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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
William Jeffrey Young, Circuit Court Judge

C.A. No.: 2013-000700

The State of South Carolina ..... Respondent

v.

MARC A. PALMER ..... Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a murder case driven by weak eye witness testimony. On November 15, 2010, the appellant was arrested for murder, (R. p. 572), and on May 5, 2011 the grand jury indicted him for murder and possession of a weapon during a violent crime (R. p. 1). The appellant was in custody from his arrest until his March 11, 2013 trial date.

The appellant timely made motions for a speedy trial, yet his case took over two years to be tried. (R. p. 4-6, 11). The speedy trial motion was also renewed along with a motion to dismiss. (R. p. 21). While the appellant was awaiting trial, two eyewitnesses to the murder changed their stories to implicate the appellant. (R p. 134; ln. 17-25; 135, ln. 1-2; R p 137, ln. 18-25, 138, ln 12-14; R. p. 210, ln. 3-9; R. p 210, ln. 19-25; 211, ln. 1-6; R. p. 211, ln 7-22; R. p. 211, ln. 14-22). The other two closest witnesses to the

murder did not implicate nor identify the appellant. (R. p. 171, ln 3-5; 435, ln. 5-15; 452, ln. 15-18, 454, ln. 10-16). The appellant's speedy trial motions were denied by the trial court. (R. p. 20 ln. 22-25; 21 ln. 1-6; R. p. 11; R. p. 49, ln. 3-4; 55, ln. 11-14).

Jury selection began on March 11, 2013. During the initial jury selection, the appellant exercised peremptory strikes on both white and black jurors. (R. p 601). After the jury was selected, the State requested a Batson v. Kentucky hearing, asserting that the appellant's strikes were not race neutral. (R. p. 33). The appellant's counsel thereafter gave a race-neutral explanation for every white juror he struck. (R. p. 34, ln. 8-25; 35, ln. 1-25; 36, ln. 1-25; 37, ln. 1-20). No discriminatory intent was inherent in any of the explanations provided by counsel. Yet, the trial court concluded that it was not convinced that the answers that were race neutral, therefore it struck the jury. (R. p. 40, ln. 9-12). A disputed juror was seated on the second jury. (R. p. 33, ln. 8; 45, ln. 16-21).

At trial, the appellant's counsel implied that Michael Montgomery could have murdered the victim in retaliation for a robbery the night before. (R. p. 423, ln. 6-8; 425, ln 12-25; 426, ln. 1-25; 427, ln. 1-25; 428, ln. 1-3). Over the objection of the appellant, the court permitted Montgomery's testimony that he took and successfully passed a polygraph exam, clearing himself of the murder. (R. p. 430, ln. 5-24).

At the trial the court also permitted evidence of the appellant's statement that he made to law enforcement, despite the appellant's invocation of his right to counsel. (R. p 11; R. p. 59, ln. 23-25, 60, ln 1-8). Specifically, the appellant stated that he wanted his attorney Charles Barr present:

Question by officer:	"Do you wish to talk to us."
Answer by appellant:	"I wish to talk to you, but I need for you to call Charles Barr too."
Question by officer:	"You want him here?"

Answer by appellant: "I want him to come, yes."

(R p. 11; R. p. 59, ln. 23-25, 60, ln. 1-8). Nevertheless, the trial permitted the admission of the appellant's subsequent statement.

On March 14, 2013, the jury found the appellant guilty of murder and possession of a weapon during the commission of a violent crime. (R. p. 1). The same day, the appellant was sentenced to five years imprisonment on the possession of a weapon during the commission of a violent crime and life imprisonment on the murder. (R. p. 2 (murder); R p. 3 (possession of a weapon), R. p. 530, ln. 8-25, 531, ln. 1-4). The appellant timely filed his Notice of Appeal. (R. p. 8).

