STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

APPELLANT

APPELLATE CASE NO. 2012-207290

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# FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

The trial judge erred in refusing to dismiss the indictment because Appellant was denied his state and federal constitutional right to a speedy trial when the State failed to call the case for trial until January 9, 2012, almost ten years after the arrest and indictment of appellant for murder.

The State argues that the trial judge fairly denied Appellant's motion to dismiss the 2002, charge of murder where Appellant never made a demand for a speedy trial; he was tried and convicted of the kidnapping of the murder victim by a separate sovereign and was serving a life sentence in that jurisdiction while the murder charge was still pending in this jurisdiction; and where there was no allegation of lost witnesses or other prejudice to Appellant. (FBOR p. 9). First, although Appellant did not formally move for a speedy trial, Appellant was effectively without counsel for the South Carolina charges from the time of his arrest in South Carolina on January 25, 2002, until June 14, 2010, when trial counsel, Randall D. Williams, was appointed to represent Appellant. R. p. 39, lines 10-18; R. p. 559. The fact that Appellant did not previously assert his right to a speedy trial should not weigh against Appellant.

Second, Appellant was not transferred to Georgia to face charges connected to the South Carolina murder charge until February 16, 2005, over three years after his arrest in South Carolina. R. p. 37, lines 14-25. The State refused to call the case for trial for the over three year period between January 25, 2002, when Appellant was arrested on the South Carolina murder charge and February 16, 2005, when Appellant was transferred to Georgia to stand trial on the Georgia charges. On September 12, 2006, Appellant and his co-defendant and brother, Alex Hunsburger, were convicted in Georgia for kidnapping with bodily injury. R. p. 27, lines 5-9. The State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. The State refused to call the case for trial for the additional five year period between September 12,

2006, and September 30, 2011. The trial and conviction in Georgia do not justify the tree year delay in the state calling the case prior to the Georgia trial or the five year delay after the Georgia conviction.

Third, as to prejudice, 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); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5th Cir. 2009); United States v. Frith, 181 F.3d 92 (4th Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11th Cir. 1996). In Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) the Court granted relief to Doggett while noting that he "did indeed come up short" in making "any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." As a result, the 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. Prejudice should be presumed in the present case because of the excessive almost ten year delay.

In the brief the State argues that there is no indication in the record that Appellant wanted a trial. (FBOR p. 19). This assertion by the State is contradicted by the letters Appellant wrote to Judge Keesley dated May 3, 2004, and May 4, 2004, and a letter to the Edgefield County Clerk of Court dated January 4, 2005, in which Appellant states that he has never met his appointed attorney

and has not been able to prepare his defense. R. p. 565, R. p. 567; R. p. 572. The State asserts that complexity in the case is a valid reason for delay in the proceedings. (FBOR p. 20). The record, however, reflects that the present case was not particularly complex. The State additionally argues that attempting to collect witnesses is a valid cause for delay but the record does not support that the almost ten year delay in the present case was due to a problem with the State collecting witnesses. (FBOR p. 21).

The prosecution delayed Appellant's trial because it wanted to try co-defendant Barnes first. R. p. 27, line 21 – p. 28, line 20 – p. 31, line 1. The prosecution, however, offered no explanation to justify why Appellant's trial and his constitutional rights would be dependent upon the trial of another. The prosecutor offered no reason for wanting to try Barnes first; he simply stated that the prosecutor wanted to do so.

Recently, 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. Four years later, when Buckner had not been tried yet, he filed a motion to dismiss based upon his speedy trial right. State v. Buckner, 738 S.E.2d 65, 68 (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. 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 initially determined, and the prosecution conceded, that the delay of over fifty-three months (over four years), raised a presumption of prejudice. Id. The

Court then examined the Barker-Doggett[1] factors. The Court acknowledged that the charge was 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 reassignment 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" –

[1] Barker v. Wingo, 407 U.S. 514 (1972); Doggett v. United States, 505 U.S. 647 (1992).

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

Buckner did not assert his right to a speedy trial until almost four years after his indictment; therefore, this factor weighed heavily against him. However, his repeated insistence that the state comply with his discovery requests somewhat mitigated his late assertion. Id. at 72.

The Court further found Buckner suffered prejudice because his defense was impaired by evidence tampering. A 2003 investigation revealed that two police officers and one retired police officer entered the deceased's bedroom before it was secured by the investigating officers. At least one of the officers tampered with evidence, including removing potential evidence from the bedroom. The officer instructed the deceased's family not to tell anyone about the police entering the bedroom. Id. at 73. Also, the officer who investigated the evidence tampering in 2003 was no longer able to recall important and material details of his investigation, the recordings of witnesses to the tampering had been lost, and the witnesses were either deceased or unable to recall important details. Therefore, Buckner was unable to explore what evidence at the crime scene was altered. Id.

Finally, in balancing the factors, the Court concluded that although Buckner's late assertion weighed heavily against him, the other factors weighed against the state. Therefore, the Court affirmed the dismissal of all charges against Buckner based upon the fifty-three.month delay. Id.

Appellant's trial was delayed by the prosecution significantly longer than fifty-three months. In fact, the prosecution delayed calling Appellant's case to trial for ten years, or one hundred and twenty months, over double the delay in Buckner. In the brief the State argues that the prosecution's ultimate decision not to seek the death penalty against Appellant served as a benefit to Appellant. (FBOR pp. 29-30). The prosecutor must not be permitted to hide behind its right to

exercise discretion concerning punishment and its control of the docket to delay unreasonably Appellant's trial and then characterize the improper delay as a benefit.

## CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court, hold that Appellant's federal and state constitutional rights to a speedy trial were violated, and dismiss the charge of murder against him.

Respectfully submitted,

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ATTORNEY FOR APPELLANT.

This 30th day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 30, 2013

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of October, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of October, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.