18261

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

ROBERT ANTHONY JAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether trial counsel was ineffective for failing to argue that petitioner's indictments should be dismissed because the state violated his Sixth Amendment right to a speedy trial and petitioner was prejudiced by this deficiency because the indictments would have been dismissed had the issue been properly raised to the trial judge?

STATEMENT

Petitioner was indicted for 2 counts of armed robbery, 2 counts of possession of a weapon during the commission of a violent crime, 2 counts of kidnapping, criminal sexual conduct, 1st degree, and assault with intent to kill by the Richland County grand jury. He was tried before the Honorable Costa M. Pleicones, and a jury, between September 20th- 24th, 1999. He was convicted and received a 40 year sentence.

He appealed his sentence and conviction and the South Carolina Court of Appeals affirmed on March 21, 2001. State v. James, Op. No. 2001-UP-082.

Petitioner then filed an application for post-conviction relief on August 8, 2001. An amended application was filed on June 7, 2005. An evidentiary hearing was held on January 14, 2005 before the Honorable Alison R. Lee. He was represented by Tara D. Shurling, Esquire. The order of dismissal was filed August 19, 2005.

Petitioner then filed a petition for writ of certiorari on February 27, 2008. The South Carolina Court of Appeals granted the petition on December 14, 2009.

This brief timely follows.

ARGUMENT

Trial counsel was ineffective for failing to argue that petitioner's indictments should be dismissed because the state violated his Sixth Amendment right to a speedy trial and petitioner was prejudiced by this deficiency because the indictments would have been dismissed had the issue been properly raised to the trial judge.

Petitioner, Robert James, spent 993 days in pre-trial detention, awaiting his trial on criminal sexual conduct, 1st degree, armed robbery, kidnapping, assault with intent to kill, and possession of a firearm during commission of a violent crime charges, alleged to have occurred on or about May 29, 1996. He was served with his first arrest warrant on December 30, 1996 and placed in jail. He informed his attorney in 1997 that he wanted his case speedily resolved. Later, he filed two *pro se* motions asking for a speedy trial. The court and his lawyer ignored his wishes, although his lawyer did file for a bond reduction motion in April 1999, over 820 days after his arrest. He was still unable to make bond and continued to sit in the detention center. On the day of his trial, his lawyer asked to dismiss the charges for the state's failure to grant him a speedy trial, although he conceded that he was unaware of any authority that would entitle his client to that relief. The judge denied the motion. Petitioner continued to trial, rejected a mid-trial plea offer of 15 years, was convicted and sentenced to 40 years in prison.

Trial counsel was ineffective for failing to argue to the trial court judge that petitioner's case should be dismissed because the state violated his rights to a speedy trial, as guaranteed by the Sixth Amendment and S.C. Constitution, article I, § 14. Instead, he argued that under S.C. Code §17-23-90 (1976), and a South Carolina Supreme Court order, it was unclear that a dismissal of the charges would even be an appropriate remedy for his client's complaint:

> MR. SHUPPER: Okay. If your Honor please. This was defendant's *pro se* motion which I was just recently given a copy of. I on behalf of Mr. James would just assert that the constitutional section reference gives the Chief Justice the authority to set the dockets. And I must admit that there is seemingly a great deal of

confusion as to whether the speedy trial act, section 17-23-90, in fact gives a right to a dismissal. Although the language of the statute seems to say that, the Chief Justice directive and order dated March 5th of 1999 seems to conflict with that by clearly stating, "This order does not create or define a right of defendant to a speedy trial." I've tried to explain that to my client. . . . [1]

But I would ask that the court, that this court take the matter under consideration and respectfully request that in a light most favorable to Mr. James take the order literally and dismiss the charge.

App. 33, l. 18—35, l. 17. *Cf.* Barker v. Wingo, 407 U.S. 514, 522 (1972) (Dismissal . . . "is the only possible remedy.")

S.C. Code Ann. §17-23-90 (1976) addresses the failure of the state to indict a defendant for an offense, and states:

If any person committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term to be brought to his trial shall not be indicted some time in the next term after such commitment, the judge of the circuit court shall, upon motion made in open court the last day of the term either by the prisoner or anyone in his behalf, set at liberty the prisoner upon bail, unless it appear to him, upon oath, made, that the witnesses for the State could not be produced at the same term. And if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term to be brought to his trial, shall not be indicted and tried the second term after his commitment or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

The judge denied petitioner's speedy trial motion:

THE COURT: Yeah. Well, you know, I'd be a lot more inclined had this been in front of a judge and the judge had ordered a trial date to—I'm not unsympathetic to you now, because this is a horrendous delay and it's really not terribly well explained. But I don't think that the situation in our state requires dismissal of the charges. So I'm not going to dismiss the charges based on the arguments that I've heard thus far.