ARGUMENT

I. DID THE TRIAL COURT ERROR IN GRANTING THE STATE'S BATSON V. KENTUCKY MOTION AND QUASHING THE ORIGINAL JURY?

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001) (citing State v. Hicks, 330 S.C. 207, 499 S.E.2d 209) (1998)); *see also* State v. Scott, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013). "The purposes of Batson and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process " State v. Haigler, 334 S.C. 623, 628-29, 515 S.E 2d 88, 90 (1999) (citing Powers v. Ohio, 499 U S. 400, 404-10, 11 S.Ct. 1364, 1367-70, 113 L.Ed.2d 411 (1991); Batson v. Kentucky, 476 U.S. 79, 85-87, 106 S.Ct. 1712,

1716-18, 90 L.Ed.2d 69 (1986)); *see also* Scott, 406 S.C. at 113, 749 S.E.2d at 163. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." Haigler, 334 S.C. at 629, 515 S E 2d at 91; *see also* Scott, 406 S.C. at 114, 749 S.E.2d at 164

In Purkett v Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the United States Supreme Court explained the procedure for a Batson hearing:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Scott, 406 S.C. at 114, 749 S.E.2d at 163. "Step two of this process does not demand an explanation that is persuasive or even plausible." Scott, 406 S C. at 114, 749 S.E.2d at 163 (citing State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294 (Ct. App. 2006)). At step two, "the proponent of the strike does not carry any burden of presenting reasonably specific, legitimate explanations for the strikes." Scott, 406 S.C. at 114, 749 S.E.2d at 163 (internal quotation marks omitted) (citing Cochran, 369 S.C. at 314, 631 S.E.2d 294). "Therefore, unless a discriminatory intent is inherent in the explanation provided by the proponent of the strike, the reason offered will be deemed race neutral and the trial court must proceed to the third step of the *Batson* process." Scott, 406 S.C. at 114, 749 S.E.2d at 163-64 (internal quotation marks omitted) (citing Cochran, 369 S.C. at 314, 631 S.E.2d 294). "At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." Cochran, 369 S.C. at 315, 631 S.E.2d at 298.

Here, the appellant struck the following jurors:

Juror Number 99, Laurenzia Mack, a black female
Juror Number 46, Mickie Davis, a white female
Juror Number 178, Brian Tisdale, a white male
Juror Number 31, Connie Coker, a white female
Juror Number 97, Terry Love, a white male
Juror Number 136, Jimmy Owens, a white male
Juror Number 173, Charles Taylor, a white male
Juror Number 7, Lonnie Belding, a white male
Juror Number 194, Ronda Williams, a black female
Juror Number 5, Glenn Baxley, a white male (as an alternate)
Juror Number 29, Chancely Coker, a white female (as an alternate)

(R. p. 25-40; R p. 601). The State thereafter made a Batson motion, arguing that the appellant should be required to provide a race neutral reason to why he struck the white jurors. (R. p. 33, ln. 1-18).

The appellant's counsel thereafter gave a race-neutral explanation for every white juror he struck: Number 46 because she and her husband were employed with Williamsburg County (R. p. 34, ln. 6-17); Number 178 because the juror was employed with South Carolina Department of Natural Resources and he felt that there potentially was a law enforcement connection and that the juror would be sympathetic towards law enforcement (R p. 35, ln. 1-6); Number 31 because she was employed with the Department of Social Services and therefore may be sympathetic to law enforcement (R. p. 35, ln 7-15); Number 97 because she is employed with the United States Postal Service and therefore may be sympathetic to law enforcement (R. p. 35, ln. 16-20); Number 136, which the appellant wanted struck because he was a Hemmingway resident and appellant's counsel wanted struck because he worked as an electrician, and technical issues were involved in the case regarding the appellant's vehicle (R p 35, ln. 21-25; 36, ln. 1-10), Number 173 because he was a plant supervisor and given his supervisory

capacity if he was appointed foreman and was potentially unsympathetic to the appellant there would potentially be improper influence, and that counsel did not tend to seek supervisors (R p. 36, ln. 11-17), Number 7 because Juror Number 7 and Juror Number 7's daughter were involved in a criminal case in which Juror Number 7 was a victim or, at the very least, a witness (R. p. 36, ln. 19-23); Number 5 because his wife was a registered nurse in the operating room and there is a lot of contact between operating room nurses and law enforcement (R. p. 37, ln 1-14); Number 29 because she is a paramedic and, like operating room nurses, paramedics have a close working relationship with law enforcement (R. p. 37, ln. 15-20). Again, appellant's counsel had no burden of presenting reasonably specific, legitimate explanations for the strikes. Scott, 406 S.C. at 113, 749 S E.2d at 163 (citing Cochran, 369 S.C. at 314, 631 S.E.2d 294). No discriminatory intent was inherent in any of the explanations provided by counsel. The court then proceeded to the third step of the Batson process. The State was required show that the reasons offered were mere pretext to engage in purposeful racial discrimination Cochran, 369 S.C. at 315, 631 S.E.2d at 298 This was the State's burden to meet. *See* Haigler, 334 S.C. at 629, 515 S E.2d at 91; *see also* Scott, 406 S.C. at 114, 749 S.E.2d at 164.

