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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Kershaw County
L. Casey Manning, Circuit Court Judge

Opinion No. 5907 (S.C. Ct. App. Filed May 4, 2022)

THE STATE,

RESPONDENT,

V.

SHERWIN ALFONZO GREEN,

PETITIONER

APPELLATE CASE NO. 2022-000923

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

ARGUMENT

1.

The Court of Appeals erred by holding Petitioner waived his right to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the South Carolina Constitution by voluntarily pleading guilty since a speedy trial violation is a ground that if asserted would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect, and therefore cannot be waived. 10

2.

The circuit court erred by denying Petitioner's motion to dismiss for violation of his rights to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, where the unreasonable thirty-three month delay between Petitioner's arrest and his plea was caused by the state's intentional delay in order to secure Petitioner's testimony in another defendant's capital murder trial, and where Petitioner showed actual prejudice due to the state's delay in calling his case to trial. 17

CONCLUSION 25

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 6, 2022.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding Petitioner waived his right to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the South Carolina Constitution by voluntarily pleading guilty since a speedy trial violation is a ground that if asserted would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect, and therefore cannot be waived?

2.

Did the circuit court err by denying Petitioner's motion to dismiss for violation of his rights to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, where the unreasonable thirty-three month delay between Petitioner's arrest and his plea was caused by the state's intentional delay in order to secure Petitioner's testimony in another defendant's capital murder trial, and where Petitioner showed actual prejudice due to the state's delay in calling his case to trial?

STATEMENT OF THE CASE

On November 25, 2012, Petitioner and his estranged wife got into a verbal altercation at her home. R. 193, l. 16 – 194, l. 11. The altercation allegedly became physical. R. 194, ll. 9-16. When law enforcement arrived, Petitioner was arrested. R. 194, ll. 17-18. A pistol that allegedly

belonged to Petitioner was found in the house. R. 194, ll. 17-21. He was charged with domestic violence, possession of a firearm or ammunition by a person convicted of a violent felony, and possession of a stolen pistol based on these events. R. 242-246.

On December 3, 2012, after Petitioner was released on bond, he allegedly snuck into his estranged wife's home while she was away and hid in her basement. R. 195, ll. 13-23. The state alleged Petitioner planned to steal his wife's car and debit card. R. 196, ll. 2-3. After his wife fell asleep, she woke to find Petitioner sitting on top of her with a knife in each of his hands. R. 196, ll. 5-8. Petitioner allegedly held her at knifepoint for seven hours until his wife convinced him to allow her to take her children to school. R. 197, l. 22 – 198, l. 12. After she dropped her children off at school, Petitioner's wife drove to the police department and reported the event. R. 198, ll. 15-18. Law enforcement responded to her home where they found Petitioner outside. R. 198, ll. 19-21. After a chase, officers apprehended Petitioner later that day. R. 198, l. 21 – 199, l. 2. He was charged with kidnapping and first degree burglary. R. 248-252.

A Kershaw County Grand Jury indicted Petitioner on May 15, 2013 for kidnapping, first degree burglary, possession of a firearm or ammunition by a person convicted of a violent felony, and possession of a stolen pistol. R. 242-252. On July 31, 2013, Petitioner filed a motion for a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the South Carolina Constitution. R. 1-3. Petitioner requested he be tried by a jury as soon as possible "as the continued delay was causing him extreme hardship." R. 1. On July 31, 2013, a hearing was convened before the Honorable Deandra G. Benjamin to address Petitioner's speedy trial motion. R. 4. Deputy Solicitor Brett Perry represented the state. R. 4. Lir P. Derieg represented Petitioner. R. 4. Judge Benjamin granted Petitioner's motion for a speedy trial and ordered a status conference be held. R. 5, l. 24 – 6, l. 2. The judge was agreeable to delaying the status conference until the end of the year

because the trial docket was full for the remainder of the year and Court Administration had yet to publish the terms of court calendar for 2014. R. 5, l. 25 – 6, l. 20; R. 158, ll. 2-9.

On December 11, 2013, Defense Counsel Derieg wrote to the Honorable Robert E. Hood, the chief administrative judge, and requested Petitioner "be added to the list" for status conferences scheduled to be held on Friday, December 13, 2013. R. 110. In his letter, Derieg wrote Petitioner "moved for and was granted a motion for a fast and speedy trial on July 31, 2013." R. 110. He explained that, at the hearing, Petitioner was told "his case would be scheduled at a status conference at the end of the year." R. 110. At a subsequent hearing in 2015, defense counsel said a status conference was ultimately held by phone in December 2013. However, a trial date was not set during that status conference. R. 158, ll. 10-12.

On July 15, 2015, Petitioner filed a motion to dismiss for violation of his constitutional right to a speedy trial. R. 7-9. In the motion, Petitioner emphasized that he had been continuously incarcerated since December 4, 2012 and was being held without bond. R. 7. He asserted that he "was substantially and detrimentally damaged in that a key witness . . . whom [Petitioner] intended to call as a witness on his own behalf, has become unavailable due to the State's delay in prosecuting his case." R. 7. Petitioner further argued that the state was intentionally delaying prosecuting his case because they hoped to use him as a witness in a separate "high profile case." R. 7.