[1] Counsel is referring to a South Carolina Supreme Court Order that states: Pursuant to Article V, §4 of the South Carolina Constitution, IT IS ORDERED that all criminal cases in the State of South Carolina shall be disposed of within 180 days from the date of the defendant's arrest. Provided, however, that the circuit court may continue a criminal case beyond 180 days by written order if the court determines that exceptional circumstances exist in the case. This order does not create or define a right of a defendant to a speedy trial." /s/ Ernest A. Finney, Jr., Chief Justice, dated March 5, 1999.

> And particularly owing to the fact that I have heard no argument relating to prejudice to the defense in this case. So, in any event, the motions are denied. We'll proceed with the trial.

App. 44, ll. 14-25.

At the PCR hearing, counsel testified that he knew, from speaking with petitioner's prior counsel, that his client expressed a desire for a speedy trial. App. 1416, l. 24- 1417, l. 8. Still, it was not until April 1999 that he even filed a motion for a bond reduction on his client's behalf. Counsel testified at the hearing that he could not find any legal authority that would have required dismissal of petitioner's charges for failing to provide his client with a speedy trial. App. 1418, l. 24- 1419, l. 5.

The Order of Dismissal made the following findings regarding the issue:

> The record also reflects that the applicant filed a *pro se* motion for a speedy trial approximately four to six months before the trial. Counsel was not aware of the motion until after Applicant filed it. The record does not reflect that Applicant discussed the motion with his attorney before he filed it. Once filed, trial counsel argued the motion on behalf of his client articulating all the issues of concern to his client. There is no evidence of any concern about a speedy trial until Applicant filed the motion himself. There is no evidence that Applicant discussed any concerns about the timeliness of the trial with his attorney before filing the motion.

App. 1498.

To review, briefly. On the day that trial was scheduled to begin, petitioner's counsel made a motion before the judge to have his client's charges dismissed based on a South Carolina statute and a court administrative order. Counsel conceded that he did not believe his client's motion was meritorious, but argued it nevertheless on his client's behalf. The trial court judge, based on that less-than-vigorous argument, and especially considering that counsel did not make any argument concerning prejudice, denied the motion. Counsel testified at the PCR hearing that he was unaware of any legal authority that would have provided his client with dismissal of the charges for the state's failure to provide him with a speedy trial. Then, in reviewing the allegation of ineffectiveness for failing to raise a federal speedy trial or state constitutional claim, the PCR judge

found that counsel articulated "all the issues of concern" that petitioner had about his lengthy, and inexplicable, nearly 3 year pre-trial detention and denied relief.

Petitioner was denied his right to a speedy trial, and counsel should have made the argument to the trial court. If he had, it would have been granted because there is ample authority requiring the dismissal of charges for a violation of the right. Respectfully, trial counsel's performance fell well below the standard of reasonableness under professional norms, and petitioner was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The PCR judge's order is predicated upon an error of law, and should be reversed. Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009); Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009).

In assessing petitioner's speedy trial claim, the following dates are relevant:

Date	**Action**	**Citation**
May 29, 1996	Crime date	Indictment
December 30, 1996	Served with armed robbery arrest warrant	App. 32, ll. 23-24
February 17, 1997	Public defender appointed	App. 43, ll. 20-23
September, 1997	Trial counsel appointed	App. 43, ll. 20-24
April, 1998	*Schmerber* hearing	App. 38, ll. 9-11
July 13, 1998	Case docketed for trial	App. 33, ll. 10-13
Specific date unknown, 1998	*Pro se* speedy trial motion filed	App. 35, ll. 9-13.
April 26, 1999	*Pro se* speedy trial motion filed	App. 32, l. 25
April, 1999	Bond reduction motion. Discussion of trial in 30-60 days	App. 37, ll. 8-17
August 11, 1999	Indicted	Indictment

September 29, 1999	Trial date	
From arrest to trial, **993 days**.		

In Doggett v. United States, 505 U.S. 647 (1992), the United States Supreme Court outlined the analytical framework for assessing speedy trial claims. There are four relevant inquires: (1) whether delay before trial was uncommonly long, (2) whether the government or defendant is more to blame for the delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered any prejudice as to the delay's result. Id. at 651. See Barker v. Wingo, 407 U.S. 514 (1972); State v. Evans, Op. No. 4641 (filed December 30, 2009); State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). And see Vermont v. Brillon, 556 U.S. ___ (2009).

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." Id. at 652 (*quoting* Barker at 530-531). The Supreme Court notes in footnote 1 that, depending on the nature of the charges, lower courts have generally found post-accusation delay "presumptively prejudicial" as it approaches one year. Id. The South Carolina Supreme Court found, in State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), a two-year and four-month delay sufficient to trigger further review. Under both federal and state standards, petitioner's 993 days suffices to trigger a review of his claim.