As an initial matter, the court applied the wrong burden. It stated ". . . I'm not convinced that the answers that were race neutral and therefore I am going to strike this jury." (R. p. 40). It was not the appellant's burden to convince the court that his answers were race neutral. "Once the race or gender neutral reason is given, **the opponent of the strike**, as movant, still carries the ultimate burden of showing purposeful discrimination, and **must convince the trial court of pretext.**" State v. Casey, 325 S.C. 447, 454, 481

S.E.2d 169, 173 (Ct. App. 1997) (internal quotations omitted) (bold added); *see also* Haigler, 334 S.C. at 629, 515 S E.2d at 91 ("[t]he burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike"). The appellant gave a race neutral reason for every juror he struck. It was the *State's* burden to then prove that the reasons offered by the appellant were pretextual *See* Cochran, 369 S C. at 315, 631 S.E 2d at 298; Haigler, 334 S.C. at 629, 515 S.E.2d at 91; Scott, 406 S.C. at 114, 749 S E.2d at 164. This was not the appellant's burden. Because the court applied the wrong burden, this case should be reversed and remanded for a new trial.

Even if the court applied the correct burden, the State failed to meet this burden to prove that the reasons offered by the appellant were pretextual. The State argued that one of the reasons for striking a white juror was because of his or her employment being in government (R p. 38, ln. 3-6), however the appellant seated Juror Number 27 who was retired from the County Transit Authority (R. p. 38, ln. 3-8). However, as appellant's counsel explained, although a bus driver is employed by the County, the bus would not likely have the similar law-enforcement leanings as would a Department of Social Service worker. (R. p. 40, ln. 2-7).

The State also argued that Juror Number 27, who was seated by the appellant, was similarly situated to a United States Post Office employee. However, the bus driver was not similarly situated to a United States Post Office employee, who would likely be sympathetic to law enforcement. (R. p. 35, ln. 17-20; R. p. 40, ln. 7-14). A United States Post Office employee may come into regular contact with law enforcement, as they often inspect packages for contraband and works with law enforcement to resolve cases. Again, it was the *State's* burden to present reasons why the strike was pretextual.

The State also argued that the appellant seated Juror Number 12 who worked as a certified nursing assistant, yet struck the husband to a registered nurse in the operating room and a paramedic. (R. p. 38, ln. 19-25, 39, ln. 1). A nursing assistant is not in the same position as an operating room nurse and a paramedic. An operating room nurse and a paramedic often come in contact with law enforcement in the contexts of wrecks and traumas, and work with law enforcement to resolve cases. On the other hand, a nursing assistant gives patients' baths, assists in toileting needs, helps with meals, and changes bedding. A nursing assistant does not have the contact with law enforcement as does an operating room nurse or a paramedic.

The State's final argument was that the appellant did not want a juror from Hemmingway, so he struck Juror Number 136, yet seated others from Hemmingway. (R p. 39, ln. 2-8). But, as counsel explained, he struck Juror Number 136 because he was a mechanic and there were mechanical issues in the case involving the appellant's vehicle. (R. p. 36, ln. 1-10; R. p. 39, ln. 21-25). In fact, counsel actually seated a white juror from Hemmingway, which weighs against a discriminatory intent. (R. p. 39, ln. 7-8; R. p.603); Haigler, 334 S.C. at 631-32, 515 S.E.2d at 92 (the prosecutor's seating of other black jurors weighed against a discriminatory intent). Even further, "the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for the inconsistency. Casey, 325 S.C. at 454, 481 S.E.2d at 173.

