STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

APPELLANT

APPELLATE CASE NO. 2014-000199

INITIAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing Appellant Moseley, who had a history of mental illness, to represent himself in his murder trial when the judge conducted a very inadequate Faretta[1] questioning after the judge suggested that Appellant Moseley could represent himself and continued to emphasize that Moseley had a constitutional right to represent himself after Moseley said he couldn't because it was a murder case?

2. Did the trial court err in denying Appellant's motion to dismiss based on the violation of his Sixth Amendment constitutional right to a speedy trial when the incident occurred in 2001, thirteen years before he went to trial, and eight years after his arrest in 2006?

[1] Faretta v. California, 422 U.S. 806 (1975).

STATEMENT OF THE CASE

On July 9, 2007, The Williamsburg County Grand Jury indicted Arthur Moseley and co-defendants, Corey Liner and Steve Durant, on the charges of murder, attempted armed robbery, and criminal conspiracy. Moseley and Durant were also indicted on the possession of a weapon during a violent crime. On January 21, 2014, Moseley appeared before the Honorable Clifton B. Newman for a pretrial motions hearing. Moseley was represented by Deborah J. Butcher, and the state was represented by Kimberly V. Barr. (January 21, 2014 Tr. 1.) On January 27, 28, and 31, 2014, Appellant Moseley and Liner proceeded to trial before the Honorable George James and a jury on the charges as indicted.[2] Moseley proceeded *pro se;* Liner was represented by Legrand Carraway. The state was represented by Kimberly V. Barr and Tyler B. Brown. Tr. 1. At the close of the state's case, Liner entered a guilty plea to attempted armed robbery and criminal conspiracy. Tr. 388, ll. 20 – Tr. 389, ll. 25. The jury returned verdicts of guilty on the four charges for Moseley. Tr. 656, ll. 3 – 22. Judge James sentenced Moseley to fifty years on the murder charge; twenty years on the attempted armed robbery; five years on the gun charge; and five years on the criminal conspiracy charge. Tr. 670, ll. 6 – Tr. 671, ll. 10. Moseley filed a notice of appeal. This appeal follows.

[2] The solicitor reported that Steve Durant was deceased by the time of trial. Tr. 59, ll. 10 – 18.

STATEMENT OF FACTS

On March 23, 2001, twenty-two year old Tory York, was shot to death in his own yard. The word on the street was that York had stolen half a kilogram of cocaine and money from David Brockington, and that York was killed because of this. Tr. 456, ll. 3 – Tr. 458, ll. 3.

The Federal Bureau of Investigation (FBI) conducted a drug investigation of this case and the murder from 2003-2006. FBI Agent Vince Flamini had a statement from Arlo Fulton who allegedly saw Brockington pay Steve Singletary $400 to $600 to kill Tory York. Tr. 459, ll. 6 – Tr. 463, ll. 25. However, the investigation concluded that Singletary not involved in the murder. The case was a cold case until 2006. Tr. 468, ll. 1 – 8.

In 2003, Agent Flamini received information from ATF that he should talk to Lonnie Dozier about this murder which he did. It was not known who was involved in the murder until Dozier gave a statement to Agent Flamini on August 7, 2003 that Dozier, Liner and Moseley were involved. They heard that York had stolen the drugs and money and the plan was to rob him. Durant provided the gun but did not go with them. The agent did not feel, due to a sense of equity, that Dozier should be charged with this murder since he cooperated. Dozier's sentence for robbery was reduced due to his cooperation in another murder. Tr. 468, ll. 7- Tr. 482, ll. 15.

The FBI officially changed the focus of the investigation in March 2005 to Moseley, Liner, and Dozier. The Kingstree Police Department knew of Dozier's interview an dhad the names of Moseley, Liner and Dozier in 2003 as soon as Agent Flamini interviewed Dozier. The state could still have proceeded with prosecution as the state was under no obligation to the Feds. Tr. 480, ll. 9 – Tr. 486, ll. 8.

Lonnie Dozier testified for the state. His story was that he was granted immunity from prosecution of this murder because he cooperated. Agent Flamini told him that the information he provided about York's murder could not be used against him. Dozier told Agent Flamini that he, Moseley, and Liner were all present at the killing of York. Tr. 176, ll. 1 – Tr. 177, ll. 20.