A review of the relevant facts relative to the second criterion compels the conclusion that the state is wholly responsible for the delay. The state initially served its warrant on petitioner on December 30, 1996. Forty-nine days later, petitioner was assigned a public defender. Through no fault of his own, his case was conflicted out of the public defenders office, and trial counsel was appointed on his case on some date in September, 1997. Seven months after trial counsel was

appointed, and 16 months after he was arrested, the state scheduled a *Schmerber*[2] hearing to extract petitioner's DNA. The state did not show, nor did it argue, that this was a contested hearing, requiring, perhaps, a delay to respond to petitioner's objections. The state made no such showing in this case. Indeed, the hearing was necessary for the state's prosecution of its case, so any time that may have been involved with the hearing's scheduling is attributable to the state. The DNA analysis in this case excluded petitioner as being a source of the semen found in the victim.

The state then scheduled this case for trial since, in South Carolina, it controls the docket, and it was scheduled for trial for the week of July 13, 1998. App. 33, ll. 10-13. See S.C. Code Ann. §1-7-330 (1976):

> **Attendance at circuit courts; preparation and publication of docket.** The solicitors shall attend the courts of general sessions for their respective circuits. Preparations of the docket for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. *Provided,* however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term. (emphasis in original).

As the case was not indicted-- and would not be for the next 17 months—the case was obviously not called for trial on that date. At some point in 1998, petitioner asserted his right to a speedy trial by filing a *pro se* motion. He made another request on April 26, 1999. A bond reduction motion was held at that time and the parties discussed trying the case within 30-60 days, suggesting the case could have been tried at the end of June, 1999. Again, this did not occur because the case was not indicted for another 2 months. The state finally indicted the case, and thus was able to try the case, on August 11th, 1999, 953 days after petitioner was served with an arrest warrant.

This entire delay in bringing petitioner to trial is attributable to the state because the state controls the docket in South Carolina, and because the petitioner did not take a single step to delay

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2 Schmerber v. California, 384 U.S. 757 (1966).

his case. Vermont v. Brillon, 556 U.S. ____ (2009). *Cf.* State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978) (finding that defendant contributed to the delay and did not assert his right to a speedy trial.) The state did not even bother to have petitioner's case indicted until nearly 2 and half years had elapsed from the time of his arrest. Knowing that the DNA test it conducted excluded petitioner as a source of the semen in the victim, it took no steps to quicken the resolution of his case. App. 949, 1.14- 956, l. 22. These facts militate in favor of dismissing petitioner's charges for failing to grant him his right to a speedy trial:

> *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. 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 at 657.

It is a relevant consideration for petitioner's speedy trial claim that the state sought DNA evidence from him in April 1998, which then *excluded him,* and then the state waited an additional 17 months to try his case. Perhaps fearing a possible acquittal, the state—since it controls the trial docket—then assigned his case a lower priority. There being no judicial oversight, the state was free to leave petitioner in the county jail until whenever it wanted to give him a trial. This fact weighs heavily in favor of granting petitioner's speedy trial claim. And see Chief Justice Toal Delivered State of Judiciary Address on February 25, 2009 at 15:15 (available at http://www.judicial.state.sc.us/whatsnew/displayWhatsNew.cfm?indexId=503 *(last visited* January

11, 2010) (acknowledging that some solicitors manage weaker cases by allowing defendants to sit in jail until they plead).

Petitioner asserted his right to a speedy trial. It is undisputed that counsel knew that petitioner wanted his case speedily resolved. The record shows that former counsel informed him of that fact:

> Q: Did you file a motion for a speedy trial in this case?
>
> A: My client had filed one *pro se* which I was not advised of until sometime after he had done it, and I—we had talked about it as I had—I had concerns about the time that he had been in jail without being called to trial, and the—what I found from the—in my investigation of the facts and circumstances related to these accusations were that the victims had—both had criminal histories, and a lot of the focus of the investigation was on the victim's background, was also I believe—talked to Mr. Roberson (petitioner's former counsel) and was told that at some point there had been a—there may have been a motion and I don't recall whether it was on a speedy trial or a bond reduction motion but that I recall that there was some discussion that should the case not come to trial soon that a bond reduction motion would be appropriate and that I'm not absolutely certain but I think that it was something to the effect that the judge said if the case isn't brought to trial in such and such a period, then we'll revisit the issue of reduction in bond.

App. 1416, l. 15- p. 1417, l. 8 (emphasis added).