Moreover, disputed Juror 173 was seated on the second jury, therefore prejudice is presumed. (R. p. 33, ln. 8; 45, ln. 16-21). "[I]f one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed

in such cases 'because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged.' ... The proper remedy in such cases is the granting of a new trial." State v Edwards, 384 S C. 504, 509, 682 S E 2d 820, 823 (2009) (quoting State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006)). Similarly here, the proper remedy is the granting of a new trial.

II. DID THE TRIAL COURT ERROR IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL AND NEW TRIAL AFTER THE ADMISSION OF A WITNESS TAKING AND SUCCESSFULLY PASSING A POLYGRAPH EXAMINATION?

The appellant's counsel implied that Michael Montgomery could have murdered the victim in retaliation for a robbery the night before. (R. p. 423, ln. 6-8; 425, ln. 12-25; 426, ln. 1-25; 427, ln. 1-25; 428, ln. 1-3). Over the objection of the appellant, the court permitted testimony that Montgomery took a polygraph exam and was "cleared" by the police. (R. p. 430, ln. 5-24) It was clear that the appellant was objecting to the admission of the polygraph as evidence. (R. p. 430, ln. 13-16). Prosecutors know that testimony regarding passing a polygraph is clearly inadmissible as improper bolstering evidence. The appellant thereafter moved for a mistrial. (R p. 467, ln. 20-25). The court held that since it was the appellant's trial, not Montgomery's trial, Montgomery's testimony that he took and passed a polygraph was admissible. (R. p. 468, ln. 2-17). It therefore refused to grant a mistrial. (R. p. 468, ln. 12-17). The appellant also moved for a new trial, which the trial court refused to grant. (R. p. 522, ln. 19-21, 524, ln. 3-7).

It is inconsequential whether it was the appellant's trial or a testifying witness' trial. The South Carolina Supreme Court "has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable " State v. Council, 335 S C. 1, 23, 515 S.E.2d 508, 519 (1999) (citing State

v. Wright, 322 S.C 253, 471 S.E.2d 700 (1996); State v. Copeland, 278 S.C. 572, 300 S.E 2d 63 (1982)); *see also* State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) (stating the general rule that no mention of a polygraph test should be placed before the jury and holding the trial court did not abuse its discretion in granting a new trial based on a reference by a state's witness to a polygraph test that she had taken); State v. McGuire, 272 S.C 547, 551, 253 S.E.2d 103, 105 (1979) ("The record here presents a close question. From the testimony it is inferable that McGuire was offered a polygraph examination. It left the jury to speculate and to conclude that he refused to take the test. Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid any mention of a polygraph examination. If such is brought out in the testimony, the trial judge should be meticulous to see that no improper inference is created"); State v. Britt, 235 S.C. 395, 425, 111 S.E.2d 669, 685 (1959) ("When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law"), *reversed on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986) ("Evidence regarding the results of a polygraph test . . . is inadmissible"); State v Thrift, 312 S.C. 282, 302, 440 S.E.2d 341, 352 (1994) ("It is well settled that any evidence flowing from an experience with a polygraph is in admissible at trial in South Carolina"); State v. Johnson, 376 S.C 8, 11, 654 S.E.2d 835, 836 (2007) ("The general rule is that no mention of a polygraph test should be placed before the jury.

It is thus incumbent upon the trial judge to ensure that should such a reference be made, no improper inference be drawn therefrom").

Further, the polygraph evidence was not relevant. *See* Rule 402, SCRE. Even if the polygraph evidence was relevant and its admissibility was analyzed under Rule 403 of the South Carolina Rules of Evidence, *see* Council, 335 S C. at 24, 515 S.E.2d at 520, here the polygraph would be inadmissible.[1] The only reason for the State to introduce the polygraph evidence was to vouch for the veracity of the witness. The jury is not allowed to consider this improper bolstering evidence. *See* State v. Jennings, 394 S.C. 473, 480, 716 S.E 2d 91, 94-95 (2011); *see also* State v. Tynes, 402 S.C. 211, 219, 740 S.E.2d 512, 516 (Ct. App. 2013). Therefore, this evidence had no probative value under Rule 403. Moreover, it was unfairly prejudicial to the appellant. The appellant showed that Montgomery could have committed the murder, not the appellant. By admission of improper bolstering evidence that Montgomery took and passed a polygraph exam, the inevitable conclusion was that Montgomery did not commit the murder. The admission of this evidence violated the appellant's constitutional right to a fair trial. For these reasons, this case should be reversed and remanded for a new trial.

