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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2014-UP-382 (S.C. Ct. App. filed 11/5/2014)

2002-GS-19-00110

THE STATE,

RESPONDENT,

V.

JULIO ANGELO HUNSBERGER,

PETITIONER
~~APPELLANT~~

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 12/17/2014.

QUESTION PRESENTED

Did the trial judge err 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?

STATEMENT OF THE CASE

In March[1] of 2002, the Edgefield County Grand Jury indicted Appellant for murder, indictment #2002-GS-19-110. On January 9, 2012, Appellant proceeded to jury trial before the Honorable R. Knox McMahon. Attorney Randall D. Williams represented appellant at trial. Attorneys Ervin J. Maye and H. Franklin Young, III prosecuted the case. The jury returned a verdict of guilty and Judge McMahon sentenced Appellant to life in prison without parole. A timely notice of intent to appeal was filed on January 19, 2012. On October 8, 2013, the final briefs were filed and on October 30, 2013, Appellant filed the final reply brief. On September 9, 2014, the case was argued before the South Carolina Court of Appeals. On November 5, 2014, in an unpublished opinion, the Court of Appeals affirmed the conviction and sentence. State v. Hunsberger, Op. No. 2014-UP-382 (S.C.Ct.App. filed November 5, 2014). The petition for rehearing was filed on November 20, 2014, and denied on December 17, 2014. This petition for writ of certiorari follows.

[1] The indictment states the March 2002, term but the date under the signature of foreperson of the Grand Jury appears to be May 25, 2002.

ARGUMENT

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.

On January 25, 2002, Petitioner was served with arrest warrant #G-679758 for the murder of Samuel J. Sturrup on September 3, 2001. (Arrest warrant and affidavit, R. p. 555.) Petitioner's brother, Alexander Hunsberger, and Steven Louise Barnes were also charged with the murder of Sturrup and each was tried separately. In either March or May of 2002 (see footnote #1) the Edgefield County Grand Jury indicted Petitioner for the murder of Sturrup, indictment #2002-GS-19-110. It is unclear from the transcript when the public defender office was appointed to represent Petitioner. R. p. 35, lines 7-9. Records from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Petitioner on January 29, 2002. (Defense of Indigent Act Appointment, R. p. 562). On February 16, 2005, over three years after his arrest in South Carolina, Petitioner was transferred to Georgia to face charges connected to the South Carolina murder charge. R. p. 37, lines 14-25. The trial judge noted that during that three year period former tri-county public defender Lee Sturkey represented Petitioner. R. p. 38, lines 1-11.

On September 12, 2006, Petitioner and his co-defendant and brother, Alex Hunsberger, were convicted in Georgia for kidnapping with bodily injury. R. p. 27, lines 5-9. Petitioner received a sentence of life in prison with the possibility of parole. R. p. 27, lines 9-13. At some point in time, another public defender, Mr. Siegler, was appointed to represent Petitioner for the South Carolina charge. R. p. 39, lines 2-6. On May 18, 2010,

Mr. Siegler moved to be relieved as counsel based on the fact that a conflict interest existed as Mr. Seigler represented Steven Louise Barnes on another criminal matter unrelated to the murder of Sturrup. R. p. 39, lines 6-9. Mr. Siegler's motion to be relieved was granted and on June 14, 2010, trial counsel, Randall D. Williams, was appointed to represent Petitioner. (R. p. 39, lines 10-18; Order of appointment, R. p. 559). Petitioner remained incarcerated in Georgia.

On September 30, 2011, Petitioner was returned to South Carolina pursuant to the Interstate Agreement on Detainers [IAD]. On October 3, 2011, the State called Petitioner's case for trial. Petitioner moved for a continuance which was granted by the Honorable William P. Keesley in a written order signed October 18, 2011. R. p. 559. In the order granting the continuance, Judge Keesley wrote, "There is no such motion for speedy trial now before the Court. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion." R. p. 563. On January 9, 2012, the State again called the case for trial before the Honorable R. Knox McMahon.