Trial counsel knew, then, that at some point during February 17, 1997 to September, 1997 (the time during which Roberson was representing petitioner) that his client was attempting to have his case speedily resolved. Also, petitioner's brief in support of his post-conviction relief claim on this issue states that he told his attorney repeatedly that the wanted a speedy trial, but that his attorney told him he needed to continue to be patient. App. 1485, para. 2. At the PCR hearing, the state did not refute this claim. Additionally, petitioner filed two motions for a speedy trial. Then, counsel requested a hearing for a bond reduction motion based on the length of his incarceration. At that time, it was discussed that the case would be tried within 30-60 days. That did not occur. Petitioner employed every device at his disposal to assert his right. See Barker at 531 ("The more serious the deprivation, the more likely a defendant is to complain.") To the extent that counsel did not act on

his client's wishes, that fact buttresses petitioner's ineffectiveness claim. And see Barker at 529 ("[T]he rule we announce today, which comports with constitutional principles, places the *primary burden* on the courts and the prosecutors to assure that cases are brought to trial.") (emphasis added). If this Court holds that it is not ineffectiveness on the part of counsel to have failed to bring petitioner's speedy trial claim in an appropriate manner, then an additional burden is being placed on defendants to assert the speedy trial right. If it is not sufficient for a defendant to have notified counsel of his desire, filed two *pro se* motions, and had a bond reduction hearing, in order to sufficiently invoke the right, then South Carolina is not providing sufficient procedures for defendants to protect the right, and is denying them meaningful access to the court system. Indeed, in many other states, statutes provide the mechanism by which these claims can be raised.[3] South Carolina, by contrast, does not have such a statute, and thus criminal defendants are even more reliant on their attorneys to appropriately assert their rights in this respect.

Petitioner was prejudiced by the delay between his arrest and trial dates. As the United States Supreme Court has observed, unreasonable delay threatens to produce more than one sort of

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[3] See Alaska Rule Crim. Pro. 45(d); Arkansas Rules of Criminal Procedure 27-30. Speedy trial; California Penal Code Ann. §1381. Imprisonment or commitment; time for trial of other offenses, dismissal.; Colorado Revised Statutes Annotated §18-1-405. Speedy trial; Connecticut General Statues Annotated §43-39. Speedy trial- time limitations; Georgia Code Annotated §17-7-170: Demand in noncapital cases; Idaho Code Annotated §19-3501. When action may be dismissed; 725 Illinois Compiled Statutes 5/103-5. Speedy trial; Indiana Revised Code §2941.401; Iowa Code Ann. Rule 2.33. Dismissal of prosecutions; right to speedy trial; Kansas Statutes Annotated 22-34-02. Discharge of persons not brought promptly to trial; Kentucky Penal Code §500.110. Trial of prisoners on untried indictment within 180 days after prisoner's request for final disposition; Louisiana Code of Criminal Procedure, Article 701. Right to speedy trial; Mississippi Code Ann. §99-17-1; Vernon's Annotated Missouri Statutes 545.780. Speedy trial, when—what constitutes—failure to comply not grounds for dismissal; exceptions. Montana Code Annotated §46-13-401. Dismissal at instance of court or prosecution; Nebraska Revised Statute §29-1207. Trial within six months; time; how computed; New York Criminal Procedure Law §30.30. Speedy trial; time limitations; Ohio Revised Code §2945.71(c), provides for trial within 270 days; Oregon Revised Statute §135-747. Dismissal for delay in bringing to trial; Utah Code §77-1-6. Rights of defendants; West Virginia Trial Court Rule 16.04. Time standards for criminal cases; Virginia Code Annotated §19.2-243: Limitation on prosecution of felony due to lapse of time after finding probable cause; misdemeanors; exceptions.

harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by the loss of memories and exculpatory evidence. Doggett at 2692 (*quoting* Barker at 532). Petitioner was significantly prejudiced because he was incarcerated for 993 days before he was brought to trial. And see United States v. Loud Hawk, 474 U.S. 302, 312 (1986) ("[T]he Speedy Trial Clause's *core concern* is impairment of liberty.") (emphasis added). And see Doggett (defendant granted relief even though he was released on bond and the Court found that Doggett "did indeed come up short" with respect to showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.) Petitioner's inexplicable three year pre-trial detention is ample prejudice under a speedy trial analysis, especially when taken in conjunction with other factors. It is not fatal to his claim that he cannot now-- three years after his arrest-- pinpoint precisely the manner in which his defense was compromised by the delay. "[W]e 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." Id. at 655 (emphasis added). Courts presume the prejudice to the accused "intensifies over time." Id. at 652.

Nevertheless, petitioner can show that he was prejudiced by the state's failure to call his case to trial. As petitioner outlines in his application for post-conviction relief, the victim changed her story significantly from the time of the events until the time of trial. Also, petitioner was prejudiced because his would-be alibi witness, Henretta Jordan, was no longer certain of the date or time she was with him. App. 1484- 1491.