III. DID THE TRIAL COURT ERROR IN REFUSING TO DISMISS THIS CASE AFTER THE STATE VIOLATED THE APPELLANT'S RIGHT TO A SPEEDY TRIAL?

On November 15, 2010, the appellant responded to a warrant for his arrest by turning himself in to law enforcement. (R. p. 572). On March 24, 2011, the appellant filed a motion for a speedy trial. (R. p. 4). On July 22, 2011, the appellant renewed his

[1] Council also suggests that the admissibility of polygraphs should be analyzed under Rule 702, SCRE, and the State v Jones, 273 S C 723, 259 S E.2d 120 (1979), factors Rule 702, SCRE, involves testimony by experts. It would be inapplicable here because the witness was not qualified as an expert The Jones factors would also be inapplicable here because they likewise involve admissibility of expert testimony *See* Jones, 273 S C at 731-32, 259 S E 2d at 124-25

speedy trial motion and made an oral motion to dismiss the case because he had not yet been tried. (R. p. 20, ln 22-25; 21, ln. 1-6). The court denied appellant's motions. (R. p. 24, ln. 2-3). At the July 22, 2011 hearing, the Assistant Solicitor told the trial court that the appellant would not be tried in 2011 and the earliest would be spring of 2012. (R. p. 20, ln. 18-21). Nevertheless, the court denied appellant's motions. (R. p. 24, ln 2-3). On March 26, 2012, the appellant filed another motion for a speedy trial. (R. p. 6). The appellant thereafter made a motion in limine to dismiss the case due to the speedy trial violation. (R. p 11, R. p. 49, ln 3-4). The court denied the motion, finding that the appellant was not unfairly prejudiced. (R p. 55, ln. 11-14). The appellant was tried on March 11, 2013.

The accused is guaranteed a speedy trial by the Sixth Amendment to the Constitution. Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L Ed.2d 101 (1972). It is a fundamental right that is imposed by the Due Process Clause of the Fourteenth Amendment on the States. Barker, 407 U.S. at 515, 92 S.Ct. at 2184. A speedy trial is also guaranteed by the South Carolina Constitution. S.C. Const. art. I § 14. In Barker, the United States Supreme Court identified four factors to determine whether a defendant has been deprived of his right to a speedy trial: the length of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker, 407 U.S. at 531, 92 S Ct. at 2192.

Here, the length of delay was substantial. It was nearly two years from the appellant's arrest until his trial date. *See* State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). Moreover, the reasons for the delay were not the fault of the appellant Even "[a] more neutral reason such as negligence or overcrowded courts

should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531, 92 S.Ct. at 2190, 33 L.Ed.2d 101. Although the State claimed that the delay was caused by the appellant's change in attorneys (R p. 53, ln. 12-17), there is no evidence that any of his attorneys requested a continuance, or indicated that they needed time to get up-to-speed on the case. (*Compare with* Vermont v. Brillon, 556 U.S. 81, 92-93, 129 S Ct. 1283, 1292, 173 L.Ed.2d 231 (2009) in which most of the delay was attributed to the defendant where his counsel requested time extensions and Boyer v. Louisiana, 133 S.Ct. 1702, 185 L.Ed.2d 774 (2013)[2] in which Alito, J., concurring, stated that " . . . the record shows . . . the delay in this case was the direct result of defense requests for continuances . . "). The appellant, in fact, protested relieving Attorney William Barr. (R. p. 17, ln. 13-15). Any such finding of the district court here was an abuse of discretion. *See* Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) ("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"). The delay was caused by the State's failure to even schedule the case for trial. (R. p. 11). Further, as recognized by the trial court, the appellant asserted his speedy trial right early in the case - - "at the point in time as he should have." (R. p 55, ln 11-12).

Finally, the appellant was prejudiced by the delay "Prejudice . . . should be asserted in the light of the interests of defendants which the speedy trial right was designed to protect." Barker, 407 U.S. at 532, 92 S Ct. at 2193. The United States Supreme Court has "identified three such interests: (i) to prevent oppressive pretrial

[2] Boyer is a per curiam decision dismissing a writ of certiorari as improvidently granted

incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532, 92 S.Ct. at 2193; *see also* Langford, 400 S C at 445, 735 S.E 2d at 484.

