STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2014-000199

THE STATE,

Respondent,

vs.

ARTHUR MOSELEY,

Appellant.

FINAL BRIEF OF RESONDENT

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STATEMENT OF ISSUES ON APPEAL

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

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

COUNTER STATEMENT OF ISSUES ON APPEAL

1. Did the motions hearing judge err by finding that Appellant voluntarily, knowingly and intelligently waived his right to counsel under *Faretta* because his finding was supported by the record, notwithstanding possible evidence of mental illness, since the South Carolina Supreme Court has expressly declined the requirement of a higher competency standard for waiver of the right to counsel than competency to stand trial and the record supports the finding that he was competent to stand trial.

2. Is Appellant's claim of a Sixth Amendment speedy trial violation properly before this Court on appeal because it was not raised at trial? Also, whether the trial judge abused his discretion by denying Appellant's motion to dismiss for violation of the Federal Speedy Trial Act because that act does not apply to state court prosecutions?

STATEMENT OF THE CASE

Appellant, Arthur Moseley, #199398 (Appellant) is confined in the South Carolina Department of Corrections (SCDC) as the result of his Williamsburg County murder conviction and sentence for murdering Tontore "Tory" York, on March 23, 2001. The Williamsburg County Grand Jury indicted him on July 9, 2007, for murder, attempted armed robbery, and criminal conspiracy (2007-GS-45-00052). **R. pp. 648-54**. Corey Liner and Steve Durant were similarly indicted.[1]

The Honorable Clifton B. Newman held a pretrial motions hearing on January 21, 2014. Deborah J. Butcher, Esquire, represented Appellant at that time. Ms. Butcher moved for a continuance. She also moved to be relieved as counsel because Appellant had reported her to the Office of Disciplinary Counsel and because Appellant had some motions contrary to counsel's request for continuance that he wished to argue. Appellant waived his right to counsel at this hearing and thereafter appeared *pro se*. He likewise moved to dismiss the case but Judge Newman declined to rule on the motion to dismiss. **1/21/14 Tr. pp. 1-43; R. pp. 1-43**.

On January 27, 28, and 31, 2014, Appellant and Liner received a jury trial before the Honorable George James and a jury. Appellant appeared *pro se* and Ms. Butcher acted as standby counsel for him. LeGrand Carraway represented Liner. Assistant Solicitors Kimberly V. Barr and Tyler B. Brown, of the Third Circuit Solicitor's Office, prosecuted the case. Liner pled guilty to attempted armed robbery and criminal conspiracy at the close of the State's case. **Tr. p. 388, line 20 –p. 389, line 25; R. p. 345, line 20 - p. 346, line 25**. The jury thereafter found Moseley guilty of all indicted offenses. **Tr. p. 656, lines 3-22; R. p. 597, lines 3-22**. Judge James sentenced Moseley to fifty years for murder, twenty years for attempted armed robbery;

[1] Steve Durant was deceased by the time of trial.

five years for the weapons charge; and five years for criminal conspiracy. **Tr. p. 670, line 6 - p. 671, line 10; R. p. 610, line 6 - p. 611, line 10.**

Moseley timely served and filed a notice of appeal.

ARGUMENTS

I. The motions hearing judge did not abuse his discretion by finding that Appellant voluntarily, knowingly and intelligently waived his right to counsel under *Faretta* because his finding is supported by the record, notwithstanding possible evidence of mental illness, since the South Carolina Supreme Court has expressly declined the requirement of a higher competency standard for waiver of the right to counsel than competency to stand trial and the record supports the finding that he was competent to stand trial.

Notwithstanding Appellant's argument to the contrary, Respondent submits that the motions hearing judge did not abuse his discretion by finding that Appellant voluntarily, knowingly and intelligently waived his right to counsel under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975) because his finding is supported by the record. Nor does evidence that Appellant may have a history of mental health problems show error because the South Carolina Supreme Court has expressly declined the requirement of a higher competency standard for waiver of the right to counsel than competency to stand trial, in *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014), and the record supports the finding that he was competent to stand trial.