On July 24, 2015, a hearing was held before the Honorable Robert E. Hood on Petitioner's motion to dismiss. R. 19. Assistant Solicitors Joanna McDuffie, Luck Campbell, and Meghan Walker represented the state. R. 19. Lir P. Derieg represented Petitioner. R. 19. Defense counsel argued the thirty-three month delay in calling Petitioner's case to trial violated Petitioner's Sixth Amendment right to a speedy trial. R. 22, ll. 14-21. Counsel explained that Petitioner and another inmate, Vincent Missouri, aided law enforcement by tipping officers off to

a scheme by a third inmate, Nickolas Miller, who was facing the death penalty. Miller approached Missouri and Petitioner on separate occasions while they were incarcerated and requested they kill a "witness on the outside" in Miller's case. R. 22, l. 22 – 23, l. 18. Based on these events, Miller was charged with two counts of solicitation of a felony, one count related to Missouri and the other related to Petitioner. R. 23, ll. 16-18.

Defense counsel explained that, initially, Deputy Solicitor Brett Perry was assigned to prosecute both Missouri and Petitioner, who were arrested within a few weeks of each other in late 2012. Missouri pled guilty in early 2013 to distribution of crack cocaine with a negotiated sentence of sixty days' time served. R. 23, ll. 19-24. Deputy Solicitor Perry likewise extended a plea offer to Petitioner in late July 2013, which Petitioner accepted. R. 28, ll. 20-25. However, before Petitioner pled guilty pursuant to the agreement, Assistant Solicitor Luck Campbell discovered the offer and Petitioner's "case was taken away from Brett Perry and given to Ms. Campbell." R. 23, l. 25 – 24, l. 3.

Defense counsel contended that once Petitioner's case was reassigned to Campbell, the state "was unwilling to bring Mr. Green [Petitioner] to court either for the plea that he agreed to with Deputy Solicitor Perry back in 2013 or even to trial." R. 24, ll. 4-8. The state's purported reason for delaying Petitioner's trial was to testify against Miller. R. 30, l. 17 – 31, l. 9. Counsel stated, "In fact, it was asserted to me multiple times that they [the prosecutors] weren't going to do anything to Mr. Green [Petitioner] until after Nick Miller's trial was over." R. 24, ll. 9-11.

Citing to Barker v. Wingo, 407 U.S. 514 (1972), defense counsel outlined the balancing test that must be used to determine if one's rights to a speedy trial were violated. R. 33, ll. 19-23. As to the first factor, the length of delay, counsel asserted it had been thirty-three months since Petitioner's arrest and that case law has established "more than one year triggers the analysis to take the next step." R. 33, l. 24 – 34, l. 6. He further argued the second factor,

whether the defendant has asserted his right to a speedy trial, had also been met. Petitioner asserted his right through counsel and his request was granted. R. 34, ll. 7-10.

Counsel explained that the third factor was the reason for the delay. He argued Petitioner "did not contribute to the delay in any way, shape, or form." R. 34, ll. 11-13. Rather, the reason for the delay was, as discussed earlier, because the state wanted to use Petitioner as a witness against Nickolas Miller. R. 34. ll. 14-22. Defense counsel contended that the dissimilar treatment of Missouri and Petitioner demonstrated the state intentionally delayed prosecuting Petitioner. The state "intentionally held [Petitioner] back to prosecute another person [Miller]." R. 40, ll. 1-19. Counsel added that "the government allowing . . . Missouri to plead showed there was no reason to delay [Petitioner's] case." R. 40, ll. 15-19.

The fourth factor is prejudice to the defendant. Counsel asserted that while Petitioner suffered presumptive prejudice because of the excessive thirty-three month delay, Petitioner could also show actual prejudice as well. R. 36, ll. 16-19; R. 35, ll. 8-22. Due to the excessive delay, two of Petitioner's witnesses, Roshita McKall and Katrina Lewis, could no longer be located to testify as to what occurred on the night of the alleged offense, nearly three years earlier. R. 35, ll. 21-22; R. 73. In addition, Petitioner had recorded conversations he had with his estranged wife during the alleged event leading to his kidnapping and first degree burglary charges. The two tapes that contained these recordings were no longer available: one was damaged and the other could not be located. R. 36, ll. 1-15.

In addition to Barker v. Wingo, 407 U.S. 514 (1972), defense counsel also cited to Doggett v. U.S., 505 U.S. 647 (1992), and State v. Buckner, 292 Ga. 390, 738 S.E.2d 65 (2013). R. 37, ll. 1-24.

Assistant Solicitor Joanna McDuffie acknowledged that Petitioner "did give information regarding Nicholas Miller towards the midpart of December of 2012" and, as a result, "he was

moved [from the Kershaw County Detention Center] to Alvin S. Glenn [Detention Center in Richland County on] December 27th, 2012." R. 43, ll. 18-23. Petitioner was originally represented by the Public Defender's Office. R. 43, ll. 24-25. Because Petitioner's appointed public defender refused to file a motion for a speedy trial, Petitioner filed such motions *pro se*. R. 44, ll. 3-6. Lir Derieg was later "appointed due to a conflict with the Public Defender's Office because of Nicholas Miller." R. 44, ll. 7-9.

The assistant solicitor acknowledged Derieg filed a motion for a speedy trial on July 31, 2013. R. 44, ll. 22-24. However, she claimed there was no record of the motion ever being heard. R. 44, l. 25 – 45, l. 25. Perhaps this was caused by confusion as to which judge heard the motion. R. 44, l. 25 – 45, l. 4. Regardless, the motion was heard by Judge Benjamin on July 31, 2013, and she orally granted Petitioner's motion for a speedy trial at the conclusion of the hearing. R. 5, ll. 24-25.