It is also relevant, in considering petitioner's claim, that, although the charges are serious, the prosecution of this case was not complex. Indeed, the state, for the most part, called percipient witnesses and law enforcement witnesses. The state also called Dr. Smithson, a local doctor. App. 889, l. 21- 890, l. 2. It called a paralegal from the parent company of South Carolina Electric & Gas

to testify to a utility bill. App. 887, l. 6- p.888, l. 15. This was not a difficult case to prosecute, in the sense that there were out of state witnesses or professional expert witnesses whose schedules needed to be taken into account. See Barker, 407 U.S. at 530- 531: "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." The nature of this case then, militates in favor of granting petitioner's speedy trial claim.

Additionally, the defense did not call any expert witnesses, did not request any competency evaluations, nor make any continuance motions. See State v. Pittman, 373 S.C. 527, S.E.2d 144 (2008). These facts militate in favor of granting petitioner relief.

The state did not extend plea offers until close to the time of trial. During the trial itself, the state offered petitioner 15 years. App. 1411, l. 8-1412, l. 16. This was not, then, a case where petitioner had led the state to believe he was going to plead, but then changed his mind. The state never had any reason to suppose this was anything other than a trial. Additionally, the offer, during trial, of 15 years, supports petitioner's claim that the state perceived this to be a weak case against him. These facts militate in favor of petitioner's grant of relief. Also, petitioner did not receive any benefit from the delay, a fact which, too, militates in favor of granting him relief. *Cf.* State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2001).

It is also relevant to the Court's analysis that the state was not prepared to try the case until August 11th, 1999—953 days after the arrest warrant was served-- when it finally had the case indicted. The state simply allowed petitioner to languish in the county jail for nearly 3 years before it even indicted his case. This fact is especially egregious in light of the fact that, in South Carolina, the state controls the docket system. Without judicial oversight to ensure that defendants are not left to do "solicitor time" in the county jail, it weighs heavily against the state that they attached no priority at all to petitioner's case until nearly three years after the first warrant was served. The solicitor's response, at trial, was essentially that this is just the way things operate in South Carolina:

[Solicitor]: And this is the first time that either of the defense attorneys or any of the defense attorneys for these defendants have requested to enforce the speedy trial law in South Carolina. In that regard, I believe that neither side has shown any undue prejudice.

My understanding, the only way I know it- I agree that it's difficult to interpret Chief Justice Finney's written order. We all know as all of us practicing members of the bar that cases, that probably less than ten percent of our case load in Richland County or Greenville County or in Charleston County, your major counties; and if you look at court administration statistics, some of your smaller counties, are disposed of within 120 days.

So based on my interpretation of that, is that if a defense attorney makes a motion to enforce the procedural 180-day rule and that if a circuit court judge then sets the trial date, that is when this whole idea of a specific written order continuing the criminal case for exceptional circumstances kicks in. That's my only way I can interpret that since we all know as officers of the court that that 180-day rule is literally violated in 85 percent of the criminal cases in South Carolina, not this circuit.

So if they would attempt—and I don't know very many private bar or public defenders want their case to come to court within 180 days.

THE COURT: Well, these guys did though.

App. 40, l. 14- p. 41, l. 14. (emphasis added).

In other words, the solicitor argued that it is up to the defendant to insist that he have his day in court, and he has to invoke the power of a circuit court judge to do so. Not only is this in violation of South Carolina's statute regarding solicitor control of the docket, but the United States Supreme Court has expressly rejected the argument that it is the defendant's burden to bring himself to trial in both Doggett and Barker. These facts militate in favor of granting petitioner the relief that he requests.

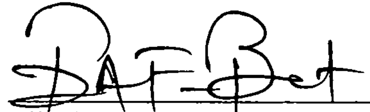
Trial counsel was ineffective for failing to argue that petitioner's charges be dismissed for failing to grant him a speedy trial. Had counsel raised the correct arguments, he would have been granted relief because there is compelling legal authority to support dismissal of the charges. Counsel, instead, was completely unaware that his client was entitled to federal speedy trial

protections. His performance was woefully inadequate and his performance prejudiced petitioner. Strickland v. Washington, 466 U.S. 668 (1984). For this reason, petitioner is entitled to relief, and he respectfully asks this Court to reverse his convictions.

CONCLUSION

For the preceding reason, petitioner respectfully asks this Court to reverse his convictions, and that these charges be dismissed with prejudice.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER.