Here, the appellant was in incarcerated from his arrest until his trial. The appellant's incarceration "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." Barker, 407 U.S. at 533, 92 S.Ct. at 2193 "Imposing those consequences on anyone who has not yet been convicted is serious." Barker, 407 U.S. at 533, 92 S.Ct. at 2193. This pretrial incarceration also increased the anxiety of the appellant. (R. p. 11).

Even further, the violation of the appellant's speedy trial right prejudiced the appellant. There was no direct physical evidence linking the appellant to the murder. This was an eye witness driven case. The two eye witnesses who implicated the appellant at trial, Maurice Smith and Brittany Croskey, were both inconsistent in their testimony and statements. Smith was a drug dealer, (R. p. 112, ln. 7-20), who gave inconsistent statements of what happened the night of the murder. In the first statement, given close in time to the night of the murder, Smith never mentioned the appellant being the shooter. (R. p. 134; ln. 17-25; 135, ln. 1-2). After giving this statement, Smith was charged with drug offenses. (R. p. 136, ln 14-20). In December 2011, while in custody on the drug charges, Smith and the appellant got into a verbal altercation. (R. p. 136, ln. 21-25, 137, ln 1-2). In February 2012, after being charged with drug offenses and after having a verbal altercation with the appellant, Smith gave another statement stating that the appellant was the murderer. (R p. 137, ln. 18-25; 138, ln. 12-14).

Brittany Croskey testified at trial that she "assumed" the appellant was the shooter because he had a specific kind of walk. (R. p. 210, ln. 3-9). However, when law enforcement asked her about the shooter in November 2010, she did not have a feeling who it was (R. p. 210, ln. 19-25; 211, ln. 1-6). She only began thinking that the appellant could be the shooter when people started talking around town. (R. p. 211, ln. 7-22). She, in fact, had no independent knowledge that the appellant was the shooter. (R. p. 211, ln. 14-22)

Further, the appellant was prejudiced by the death of a witness Elijah Kennedy (R. p. 300, ln. 21-25; 301, ln. 1-21; 304, ln. 8-15). He was also prejudiced by witness James Palmer's lack of memory of what the appellant looked like before he left the house the night of the murder. (R. p. 357, ln. 25; 358, ln 1-3).

It was extremely important for the appellant to have a speedy trial. The two eye witnesses who implicated the appellant in the case changed their stories over the years it took to bring the appellant to trial. The appellant filed speedy trial motions, but yet his trial was not timely scheduled. The delay was extremely prejudicial to the appellant.

Further, the trial court completely neglected its obligation to protect and ensure the appellant's constitutional right to a speedy trial. *See* Dickey v. Florida, 398 U.S. 30, 51, 90 S.Ct 1564, 1575-76, 26 L.Ed.2d 26 (J. Brennan, concurring) ("Clearly a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is purposeful or oppressive, is unjustifiable ... The same may be true of any governmental delay that is unnecessary whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure, when negligence is the cause, the

only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonable have been avoided - whether it was unnecessary. . For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect" (internal citations and quotation omitted)); *see also* U S. v. Valenzuela-Bernal, 458 U.S. 858, 869, 102 S.Ct. 3440, 3447-48, 73 L.Ed.2d 1193 (1982) ("Thus, other interests protected by the Sixth Amendment look to the degree of prejudice incurred by a defendant as a result of governmental action or inaction")

The government's failure hindered the appellant's relationship with attorney James Hoffmeyer and the appellant requested that he be relieved. (R. p. 18, ln. 22-25; 19, ln. 1-25, 20, ln. 1-25; 21, ln. 1-25, 22, ln. 1-25; 23, ln. 1-15). At this hearing, the appellant proposed to keep Attorney Hoffmeyer as his counsel if the respondent would call his case to trial during the January 2012 court term because the trial originally scheduled for that court term was just delayed. (R. p. 24, ln. 17-25; 25, ln. 1-12). However, the appellant's request was ignored. Due to this inaction, the appellant asked Attorney Hoffmeyer to be relieved. (R. p. 26, ln. 4-20).

