewed his motion to dismiss at the close of the state's case. Petitioner argued that the changes in the testimony of the witnesses, which had been demonstrated through cross examination, provided an example of the prejudice Petitioner suffered. Petitioner pointed to the

poor memories of Griffin and Thatcher due to the passage of time. Concerning the prejudice factor, Petitioner indicated the delay was "so substantial and was due entirely to prosecutorial discretion" and therefore, Petitioner had no burden to show specific prejudice. Petitioner also reminded the court that prejudice is only one factor for consideration. R. 194, line 22 – R. 195, line 25.

Judge Newman again denied the motion. He was persuaded that "given the number of trials and different proceedings that were taking place both here and in the state of Georgia involving these defendants and others ... it's something that is inherent after sorting out that process." Judge Newman remarked that Petitioner had not "been deprived his liberty because he's incarcerated under another sentence." He found no prejudice to Petitioner. R. 196, line 9 – R. 197, line 13.

Sentencing proceeding

During the sentencing proceedings, Petitioner asked Judge Newman for a thirty-year sentence and to start his sentence as of the date of his arrest on January 25, 2002. R. 201, line 3 – R. 202 , line 13; R. 204, lines 11-18. The prosecution asked for the judge to "hand down a sentence that would ensure that he is never released again." R. 203, line 10 – R. 204, line 1. Judge Newman stated that "[t]he law of this state for anything who is sentenced would be entitled to credit for the time that they've served. ... I would think that you'd be entitled to credit for time served." R. 217, lines 10-16. Although the sentence sheet indicated Judge Newman ordered Petitioner to receive credit for time served as calculated by the Department of Corrections pursuant to the statute, the record lacked any affirmative indication that Petitioner would receive credit for the ten years he awaited disposition of this matter. R. 234.

Discussion

The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial." U.S. Const. amend. VI; see also Klopfer v. North Carolina, 386 U.S. 213 (1967); Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966). Additionally, our state constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy trial." S.C. Const. art. I, § 14. "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) (citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). If a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the only possible remedy." Barker v. Wingo, 407 U.S. 514, 522 (1972).

Balancing test

The United States Supreme Court explained "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon the circumstances." Beavers v. Haubert, 198 U.S. 77, 87 (1905). Therefore, the Court explained the appropriate analysis for a speedy trial claim is "a balancing test, in which the conduct of both the prosecution and defendant are weighed." Barker, 407 U.S. at 529. The Barker Court "identif[ied] some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." Those four factors are (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. Id. at 530; see also Doggett v. United States, 505 U.S. 647 (1992); Vermont v. Brillon, 556 U.S. 81 (2009); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973); State v. Monroe, 262 S.C. 346, 204 S.E.2d 433 (1974); Waites, 270 S.C. at 107, 240 S.E.2d at 653; State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997); State v. Evans, 386 S.C.

418, 688 S.E.2d 583 (Ct. App. 2009). However, "none of the four factors identified [are] a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." Barker, 407 U.S. at 533.

Triggering the speedy trial analysis & length of the delay

In order to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial "has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett, 505 U.S. at 652 (quoting Barker, 407 U.S. at 530-531). "The clock starts running on a defendant's speedy trial right when he is 'indicted, arrested, or otherwise officially accused.'" Langford, 400 S.C. at 442, 735 S.E.2d at 482 (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982)). The length of the delay that will trigger the inquiry is dependent upon the peculiar circumstances of the case. Barker, 407 U.S. at 530-531. Generally, the delay tolerated for an ordinary street crime is less than for a serious, complex conspiracy charge. Id. at 531.