Prior to trial, Petitioner moved to dismiss the charges based on the State's failure to bring the case to trial in a timely manner. (R. p. 10, lines 11 – p. 11, lines 1-13). Petitioner specifically argued a violation of the right to a speedy trial pursuant to both the United States and South Carolina Constitutions. (R. pp. 21 – 26). Petitioner acknowledged that the right to a speedy trial had not previously been asserted but correctly argued that this was merely a factor for the judge to consider under Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972). R. p. 22, lines 8 – pp. 23 – 26, lines 1-18. Counsel for Petitioner attributed the failure to assert the right to a speedy trial, in some degree, to

the fact that Petitioner's initial attorney, Lee Sturkey, was suspended from the practice of law prior to his death. Counsel stated, "Now, the position I simply take is his failure to assert his right, I think, is coupled with the fact that he was basically in a flux, did not have an attorney. I was not representing him until leading into the Barnes trial. I was - - didn't even know what his circumstances were until I was appointed some, I guess, eight years after his arrest, eight and a half years to him after his arrest." R. p. 25, lines 3-11.

Counsel further argued that his motion for a continuance should not preclude assertion of Appellant's right to a speedy trial. Counsel stated, " . . . as it relates to the issue of us requesting the continuance, my client got to South Carolina on September 30th of 2011. I had not had an opportunity to meet with him but on one prior occasion before he was moved back away from Augusta, back to some part of lower Georgia on the other side – well on the other side of Savannah and Dublin and had only met with him on one occasion. And I did request a continuance because I thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case." (R. p. 32, lines 22 - p. 33, lines 1-10; p. 42, lines 13-20).

The trial judge denied the motion to dismiss. (R. pp. 44 – 49). The judge stated, "I think once you get past the – you look at the right to a speedy trial and you look at those factors under Barker versus Wingo, and there is some indication that there is somewhat of a presumed prejudice because of the length of delay, I find based on the totality of the circumstances here of what's been presented, that the defendant would not be prejudiced." (R. p. 48, lines 14-21). The judge went on to state, "I think given the fact that he was a sentenced prisoner in Georgia and that he was, for that length of time,

that he would not have been released, that it was not unreasonable for the State to take the position that they wanted to try the one defendant that they sought the death penalty on in the case first and disposed of that case first." (R. p. 49, lines 6-12). At the close of the State's case, Petitioner again moved for dismissal based on violation of the speedy trial right. (R. p. 455, lines 12-24). The judge again denied the motion. (R. p. 455, lines 25 – p. 456, line 1). The trial judge erred.

In State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) this Court wrote:

> The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina 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. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The speedy trial right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007).

In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant.

Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972) Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978). In a footnote in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) the Court wrote, "Depending on the nature of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett Fn. 1

In Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) the Court wrote:

> We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. Barker, 407 U.S. at 530, 92 S.Ct. 2182. We should not even examine the remaining factors "[u]ntil there is some delay which his presumptively prejudicial." Id. The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

The almost ten year delay in the present case is presumptively prejudicial. Petitioner remained in pre-trial detention in South Carolina for over three years from the time of his arrest on January 25, 2002, until the time he was transferred to Georgia for trial in February 16, 2005. On September 12, 2006, Petitioner was convicted and sentenced in Georgia. The State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. There is no evidence in the record that the State was unable to extradite Petitioner from Georgia. Prejudice should be presumed. The excessive delay was unreasonable and without valid reason by the State.