A. The January 21, 2014 motions hearing and Appellant's waiver of his right to counsel.

The Honorable Clifford B. Newman conducted a motion's hearing on January 21, 2014. Appellant was present at this hearing and (Third Circuit) Assistant Public Defender Deborah J Butcher initially represented him at that hearing. Ms. Butcher moved for a continuance because, even though this was a 2001 murder and she had been appointed in July 2013, she had not begun preparing for the trial until she had obtained the results of a competency evaluation on November 27, 2013. Also, she did not obtain funding for an investigator until November 27, 2013. She asserted that there was a lot for the investigator to do because he was investigating the original

investigation, from 2001, and the investigator was trying to locate a potential eyewitness. **1/21/14 Tr. pp. 3-4;**[2] **R. pp. 3-4.**

Counsel likewise moved to be relieved as counsel because Appellant had reported her to the Office of Disciplinary Counsel and because - contrary to counsel's request for continuance - Appellant had some motions that he wished to argue that counsel did not feel were "ripe." **1/21/14 Tr. p. 4; R. p. 4.** Counsel subsequently noted that counsel's motion for continuance conflicted with Appellant's motion for a speedy trial, and she noted that she would not have made a speedy trial motion because it would have been "out of time." **1/21/14 Tr. p. 10, R. p. 10.**

Appellant then addressed Judge Newman. He complained that he had previously prepared a motion to dismiss on July 3, 2013 and a motion "to recuse" his former attorney, Amanda Shuler, because she had not brought these motions to the attention of the trial court. He also moved to dismiss the case, but Judge Newman declined to rule on the motion to dismiss and instructed Appellant to bring that motion to the attention of the trial judge. **1/21/14 Tr. pp. 4-6; 25-26; R. pp. 4-6, 25-26.**

In the course of responding to Judge Newman's inquiry related to counsel's motion for continuance, the Assistant Solicitor stated that she had complied with the requirements of Rule 5, SCRCrim.P. However, she agreed to provide counsel with any specific information that counsel felt was necessary and that if counsel provided her with the names of any potential eyewitness, she would attempt to have law enforcement locate the witness. **1/21/14 Tr. p. 8-9; R. pp. 8-9.**

Addressing counsel's motion to be relieved, the Assistant Solicitor stated that:

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[2] Counsel later clarified that she was not asserting that the State had failed to comply with Rule 5, SCRCrim.P. Rather, she was simply stating that the defense was having problems locating the individual. **1/21/14 Tr. p. 10; R. p. 10.**

> ... Judge, as it relates to her motion to be relieved as counsel, this obviously is a modus operandi for the defendant in terms of every time his case gets called for trial, then he files some sort of complaint against me or against his lawyers or whomever. And it seems to me it's an attempt by the defendant to try to delay the trial of the case. And at the same time out the other side of his mouth argues that the state has somehow denied him his right to a speedy trial. Can't have it both ways. Your Honor, I would respectfully submit to the court.

1/21/14 Tr. p. 8; R. p. 8.

The Assistant Solicitor explained to Judge Newman that when the case was originally called for trial in December 2007, Appellant's then-attorney, Verdell Barr, Esquire, moved for a continuance. The State attempted to call the case again in October 2012, and Mr. Barr again moved for continuance. He also moved for a bench warrant not to be issued for Appellant. At some later point, there was a hearing before Judge Newman. Judge Newman ruled that the case would not be heard until Appellant was in court. So, a bench warrant was issued. The matter was again addressed on January 29, 2013, and Mr. Barr was relieved as counsel at that time. Ms. Shuler was thereafter appointed, but she was also relieved as counsel and Ms. Butcher was appointed to represent Appellant. **1/21/14 Tr. pp. 11-12: R. pp. 11-12.**

Now, it appeared that Appellant wanted to fire Ms. Butcher and either have another lawyer appointed or represent himself. **1/21/14 Tr. p. 12; R. p. 12.** Appellant disputed the Assistant Solicitor's representations about the bench warrants, and he again complained that Ms. Shuler did not file his motion for speedy trial under 18 U.S.C. §§ 3161-74. **1/21/14 Tr. pp. 12-13; R. pp. 12-13.** *See* **Argument II**, *infra.* Judge Newman asked Appellant if he wished to represent himself, and Appellant's initial response was that he could not because he was facing a murder charge. **1/21/14 Tr. pp. 13-14; R. pp. 13-14.**

Judge Newman noted that after Mr. Barr was relieved, Ms. Shuler had been appointed to represent Appellant and she was relieved. Appellant claimed that Ms. Shuler had violated his

Fourteenth Amendment rights by refusing to file his *pro se* motions. **1/21/14 Tr. pp. 14-15; R. pp. 14-15.** Because Appellant's speedy trial motion had not been made by his counsel and Appellant was still represented by her, Judge Newman had the following colloquy with Appellant:

[THE COURT]: If you have a lawyer representing you, then documents must be filed by the lawyer. You've written to the court. You are citing all of these cases and laws and various things. If you want to represent yourself, you have a constitutional right to represent yourself. You'd be subject to the same rules as if you were a lawyer.