The Barker Court found a delay between arrest and trial of well over five years to be clearly "extraordinary." Barker, 407 U.S. at 533. Although seven months of that period was excused by the illness of a witness, the delay of "more than four years was too long a period." Id. at 534. In Doggett, the Supreme Court noted that, depending on the nature of the charges, lower courts have generally found post-accusation delay "presumptively prejudicial" as it approaches one year. Doggett, 505 U.S. at 652; see also United States v. Cope, 312 F.3d 757 (6th Cir.l 2002); State v. Cooper, 386 S.C. 210, 217, 687 S.E.2d 62, 66 (Ct. App. 2009). This Court found a two-year and four-month delay sufficient to trigger further review. Waites, 270 S.C. at 108, 240 S.E.2d at 653. A twenty-three month delay was presumptively prejudicial where the charges were serious, but the factual proof was not complicated. Langford, 400 S.C. at 442-443, 735 S.E.2d at 482. A three year and five month delay was sufficient to trigger the analysis in State v. Brazell, 325 S.C. 65, 480

S.E.2d 64 (1997). The Court of Appeals affirmed a circuit court's decision that a delay of forty-four months triggered the speedy trial inquiry. Cooper, 386 S.C. at 216-217, 687 S.E.2d at 66-67.

The Court of Appeals found the length of the delay "sufficient to trigger further review of his right to speedy trial." App. 6. Petitioner agrees with this determination. However, the court's failure to consider the full ten-year delay between Petitioner's arrest and trial was an error of law. Whether a person is incarcerated, the length of that incarceration, and the location of that incarceration, is irrelevant to whether the speedy trial analysis is triggered. The only consideration is the time between the arrest and the trial. See Doggett v. United States, 505 U.S. 647 (1992)(explaining the eight and one-half years' delay between indictment and trial triggered the speedy trial analysis even where the defendant was incarcerated in another country for some period of that time and had returned to the United States voluntarily and was not incarcerated at all for six years). This error permeates the Court of Appeals' opinion.

The ten year delay between Petitioner's arrest and trial was uncommonly long. Eight years prior, in 2004, Judge Keesley called the delay "clearly bordering on excessive." Judge Newman, at trial, described this as "the first case he had where ten years had passed between the arrest and trial." In light of the case law, the unconscionable delay obviously triggers the speedy trial analysis, as it is presumptively prejudicial. Although the case was a very serious one, it was not a complicated case to try. Primarily, the trial involved the testimony of three eyewitnesses regarding a single charge. The extraordinary length of the delay weighs heavily against the prosecution.

The Court of Appeals also noted the state's assertion that "it attempted to proceed with the trial in October 2011, but that [Petitioner] refused to sign extradition papers, which delayed transporting him back to South Carolina." App. 6. This suggests some of the ten-year delay is

attributable to Petitioner, which simply cannot stand as it contorts the facts presented to the trial judge. At the hearing, the prosecutor argued that Appellant attempted to delay his return to South Carolina by contesting jurisdiction "and not wanting us to proceed at the last term of court." R. 24, lines 21-25; R. 27, lines 6-11. However, the only actual evidence in the record concerning possible extradition was Petitioner's testimony that when his prison counselor approached him in September of 2011 and asked him to sign a form consenting to extradition, the counselor explained that if he did not sign to consent, then he would have twenty days to file a writ to contest extradition. Petitioner did not consent immediately because he wanted the advice of counsel first. However, Petitioner filed no writ of habeas corpus nor took any other action contesting jurisdiction. Thereafter, he was extradited to South Carolina. R. 35, line 6 – R. 38, line 9.

Even if this Court determined Petitioner had caused any delay due to his not signing the extradition consent, this occurred in September 2011, which was a mere four months before his case was called to trial. Therefore, the only delay that could be attributed to Petitioner in this regard is four months. Nevertheless, Petitioner contests any of the ten-year delay being attributed to any acts or omissions by Petitioner.

Reasons for the delay

The Supreme Court afforded different weights to the different reasons[1] for the presumptively prejudicial delay. On the far end of the spectrum is a deliberate delay by the

[1] The burden is on the government to provide an acceptable rationale for the delay. Jackson v. Ray, 390 F.3d 1254, 1261 (10th Cir. 2004)(explaining that the "Supreme Court places the burden on the state to provide an inculpable explanation for delays in speedy trial claims"); see also United States v. Ingram, 446 F.3d 1332, 1337 (11th Cir. 2006); McNeely v. Blanas, 336 F.3d 822, 827 (9th Cir. 2003); United States v. Brown, 169 F.3d 344, 349 (6th Cir. 1999); United States v. Brown, 169 F.3d 344, 349 (6th Cir. 1999); Jones v. Morris, 590 F.2d 684, 686 (7th Cir. 1979); Morris v. Wyrick, 516 F.2d 1387, 1390 (8th Cir. 1975); Georgiadis v. Superintendent, Eastern Correctional Facility, 450 F.Supp. 975, 980 (S.D.N.Y.), aff'd, 591 F.2d 1330 (2nd Cir. 1978).