This 15th day of March, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

ROBERT ANTHONY JAMES,

PETITIONER,

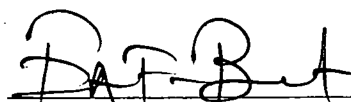
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

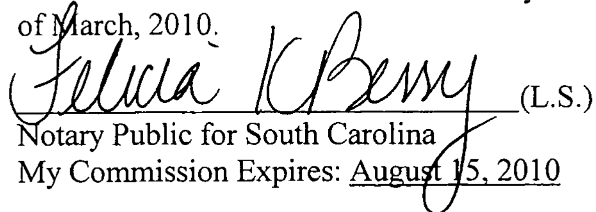
I certify that a true copy of the brief of petitioner, in this case has been served on Brian Petrano, Esquire, this 15th day of March, 2010.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of March, 2010.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 15, 2010

18261

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2001-CP-40-03299

Robert Anthony James .... Petitioner

v.

State of South Carolina, ... Respondent

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737
bpetrano@scag.gov

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

WHETHER ANY EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S DISMISSAL AND FINDING OF FACTS THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO BETTER ARTICULATE THE PETITIONER'S RIGHT TO SPEEDY TRIAL MOTION(S) BECAUSE PETITIONER CANNOT ESTABLISH THE REQUISITE PREJUDICE TO SUPPORT DISMISSAL OF THE INDICTMENTS?

STATEMENT OF THE CASE

The Respondent agrees with Petitioner's statement of the case for purposes of this Return:

Petitioner Robert James was indicted by the Richland County grand jury in August 1999 for armed robbery, possession of a firearm or knife during commission of a violent crime, assault with intent to kill, two counts of kidnapping, and first-degree criminal sexual conduct. After a September 1999 trial before the Honorable Costa M. Pleicones and a jury, petitioner was sentenced to forty years in prison. App. pp. 1500- 1524.

Petitioner appealed and Wanda H. Carter submitted a brief to the Court of Appeals pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefing one arguable issue and moving to be relieved as counsel. App. pp. 1358-1369. The Court of Appeals affirmed petitioner's conviction on March 21, 2001 and granted the petition to be relieved.

Petitioner filed an application for post-conviction relief on August 8, 2001, alleging his trial counsel and appellate counsel were ineffective. App. pp. 1371-1378. The state filed its return on March 26, 2002 and requested an evidentiary hearing. App. pp. 1383-1387. Petitioner, represented by Tara D. Shurling, filed an amended application on January 7,2005. App. pp. 1379- 1381.

The Honorable Alison R. Lee convened an evidentiary hearing on January 14, 2005 in Columbia, South Carolina. Shurling represented petitioner and Arie Bax represented the state. App. p. 1389. At the hearing, petitioner alleged his trial counsel was ineffective for failing to hire an expert to refute the state's DNA evidence that tied his brother, and thus petitioner, to the rape; improperly advising him not to testify;

failing to object to improper jury instructions; failing to move to quash the indictment for failing to comply with Rule 3(c), SCRCrimP; failing to object to prosecutors being sole witness before the grand jury; failing to object to application of amended armed robbery statute; failing to argue his motion for a speedy trial; failing to move for a mistrial when jurors slept; failing to challenge state's theory that petitioner lived with his brother (who was connected by DNA to the rape); and failing to impeach the medical doctor on the inconsistencies between his report and his testimony. PCR counsel also argued that appellate counsel was ineffective for failing to petition the South Carolina Supreme Court for review of the denial of his direct appeal. App. pp. 1393- 1403.

Petitioner and his trial counsel, John Shupper, both testified at the PCR hearing. Petitioner submitted several exhibits as well. App. pp. 1465-1491. Judge Lee denied and dismissed the application in a written order filed August 22, 2005. App. pp. 1493-1499. The order did not address the issue of ineffective assistance of appellate counsel and PCR counsel did not file a motion to alter/amend judgment under SCRCP Rule 59 (e).

The Petitioner filed a Petition for Writ of Certiorari on February 27, 2008. The Respondent moved to have the record sealed, the South Carolina Supreme Court denied the motion to seal the record but ordered Petitioner to file an amended, redacted, appendix. The amended, redacted, appendix was filed, this return follows. On January 6, 2009 the South Carolina Supreme Court transferred this case, per Rule 227(l), SCACR, to this Court.[1] This

1 Now Rule 243(l), SCACR.

Court granted certiorari on December 14, 2009. The Brief of Petitioner was filed on March 15, 2010, this Brief of Respondent follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v.