Assistant Solicitor McDuffie maintained the reason for the delay in prosecuting Petitioner was because the state was unsure if Petitioner was going to testify against Miller, who had been served with notice of the state's intent to seek the death penalty. R. 33, ll. 10-11; R. 46, l. 15 – 47, l. 15. She asserted, "It was always represented by Mr. Derieg [defense counsel] to our office that this defendant [Petitioner] did want to cooperate. He did want to testify against Nicholas Miller. He did want to hopefully receive some benefit for that testimony and cooperation, and that he would wait until the Nicholas Miller case was over before his charges were disposed of."[1] R. 47, ll. 10-19. The solicitor explained that Miller's case was originally scheduled for trial on

[1] The assistant solicitor further argued that a letter Petitioner wrote to the circuit court where Petitioner complained the solicitor was delaying his trial, was a concession from Petitioner that he "agreed" to wait until Miller's case was resolved before his case was prosecuted. R. 50, 11. 8-23. However, nothing in the language quoted by the solicitor indicated Petitioner waived his right to a speedy trial. Rather, the letter was Petitioner asserting the state's wrongful delay of his trial. R. 55, l. 25 – 56, l. 12.

September 8, 2014. R. 44, ll. 15-16. However, due to complications related to former Chesterfield County Sheriff Sam Parker, the trial date was delayed until February 9, 2016. R. 46, l. 24 – 47, l.9. Miller ultimately pled guilty on March 14, 2015. R. 47, ll. 16-17. After Miller pled guilty, McDuffie maintained Luck Campbell "noticed Petitioner for trial for the week of" June 26, 2015. R. 47, ll. 17-19. However, Derieg was "protected that week in June" and requested the trial be continued until July, which was done. R. 47, l. 23 – 48, l. 1.

As far as prejudice caused by the delay, the assistant solicitor said she was unaware of the existence of a second tape containing any alleged recordings. She maintained there was no mention of a second tape on the return from the search warrant nor were there any photographs of a second tape taken during the execution of the warrant. R. 49, ll. 3-12. Regarding the potential defense witnesses, the solicitor argued Petitioner failed to present any evidence of an attempt to contact these individuals before "July of this year [2015]." R. 49, l. 13 – 50, l. 2.

By order filed July 29, 2015, Judge Hood denied Petitioner's motion to dismiss based on a violation of his right to a speedy trial. R. 145-147. Initially, the judge determined that while Petitioner filed a motion for a speedy trial on July 31, 2013, it was never heard nor ruled upon. R. 145-146. Again, this erroneous finding is likely due to the confusion regarding which judge heard the motion. Defense counsel mistakenly stated Judge Hood heard the motion when it was actually Judge Benjamin. See R. 4-6.

Judge Hood further found Petitioner "sought to gain some benefit for cooperation in testifying against Nickolas Miller, and chose not to have his charges disposed of until after Mr. Miller's case was resolved." App. 146. The judge maintained the state attempted to call Petitioner's case for trial three months after the disposition of Miller's case, but "at that time it was defense counsel who delayed proceedings further" by moving "for a continuance due to a scheduling conflict." R. 146. Moreover, Judge Hood determined Petitioner did not present any

evidence on how the length of time prior to trial contributed to Petitioner's inability to procure witnesses. R. 147. After "considering a variety of factors to include, the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant," the judge found Petitioner's right to a speedy trial was not violated. R. 147. Consequently, he denied the motion to dismiss. R. 147.

On September 3, 2015, Petitioner filed a second motion to dismiss for a violation of right his to a speedy trial. R. 148-150. A hearing was convened on September 28, 2015 before the Honorable L. Casey Manning. R. 154. Assistant Solicitors Meghan Walker and Luck Campbell represented the state. R. 154. Lir P. Derieg represented Petitioner. R. 154. Defense Counsel Derieg explained the history of the case for the benefit of Judge Manning. R. 155, l. 13 – 159, l. 8. Counsel argued that Judge Benjamin did grant Petitioner's speedy trial motion on July 31, 2013. R. 157, l. 2 – 158, l. 9; See R. 5, l. 3 – 6, l. 2. He explained that a status conference was ordered by Judge Benjamin, but delayed until the end of the year at the state's request. R. 158, ll. 2-18. Defense counsel also informed the court that both of the continuances he requested were not Petitioner's fault and Petitioner had "no control" over them. R. 158, l. 19 – 159, l. 3. The first continuance was because defense counsel had suffered an injury to his knee that required medication "where the doctor said [he] wasn't allowed to appear in court." R. 158, ll. 19-23. The second was for a cell phone expert to extract text messages off Petitioner's phone. R. 158, l. 24 – 159, l. 3.

The state argued Petitioner's motion to dismiss for violation of his speedy trial right was a violation of Rule 4, SCRCrimP, because Judge Hood had already denied Petitioner motion in a written order from July 27, 2015. R. 172, ll. 5-19. However, defense counsel argued he had new evidence to present since Judge Hood's ruling, specifically, he was able to confirm Petitioner's

motion for a speedy trial was heard and ruled upon by Judge Benjamin on July 31, 2013. R. 173, ll. 13-22.

At the conclusion of the hearing, Judge Manning denied Petitioner motion to dismiss presumably pursuant to Rule 4, SCRCrimP. R. 174, ll. 3-6. He found Rule 4 precluded Petitioner from making another motion to dismiss when Judge Hood denied the motion two months earlier. R. 172, l. 20 – 174, l. 6. Since Judge Manning relied on Rule 4, his ruling was based on Judge Hood's erroneous finding that Petitioner's speedy trial motion was never ruled upon. See R. 5, l. 24 – 6, l. 2.