prosecution to impede the defendant's ability to defend himself. A prosecutor acts improperly if he intentionally delays a trial to gain some tactical advantage over a defendant or to harass a defendant. Barker, 407 U.S. at 531, n. 32 (citing United States v. Marion, 404 U.S. 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957)). Such a reason should be weighted heavily against the prosecution. Even neutral reasons weigh against the state because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531.

> Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned to a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett, 505 U.S. at 657.

The Supreme Court of Georgia dismissed capital murder charges against a defendant based upon a delay of fifty-three months between indictment and the defendant's motion to dismiss. Buckner was indicted in December 2007 for kidnapping, molestation, and murder of a minor. State v. Buckner, 738 S.E.2d 65 (Ga. 2013). Buckner's case had been set for trial on April 4, 2011, but the prosecution announced its intent to seek the death penalty on that date. Id. at 68. Four years later, when Buckner had not been tried yet, he filed a motion to dismiss based upon his speedy trial right. Id. In light of the announcement, the trial was continued and new lawyers were appointed to

represent Buckner. Then, on August 25, 2011, the prosecution decided it would not seek death after all. Buckner's trial was set for February 2012. Buckner filed his motion to dismiss in December 2011. Id. at 69.

The Supreme Court of Georgia acknowledged that the charges were serious, but found the prosecution had completed its investigation by the time Buckner was indicted. The case against Buckner was "no more complicated than most other cases involving such serious crimes." Therefore, the fifty-three month delay was uncommonly long and weighed against the state. Id. at 70.

The reasons for the delay were the negligent inaction of the prosecuting attorneys and the shuffling of the case among prosecuting attorneys. This delay of approximately thirty months weighed benignly against the state. Id. The Court attributed three months of the delay to the defense submitting a notice of conflict, which weighed benignly against Buckner. Id. However, the Court weighed more heavily the delay of ten months in which the prosecuting attorneys intended to seek the death penalty. The Court explained the announcement occurred late in the already delayed case and was unnecessary in light of the prosecutor's subsequent withdrawal of the notice. The prosecution must exercise its discretion to seek the punishment it deems appropriate in each case; however, the Court could not ignore that the state chose not to exercise its discretion until the eve of trial in a case that had been pending for forty months. The late decision was not based on the discovery of new evidence or other notable newly acquired information that would cause a reasonable prosecutor to reconsider the issue of punishment. The ten-month delay due to the death penalty announcement was the result of a deliberate decision by the prosecution and was something more than mere negligence. Id. at 71. The Court explained that seeking death in the case – one "involving a convicted sex offender accused of murder, kidnapping, and sexually abusing a child" –

was hardly novel. Thus, the prosecuting agency should have reviewed the file and made its discretionary determination long before December 2010. Id.

Several federal courts have examined speedy trial claims when the justification for delay offered by the government is the desire to complete proceedings on charges in another jurisdiction. See United States v. Battis, 589 F.3d 673 (3rd Cir. 2009); United States v. Watford, 468 F.3d 891, 902 (6th Cir. 2006); United States v. Shreane, 331 F.3d 548, 554 (6th Cir. 2003); United States v. Thomas, 55 F.3d 144, 151 (4th Cir. 1995). The Tenth Circuit held that while "awaiting the completion of another sovereign's prosecution may be a plausible reason for delay in some circumstances," it "does not necessarily mean that it is a justifiable excuse in every case." United States v. Seltzer, 595 F.3d 1170, 1178 (10th Cir. 2010). In fact, "it is the government's burden to explain why such a wait was necessary in a particular case." This burden requires "a particularized showing of why the circumstances require the conclusion of the [other jurisdiction's] proceedings." Id.