Dozier's details were that the three of them met at Steve Durant's house. Durant told them about York's robbing "Little D" of drugs. Durant gave a gun to Liner and then the three of them went to York's house to rob him. When they arrived, Liner, who was the driver, was talking to York while all three of them were still in the car. Moseley picked up the gun from the center armrest, and walked around the front of the car. Moseley shot York several times. Dozier and Liner were shocked because shooting York was not part of the plan. Tr. 156, ll. 1 – Tr. 177, ll. 20.

Shannon Coker was an investigator with the Williamsburg Sheriff's Department. He went to the scene and recovered a .38 bullet from the house next door. It was sent to SLED. There were no non-participant eyewitnesses to the crime, and it went unsolved for many years. They received word of Moseley's involvement from the FBI in 2006. Tr. 270, ll.- Tr. 280, ll. 18.

Investigator Coker testified that Dozier was granted immunity from prosecution on giving the information he provided. Tr. 309, ll. 13 – Tr. 310, ll. 2.

The firearm experts from SLED, Vello Paavel, reported that no firearm was ever submitted for testing. The bullet was too damaged to tell what kind of firearm fired it. Tr. 311, ll. 23 – Tr. 314, ll. 16; Tr. 321, ll. 15 – Tr. 327, ll. 25.

At the pretrial hearing held January 21, 2014, one week before the trial, Moseley's attorney, Debra Butcher, asked the judge for a continuance. She explained that she was appointed in July 2013, and a mental evaluation was pending that she had to wait to be completed which was done November 27. The case was a cold case from 2001 so she obtained funding for an investigator after the evaluation was completed and she knew they were going forward. She did not have enough time to fully investigate the issues. There was an eyewitness she was trying to track down. Her client deserved more time for the investigation to be completed. (January 21, 2014, Tr. 3, ll. 1 – Tr. 4, ll. 10.)

Trial counsel then moved to be relieved because Moseley had filed a grievance against her with the Office of Disciplinary Counsel. He wanted her to make motions that she felt were not "ripe." (Jan. 2, 2014, Tr. 4, ll 12 – 20.)

Moseley told the judge that he had a motion to dismiss because his right to a speedy trial was being violated. The judge told him that he would have to ask the judge the next week who was presiding at his trial to rule on his motion to dismiss. (Jan. 21, 2014 Tr. 4, ll. 20 – Tr. 6, ll. 22; Tr. 25, ll. 18 – Tr. 26, ll. 9.)

The solicitor said the case was first called for trial in 2007 when Attorney Verdell Barr was Moseley's attorney. At that time, Attorney Barr asked for a continuance. Rule 5 disclosure of forty-two documents was made in October 2007 to Mr. Barr. Mr. Barr asked to be relieved in October 2012 but died thereafter. Attorney Amanda Shuler of the Public Defender's Office was appointed then. The solicitor "believed' Mr. Barr gave the discovery to Ms. Shuler. When Ms. Butcher was appointed in July 2013 to represent Moseley, the solicitor "assumed" Ms. Shuler gave the discovery to Ms. Butcher. (Jan. 21, 2014 Tr. 6, ll. 24 – Tr. 12, ll. 21.)

The solicitor stated that bench warrants were issued against Moseley for failure to appear several times. He was picked up the end of 2012. Moseley argued that he was at his home in White Oak and did not know of bench warrants. (Jan. 21, 2014 Tr. 11, ll. 1 – Tr. 13, ll. 14.)

Moseley argued to the court that he was entitled to pretrial motions and his attorney had not done any motions. The judge then asked:

> **Court:** Do you want to represent yourself?
>
> **Moseley:**I can't represent my self because this is a murder charge, sir.
>
> **Court:** Well, you can. You have a constitutional right to represent yourself if you want to represent yourself. You've been given three now, three lawyers. You're not —
>
> **Moseley:** I paid----
>
> **Court:** satisfied with any of them?
>
> **Moseley:** for my first lawyer, sir. I wasn't given Verdell Barr.

Jan. 21, Tr.13, ll. 25 – Tr. 14, ll. 10.