As to the second factor from Barker, the reason for the delay, the State argued that they waited to call Petitioner's case to trial until after the capital trial of co-defendant,

Steven Barnes in November of 2010. (R. p. 27, lines 21 – p. 28, p. 29 lines 1-5). As the trial judge correctly noted, "The reason for the delay, again, I take that balancing, for whatever reason, Mr. Barnes was not tried for eight years and some months. And I don't think you can say, well, I'm not going to try the co-defendant until I try Mr. Barnes. I think Mr. Hunsburger's due process rights are separate and distinct from the State's prosecutorial plan so to speak on the defendants and the co-defendants involved in the Sturrup homicide." (R. p. 48, lines 22 – p. 49, lines 1-5). In a letter, dated October 11, 2010, to Petitioner from trial counsel marked as Court's exhibit #1, counsel writes, "It was a pleasure meeting you on September 22, 2010. After meeting with you, I informed the prosecutor here in this county, that you did not have any information regarding the facts and circumstances of the alleged murder. He then informed that he intends to try all parties who have chosen not to cooperate with the prosecution of one, Steven Barnes. Furthermore, he has asserted that he will call your case to trial at the next available opportunity." (R. p. 558). Petitioner was not returned to South Carolina until September 30, 2011.

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

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

Doggett, 505 U.S. at 657.

The State's purported reason for the delay, because the State wished to try co-defendant Barnes first, does not justify the almost ten year delay, especially in light of the fact that Petitioner was not a witness for the State in the prosecution of co-defendant Barnes. The State's refusal to call Petitioner's case for trial for almost ten years, without sufficient cause, gives the appearance that the State was using the delay as a tactical advantage to coerce cooperation from Petitioner in the trial of the co-defendant, Barnes. The present case is distinguished from State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009) where the South Carolina Court of Appeals, finding no speedy trial violation, found that a twelve year delay was troubling but justified based on an appeal taken by the State and the case being transferred to different prosecuting offices. There was no appeal involved in the present case and the case was never transferred out of the Eleventh Circuit Solicitor's Office. The reason for the delay in the present case is unjustified.

The final delay, nine years after arrest and indictment, between October 2011, and the trial date of January 9, 2012, was based on the proper granting of the continuance motion. As noted by the trial judge, "Upon his return, I also do not think that you could look at the – Mr. Williams' [trial counsel's] motion for a continuance and then foreclose his right to make that motion for a speedy trial or it could have any weight and value added to it whatsoever. I just feel like a defense attorney if he stood up and says, well, we demand a speedy trial, and the State's over there ready to try the case and he's got three to five days to try a major case like this, it would be a recipe for a disaster in my opinion. I think an attorney has to have proper time to prepare, meet with his client and talk with his client. R. p. 47, lines 1-13. Additionally, in Judge Keesley's order granting the continuance, he specifically wrote, "There is no such motion for speedy trial now before the Court. Therefore, no part of this Order is intended to apply or address any matter of speedy trial. Likewise, this order is not intended to prejudice any future right the defendant may have to make such a motion." R. p. 559. The continuance motion should not weigh against Petitioner.

As to the third factor from Barker, Petitioner's assertion of the right to a speedy trial, Petitioner acknowledged that the speedy trial right had not previously been asserted. In Barker the Court wrote:

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal

procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Barker v. Wingo, 407 U.S. 514, 528-529, 92 S.Ct. 2182, 2191 (1972).

The status of Petitioner's appointed counsel during the first three years after his arrest and while he remained in pre-trial detention in South Carolina is in question. While the transcript in the present case fails to reflect when the public defender was appointed, documents from the Edgefield Clerk of Court's Office reflect that attorney O. Lee Sturkey was appointed to represent Petitioner on January 29, 2002. (R. p.35, lines 7-9; R. p. 562). As noted by the trial judge, Mr. Sturkey failed to appear at a bond hearing on Appellant's behalf. (R. p. 38, lines 1-15).