In Battis, the Government delayed trying Battis on the federal charges against him to allow the state prosecutors to try Battis first. Battis, 589 F.3d at 680. The Third Circuit was "not persuaded that the Government's justification for the delay [was] sufficient to balance the scales" where "the Government could have brought Battis to trial at any time." Id. The duty of a prosecutor "to bring the defendant to trial expeditiously" "persists even when state authorities have a strong interest in bringing their own case against the same defendant." Id. In short, the prosecution "cannot indict a defendant and then delay a case indefinitely ... merely because it is aware of a state proceeding involving the same defendant." Id. The Third Circuit recognized that "the initial delay to allow the state to proceed may have been valid," but the court found "there

came a time when the federal Government should have taken some action to proceed in light of the state authorities' inaction." Id.

The stated reasons for the delay in the prosecutor calling Petitioner's case to trial were that Solicitor Myers was deciding whether to seek the death penalty against Petitioner and obtaining Petitioner's cooperation against Barnes. Although Solicitor Myers decided very early on to seek death against Barnes, he was not sure whether he would seek death against Petitioner until after Barnes' trial. By failing to try Petitioner by February 2005 as instructed by Judge Keesley, the state consented to Petitioner's extradition to Georgia. Petitioner was tried in Georgia shortly thereafter – in 2006. Nevertheless, the first attempt by the prosecutor to extradite Petitioner to South Carolina was "in the first part of 2011" following Barnes' conviction in November of 2010.

The delay was a deliberate attempt by the prosecution to force Petitioner to testify against Barnes. The prosecutor held a "sword of Damocles" in the form of a threat of a death sentence over the head of Petitioner for ten years in hopes of forcing Petitioner to assist in the prosecution of Barnes. There is simply no reason the prosecution had to wait for Barnes' trial to conclude before trying Petitioner.

Without question, South Carolina had physical possession of Petitioner from January 2002 until January 2005 when Judge Keesley granted Petitioner a bond. During those three years, the prosecution made no attempt to prosecute Petitioner. Petitioner's trial in Georgia, and the disposition of the testifying co-defendants' charges were resolved in 2006. Therefore, any cross-border issues were resolved by the end of 2006. Thus, there was no "wait" at the "prosecutorial turnstile" as suggested by the Court of Appeals's opinion and citation to United States v. Grimmond, 137 F.3d 823, 828 (4th Cir. 1998). App. 7. To the extent any wait ever existed, the

State of South Carolina was first in line as this jurisdiction had physical custody of Appellant in January 2002 and voluntarily relinquished him to Georgia.

There is no argument that the state can present except that Petitioner's trial was delayed deliberately by the state in order for the state to gain an advantage in the trial of Steven Barnes. The prosecution rightly did not argue a crowded docket prevented trial of Petitioner, as the order of Judge Keesley offered the creation of a special term of court in 2005. Additionally, the prosecution rightly did not argue the factual presentation of the case was complicated as it consisted primarily of the testimony of three eyewitnesses who cooperated *immediately* with law enforcement.

Assertion of the right

The third factor of the speedy trial analysis is the defendant's assertion of his right to a speedy trial. According to the Supreme Court, "[w]hether and how a defendant asserts his right is closely related to the other factors" because the strength of his efforts will be affected by the other factors. Barker, 407 U.S. at 531-532. Petitioner clearly and repeatedly asserted his right to a speedy trial. He filed multiple motions in 2004 and 2005 demanding to be tried in a timely manner. When the prosecution finally placed his case on the trial docket, Petitioner again asserted his right to a speedy trial. There can be only one conclusion regarding this factor – Petitioner unequivocally and repeatedly asserted his right to a speedy trial.

