STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

Clifton Newman, Circuit Court Judge

Opinion No. 2014-UP-381 (S.C. Ct. App. filed 11/5/2014)

02-GS-19-0109

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

PETITIONER

Appellate Case No. 2012-206608

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 17, 2014. App. 28-29.

QUESTION 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 OF THE CASE

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 After oral argument on September 9, 2014, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion on November 5, 2014.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.

Petitioner now files this petition for writ of certiorari.

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 charged Petitioner with 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 context 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 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 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 waited 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).

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 the length of the delay, the reason for the delay, the defendant's assertion of his right, and 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.

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 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. This Court found a twenty-three month delay 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. This Court also found a three year and five month delay sufficient to trigger the analysis. 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. State v. Cooper, 386 S.C. 210, 216-217, 687 S.E.2d 62, 66-67 (Ct. App. 2009)

The Supreme Court 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. Brillon, 556 U.S. at 90.

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.

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). 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.

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.

Length of the delay

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, Petitioner's case 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 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.

Reason for the delay

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 receiving Petitioner's assistance 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, for the six years after the Georgia convictions, 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.

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 the charges 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

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

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.

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.

Assertion of right to speedy trial

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 placed his case on the trial docket, Petitioner again asserted his right to a speedy trial.

Prejudice

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. 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 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. 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.

CONCLUSION

Petitioner respectfully requests this Court order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 16th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

Clifton Newman, Circuit Court Judge

Opinion No. 2014-UP-381 (S.C. Ct. App. filed 11/5/2014)
02-GS-19-0109

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Alexander L. Hunsberger #986761, at Wheeler Correctional Facility, 195 North Broad Street, Post Office Box 466 Alamo, GA 30411 and the S.C. Court of Appeals this 16th day of January, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of January, 2015.

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