On May 3, 2004, Petitioner wrote to Judge Keesley with concerns that he was unable to obtain access to his counselor and specifically referred to his co-defendant/brother's motion for a speedy trial. (R. p. 567). Judge Keesley responded to Petitioner's letter in a document filed May 11, 2004. (R. p.570). On May 4, 2004, Petitioner wrote a letter to the Edgefield County Clerk of Court asking that Mr. Sturkey be relieved as counsel. (R. p. 567). On January 4, 2005, Petitioner wrote another letter to the Edgefield County Clerk of Court asking to relieve Mr. Sturkey as counsel because Petitioner had never met his court appointed attorney in the three years since the time of his arrest on January 22, 2002. R. p. 572. As noted by trial counsel, Mr. Sturkey was suspended from the practice of law. In re Sturkey, 657 S.E.2d 465 (2008). (R. p. 24, lines

7-12). The fact that Petitioner did not previously assert his right to a speedy trial, when, it appears Petitioner was effectively without counsel from 2002 until at least 2005, should not weigh against Petitioner.

As to the fourth factor from Barker, 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 while noting that Doggett "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. The presumption of prejudice in the present case was neither extenuated by Petitioner's acquiescence, nor persuasively rebutted by the prosecution. Prejudice should be presumed because of the excessive almost ten year delay.

In Langford, 400 S.C. 421, 441-442, 735 S.E.2d 471, 482 (2012) this Court wrote:

> The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. 2182. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." Id. Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." Id. at 529–30, 92 S.Ct. 2182. If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy." Id. at 522, 92 S.Ct. 2182. A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct.App.2007) (applying abuse of discretion standard to speedy trial claim), *rev'd on other grounds,* 384 S.C. 504, 682 S.E.2d 820 (2009); see also State v. Redding, 274 Ga. 831, 561 S.E.2d 79, 80 (2002) (noting the inquiry is whether court abused its discretion under Barker). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008).

Petitioner's speedy trial rights were violated in the present case and dismissal is the only possible remedy. The trial judge abused his discretion in refusing to dismiss the charges. The trial judge failed to properly balance the presumptively prejudicial almost ten year delay, attaching undue significance to the facts that Petitioner was incarcerated in Georgia and the State wanted to try Barnes first, against a finding that Petitioner was not prejudiced by the delay. Properly balancing the Barker factors, the excessive delay, the fact that the State provided no other explanation for failing to call the case to trial for three years before extradition to Georgia and then failing to call the case for trial for another five years after conviction in Georgia on September 12, 2006, until October of 2011, and the fact that the status of Petitioner's appointed representation was in question far outweigh any finding that no prejudice was demonstrated by the delay.

The South Carolina Court of Appeals found that Petitioner's right to a speedy trial had not been violated. State v. Hunsberger, Op. No. 2014-UP-382 (S.C.Ct.App. filed November 5, 2014). The Court of Appeals erred. In considering the four Barker-Doggett[2] factors the Court of Appeals overlooked key factors. First, in regard to the length of the delay, while the Court of Appeals acknowledged the almost ten year delay between arrest and trial, the Court failed to address the fact that during eight years of the ten year delay the State could have readily called the case for trial but simply refused to do so. The Court correctly noted that Petitioner was incarcerated in South Carolina for three years prior to being released to Georgia. This Court wrote, "Although almost ten years passed between Hunsberger's arrest and his trial, the trial court noted that Hunsberger was only detained in South Carolina from January 25, 2002, to February 16, 2005, before he was released to Georgia. This three year period would have been sufficient to trigger further review of his speedy trial rights; however, he never asserted them." State v. Hunsberger, No. 2012-207290, 2014 WL 5772757, at *4 (S.C. Ct. App. Nov. 5, 2014). The Court then correctly noted that Petitioner was convicted and sentenced in Georgia on September 12, 2006, and not returned to South Carolina until September 30, 2011. The Court of Appeals, however, overlooked the important five year time frame between when Petitioner was convicted in Georgia in September of 2006, and the time when the State of South Carolina finally sought extradition in August of 2011. The additional five year time frame after the Georgia conviction resulted in a cumulative eight year time frame where the State could have called the case for trial but refused to do so.