Prejudice - Presumed

A defendant is not required to show prejudice affirmatively to win a speedy trial claim. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6th Cir. 2011); United States v. Molina-Solorio, 577 F.3d 300, 307-308 (5th Cir. 2009); United States v. Erenas-Luna, 560 F.3d 772 (8th Cir. 2009); Battis, 589 F.3d 673, 683 (3rd Cir. 2009); United States v. Mendoza, 530 F.3d 758, 764-765 (9th Cir. 2008); United States v. Ingram, 446 F.3d

1332 (11th Cir. 2006); United States v. Serna-Villarreal, 352 F.3d 225, 232 (5th Cir. 2003); United States v. Clark, 83 F.3d 1350, 1353-1354 (11th Cir. 1996); United States v. Shell, 974 F.2d 1035 (9th Cir. 1992). The United States Supreme Court explained "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." In light of the difficult nature of proving prejudice, the Court held that the importance of presumptive prejudice increases with the length of delay. Doggett, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state's negligence and a substantial delay will compel relief unless the presumption of prejudice is either "extenuated, as by the defendant's acquiescence, or persuasively rebutted" by the prosecution. Id. at 658.

Clearly, the reason for the delay plays a large role in the analysis, for it determines whether a presumption of prejudice applies; therefore, the reasoning used overlaps to some degree with the reasoning discussed earlier. In Doggett, the Court provided three hypotheticals to demonstrate the role of presumptive prejudice in the speedy trial analysis. As one would imagine, the defendant's degree of proof in each of the hypothetical situations varies inversely with the prosecuting body's degree of culpability for the delay. Id. at 657. If the government put forward reasonably diligent efforts to try the defendant, then the defendant must show "specific prejudice to his defense." Id. On the other end of the spectrum, if the government intentionally held back its prosecution to gain an impermissible tactical advantage, then the case for dismissal is "overwhelming." Id.

Occupying the "middle ground" is "official negligence." Id. The Constitution's "toleration of ... negligence varies inversely with its protractedness ... and its consequent threat to the fairness of the accused's trial." Id. Thus, if the prosecuting body's conduct is neither diligent nor malicious – simply negligent – the court must perform another balancing to determine the weight to be accorded such negligence. In conducting this balancing, the court must determine

what portion of the delay is attributable to the state's negligence and whether the negligent delay is of such a duration that prejudice to the defendant should be presumed. Id.

Looking at the hypotheticals offered in Doggett, supra, it is clear that in at least two circumstances prejudice is presumed: (1) when the government intentionally delayed its prosecution to gain a tactical advantage, or (2) when the government negligently delayed the prosecution for an inordinate amount of time.

The Fifth Circuit found the presumption of prejudice applicable where the Government had not engaged in bad faith, but merely failed to show diligent pursuit of the charges against the defendant. Molina-Solorio, 577 F.3d at 305. Molina-Solorio escaped from federal custody on September 28, 1997. Id. at 302. The following month, he was indicted for escape. Id. In 1999, the state of Texas apprehended Molina-Solorio on drug charges. After he served his sentence, he was deported to Mexico on February 24, 2001. Id. At the time of his deportation, the federal authorities were aware of the federal warrant against him for escape. Id. at 302-303. In December 2006, federal authorities arrested Molina-Solorio in Texas for illegal re-entry. Id. at 303. In July 2007, he was sentenced on that charge. Shortly thereafter, he was arrested on the escape charge. Id. Molina-Solorio moved to dismiss the escape indictment based on a violation of his speedy trial right. Id.

The Fifth Circuit found the length of the delay "to weigh heavily in Molina-Solorio's favor because the delay was nearly ten years, the last eight of which occurred after Molina-Solorio had been back in state and federal custody." Id. at 305. Additionally, the Fifth Circuit found the authorities' negligence in pursuing Molina-Solorio weighed heavily in his favor where the Government did not pursue him diligently for over eight years. Id. Finally, the Fifth Circuit concluded that because the first three factors weighed heavily in Molina-Solorio's favor, he was

relieved of demonstrating actual prejudice. Id. at 307. Thus, the court held the delay violated his right to a speedy trial and dismissed the indictment. Id. at 308.