State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S DISMISSAL AND FINDING OF FACTS THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO BETTER ARTICULATE THE PETITIONER'S RIGHT TO SPEEDY TRIAL MOTION(S) BECAUSE PETITIONER CANNOT ESTABLISH THE REQUISITE PREJUDICE TO SUPPORT DISMISSAL OF THE INDICTMENTS

The record indicates that the Petitioner drafted a *pro se* motion for speedy trial on April 26, 1999 but that appointed counsel was not made aware of the *pro se* motion until September 15, 1999. (App. p. 32 L. 23 – p. 33 L. 6). "'[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.' Barker, 407 U.S. at 532, 92 S.Ct. 2182." State v. Robinson, 335 S.C. 620, 626, 518 S.E.2d 269, 272 (S.C.App.,1999).[2] Accordingly, Petitioner first asserted his right to a speedy trial on September 15, 1999 when a formal motion was made by trial counsel. Petitioner himself explained to the trial court, at the motion for speedy-trial hearing, that he waited "seven to eight months" after his third attorney was appointed to file a *pro se* speedy trial motion. (App. p. 42 L. 19-23). Trial counsel informed the trial court, at the motion for speedy trial hearing, that although Petitioner alleged that he filed a motion for speedy trial, *pro se*, sometime in 1998, there was no physical evidence of that motion. (App. p. 35

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2 *Citing,* Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

L. 9-13).[3] The Respondent submits that according to the record, and the credible testimony, the PCR Court did not err in dismissing the Petitioner's claims and finding that trial counsel argued the speedy trial motion articulating all of the issues of concern to the Petitioner. (App. p. 1498).

The Petitioner himself admitted that any delay in trying the case could also be advantageous to him. (App. p. 1485). Even assuming that the Petitioner's right to speedy trial was formerly asserted sometime prior to September, 1999, and the "when and how" the right to a speedy trial was asserted is established, the next part of the analysis revolves around "the reason the State asserts to justify the delay." State v. Robinson, 335 S.C. 620, 625, 518 S.E.2d 269, 272 (S.C.App.,1999).[4] The Respondent submits that there is nothing in the record to suggest that the State played any role in the fact that the Petitioner qualified for a public defender and that the public defender's office was conflicted out, due to their representation of the co-defendant brother; and the originally appointed counsel was replaced because of a conflict with the Petitioner himself. (App. p. 1428 L. 13 – 18). Accordingly, State indicated that there was a difficulty scheduling the Schmerber hearings as a result of the Petitioner going through several attorneys.[5] (App. p. 38 L. 1-11). At the motion for speedy-trial hearing, trial counsel explained that he and the State had been attempting to try the case for close to ten months; but that the DNA testing, the bond reduction

3 There is reference to a *pro se* motion regarding *speedy trial* from the co-defendant. (App. p. 42 L. 2).
4 *Quoting,* Barker v. Wingo, 407 U.S. 514 at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).
5 Schmerber v. California, 384 U.S. 757 (1966).

hearing, and for other "various and sundry reasons" the case was delayed until September, 1999. (App. p. 37 L. 8-17).

The Respondent submits that the Petitioner himself explained that he "waited seven to eight months" after his final trial attorney (Shupper) had been appointed before making his first claim regarding his right to a *speedy trial*. (App. p. 42 L. 19 - 23). It is the Petitioner's claim now that but for trial counsel's deficient performance the trial court would have granted a *speedy trial* motion, i.e. hold a trial or dismiss the charges. As explained during the motion, the trial court was unwilling to dismiss the charges because there had been no demonstration of prejudice. (App. p. 44 L. 23). As explained below, the Respondent submits that the arguments Petitioner claims counsel should have made would not have made any difference in the trial court's decision not to dismiss the charges.

Assuming that the Petitioner's right to speedy trial was formerly asserted, this Court should compare the reasoning for the delay with the circumstances of prejudice imposed on the Petitioner. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (S.C.App.,1999). Considering the fact that the DNA testing cleared the Petitioner of any connection to the DNA specimen(s) recovered via the Rape Kit, the Petitioner benefited significantly from any delay due to scheduling the Schmerber hearing with new counsel and awaiting the results. The Petitioner alleges that he was prejudiced by the delay because he suffered "extreme stress" by being incarcerated for so long

prior to the trial. The Respondent submits that the Petitioner received credit for the time incarcerated prior to trial, and he would have to endure the "extreme stress" of incarceration due to a lawful sentence whether or not he experienced any speedy trial delays. The Respondent submits that the Petitioner's extreme stress of incarceration between time of arrest and indictment is not a *speedy trial* issue because he could have sought release without bail pursuant to S.C. Code § 17-23-90 or a purported Rule 3(c), SCRCrimP violation. However, as discussed below S.C. Code § 17-23-90 or a purported Rule 3(c), SCRCrimP violation is not a *speedy trial* issue.

Secondly, the Petitioner alleges that he was prejudiced because the victim developed inconsistencies between her prior statements and her testimony at trial. The Respondent submits that, despite Petitioner's argument to the contrary, any inconsistencies in the victim's testimony prejudice the State, and not the Petitioner. Trial counsel testified that the lapse added the defense regarding the victim's identification testimony. (App. p. 1436 – 1437). It was the victim who identified the Petitioner, both in court and via a photo-id, as one of the men who raped her. (App. p. 577, 604-607). Trial counsel, both directly and by proxy through co-defendant's counsel, was able to cross-examine the victim and reveal inconsistencies between her trial testimony and prior statements. (App. p. 612-653).