Moseley said his Fourteenth Amendment rights were being violated because no pretrial motions were being filed. The judge told him if he wanted to be represented by counsel, to tell him. Moseley said he would represent himself. (Jan. 21, 2014 Tr. 13, ll. 15 - Tr. 16, ll. 25.)

The judge then placed Moseley under oath and proceeded to determine if he was competent to represent himself. The state reported that Moseley was evaluated by the Department of Mental Health on August 28, 2013 by Dr. Kimberly Harrison. Her opinion was that he competent to stand trial. He was also evaluated for criminal responsibility on the same date and was found to be responsible. The report did not make a finding that he was

competent to stand trial which was then left to this judge. The report indicated that Moseley had been receiving disability for mental health issues. He had several head injuries and a stroke. He was diagnosed as being bi-polar and schizophrenic with addiction problems.

Moseley told the judge that he had represented himself in two civil cases. When asked, he said he was familiar with the rules of criminal procedure and evidence. The judge asked if he ever been treated for mental illness or abuse of drugs. Moseley said yes. He presented the judge with documents showing hospitalizations. When asked if Moseley thought he was competent to stand trial, he said that he pled the Fifth on that. The judge found that Moseley was competent to stand trial. (Jan. 21, 2014 Tr. 17, ll. 1 – Tr. 31, ll. 25.)

Moseley told the judge that he watched "Law and Order" television programs. The judge warned Moseley about the dangers of self-representation, and asked him again. Moseley said he would represent himself. He said none of the attorneys cared about his rights, and he had to put his life in his own hands. Nobody was going to get money off of railroading him. They had gotten enough money already. Jan 21, Tr. 41, ll. 14 – ll. 24. The judge then made a finding that Moseley knowingly and voluntarily waived his right to counsel and the trial would proceed the next week as scheduled. The judge appointed Ms. Butcher as standby counsel during the trial. (Jan 21, 2014 Tr. 32, ll. 1 – Tr. 42, ll. 25).

In pretrial motions hearing at the beginning of the trial before Judge James, Moseley made his motion to dismiss for a violation of his right to a speedy trial. He argued that his constitutional rights under the Fifth and Sixth Amendments were violated for lack of speedy prosecution. He tried to file a motion for a speedy trial in April 2013 but was denied access due to his attorney at the time. He filed a speedy trial motion several years before when he

had a prior counsel. He argued that it had been eight years since he was arrested. Tr. 99, ll. 8 – Tr. 101, ll. 18; Tr. 104, ll. 15 – Tr. 105, ll. 16.

Moseley filed a motion to dismiss July 3, 2013. Tr. 106, ll. 21 – Tr. 108, ll. 6. he again argued to the judge that his case should be dismissed because it was not tried in a speedy fashion. Tr. 110, ll. 1 – 25. His right had been violated by presumptive prejudice. He was arrested January 31, 2006 and indicted July 2007. The solicitor could not explain the delay of the first five years except that the investigation focused on another person named Steve "Rab" Singletary. It was determined by the FBI investigation that Moseley was the guilty party. Tr. 111, ll. 1 – Tr. 112, ll. 19.

Moseley named two witnesses who saw Tony York, brother of the deceased Tory York, with blood on his shirt and with lots of drugs on the night of the murder. This was in a statement the witness gave to the FBI in March 2002. She was the driver when they stole the drugs from Brockington. There was another witness, Andy White who was the cousin of the victim, who also saw Tony York with blood on his shirt because he asked Andy White for another shirt. Tr. 102, ll. 1 – 19.

When the judge asked the solicitor about this exculpatory evidence, she confirmed what Moseley had presented which came out during the FBI investigation. She did not know where Tony York was. He could be local. The solicitor had had no contact with the witness who saw Tony York with blood on his shirt. Moseley said her name was Keisha Burgess. Tr. 114, ll. 1 – Tr. 116, ll. 7.

The solicitor stated the case was first called for trial November 2, 2007 after she had delivered the discovery under Rule 5 to Attorney Verdell Barr. The case was continued then at the request of defense counsel Barr. Bench warrants were issued for Moseley in 2007,

2008, 2009, and 2010. He was picked up at his home or a relative's home in December 2012 or January 2013. Tr. 116, ll. 1 – Tr. 117, ll. 14.