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

Second, as for the reason for the delay, the Court of Appeals wrote, "As for the reason for the delay, the trial court found that 'given the fact that [Hunsberger] was a sentenced prisoner in Georgia and . . . , for that length of time, . . . he would not have been released, . . . it was not unreasonable for the state to take the position that [it[wanted to try the one defendant that [it] sought the death penalty on in the case first and dispose of that case first.'" State v. Hunsberger, No. 2012-207290, 2014 WL 5772757, at *4 (S.C. Ct. App. Nov. 5, 2014). The Court then cited United States v. Grimmond, 137 F.3d 823 (4th cir. 1998) for the proposition that, "When a defendant violates the laws of several different sovereigns, . . . at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for delay." The Court of Appeals overlooked the fact that South Carolina was not simply waiting its turn at the prosecutorial turnstile. Instead, the Prosecution refused to extradite Petitioner for five years following the conviction in Georgia.

The Court of Appeals also cited State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), for the proposition that the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable." The delay in the case was unreasonable and can not be justified by the Georgia prosecution and conviction or the fact that the State simply wanted to try the capital case against co-defendant Barnes first. The Court of Appeals also cited State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), for the proposition that a two year and two month delay did not violate speedy trial rights when the case was complicated and required substantial time to investigate and prepare.

There is nothing in the record to indicate that Petitioner's case was complicated to the extent to justify the ten year delay.

The Court of Appeals noted that when the State finally called the case for trial in October of 2011, Petitioner did not move for a speedy trial and in fact moved for a continuance. This factor should not weigh against Petitioner when the State did not seek extradition under the IAD until August of 2011, almost five years after the Georgia conviction. When competent conflict free counsel was finally appointed to represent Petitioner in 2010, Petitioner was still incarcerated in Georgia and it was difficult for counsel to meet with his client. Counsel argued that his motion for a continuance should not preclude assertion of Petitioner's right to a speedy trial. Counsel stated, " . . . as it relates to the issue of us requesting the continuance, my client got to South Carolina on September 30th of 2011. I had not had an opportunity to meet with him but on one prior occasion before he was moved back away from Augusta, back to some part of lower Georgia on the other side – well on the other side of Savannah and Dublin and had only met with him on one occasion. And I did request a continuance because I thought it was fundamentally unfair for me to proceed to trial having only met with him on that one occasion and that one occasion was actually regarding his consideration to testify for the State in the Barnes case." (R. p. 32, lines 22 - p. 33, lines 1-10; p. 42, lines 13-20).

The final delay, nine years after arrest and indictment, between October 2011, and the trial date of January 9, 2012, was based on the proper granting of the continuance motion. As noted by the trial judge, "Upon his return, I also do not think that you could look at the – Mr. Williams' [trial counsel's] motion for a continuance and then foreclose his right to make that motion for a speedy trial or it could have any weight and value added to it

whatsoever. I just feel like a defense attorney if he stood up and says, well, we demand a speedy trial, and the State's over there ready to try the case and he's got three to five days to try a major case like this, it would be a recipe for a disaster in my opinion. I think an attorney has to have proper time to prepare, meet with his client and talk with his client." (R. p. 47, lines 1-13). The continuance motion should not weigh against Petitioner. Neither the trial and conviction in Georgia nor the State's decision to wait and call Petitioner's case after the Barnes case justify the almost ten year delay.

Third, as to Petitioner's assertion of the right to a speedy trial, the Court of Appeals overlooked the fact that Petitioner Julio Hunsberger 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 Petitioner. (R. p. 39, lines 10-18). The Court of Appeals wrote:

> Hunsberger first asserted his right to speedy trial at the beginning of his South Carolina trial on January 9, 2012. See Waites, 270 S.C. at 109, 240 S.E.2d at 653 (citing to Commonwealth v. Watson, 360 A.2d 710 (Pa.Super.1976), in which the court concluded a delay of more than three years between the defendant's arrest and the trial did not deny the defendant his constitutional right to a speedy trial when he did not assert the right until three days prior to trial). His counsel testified he did not think it was appropriate to file a speedy trial motion prior to that time because he did not know the State was going to try Hunsberger due to his life sentence in Georgia. Counsel testified, "Sometimes that can be a dangerous proposition. You may get just what you ask for."