The state has provided lawyers for you. You have a lawyer now, Ms. Butcher. She also has -- the state has provided you a lawyer free of charge and an investigator free of charge. If you do not wish to have a lawyer represent you, and if you want to represent yourself, you can represent yourself, but you can't have it both ways. You cannot be a lawyer and have a lawyer. Either the lawyer has to do it, or you can do it.

Now, if you want to be represented by counsel, let me know if you want to be, but you're not going to pick and choose and go through the whole list of lawyers in the state of South Carolina until you are satisfied with one because it appears that none of them will be able to satisfy you. That's the impression I get.

If you want to represent yourself, you can; if you want to be represented by a lawyer, you can. Which one you want?

DEFENDANT: I'll represent myself, sir.

THE COURT: All right, you wish to represent yourself?

DEFENDANT: Yes, sir.

THE COURT: All right. That means if I relieve Ms. Butcher, she gets up and goes, and this case comes up -- I'm not going to try the case. Judge James is scheduled to try it next week. That means that you will be solely responsible for representing yourself in this case. Is that what you want?

DEFENDANT: Yes, sir.

1/21/14 Tr. p. 15, line 10 – p. 16, line 18; R. p. 15, line 10 – p. 16, line 18.

Judge Newman then questioned Appellant, to make sure he understood the dangers of self-representation. In sworn responses to Judge Newman's inquiries, Appellant indicated that:

- he understood that the Constitution guaranteed him the right to counsel;
- he understood that counsel had been appointed to represent him and that it was dangerous for an untrained person to represent himself;
- he had a GED;
- he had represented himself previously in two civil cases, which involved twenty different attorneys;
- he was familiar with the rules of criminal procedure; and
- he was familiar with the rules of evidence.

1/21/14 Tr. p. 17, line 11 – p. 18, line 12; R. p. 17, line 11 – p. 18, line 12.

In response to Judge Newman's inquiries as to whether or not he had been treated for the abuse of alcohol or drugs or from mental illness, Appellant stated that he had been treated at Carolina Hospital, in Florence, South Carolina, as the result of hallucinations and threats to kill himself and others. This hospitalization occurred on October 29, 2012, and he was transferred to M.U.S.C. on November 2, 2012. Appellant handed up documents that detailed his hospitalization and which were later introduced as Defendant's Exhibit 4A, **R. pp. 616-22**. *See* **1/21/14 Tr. pp. 18-20; R. pp. 18-20.**

When Appellant indicated that he had been evaluated for his competency, Judge Newman asked the Assistant Solicitor whether there was a finding of his competency to stand trial and criminal responsibility under *M'Naghten.*[3] The Assistant Solicitor indicated that he had been

[3] *M'Naghten's Case*, 10 Clark & Fin. 200, 8 Eng.Rep. 718 (H.L. 1843).

evaluated for his competency to stand trial by the South Carolina Department of Mental Health on August 28, 2013. The report, which was prepared on September 19, 2013, noted that there was a prior mental health history. Also, the report stated that Appellant had been evaluated for his competency to stand trial in 2002. At that time it was determined that he was competent to stand trial and that his description of past hallucinations was "atypical of psychotic mental illness." In 2002, the examiners found that he had malingered some symptoms of mental illness and that he was competent to stand trial. *See* **1/21/14 Tr. pp. 23-24; R. pp. 23-24; 09/19/13 DMH Competency Report, pp. 3-6, R. pp. 633-36.**

The examiners in 2013 found that Appellant "demonstrated no volitional thoughts that would interfere with his ability to consult with his attorney." The examiner concluded, "with a reasonable degree of certainty," that

> [Appellant] is currently competent to stand trial. He demonstrated some factual understanding of corporate personnel and legal procedures and the ability to learn and recall information relevant to this case. He appeared to have an adequate rational appreciation of his legal situation and the ability to evaluate his options in a logical manner. He did not exhibit any overt difficulties with memory, attention, or concentration. He has the ability to work with his attorney and control his behavior in the courtroom, if he chooses to do so. There is no indication that [Appellant's] behaviors, thought processes, or ability to communicate are currently influenced by mental disorder.
>
> In summary, [Appellant] currently possesses the capacity to understand the legal proceedings against him and to assist in his own defense.