The trial court left control of the trial docket to the respondent in accordance with S.C. Code Ann. § 1-7-330 (1976). In State v. Langford, the South Carolina Supreme Court held that "a court's power to hear and decides cases 'carries with it the inherent power to control the order of its business' .. Setting the trial docket therefore is the prerogative of the court." 400 S.C. 421, 435, 735 S.E.2d 471, 479 (2012) (quoting Williams v Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)). The failure

of the trial court here to control its own docket led to the denial of the appellant's right to a speedy trial and violated due process. As acknowledged by the Court in Langford, "[u]ndoubtedly, [S]ection 1-7-330 leaves room for abuses which can deny a defendant due process." 400 S.C at 439, 735 S E.2d at 480. Here, Section 1-7-330 deprived the appellant of his right to a speedy trial and violated his due process rights. Due to Section 1-7-330, the respondent never even requested a continuance. It just refused to call the case for trial. "The duty which the Sixth Amendment places on Government officials to proceed expeditiously with criminal prosecutions would have little meaning if those officials could determine when that duty was to commence . . . it is precisely because this right is relative that we should draw the line so as not to condone illegitimate delays . ." United States v. Marion, 404 U S 307, 331-32, 92 S.Ct. 455, 469, 30 L.Ed.2d 468 (1971). As in Struck v. United States, 412 U S 434, 436, 93 S.Ct. 2260, 2262, 37 L.Ed.2d 56 (1973), "[t]he entire course of events from the time of arrest through the Court of Appeals plainly placed the Government on notice that the speedy trial issue was being preserved by the accused and would be pressed, as indeed it has been." (R. p. 4; R. p. 20, ln. 18-25; 21, ln. 1-14, 24, ln. 2-3; R. p. 18, ln. 23-25, 19, ln. 1-25, 20, ln. 1-25; 21, 1-10, 22-25; 22, ln. 1-13; 24, ln. 14-25; 25, ln. 1-8; 26, ln. 11-20, 28, ln. 20-25; 29, ln. 1-10; R. p. 6; R. p 17, ln. 8-25; 18 ln. 1-25; 19, ln. 1-9). "It is important for States to understand that they have an obligation to protect a defendant's constitutional right to a speedy trial " Boyer, 133 S.Ct. at 1704, Sotomayor, J., dissenting.

For these reasons, this Court should reverse the trial court, and order that the charges be dismissed with prejudice.

IV. DID THE TRIAL COURT ERROR IN ADMITTING THE APPELLANT'S STATEMENT AFTER HE UNAMBIGUOUSLY INVOKED HIS RIGHT TO COUNSEL?

"Statements elicited during interrogation are admissible if the prosecution can establish that the suspect 'knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.'" State v. Kennedy, 333 S.C 426, 429, 510 S.E.2d 714, 715 (1998) (quoting Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966)). "If the desire for counsel is presented 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney,' no ambiguity or equivocation exists, and all questioning must cease until the person can consult counsel or the accused voluntarily reinitiates conversation.'" Kennedy, 333 S C. at 430, 510 S.E.2d at 715 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994)). "[A] suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present." Davis, 512 U.S. at 458, 114 S.Ct. at 2355, 129 L.Ed.2d 362 (citing Minnick v. Mississippi, 498 U S 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1998)).

The appellant gave a statement to law enforcement on October 29, 2010. Officer Creech read the appellant his Miranda warnings. (R. p. 57, ln. 22-25, 58, ln. 1-11). He then asked the appellant if he wished to speak to the officers. The transcript of the interview states in pertinent part:

Question by Officer Creech:	"Do you wish to talk to us."
Answer by appellant:	"I wish to talk to you, but I need for you to call Charles Barr too."
Question by Officer Creech:	"You want him here?"

Answer by appellant: "I want him to come, yes."