On September 29, 2015, the following day, Petitioner pled guilty to kidnapping, second degree burglary (nonviolent), possession of a firearm or ammunition by a person convicted of a violent felony, and possession of a stolen pistol. R. 179, l. 24 – 189, l. 18. Judge Manning found there was a substantial factual basis for the plea and that Petitioner's decision to plead guilty was freely, voluntarily, knowingly, and intelligently made. R. 201, ll. 8-15. Judge Manning sentenced Petitioner to twenty years for kidnapping, fifteen years for burglary in the second degree, and five years for each of the weapon offenses. R. 209, l. 23 – 210, l. 6. All sentences were ordered to be served concurrently with credit for 1059 days' time served. R. 210, ll. 5-20.

On October 9, 2015, Petitioner filed a motion to reconsider his sentence. R. 211. On June 20, 2016, Petitioner filed an amended motion to reconsider his sentence. R. 213. On August 15, 2017, a hearing was on held on Petitioner's motions before Judge Manning. R. 216. Assistant Solicitors Luck Campbell, Joanna McDuffie, and Meghan Walker represented the state. R. 216. Lir P. Derieg represented Petitioner. R. 216. By order filed March 7, 2019, Judge Manning again denied Petitioner's motion to dismiss for violation of his right to a speedy trial. R. 236-237. However, the judge granted Petitioner's motion to reconsider his sentence and resentenced Petitioner to an aggregate twelve years' imprisonment. R. 236-237.

Petitioner filed a timely notice of appeal. In a published opinion filed on May 4, 2022, the Court of Appeals held Petitioner waived his right to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the South Carolina Constitution when he voluntarily pled guilty. State v. Green, 436 S.C. 492, 872 S.E.2d 869 (Ct. App. 2022). In its opinion, the Court of Appeals noted that "South Carolina does not appear to have specifically addressed whether a defendant waives a speedy trial claim when he pleads guilty." Id. at ___, 872 S.E.2d at 870. On May 19, 2022, Petitioner filed a petition for rehearing. By order dated June 6, 2022, the Court of Appeals denied rehearing.

This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred by holding Petitioner waived his right to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the South Carolina Constitution by voluntarily pleading guilty since a speedy trial violation is a ground that if asserted would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect, and therefore cannot be waived.

An accused is entitled to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 14, of the Constitution of South Carolina. See Klopfer v. North Carolina, 386 U.S. 213 (1967) (applying the right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution to the states); State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978). "A speedy trial means a trial without unreasonable and unnecessary delay." State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (citing State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012); See

Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). "The remedy for a speedy trial violation is dismissal of the charges." Id. (citing Langford, 400 S.C. at 442, 735 S.E.2d at 482).

"A knowing, voluntary, and intelligent guilty plea 'constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.'" State v. Sims, 423 S.C. 397, 400, 814 S.E.2d 632, 633 (Ct. App. 2018) (quoting State v. Rice, 401 S.C. 330, 331-332, 737 S.E.2d 485, 485 (2013)). "While a valid guilty plea waives 'nonjurisdictional' defects and defenses, it is unclear what amounts to a jurisdictional defect to a criminal prosecution." Id. "A series of federal cases acknowledge that a defendant's right not to be 'haled into court' implicates the court's jurisdictional power. These cases hold a defendant who pleads guilty to something he could not be properly convicted of does not give up his right to claim he could not have been prosecuted in the first place." Id. at 401, 814 S.E.2d at 634 (citing Blackledge v. Perry, 417 U.S. 21, 30 (1974) (claim attacking "the very power of the State to bring the defendant into court to answer the charge brought against him" survives guilty plea); Menna v. New York, 423 U.S. 61, 62 (1975) (per curiam) (where double jeopardy would bar State from "haling" defendant into court on charge, conviction must be set aside "even if the conviction was entered pursuant to a counseled plea of guilty").

In Blackledge, Perry, a North Carolina inmate, was charged with the misdemeanor of assault with a deadly weapon after an altercation with another prisoner. 471 U.S. at 22. Perry was convicted, but while his appeal was pending, the prosecutor obtained another indictment charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury for the same conduct. Id. at 23. Perry pled guilty to the felony charge in North Carolina state court. Id.

Subsequent to that guilty plea, Perry filed an application for a writ of habeas corpus in the United States District Court claiming the indictment for the felony offense to which he pled

guilty constituted double jeopardy and deprived him of due process of law. Id. In an unreported decision, the district court dismissed Perry's petition for failure to exhaust his state court remedies. Id. The Fourth Circuit Court of Appeals reversed "holding that resort to state courts would be futile, because the Supreme Court of North Carolina consistently rejected the constitutional claims presented by Perry." Id. at 23-24.

The Fourth Circuit remanded the case to the district court and the district court granted the writ. Id. at 24. The district court "held that the bringing of the felony charge after the filing of the appeal violated Perry's rights under the Double Jeopardy Clause of the Fifth Amendment." Id. The district court also held Perry "had not, by his guilty plea . . . waived his right to raise his constitutional claims in the federal habeas corpus proceeding." Id. The Fourth Circuit affirmed and the United States Supreme Court granted certiorari. Id.

The Supreme Court directly addressed the question of whether Perry was barred from raising his constitutional claims on appeal because of his guilty plea to the felony offense in state court. Id. at 29. The Court explained there was an important exception to the rule that a guilty plea is "a break in the chain of events which has preceded it in the criminal process" such that a criminal defendant may not raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Id. at 29-30. That exception is when the constitutional claim on appeal "went to the very power of the State to bring the defendant into court to answer the charge brought against him." Id. at 30.