See **1/21/14 Tr. pp. 23-24; R. pp. 23-24; 09/19/13 DMH Competency Report, pp. 8-9, R. pp. 638-39.**

The Assistant Solicitor also submitted a separate report, in which the South Carolina Department of Mental Health had evaluated Appellant for his criminal responsibility and his capacity to conform his conduct to the requirements of law. *See* **09/23/13 DMH Criminal Responsibility & Capacity to Conform Conduct Report, R. pp. 640-47.** The examiners

observed that Appellant had denied committing the offenses and claimed that he was in Philadelphia, Pennsylvania at the time that the crimes were committed. The examiners opined that:

> "[a] discrepant report of events is not uncommon in a criminal case, and there is currently no indication these discrepancies are due to symptoms of mental illness. He does not have a mental health diagnosis that would be associated with an inability to distinguish wrongfulness. Based on available information, it does not appear that Mr. Moseley was suffering from a mental disease or defect such that he lacked the capacity to distinguish moral or legal right for moral or legal wrong at the time of the alleged offenses.

09/23/13 DMH Criminal Responsibility & Capacity to Conform Conduct Report, p. 8, R. p. 647. The examiners further opined that "[there] is no evidence to suggest he was experiencing symptoms of a mental disorder at the time of the alleged offenses that would have caused him to lack sufficient capacity to conform his conduct to the requirements of the law." **09/23/13 DMH Criminal Responsibility & Capacity to Conform Conduct Report, p. 8, R. p. 647**.

When Judge Newman asked whether Appellant had anything further that he wanted the judge to consider, Appellant again referred to his motion to dismiss. Judge Newman, however, reminded him that he would have to address that with the trial judge. *See* **1/21/14 Tr. pp. 25-26; R. pp. 25-26.**

Judge Newman observed that Appellant had apparently been evaluated twice for his competency to stand trial. He noted that the social history from the 2013 evaluation reflected that he had attended school until the tenth grade; that he was expelled for fighting; and that he thereafter went to prison. The 2013 social history likewise reflected that he had held several jobs, the longest of which was for eighteen months at a Florence newspaper. Judge Newman observed that the 2013 report likewise reflected that Appellant began drinking alcohol when he was seven or eight years old; that he had previously used cocaine and was addicted to it even though he had

not used it since 2001; that he had a lot of head injuries in car accidents; that he was admitted to a psychiatric hospital and 2001 for being suicidal and depressed, and that he was placed on medication for these problems; and that he had collected disability for schizophrenia and bipolar disorder. **1/21/14 Tr. pp. 26-27; R. pp. 26-27.**

Appellant admitted that he had received a diagnosis while in SCDC in 2004, but he stated that he had not had any mental health counseling since he had been incarcerated. Instead, he was locked up without treatment. **1/21/14 Tr. pp. 28-30; R. pp. 28-30.**

Judge Newman found that:

> the record ... contains a diagnosis, information related to criminal responsibility, and the opinion of the evaluators who evaluated your situation. And the conclusions of the doctor[s] who saw you said, [in] their view, that you are competent to stand trial. That you demonstrated some factual understanding of courtroom personnel and legal procedures, and the ability to learn and recall information relevant to your case. You appeared to have an adequate rational appreciation of your legal situation, and the ability to evaluate your options in a logical manner. He did not exhibit any overt difficulties with memory, attention, or concentration. You have the ability to work with your returning control your behavior if you choose to do so. There is no evidence your behaviors, thought process ability, or ability to communicate are currently influenced by mental disorders and, therefore, you have the capacity to stand trial. And similarly, based on the evaluation, [you] have the ability to conform your conduct to the requirements of the law.
>
> So, taking into consideration your medical records that you gave me, the medical records from the mental health department, and our communications here today, I find that you are competent to stand trial, and that you are legally responsible for any act that you may be found guilty of committing because you had the capacity to conform your conduct to the requirements of the law.

1/21/14 Tr. p. 30, line 23 – p. 31, line 23; R. p. 30, line 23 – p. 31, line 23.