Moseley had written the solicitor about the state's failure to comply with the request for a speedy trial. One reason was the failure for him to be evaluated for competency and criminal responsibility. The solicitor said he was evaluated August 28, 2013 and was found competent. She told of the hearing before Judge Newman the previous week where Judge Newman found Moseley to competent and criminally responsible. Judge Newman also found him capable of representing himself. Tr. 117, ll. 16 – Tr. 119, ll. 11.

Moseley argued that he never consented to the continuance in 2007 that Attorney Barr requested. He knew of only one bench warrant issued October 29, 2012. He was in the psychiatric ward of Carolina Hospital in October 2012, and transferred to MUSC in November. The judge denied Moseley's motions. Tr. 124, ll. 12 – Tr. 131, ll. 5.

Moseley told the court that he had to represent himself in order for his motions to be heard. He needed documents from Belmont Psychiatric Hospital in Philadelphia indicating that he was there at the time of this crime. His standby counsel, who was his most recent attorney, had sent subpoenas to Belmont without a response. The solicitor reported that the competency evaluation report indicated that DMH was unable to get the documents from Belmont because they were in outside storage. Tr. 231, ll. 4 – Tr. 236, ll. 5.

The judge then said to the solicitor:

> Well, if there are records, Ms. Barr, that show he was in Philadelphia, Pennsylvania, at the time in question, March 23, 2001, wouldn't the state want those, too, to accomplish some sense of justice?

Tr. 236, ll. 6 – 10.

Moseley wanted to present alibi witnesses which included his parents, his former girlfriend, and other witnesses from the federal documents regarding third parties who had information about other suspicious people. He sent those names to the solicitor on the first day of trial. The solicitor argued that she was entitled to proper notice as stated in the rule or at least ten days before trial. Moseley said he did not know of any such rule. When asked, he said he did not designate them as alibi witnesses as he did not know he should do that. The judge asked if he had his girlfriend, Ms. Britt, subpoenaed. Moseley said no as it depended on them. The judge told him that the state would not issue a subpoena for him. Tr. 222, ll. 14 – Tr. 237, ll. 10. Moseley then asked;

> So you saying for all these people I want witnesses to, I need a subpoena for them?

Tr. 237, ll. 20 – 21.

The judge said yes. Tr. 237, ll. 22. His mother and stepfather were allowed to testify that they thought he was in Philadelphia during the murder, but were not absolutely. Tr. 433, ll. 18 – Tr. 446, ll. 17; Tr. 506, ll. 1 – Tr. 508, ll. 14.

FBI Agent, Vince Flamini, testified for the defense. When he started to present statements from witnesses he talked to during the FBI investigation, the state objected as hearsay. An in camera hearing was held where Agent Flamini presented the statements of several witnesses. One was from Steve Durant, now deceased who denied giving a gun to any of the defendants. Tr. 447, ll. 1- Tr. 454, ll. 24.

Another witness was Arlo Fulton who told Agent Flamini on March 20, 2002, that he saw David Brockington pay Steve Singletary $400 to $600 to kill Tory York. Tr. 456, ll. 1 – Tr. 463, ll. 25.

The witness, Don Burgess, told Agent Flamini that Keisha Burgess told him that after the murder, she saw Tony York with blood on his shirt and with lots of drugs. Tr. 471, ll. 7 – Tr. 572, ll. 16.

The witness, Ferrell Shaw, told Agent Flamini, that Singletary admitted to Shaw that he killed Tory York and Brockington still owed him money. Tr. 472, ll. 19 – Tr. 473, ll. 14.

Moseley told the judge that he wanted to present these statements and Dozier's, to the jury. The judge allowed him to ask questions of Agent Flamini about Dozier. The other statements were hearsay. Moseley did not understand the hearsay ruling which the judge had to explain hearsay. If Moseley had the witnesses present to testify, then he might be able to get their statements in before the jury. The judge ruled that he could not question Agent Flamini about any of those witnesses because they were hearsay. Tr. 473, ll. 18 - Tr. 476, ll. 25.