Since North Carolina chose to proceed on the misdemeanor charge first, it was precluded by the due process clause from subsequently "calling upon" Perry "to answer to the more serious charge." Id. Accordingly, Perry's appeal did not raise "antecedent constitutional violations" or complain "of a deprivation of constitutional rights that occurred prior to the entry to of the guilty plea." Id. (internal citation and quotation marks omitted). Instead, Perry was asserting "the right

not to be haled into court at all" because the proceedings against him "operated to deny him due process of law." Id. at 30-31. Thus, the Supreme Court affirmed the Fourth Circuit's decision to allow Perry to proceed with the appeal of his guilty plea for a constitutional violation. Id. at 31.

The Court of Appeals erred in holding Petitioner's "speedy trial defense is not a jurisdictional claim or other claim that would have prevented the State from prosecuting him in the first place." Green, 436 S.C. at ___, 872 S.E.2d at 870. The remedy for violating a defendant's right to a speedy trial is dismissal of the charges. See State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012). If a defendant is successful in arguing his right to a speedy trial has been violated, there is no opportunity for the state to cure the violation and the state no longer has the right to prosecute the defendant regardless of the strength of the evidence against him. Accordingly, Petitioner's claim that his speedy trial rights were violated was not waived by his guilty plea and should be evaluated on the merits.

The Court of Appeals misapplied its own holding in State v. Sims, 423 S.C. 397, 814 S.E.2d 632 (Ct. App. 2018). Sims was indicted for attempted murder and claimed immunity from prosecution pursuant to the Protection of Persons and Property Act. Id. at 399, 814 S.E.2d at 633. The trial court held an evidentiary hearing and denied Sims' immunity claim. Id. Sims then pled guilty to the lesser included offense of assault and battery of a high and aggravated nature. Id.

Sims appealed his conviction asserting his motion for immunity pursuant to the Protection of Persons and Property Act was a "jurisdictional challenge a defendant may raise on appeal even after pleading guilty." Id. The Court of Appeals cited to the Menna-Blackledge series of federal cases for the proposition that a "defendant who pleads guilty to something he could not be properly convicted of does not give up his right to claim he could not have been

prosecuted in the first place." Id. at 401, 814 S.E.2d at 634; See Blackledge v. Perry, 417 U.S. 21 (1974); Menna v. New York, 423 U.S. 61 (1975).

In Sims, the Court of Appeals seemed displeased with the Menna-Blackledge doctrine cases because, despite being "well recognized," those cases "lack a core guiding principle capable of reliable application." 423 S.C. at 401, 814 S.E.2d at 634. In its search for such guidance, the Court of Appeals in Sims favorably cited the Second Circuit Court of Appeals' decision in United States v. Curcio, 712 F.2d 1532, 1539 (2nd Cir. 1983) for the proposition that a "defendant who unconditionally pleads guilty may still challenge his conviction on any ground 'that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect.'"

The Court of Appeals' decision in this case runs directly opposite to that "core guiding principle" the Court of Appeals favored in Sims. An appeal based on a right to a speedy trial violation is the exact type of ground the Curcio principle contemplates. If a defendant successfully "asserted his right" that his constitutional right to a speedy trial was violated, the state would be precluded "from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect." See Curcio, 712 F.2d at 1539; see also Langford, 400 S.C. at 441-442, 735 S.E.2d at 482 ("If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy."). Accordingly, Petitioner's guilty plea did not waive his right to appeal the violation of his speedy trial right.

The United States Supreme Court's recent opinion in Class v. U.S., 138 S.Ct. 798 (2018), further clarified the Menna-Blackledge doctrine for determining what types of appellate issues are not barred due to an unconditional guilty plea. The defendant in Class pled guilty to possessing firearms on the grounds of the Capital Building. 138 S.Ct. at 802-803. After pleading guilty, Class appealed his conviction, arguing that the statute was an unconstitutional violation of

the Second Amendment. Id. The Court of Appeals for the District of the Columbia held Class waived his constitutional claims by pleading guilty. Id. The United States Supreme Court held the guilty plea did not bar the appeal. Id. at 801-802.

The Court in Class first laid out the history of the Menna-Blackledge doctrine. In Menna, a case where the Supreme Court further developed the principle from Blackledge, that "a guilty plea does not waive a claim—that judged on its face—the charge is one which the State may not constitutionally prosecute." Id. at 803-804 (citing Menna v. New York, 423 U.S. 61 (1975)). The Court noted that Menna's argument "amounted to a claim that 'the State may not convict' him 'no matter how validly his factual guilt is established.'" Id. Accordingly, "Menna's 'guilty plea, therefore, [did] not bar the claim.'" Id. (alterations in original).

The Court then elaborated that a valid guilty plea relinquished any claim that would contradict the "admissions made upon entry of a voluntary plea of guilty," but claims which by their nature extinguish the government's power to prosecute the defendant if the claim were successful are not barred. Id. at 805-806. Accordingly, since Class's argument was that the statute was unconstitutional, his guilty plea did not bar his appeal because the issue on appeal went to the state's ability to prosecute him if his argument was successful. Id. at 807.

The majority opinion in Class supports Petitioner's argument in this case as Petitioner's speedy trial claim also went directly to the state's ability to prosecute him if his argument was successful. See Langford, 400 S.C. at 441-442, 735 S.E.2d at 482. However, Petitioner's argument is also supported by the dissent in Class. The dissent specifically acknowledged that the Court's holding in Class would allow Petitioner's appeal here. In his dissent, Justice Alito posited, "Would [the holding in Class] permit a defendant [who pled guilty unconditionally] to argue his prosecution was barred by a statute of limitations or by the Speedy Trial Act? Presumably the answer is yes." Id. at 814 (Alito, J., dissenting). Accordingly, both the majority

and the dissent in Class would agree that the decision of the Court of Appeals barring Petitioner from appealing the violation of his speedy trial right because he pled guilty was error.