State v. Hunsberger, No. 2012-207290, 2014 WL 5772757, at *4 (S.C. Ct. App. Nov. 5, 2014). Petitioner's failure to assert his right to a speedy trial prior to the 2012 trial should not weigh against Petitioner when the State failed to provide Petitioner, an indigent defendant charged with murder, with competent, conflict free legal counsel until June of 2010, eight years after his arrest. Petitioner's failure to assert his right to a speedy trial prior

to his January 2012 trial date should not weight against him when he was effectively without legal representation for eight years after his arrest. It is reasonable to assume that if Petitioner had been represented by competent counsel, he would have asserted his right to a speedy trial, as his brother and co-defendant, Alexander Hunsberger asserted his right to a speedy trial on November 17, 2004. See State v. Hunsberger, Op. No. 2014-UP-381 (S.C.Ct.App. filed November 5, 2014). As noted by the Court of Appeal in the unpublished opinion of State v. Alexander Hunsberger:

> On November 17, 2004, he filed a motion for speedy trial. Judge William Keesley filed an order addressing Hunsberger's speedy trial motion on December 2, 2004. Judge Keesley noted he was "deeply concerned about the length of time that has transpired without bringing [Hunsberger] to trial." Judge Keesley acknowleged that part of the delay was because multiple defendants and different jurisdictions were involved and there was the possibility the State could seek the death penalty. However, Judge Keesley stated Georgia had disposed of the co-defendants' cases more than a year before and the court had instructed the Solicitor's office to make a decision about whether to serve the death penalty notice. Judge Keesley determined no circumstances warranted modification of his previous order, admonished the State to bring the case to trial in February 2005, and provided Hunsberger could reassert his motions if the case was not brought to trial in February 2005. The State subsequently informed the court that it did not intend to try the case in February. As a result, Hunsberger renewed his motion. Judge Keesley filed a second order on January 28, 2005, denying Hunsberger's motion to dismiss, but granting him a $50,000 personal recognizance bond. Judge Keesley stated Hunsberger "is not to be released from custody unless the holds placed by the State of Georgia are lifted. The State of Georgia may attempt extradition proceedings to secure possession of [Hunsberger]." Thereafter, the State released custody of Hunsberger to the State of Georgia.

State v. Hunsberger, No. 2012-206608, 2014 WL 5772563, at *1 (S.C. Ct. App. Nov. 5, 2014)

Fourth and finally, in regard to the prejudice, the Court of Appeals overlooked the fact that a finding of actual prejudice need not be shown in order to find a speedy trial violation. 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). Addressing the prejudice factor in the present case, the Court of Appeals wrote:

> On appeal, he only argues prejudice should be presumed from the excessive almost ten-year delay. The trial court noted Hunsberger did not allege any witnesses were unavailable. All the witnesses were available to testify, and the transcripts from the previous trials were available to Hunsberger to use to impeach the witnesses. Hunsberger did not allege any witnesses or evidence were lost, the delay impacted his case, or an earlier trial would have resulted in a different verdict and sentence. See Brazell, 325 S.C. at 76, 480 S.E.2d at 70–71 (noting the three-year-and-five-month delay was negated by the lack of prejudice to the defense); Kennedy, 339 S.C. at 251, 528 S.E.2d at 704 ("While Kennedy may have been slightly prejudiced by the twenty-six month pretrial in the absence of any actual prejudice to the defendant's case).

State v. Hunsberger, No. 2012-207290, 2014 WL 5772757, at *5 (S.C. Ct. App. Nov. 5, 2014).