Moseley's mother, Gloria Smith, testified for the defense. She confirmed that Moseley was mentally ill and had been in and out of mental hospitals. She said that he was mentally ill now. She testified that he went to Philadelphia to live with her sister due to his illness in 2000 and returned in 2001. Tr. 433, ll. 18 – Tr. 435, ll. 10.

Moseley testified in his own behalf. Tr. 529, ll. 22 – Tr. 554, ll. 25. He told the jury that he received SSI disability. Tr. 548, ll. 1 – 25. When asked about the crime, Moseley said that he was not there. Tr. 522, ll. 12 – Tr. 554, ll. 12; Tr. 540, ll. 1 – Tr. 541, ll. 21.

Moseley called Investigator Shannon Coker. When Moseley asked him if during his investigation he learned of anybody leaving the scene with a bloody shirt who had braids and gold teeth, the state objected to hearsay. An in-camera hearing was held. Investigator Coker said there was nothing in his notes about that. Moseley produced statement that a

person named Ijel York gave to Shannon Coker on October 30, 2001. In this statement, Ijel York stated that she was at the victim's house on the day he was killed. Several men were there arguing with the victim about money. "Little D" (David Brockington), who was the person allegedly robbed by Tory York of drugs and money, drove up in his green expedition. Ijel left to get her hair done. As she was on her way back, she heard shots coming from Thorn Street where the victim lived. Then she saw the green expedition pass by on Thorn Street. She also was present later when she heard Andy White say he saw Tony York with blood on his shirt. Investigator Coker never talked to Andy White. Tr. 509, ll. 1 – Tr. 517, ll. 19.

The judge said all of this by Ijel York was hearsay and could not come in. Moseley did not understand why it was hearsay. The judge said that if Ijel York was present, Moseley could ask her these questions, but he could not get it in through this witness. Tr. 518, ll. 11 – Tr. 519, ll. 25.

The state called a reply witness, Lewellyn Jordan, who was a police officer in Florence in March 2001. He stopped Moseley on March 17, 2001 for driving 65 mph in a 45 mph zone. He was arrested and taken to the Florence County Detention Center for driving while his license was suspended. Mr. Jordan presented no evidence as to how long Moseley was incarcerated. Tr. 555, ll. 8 – Tr. 566, ll. 24.

When the judge decided to confer with the attorneys on the proposed jury charges, Moseley asked:

> What do you mean exactly by charges, sir?

Tr. 569, ll. 1 – Tr. 571, ll. 1.

The judge then explained jury charges. Tr. 570, ll. 7 – Tr. 571, ll. 1.

After closing arguments, the judge clarified his ruling on Moseley's motion to dismiss for delay in the trial. The judge considered the factors as stated in Barker v. Wingo, 407 U.S. 514 (1972): length of the delay, reason for the delay, Moseley's assertion of his right, and prejudice to the defendant. The judge's ruling was:

> Number One, length of the delay. In this particular instance, it's been six, almost seven years post-indictment. The reasons for the delay based on my review of the evidence, Mr. Barr did ask for a continuance when the case was called for trial in late 2007. After that, according to Ms. Kimberly Barr, the defendant did not appear. Bench warrants were issued. Mr. Moseley asserted his right to a speedy trial, he claims, in 2006, but it's hard to try somebody if he can't be located. Any prejudice that may have resulted to Mr. Moseley was a result of his own, perhaps not intentional delay, but absenting himself from the authority of the court. I just wanted to place that on the record.

Tr. 611, ll. 13 – Tr. 612, ll. 4.

Moseley told the court that he had no knowledge of Attorney Barr asking for a continuance because Moseley filed a speedy trial motion in 2006. He was at his house in White Oak during the time of the bench warrants. Tr.610, ll. 1 – 25.

Following the jury verdict, the judge told Moseley that since Moseley had cited Barker v. Wingo, id., regarding the violation of his right to a speedy trial, the judge had examined those factors on the record. That was something that Moseley could put in his new trial motion or appeal or both. Tr. 669, ll. 10 – 16.

ARGUMENT

The trial court erred in allowing Appellant Moseley to represent himself in his murder trial when he explained that he had a history of mental illness and received Social Security disability based on mental illness.

