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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

APPELLANT

Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

Opinion No. 2014-UP-381

Appellate Case No. 2012-206608

PETITION FOR REHEARING

On November 5, 2014, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Hunsberger, 2014-UP-381 (S.C. Ct. App. filed Nov. 5, 2014). Pursuant to Rule 221(a), SCACR, Appellant asks this Court to rehear this matter in light of the significant points overlooked and/or misapprehended by this Court in rendering its opinion, which will be explained more fully below.

This Court held the prosecutor's delay in calling Appellant's case to trial "was sufficient to trigger further review of his right to speedy trial." Certainly, Appellant has no objection to this finding. However, this Court's failure to consider the full ten-year delay between Appellant'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 consideration of only the time in which Appellant was incarcerated in South Carolina is erroneous and pervasively influences the entire opinion.

Additionally, this Court failed to address Appellant's argument that he was not required to demonstrate any prejudice at all because the length of time required a presumption of prejudice. A defendant is not required to show prejudice affirmatively to win a speedy trial claim.[1] 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). 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.

Appellant made clear that the substantial delay coupled with what must be considered at a minimum, the state's gross negligence in failing to calling his case for trial compelled the Court to presume prejudice. Despite Appellant's incarceration in a different jurisdiction, the ten-year delay before his trial must not be discounted or denied. Without question, ten years between an arrest and a trial is a substantial amount of time.[2]

Nevertheless, Appellant has shown 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 v. Wingo, 407 U.S. 514, 532 (1972). 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.

Appellant provided at least one example of prejudice - during the capital trial of Steven Barnes, Appellant's co-defendant, a witness, Richard Cave, admitted that his sworn testimony was

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[1] "[N]one 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 v. Wingo, 407 U.S. 514, 533 (1972).

[2] Eight years prior, in 2004, Judge Keesley called the delay "clearly bordering on excessive." The trial judge described this as "the first case he had where ten years had passed between the arrest and trial."

influenced by what he had read in transcripts and statements. Appellant also demonstrated through cross-examination that the memories of the witnesses were impaired by the passage of time. Additionally, the mental and emotional anguish Appellant suffered from the "sword of Damocles" controlled by the prosecution must receive significant weight and consideration. For almost a decade, Appellant lived in a state of mental and emotional turmoil waiting for the state to make a life-or-death decision.

Although the record is unclear at this time, Appellant's ability to receive credit for time served from the date of arrest is likely hindered by the state's failure to prosecute him earlier. The Department of Corrections often discounts pre-trial detainment in another state or detainment subsequent to a conviction in a different jurisdiction.

The Supreme Court has afforded different weights to the different reasons for the presumptively prejudicial delay. On the far end of the spectrum is a deliberate delay by the 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. Obviously, delays contributed to the defendant's conduct weighs against him. Vermont v. Brillon, 556 U.S. 81 (2009).

The stated reasons for the delay in the prosecutor calling Appellant's case to trial was that Solicitor Myers was deciding whether to seek the death penalty against Appellant and obtaining Appellant'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 Appellant until after Barnes' trial. By failing to try Appellant by February 2005 as instructed by Judge Keesley, the state consented to Appellant's extradition to Georgia. Appellant was tried in Georgia shortly thereafter – in 2005. Nevertheless, the first attempt by the prosecutor to extradite Appellant 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 Appellant 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 Appellant for ten years in hopes of receiving Appellant's assistance in the prosecution of Barnes. There is simply no reason the prosecution had to wait for Barnes' trial to conclude before trying Appellant.

Without question, South Carolina had physical possession of Appellant from January 2002 until January 2005 when Judge Keesley granted Appellant a bond. During those three years, the prosecution made no attempt to prosecute Appellant. Appellant's trial in Georgia, and the disposition of the testifying co-defendants' charges were resolved in 2006, also resolving any so-called "cross-border issues." Thus, for the six years after the Georgia convictions, there was no

"wait" at the "prosecutorial turnstile" as suggested by this Court's opinion and citation to United States v. Grimmond, 137 F.3d 823, 828 (4th Cir. 1998). 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 Appellant'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 Appellant, 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.

In light of the factors listed above that were overlooked and/or misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court rehear the matter and dismiss the charge against him.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 20th day of November, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Alexander L. Hunsberger, #98676, at Wheeler Correctional Facility, 195 North Broad Street, Post Office Box 466 Alamo, GA 30411, this 20th day of November, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of November, 2014.

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