While there have been decisions in other jurisdictions, such as one by the Fourth Circuit Court of Appeals, that have held the right to a speedy trial is waived by a guilty plea, Petitioner respectfully argues this Court should not follow those erroneous decisions and more faithfully adhere to the holding set forth in Class. See United States v. Lozano, 962 F.3d 773 (4th Cir. 2020); see also Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013) (holding that our state courts are not bound to follow the decisions of the lower federal courts). The dividing line between the claims that are implicitly waived by an unconditional guilty plea and those that survive is whether there was any chance the defendant could be retried if his argument on appeal is successful or if the state could cure the error and continue the case properly. See United States v. Chavez-Daiz, 949 F.3d 1202, 1208-1209 (9th Cir. 2020) (Chavez-Diaz conceded that if his claims were successful, the government could retry him. That inevitable concession necessarily removes Chavez-Diaz from the limited ambit of the Menna-Blackledge exception because his challenges do not "amount[ ] to a claim that 'the State may not convict' him." (quoting Menna, 423 U.S. at 63 n.2)); see also State v. Legare, 935 N.W.2d 773 (ND 2019) (Legare's claim fell outside the Menna-Blackledge exception because even if the court erred in denying Legare's motion in limine, the error could have been cured.)

Stated more simply, if there is any possibility the defendant could be retried even after his appeal is successful, his claim is waived by his guilty plea. If, however, the state could not retry him if he was successful, his appeal is not barred and must be adjudicated on the merits. Petitioner's case falls into the latter category because, if he is successful on his speedy trial claim, the state will be forever precluded from retrying him. See Langford, 400 S.C. at 441-442, 735 S.E.2d at 482.

The final reason this Court should grant certiorari and hold a guilty plea does not waive a right to a speedy trial claim regards the public interest. The public has an interest in the expeditious administration of justice. The underpinning for the right to a speedy trial is derived from public interest for penalizing official abuse of the criminal process and discouraging official lawlessness. See Dickey v. Fla., 398 U.S. 30, 42-43 (1970) (Brennan, J., concurring). "Thus the guarantee [to a speedy trial] protects our common interest that government prosecute, not persecute, those whom it accuses of crime." Id. at 43.

Public policy would dictate that a speedy trial violation should not be waived by a guilty plea. Such a policy would allow the state to intentionally weaponize onerous delays to pressure defendants to plead guilty then hide its wrongful conduct behind the implicit waiver from the guilty plea. In such a circumstance, the fair administration of criminal justice would be compromised. In this case, the state's delay is what caused Petitioner to plead guilty. The state should not be allowed to delay the trial to wear a defendant down into pleading guilty then have their dilatory behavior evade appellate review.

Respectfully, this Court should grant certiorari, reverse the Court of Appeals, and hold a guilty plea does not waive speedy trial claims.

2.

The circuit court erred by denying Petitioner's motion to dismiss for violation of his rights to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, where the unreasonable thirty-three month delay between Petitioner's arrest and his plea was caused by the state's intentional delay in order to secure Petitioner's testimony in another defendant's capital murder trial, and where Petitioner showed actual prejudice due to the state's delay in calling his case to trial.

An accused is entitled to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 14, of the South Carolina Constitution. See Klopfer v. North Carolina, 386 U.S. 213 (1967) (applying the right to a speedy trial as guaranteed by the Sixth Amendment to the states); State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978). "A speedy trial means a trial without unreasonable and unnecessary delay." State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (citing State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012); See Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). "The remedy for a speedy trial violation is dismissal of the charges." Id. (citing Langford, 400 S.C. at 442, 735 S.E.2d at 482).

"An accused's speedy trial right begins when he is 'indicted, arrested, or otherwise officially accused.'" Id. at 342, 794 S.E.2d at 372 (quoting Langford, 400 S.C. at 442, 735 S.E.2d at 482; See United States v. MacDonald, 456 U.S. 1, 6 (1982). "To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay, since, by definition, he cannot complain that the government has denied him a speedy trial if it has, in fact, prosecuted his case with customary promptness." Id. at 342-343, 794 S.E.2d at 372 (quoting Doggett v. U.S., 505 U.S. 647, 652 (1992)) (internal quotation marks omitted). "Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness." Id. at 343, 794 S.E.2d at 372 (citing Doggett, 505 U.S. at 651-652). "Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied." Id. (citing Barker v. Wingo, 407 U.S. 514, 530-531 (1972); See Langford, 400 S.C. at 441, 735 S.E.2d at 482. These factors, identified by the United States Supreme Court in Barker, are: (1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the

accused. Id. (citing Barker, 407 U.S. at 531-532); See State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973) (recognizing these factors in South Carolina). "A speedy trial claim must be 'analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.'" Id. (quoting State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008)); See Barker, 407 U.S. at 530.

In Doggett v. United States, 505 U.S. 647, 652, n. 1 (1992), the United States Supreme Court suggested that a delay of more than a year is "presumptively prejudicial." See Waites, 270 S.C. at 108, 240 S.E.2d at 653. The Court further "recognize[d] that excessive delay *presumptively* compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Id. at 655 (emphasis added). There is also a presumption that the prejudice to the accused "intensifies over time." Id. at 652.