An accused may waive his right to counsel and proceed *pro se*. Faretta v. California, 422 U.S. 806 (1975). The right must be preserved even where the court – as here and almost always – believes that the defendant will benefit from the advice of counsel. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1988). The Faretta Court wrote that the Sixth Amendment guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation when he voluntarily and intelligently elects to do so.

The United States Supreme Court in Indiana v. Edwards, 554 U.S. 164 (2008) held that the states had the right to prohibit defendants from waiving their right to counsel if they were not competent to conduct trials by themselves. The Court held that the United States Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

The Court in Edwards wrote choosing to forgo counsel presents a very different et of circumstances than the mental competency determination for a defendant to stand trial. The Court pointed out that the "nature of mental illness –which is not a unitary concept, but varies in degree, can vary over tine, and interferes with an individual's functioning at different times in different ways-cautions against using a single competency standard to

decide both whether a defendant who is represented can proceed to trial and whether a defendant who goes to trial must be permitted to represent himself.

In State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014), the South Carolina Supreme Court rejected the Edwards standard and held that the trial court was required to apply the Faretta standard for waiver of the right to counsel, rather than a higher competency standard under Indiana v. Edwards, *supra.* The Court reversed.

Chief Justice Toal wrote a dissent where she stated she would hold that "South Carolina trial courts may insist upon representation by counsel for those competent enough to stand trial.....but who still suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves."

Moseley's case is distinguished from Barnes in that Barnes was a capital case. Barnes requested to represent himself. He understood the subpoena process as he asked the judge if he could subpoena witnesses. He finished the eleventh grade and was self-employed. The judge questioned him about specific rules of evidence which he understood. He asked to pursue a third party guilt defense at trial.

Moseley did not ask to represent himself. The judge suggested it to him first. The record shows that Moseley did not understand the subpoena process nor jury charges. He did not understand the rules about hearsay, and lost evidence because of this.

Moseley's case is similar to Edwards in that they both had a history of being diagnosed with schizophrenia. Moseley also had a history of the additional diagnosis of bi-polar disorder. Moseley was receiving SSI disability based on schizophrenia and bipolar disorder. However, at the time of the evaluation in 2013, he was diagnosed with personality disorder not otherwise specified with antisocial features. The evaluation stated: "Personality

disorders are defined by persistent and inflexible patterns of thought, emotion, and behavior that are stable over time and lead to subjective distress or functional impairment." Neither case was a capital case. Both had been determined to be competent to stand trial.

Moseley did not request to represent himself. The hearing judge asked him if he wanted to represent himself and Moseley said he could not because this was a murder case. The judge told him he could because he had a constitutional right to do so. The judge said he had had three attorneys and was not happy with any.

The hearing judge asked him in a cursory manner about hearsay but then gave him an explanation of hearsay. Moseley thought the judge was explaining the rules to him. (Jan 21, 2014 Tr. 36, ll. 1 – 7. The judge only asked him if he knew about filing motions for criminal procedure. Again, the judge explained the rule rather than inquiring if Moseley really understood. The judge reviewed the competency evaluation and ruled Moseley was competent to stand trial. He then found Moseley competent to represent himself at trial.

With all due respect to the Supreme Court's decision in State v. Barnes, *supra*, this court is being asked to apply the Edwards competency standard in Moseley's case where there is a history of mental illness; it is a non-capital murder case; and he did not initiate the request to represent himself. Further, the hearing judge's inquiry was not sufficient to determine his competency to represent himself.

In Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990), the Supreme Court reversed and remanded the case because the record did not demonstrate that the petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed without counsel. The Court wrote that the ultimate test was not the judge's advice,

but the defendant's understanding. The record clearly shows that Moseley did not fully understand the dangers of representing himself.

Moseley was prejudiced by not having legal counsel to represent him in several ways. An attorney would have had the witnesses who gave exculpatory statements to FBI Agent Flamini subpoenaed to testify. An attorney could have investigated and pursued a possible defense of third party guilt. The attorney would have known the rule regarding notice of alibi and the subpoena process and could have had other alibi witnesses available. The attorney would have understood the hearsay rule and possible exceptions such as the admission of guilt by Singletary to Shaw.