(R. p. 11; R. p 59, ln. 23-25, 60, ln. 1-8; R. p. 578). At this point, the appellant's request for counsel was sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney *See* Kennedy, 333 S.C. at 430, 510 S.E 2d at 715. There was no ambiguity or equivocation in the appellant's statements He did not use equivocal words such as "might" or "maybe." The officers were required to cease questioning unless an attorney was actually present. *See* Davis, 512 U.S. at 458, 114 S.Ct. at 2355, 129 L.Ed.2d 362. Nevertheless, they continued to question the appellant, in violation of his right to counsel. The appellant's statements were admitted into evidence, over the appellant's renewed objection. (R. p. 279, ln. 19-25, 280, ln. 1-21; 281, ln. 2-25; 282, ln. 1-25; 283, ln. 1-25; 284, ln. 1-25; 285, ln. 1-25; 286, ln. 1-25; 287, ln. 1-11). For these reasons, this Court should reverse the trial court, and order that the appellant be granted a new trial.

V. DID THE TRIAL COURT ERROR IN IMPOSING A FIVE-YEAR SENTENCE ON THE POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME AFTER SENTENCING THE APPELLANT TO LIFE WITHOUT PAROLE ON THE MURDER?

The appellant was charged with murder in violation of S C. Code Ann. § 16-3-10 and possession of a weapon during the commission of a violent crime in violation of S.C. Code Ann. § 16-23-490. The trial court sentenced the appellant to five years imprisonment on the possession of a weapon during the commission of a violent crime after sentencing him to life without parole on the murder. (R. p. 3; R. p. 2; R p 530, ln. 8-20, *see also* S C. Code Ann § 16-3-20).

S.C. Code Ann. § 16-23-490(A) provides that the five-year sentence is inapplicable when a court imposes a life without parole sentence:

> If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. **This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.**

S.C Code Ann. § 16-23-490(A) (bold added).

State v Owens, 345 S.C. 637, 666, 552 S.E.2d 745, 760 (2001), *reversed on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), is directly on point. In Owens, the appellant argued that the trial judge erred in sentencing him for possession of a firearm in the commission of a violent offense because he also received a death sentence. Owens, 345 S C at 666, 552 S.E.2d at 760 The South Carolina Supreme Court agreed. Owens, 345 S.C at 666, 552 S.E.2d at 760. It stated that "Section 16-23-490(A) expressly provides the mandatory five year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime." Owens, 345 S C at 666, 552 S.E.2d at 760. Here, the appellant was sentenced to life without parole for a violent crime. The mandatory five year sentence for possession of a firearm during the commission of a violent crime should not have been imposed. Therefore, this Court should vacate the appellant's five year sentence for possession of a weapon. *See* Owens, 345 S.C. at 666, 552 S.E 2d at 760.

CONCLUSION

This Court should order that the charges be dismissed with prejudice because the State violated the appellant's right to a speedy trial. In the alternative, this Court should order that the appellant receive a new trial because the trial court erred in granting the

State's Batson v. Kentucky motion and quashing the original jury, the trial court erred in failing to grant a mistrial and the appellant's motion for a new trial after a witness testified about taking and successfully passing a polygraph examination, and the trial court erred in admitting the appellant's statement after he unambiguously invoked his right to counsel In the alternative to the remedies specified above, this Court should vacate the appellant's five year sentence for possession of a weapon

Dated this 18th day of November, 2014

Respectfully Submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
William Jeffrey Young, Circuit Court Judge

The State of South Carolina . . . . . Respondent

v.

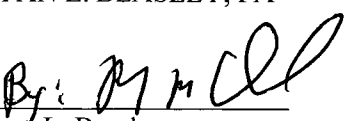
Marc Anthony Palmer . . . . . Appellant

CERTIFICATE OF COMPLIANCE

The Undersigned certifies that this Final Brief of Mark Anthony Palmer complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 18th day of November, 2014

RYAN L. BEASLEY, PA

By: 

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C.A. No.: 2013-000700

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v.

Marc Anthony Palmer . . . . . Appellant

PROOF OF SERVICE

I, Ryan Beasley, counsel for the Appellant, certify that I have served Appellant's Final Brief of Appellant and Certificate of Compliance on the persons listed below by depositing the same via U S. mail, first class, postage prepaid:

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I further certify that I have served fifteen (15) copies of the Final Brief of Appellant and Certificate of Compliance on the Clerk of the Court of Appeals, with one copy being unbound, by depositing the same via U.S. mail, first class, postage prepaid:

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I further certify that all parties required by Rule to be served have been served.

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