Petitioner had "no burden of pointing to specific prejudice." In light of the outrageous length of the delay and the admitted reason for the delay, the presumption of prejudice to Petitioner is great. The prosecution's intentional delay to gain an advantage warrants application of automatic and presumptive delay. However, even if this Court construed the delay as negligence, rather than bad faith, the protractedness of the delay combined with the negligence relieves Petitioner from showing specific prejudice. Just as Doggett relied upon the presumption of prejudice created by the extreme delay, Petitioner is entitled to rely upon the presumption of prejudice. Doggett was unable to "make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." Doggett, 505 U.S. at 655. Nevertheless, the United States Supreme Court held Doggett's speedy trial rights were violated due to the inordinate delay, reasoning that "affirmative proof of particularized prejudice is not essential to every speedy trial claim" because "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter identify." Id. As observed by the Court, the longer the delay between indictment and trial extends beyond the bare minimum, the heavier this factor weighs in a defendant's favor because "the presumption that pretrial delay has prejudiced the accused intensifies over time." Id. at 652.

The state has presented no evidence to overcome the presumption of prejudice here. Petitioner never extenuated the delay through acquiescence as demonstrated through his repeated assertions of his right to a speedy trial. Further, the state has not "persuasively rebutted" the presumption here. As the Court expressed in Doggett, although the Government "ably counter[ed] Doggett's efforts to demonstrate particularlized trial prejudice, it has not, and probably could not

have, affirmatively proved that the delay left his ability to defend himself unimpaired." 505 U.S. at 654 n.4.

Prejudice - Particularized

Also, Petitioner has demonstrated particularized prejudice. As the United States Supreme Court has observed, unreasonable delay threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by the loss of memories and exculpatory evidence. Barker 507 U.S. at 532. The Court observed that loss of memory "is not always reflected in the record because what has been forgotten can rarely be shown." Id. According to the Court, "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." Id. Being locked up hinders a defendant's ability to gather evidence, contact witnesses, and prepare his defense. Id. at 533. Even a defendant who is not in jail prior to trial is disadvantaged "by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." Id.

Nevertheless, Petitioner provided at least one example of prejudice affecting his trial - during the capital trial of Steven Barnes, Petitioner's co-defendant, a witness, Richard Cave, testified that his testimony was the combined result of what he actually remembered and what he read in transcripts and statements. Simply stated, his testimony not based entirely upon his own memory. Petitioner also demonstrated through cross-examination that the memories of the witnesses were impaired by the passage of time. "Forecasting how faded memories could harm him is precisely the sort of difficult-to-obtain proof that supports the finding of general prejudice in a case of extraordinary delay." United States v. Velazquez, 749 F.3d 161, 185 (3d Cir. 2014).

Additionally, the mental and emotional anguish Petitioner suffered from the "sword of Damocles" controlled by the prosecution must receive significant weight and consideration. For almost a decade, Petitioner lived in a state of mental and emotional turmoil waiting for the state to make a life-or-death decision.

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

Smith v. Hooey, 393 U.S. 374, 378 (1969). While "it might be argued that a person already in prison would be less likely than others to be affected by 'anxiety and concern accompanying public accusation,' there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large." Id. at 379 (citing Klopfer, 386 U.S. at 221-222). In addition to the psychological toll inflicted by the unreasonable delay, even to an individual incarcerated in another jurisdiction, "it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction." Id. Such confinement, especially if far from the place where the offense allegedly took place, obviously impairs an individual's "ability to confer with potential defense witnesses, or even to keep track of their whereabouts." Id. at 379-380. "[A] man isolated in prison is powerless to exert his own investigative efforts to mitigate [the] erosive effects of the passage of time." Id. at 380.

"The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed." Dickey v. Florida, 398 U.S. 30, 37 (1970). "[T]he time to meet [the charges] is when the case is fresh." Id. "Stale claims have never been favored by the law, and far less so in criminal cases." Id. "[T]he right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." Id. at 38. The state delayed trying Petitioner for ten years. The stated reasons for the delay show negligence at best, and malice at worst. Petitioner asserted his right to a speedy trial and he was relieved of showing prejudice due to the protractedness of the delay and the nature of the reasons offered by the state to justify the delay. In light of this violation, this Court should dismiss the charge against Petitioner.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court, hold that Petitioner's federal and state constitutional rights to a speedy trial was violated, and direct that the charges against Petitioner be dismissed.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of June, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Alexander L. Hunsberger #986761, at Coffee Correctional Facility, 1153 North Liberty Street, Nicholls, GA 31554, this 19th day of June, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of June, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.