In Hunsberger, this Court held Hunsberger's right to a speedy trial was violated by a ten year delay where the reason for the delay, like here, was to try to coerce Hunsberger to testify in another defendant's capital murder case. 418 S.C. at 352-353, 794 S.E.2d at 376-377. Hunsberger was arrested in January 2002 and moved for a speedy trial in November 2004. Id. at 342, 794 S.E.2d at 371. "While [Hunsberger's] motion was denied in December 2004, the circuit court judge found the delay 'clearly bordering on the excessive' and admonished the State to either try [Hunsberger] or release him to Georgia which had placed a hold on him." Id. at 341, 794 S.E.2d at 371.

Judge Keesley offered to hold a special February 2005 term of court to allow the state to try Hunsberger then, but the state refused. Id. Consequently, in January 2005, Judge Keesley granted Hunsberger bail and he was subsequently extradited to Georgia to face related charges. Id. He was tried and convicted of kidnapping in Georgia in September 2006 and sentenced to life imprisonment. Id. While imprisoned in Georgia, Hunsberger repeatedly declined to be a

witness against Steven Barnes in Barnes' South Carolina death penalty case. Id. Barnes was tried and convicted in November 2010. Id. In early 2011, Hunsberger was extradited back to South Carolina. Id. When Hunsberger's case was finally called to trial in January 2012, Hunsberger moved to dismiss his charges arguing his state and federal rights to a speedy trial had been violated. Id.

This Court applied the Barker factors to the circumstances of Hunsberger's case. Despite recognizing that the ten year delay was not entirely attributable to the state, this Court concluded that the length of the delay was sufficient to trigger the speedy trial analysis. Id. at 344-345, 794 S.E.2d at 373. The state was not held responsible for the time period that Hunsberger spent while extradited to Georgia to face separate charges, but the Court determined that the state was responsible for eight years of the delay, which "weigh[ed] heavily against the state." Id. at 346-347, 794 S.E.2d at 373. The Court also determined that although Hunsberger asserted his right to a speedy trial three times before his trial was held, "his seven-year silence" rendered this factor of the Barker test neutral. Id. at 349-350, 794 S.E.2d at 375.

The state admitted it delayed trying Hunsberger in hopes he would agree to be a witness against Barnes in Barnes's South Carolina's capital trial, which itself did not take place until approximately nine years after the murder occurred. Id. at 348, 794 S.E.2d at 374. However, the Court determined that the state's true reason for delay was its hope that Hunsberger would be coerced by the delay in his trial into testifying against Barnes. Id. at 348, 794 S.E.2d at 374-375.

This Court emphasized that "[t]he purpose of the right to a speedy trial is to vindicate a defendant's and society's interest in a speedy resolution of cases." Id. at 348, 794 S.E.2d at 375. "This purpose is not served when the constitutional rights of a low priority defendant is sacrificed in hopes that that defendant will help the State in a higher priority trial." Id. This Court concluded, "The State's desire to present the strongest case against Barnes, especially

when the three other eyewitnesses who had pled guilty to the Georgia charges in 2003 were available and willing to testify against him, does not justify the delay in prosecuting [Hunsberger's] case." Id. The Court held the reasons for the delay weighed heavily against the state. Id. at 349, 794 S.E.2d at 375.

This is exactly what the state did in the present case. The state intentionally delayed Petitioner's prosecution in the hope that he would testify against Miller, who was facing the death penalty. The state did not attempt to call Petitioner's case to trial until three months after Miller pled guilty and it was clear that the state would not need Petitioner as a witness. Moreover, the state had another witness in Vincent Missouri, whose case it did not delay, available and willing to testify. R. 40, l. 1 – 41, l. 3. Therefore, the state's delay in Petitioner's case was not justified and its impermissible reason for delaying Petitioner's case should weigh heavily against it.

Lastly, in Hunsberger, this Court emphasized that the trial court's determination that Hunsberger must show actual prejudice from the delay was an error because an "accused can assert presumptive prejudice as the result of the State's violation of his right to a speedy trial." Id. at 351, 794 S.E.2d at 376. Thus, the lower court's ruling "was influenced by an error of law" because "the United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." Id. Accordingly, because the state's reason for delay was intentional rather than negligent, the length of delay resulted in presumptive prejudice to Hunsberger. Id. at 351-352, 794 S.E.2d at 376. This Court ultimately dismissed Hunsberger's charges for violation of his rights to a speedy trial.

In State v. Buckner, 738 S.E.2d 65 (Ga. 2013), the Supreme Court of Georgia held the state violated Buckner's right to a speedy trial and dismissed his charges. Buckner was charged with kidnapping, molestation, and murder of a minor. Id. at 68. The Georgia Supreme Court

used the tests put forth in Barker and Doggett. Id. at 69. The court determined that although Buckner waited nearly four years to assert his right to a speedy trial, the state's delay of fifty-three months was presumptively prejudicial. Id. at 72-73. The court in Buckner held that when a delay is presumptively prejudicial a more searching inquiry is warranted where a court must consider, "whether [the] delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." Id. at 69-70. No one factor is dispositive. They must be weighed together. Id.

After weighing the Barker factors, the lower court in Buckner determined that Buckner's right to a speedy trial had been violated. Id. at 68. The length of the fifty-three month delay was uncommonly long and thus weighed in favor of Buckner. Id. at 394. The Georgia Supreme Court held that although three months of the delay was attributed to trial counsel, the reason for the delay weighed in favor of Buckner because the state reassigned the case "from one prosecuting attorney to another." Id. at 70-71. Moreover, a portion of the delay "was attributable to unknown circumstances to which the record is silent." Id. Furthermore, the third factor, when and how Buckner raised his right to a speedy trial, weighed "heavily" against Buckner because he waited "almost four years" to assert his right to a speedy trial. Id. at 72-73.