Thirdly, the Petitioner alleges that, because of the undue delay, he was unable to adequately refute the State's evidence that he did not live with his

brother; that the landlord could not be located by the time the trial occurred and that the landlord would have supposedly testified that the Petitioner was "not even allowed at his brother's address." (Petition for Cert. p. 9). While aware of the notion that what has been forgotten can rarely be shown, the Respondent nevertheless submits that what the Petitioner's brother's landlord may have testified to is mere speculation because he was not produced at the PCR hearing, nor is there any record that there was an attempt to locate the supposed landlord for the purposes of the PCR hearing (the Petitioner did not even bother to call his brother to verify this supposed arrangement). See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding that where contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); *cf.* Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) Harris v. State, 659 S.E. 2d 140 at 146, Op. No. 26458 (March 10, 2008). Additionally, the Petitioner suggests that the landlord would have testified that the Petitioner was not "allowed" at the brother's residence. The Respondent submits that apart from mere argument, there is no actual evidence of prejudice, due to the allegedly improper denial of a speedy trial and the landlord issue.

Finally, the Petitioner alleges that due to the delay, his "alibi" witness

could no longer be certain she was with Petitioner on the night in question since it occurred three years earlier. The Respondent submits that it is a mischaracterization to present the purported alibi witness' ability to recall the night in question as if she would not know which night she needed to remember. The date of the incident was, on or about, May 29, 1996, and the date of the indictment was August 11, 1999. (App. p. 1501). However, the Petitioner was notified by the arrest warrant as to what date the alleged crime(s) occurred. There is no basis to claim a *speedy trial* violation based on the time between the incident and the arrest (or indictment whichever occurs first) because it is the formal notice of charges that trigger the right to a speedy trial – there simply can be no claim based on the time between incident and formal notice.

> In Marion, the United States Supreme Court declined to extend the reach of the speedy trial provisions of the Sixth Amendment to the period prior to arrest, stating:
>
> > . . . it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

State v. Allen, 269 S.C. 233, 237, 237 S.E.2d 64, 66 (S.C. 1977) citing United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468.

The arrest warrant for armed robbery was served on the Petitioner on December 30, 1996. (App. p. 1503). The arrest warrant puts the Petitioner on notice regarding his alibi witness (and the landlord), and that he is charged with crime(s) that allegedly occurred on May 29, 1996, a mere seven months

after the crime(s), not "almost three years" as characterized by the Petitioner. Because this Court has held that even a delay of five years was sufficient to trigger an analysis **without** finding a presumption of prejudice, the Respondent submits that the Petitioner has failed to meet his burden of proof regarding prejudice from the delay (even assuming his motion for a speedy trial was formally asserted prior to September, 1999) and the PCR Court did not err by finding the same. State v. Pittman, 373 S.C. 527, 551, 647 S.E.2d 144, 156 (2007), citing, State v. Foster, 260 S.C. 511, 515, 197 S.E.2d 280, 281 (1973).

The Petitioner relies on S.C. Code § 17-23-90 for the proposition that his charges should be dismissed. However, S.C. Code § 17-23-90 provides no such relief, it is merely provides for release without bail, not discharged from further prosecution. State v. Campbell, 277 S.C. 408, 288 S.E.2d 395 (1982); Similarly, a purported Rule 3(c), SCRCrimP violation is not a *speedy trial* issue. State v. Culbreath, 282 S.C. 38, 39, 316 S.E.2d 681, 681 (S.C.,1984) (stating that rule is merely administrative and not intended to address constitutional guarantee of speedy trial issues). The PCR Court properly addressed the Rule 3(c), SCRCrimP and S.C. Code § 17-23-90 issues in the Order of Dismissal. (App. p. 1498).

The Respondent notes that the relief requested appears to be unprecedented, i.e. not the typical remand but instead a permanent dismissal

of the charges.[6]

6
> The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Barker v. Wingo, 407 U.S. 514, 522, 92 S.Ct. 2182, 2188 (U.S.Ky. 1972) (footnote omitted).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny requested relief.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

By:
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
May 14, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
Honorable Alison R. Lee, Circuit Court Judge

ROBERT A. JAMES, 261393,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

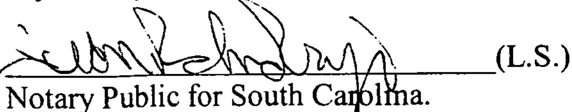
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent has been served upon opposing counsel, Elizabeth A. Franklin-Best by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 14th day of May, 2010.

BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 14th
day of May, 2010.



(L.S.)
Notary Public for South Carolina.
My Commission Expires: My Commission Expires
January 30, 2013