The present case is distinguished from Brazell and Kennedy and prejudice should be presumed. In State v. Brazell, 325 S.C. 65, 76, 480 S.E.2d 64, 70-71 (1997), this Court held, "Although the delay was lengthy and the justification was unsatisfactory, Brazell's right to a speedy trial was not denied when one balances the *Barker* factors. The long delay was negated by the lack of prejudice to the defense. There is no evidence that the delay was willful or intentional." The delay in Brazell was three years and five months as opposed to the almost ten year delay in the present case. The delay in the present case is not negated by the lack of showing of actual prejudice. As to the reason for the delay, the Court in Brazell wrote, "The State offers no justification for the initial eleven months during which time the defendant was detained in jail. The State claims the delay after the re-indictment was necessary because of the complexities of the case

including the location of witnesses and piecing together the circumstantial evidence. It also asserts the delay was due to upheaval in the solicitor's office. However, these reasons do not excuse the lengthy delay." State v. Brazell, 325 S.C. 65, 76, 480 S.E.2d 64, 70 (1997). In the present case the State does not assert that the delay was due to complexities of the case including locating witnesses and piecing together circumstantial evidence or due to upheaval in the solicitor's office. The sole reason for the delay asserted by the State was the desire to call Petitioner's case to trial after the capital trial of co-defendant Steven Barnes on November 8, 2010. (R. pp. 27-29). The State offers no reason why Petitioner's case could not have been called to trial prior to the Barnes case and offers no explanation as to why Petitioner was not returned to South Carolina for trial until September 30, 2011, ten months after the conclusion of the Barnes trial. Unlike Brazell, the evidence clearly shows that the delay was willfull and intentional on the part of the State. Proper balancing of the Barker factors in the present case demonstrates a violation of Petitioner's right to a speedy trial absent an affirmative showing of prejudice. Prejudice is presumed.

In State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) aff'd, 348 S.C. 32, 558 S.E.2d 527 (2002), the Court of Appeals held, "Assuming that the twenty-six month delay between Kennedy's arrest and trial triggers review of the remaining factors, we find no violation of his right to a speedy trial. While Kennedy asserted his right to a speedy trial fourteen months prior to the commencement of his trial, the case was clearly complicated and required substantial time to investigate and prepare. Further, there is an absence of evidence in this case that the State purposefully delayed Kennedy's trial. Finally, we conclude the prejudice to Kennedy, if any, is

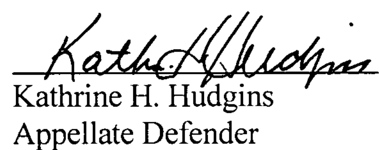
minimal." The delay in Kennedy was twenty six months as opposed to the almost ten year delay in the present case. The State does not assert that the present case was complicated. Instead, the State purposefully delayed, without explanation, Petitioner's case in order to try the Barnes case first. Prejudice should be presumed.

In Doggett the Court granted relief while noting that Doggett "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. The presumption of prejudice in the present case was neither extenuated by Petitioner's acquiescence, nor persuasively rebutted by the prosecution. Prejudice should be presumed because of the excessive almost ten year delay. A proper balancing of the Barker factors supports that Petitioner's State and Federal constitutional right to a speedy trial was violated.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted and the conviction and sentence reversed based on the violation of the speedy trial right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 16th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2014-UP-382 (S.C. Ct. App. filed 11/5/2014)
2002-GS-19-00110

THE STATE,

RESPONDENT,

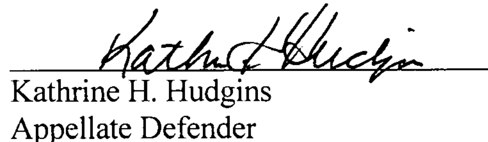
V.

JULIO ANGELO HUNSBERGER,

APPELLANT

CERTIFICATE OF SERVICE

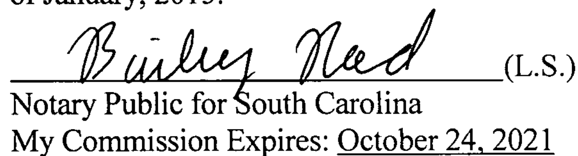
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201and the S.C. Court of Appeals this 16th day of January, 2015.



Kathrine H. Hudgins
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 24, 2021