The lower court also found that Buckner was prejudiced because the delay caused Buckner to be unable to "adequately prepare his case." Id. at 73. Additionally, Buckner showed that officers tampered with evidence at the scene of the alleged crime before it was "secured by the proper authorities," and because of the delay Buckner could not identify what evidence was removed from the scene. Id.

Upon balancing the Barker factors, the Georgia Supreme Court affirmed the lower court's decision. Id. at 74. Although the late assertion of Buckner's speedy trial right "weighed

significantly" against him, the other three factors indicated that Buckner's right to a speedy trial had been violated. Id.

The appellate court in Buckner stated repeatedly that it needed to follow the factual findings of the lower court *unless they were clearly erroneous*. Id. at 70 (emphasis added). In this case, the lower court's findings *were* clearly erroneous because Judge Hood stated in his order denying Petitioner's motion to dismiss that Petitioner's July 31, 2013 motion for a speedy trial was never ruled on. R. 146. However, he record showed that Judge Benjamin granted Petitioner's speedy trial motion. R. 5, l. 24 – 6, l. 2

Two months later, Judge Manning denied Petitioner's motion to dismiss for violation of his speedy trial rights pursuant to Rule 4, SCRCrimP, and Judge Hood's order. R. 174, ll. 3-4. Therefore, this Court is not required to follow Judge Hood's flawed order, nor does it need to follow Judge Manning's subsequent denial, because they were based on the erroneous finding that Petitioner's speedy trial motion was never ruled on when Judge Benjamin ruled, "I grant the motion," during the July 31, 2013 hearing. R. 5, l. 24 – 6, l. 2.

In applying the four factor test outlined in Barker to Petitioner's case, the length of delay weighs in Petitioner's favor. More than thirty-three months passed while Petitioner waited for trial. This delay was sufficient to find presumptive prejudice and trigger further review of the other three factors enumerated in Barker. The second prong of the Barker test is the reason for the delay. In Petitioner's case, as defense counsel argued, the state's reason for delaying Petitioner's trial was illusory. R. 40, l. 1 – 41, l. 3. The state's purported reason for the delay was because it wanted him to testify against Miller in Miller's case. However, that reasoning was undercut by the dissimilar treatment of Petitioner and Missouri's cases. R. 40, ll. 10-19. Both Petitioner and Missouri approached the police at the same time to inform them about Miller's scheme and Missouri's case was resolved two months later. R. 23, l. 10 -25, l. 4; R. 28, ll. 19-24. The state showed, by their

treatment of Missouri, that they did not need to delay Petitioner's trial to procure his testimony against Miller. Accordingly, the second prong of the Barker test cut in favor of Petitioner.

Petitioner asserted his right to a speedy trial on July 31, 2013 before Judge Benjamin. R. 5, l. 24 – 6, l. 2. Judge Benjamin ruled on the record, "I grant the speedy trial motion." Id. Accordingly, the contention by the state and the finding by Judge Hood that Petitioner's speedy trial motion had never been ruled on was incorrect. R. 146. Therefore, the third prong in the Barker test weighs toward Petitioner.

The prejudice requirement under a speedy trial analysis is exceptional because often it is impossible for a defendant to define the nebulous damage that occurred during the delay. Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376. In addition to the presumptive prejudice of the thirty-three month delay, Petitioner showed the delay actually prejudiced him as well. Due to the delay, Petitioner was unable to locate witnesses Roshita McKall and Katrina Lewis to testify in his defense. R. 32, l. 4 – 33, l. 15; R. 72-73; See Hunsberger, 418 S.C. at 352, 794 S.E.2d at 376 (where Hunsberger suffered actual prejudice because of discrepancies between witness statements due to the delay in his trial). Moreover, Petitioner contended there were tapes of the conversations that occurred at his estrange wife's house on the night of the incident that were now missing as well. R. 35, l. 21 – 36, l. 15; R. 73.

Accordingly, Petitioner was denied his right to a speedy trial and was prejudiced by the state's unreasonable delay. See Strunk v. United States, 412 U.S. 434 (1973) (finding the relief granted where an accused has been denied the right to a speedy trial is generally dismissal of the criminal charge). The state's delay in calling Petitioner's case to trial was unreasonably long. Petitioner asserted his right to a speedy trial during the July 31, 2013 hearing before Judge Benjamin, which she granted. R. 5, l. 24 – 6, l. 2. The state's reason for delay was impermissible since Petitioner and Missouri provided the same information to law enforcement about Miller,

but Missouri's case was resolved in two months and Petitioner's in *thirty-three* months. Moreover, Missouri was also available to testify against Miller if necessary. R. 23, l. 10 – 25, l. 4; R. 28, ll. 19-24; R. 40, ll. 10-19; Hunsberger, 418 S.C. at 348-349, 794 S.E.2d at 375.

Lastly, Petitioner experienced prejudice due to the delay because he was unable to adequately mount a defense to the charges against him without exculpatory witnesses or the lost tapes, which contained recordings of discussions Petitioner had with his estranged wife during the alleged event. R. 31, l. 18 – 33, l. 15; R. 73; See Hunsberger, 418 S.C. at 351, 794 S.E.2d at 376. Therefore, Petitioner's right to a speedy trial was violated and his charges should be dismissed.

Respectfully, this Court should grant certiorari and hold the circuit court erred by denying Petitioner's motion to dismiss for violation of his rights to a speedy trial.

CONCLUSION

Respectfully, this Court should grant the petition for writ of certiorari and order further briefing on the questions presented. Ultimately, Petitioner respectfully requests this Court dismiss the indictments for violation of his constitutional rights to a speedy trial.

Respectfully Submitted,

s/ Lara M. Caudy
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Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of July, 2022.