ARGUMENT

2

The trial court erred in denying Appellant's motion to dismiss based on the violation of his Sixth Amendment constitutional right to a speedy trial when the incident occurred in 2001, thirteen years before he went to trial, and eight years after his arrest in 2006.

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, 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, 129 S.Ct. 1283 (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).[3] 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,

[3] "The clock begins running on a defendant's speedy trial right when he is 'indicted, arrested, or otherwise officially accused.'" Langford, 400 S.C. at __, 735 S.E.2d at 482 (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982)).

386 S.C. 210, 217, 687 S.E.2d 62, 66 (Ct. App. 2009). The South Carolina Supreme 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. The 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. 421, 735 S.E.2d at 482. Our 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). This Court 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 second factor concerns the reason for the delay. 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. Brillon, 556 U.S. at ___, 129 S.Ct. at 1290.

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.

As an initial matter, 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 "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. 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.

In applying the factors from Barker v. Wingo, Id., to Moseley's case, the length of the delay was seven years from the indictment and eight years from his arrest in 2006. however, the fact that this was a cold case for five years presents complicating factors. FBI Agent Flamini testified that the Kingstree Police knew that Moseley had been identified as the shooter by co-defendant Dozier in Dozier's statement to Flamini in August 2003. Mosley was arrested in 2006. The FBI did not make a formal memorandum on Dozier's statement until 2005. This was another two year pre-indictment delay.

The reason for the delay was cited by the state as being a continuance which was sought by defense counsel in 2007 when the case was first called for trial. Then the state blamed later delay on Moseley for not appearing and bench warrants were issued. Moseley claimed he was at home and in the community. No evidence was presented that the state had sought to locate Moseley. The state had no explanation for the five year pre-indictment delay.

As to the third factor, Moseley testified that he filed a speedy trial motion in 2006. He then filed a speedy trial motion in late 2013. In Barker v. Wingo, *supra*, the Supreme 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 ahs 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.

Moseley suffered prejudice due to the pre-indictment delay and the seven year delay following indictment. Some witnesses were deceased. Some were not located. The Belmont Hospital records could not be located. The memories of witnesses were impaired.

South Carolina has adopted the Fourth Circuit two prong inquiry regarding pre-indictment delay. State v. Brazell, 325 S.C. 65, 72, 480 S.E.2d 64, 68-69 (1997). Under Brazell, the defendant must (1) show substantial actual prejudice, and (2) the court must balance that prejudice against the state's justification for the delay. In doing so, it should consider "whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" Id., citing Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016, 111 S.Ct. 590 (1990); United States v. Automated Medical Laboratories, Inc., 770 F.2d 399 (4th Cir. 1985).

The South Carolina Supreme Court reversed the case of State v. Lee, 375 S.C. 394, 653 S.E.2d 259 (2007), finding that the twelve year pre-indictment delay violated the defendant's due process rights as he suffered actual prejudice. Lee was convicted of criminal sexual conduct with his two stepdaughters. The records from Family Court case

had been destroyed, and his original attorney could not be located. Lee had no record of the DSS investigation.

Moseley suffered prejudice as the Belmont Hospital records were no available. He claimed that he was hospitalized there at the time of the incident. Although he was arrested in Florence on March 17, 2001, it was still possible for him to be in the psychiatric ward of Belmont Hospital on March 23. Moseley's original retained attorney was relieved in 2013 and deceased at the time of trial. He could not be consulted on the case.

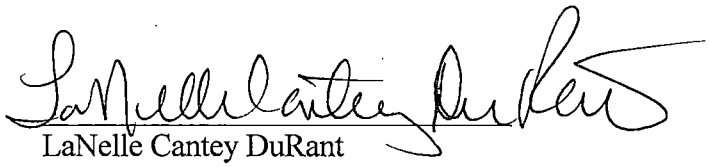
Under the second factor from Brazell, the state offered no explanation for the five year pre-indictment delay.

Moseley's constitutional right under the Sixth Amendment was violated by the thirteen year delay in the state bringing this case to trial.

CONCLUSION

Based on Issue One, Appellant's convictions and sentences should be reversed and the case remanded for a new trial. Based on Issue Two, the case should be dismissed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Arthur Moseley, #199398, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of April, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of April, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.