Judge Newman then continued with the inquiry concerning whether Appellant's decision to appear *pro se* was knowing, intelligent and voluntary. This further inquiry established that:

- Appellant understood the dangers of self-representation;

- he understood that he was charged with most serious crimes, including murder;

- he understood that the sentencing range for the crime of murder was between thirty years imprisonment and life imprisonment;

- he understood that he could receive up to five years imprisonment for possession of a weapon during a violent crime;

- he understood that if he represented himself, then the trial judge would not be able to advise him as to how to try the case and could not provide any advice, whatsoever, to him;

- he was able to give a plausible definition of "the rule against hearsay" as "basically he say, she say I saw him do this and that, whatever basically;" and

- he understood that the trial judge would rule on objections made by him or the State relating to questions of hearsay.

1/21/14 Tr. p. 31, line 25 – p. 33, line 23; R. p. 31, line 25 – p. 33, line 23.

Because Appellant then went on a tangent about witness statements that supposedly could exonerate him (**1/21/14 Tr. p. 33, line 23 – p. 35, line 9; R. p. 33, line 23 – p. 35, line 9**), Judge Newman again explained that the trial judge would not be able to give his "feelings about anything." Rather, the trial judge would "rule based on the evidence that is presented and the objections that are made to the evidence. And … the trial will proceed according to the rules of evidence, including the rules involving hearsay evidence." The jury would then determine guilt or innocence. Appellant indicated that he understood that Judge Newman was trying to determine whether he understood what Judge Newman was telling him, but he wanted to know how that related to the hearsay rule. **1/21/14 Tr. p. 35, line 9 – p. 36, line 11; R. p. 35, line 9 – p. 36, line 11.**

So, Judge Newman gave yet another lengthy explanation that witnesses are generally able to testify to matters that they have seen or not, as opposed to what they have heard someone else

say, unless they heard it from the defendant. However, there are exceptions to the hearsay rule that can be very technical and which lawyers are educated to understand. However, non-lawyers typically are not sufficiently educated to understand these technicalities, and this is why people are "often represented by lawyers." Also, Judge Newman explained that if Appellant decided that he did not wish to be represented by counsel, "part of the risk you take, obviously, is the risk of not fully knowing the law ... sufficiently enough to adequately represent yourself. That's ... the reason I'm explaining it to you." Appellant indicated that he understood. **1/21/14 Tr. p. 36, line 12 – p. 37, line 3; R. p. 36, line 12 – p. 37, line 3.**

When Appellant, again, started to go on a tangent concerning the Assistant Solicitor's assessment of his "exculpatory" witnesses, Judge Newman informed him that the Assistant Solicitor did not have to explain the prosecution's case to him. In response to Judge Newman's further questioning, Appellant indicated that:

- he understood the rules of criminal procedure;
- he understood there were certain motions that can be made before trial, during the trial or post-trial;
- he understood he had made a number of such motions, including his motion to dismiss;
- he understood that he had the right to either testify or not to testify at trial;
- he understood that if he decided to testify, then he could be asked about any convictions that he may have involving either dishonesty or false statements or convictions that carried a sentence of more than one year imprisonment to attack his credibility;
- he understood that if he decided not to testify, the trial judge would instruct jurors that they could not hold his decision against him because he had a constitutional right to remain silent;
- he understood that he claimed to have the defense of alibi, which meant that he could not have committed the crime because he was someplace

else, and that the State would have the burden of disproving his alibi and of proving that he was, in fact, present and murdered the victim;

- he understood that an attorney could help him with the matters that the judge had discussed with him, including the rules of evidence, the rules of criminal procedure and presenting his defense;

- he understood that this was the reason why Ms. Butcher and others had been appointed to represent him; and

- he understood Judge Newman's opinion that "you'd be far better in defending yourself by a trained lawyer than you, despite your own personal view of your own wisdom. That you'd be better defended by a lawyer representing you rather than you attempting to represent yourself."

- he also understood that Judge Newman thought that it was "unwise of you to try to represent yourself because though you may have been exposed to some books and cases and all that, you do not seem to be sufficiently familiar with the rules and procedures and all to represent yourself as well as you can be represented by a lawyer;" and

- he understood that Judge Newman "strongly urge[d]" him to not attempt to represent himself, but to "take advantage of the assistance of a lawyer and ... to direct whatever input you might have through the lawyer."

1/21/14 Tr. p. 37, line 21 – p. 40, line, 13; R. p. 37, line 21 – p. 40, line, 13.

The following exchange occurred immediately thereafter:

[THE COURT:] ...[I]n light of the penalty that you might suffer if you're ... found guilty, such as a sentence of up to life imprisonment, and in light of all the difficulties that I would anticipate in representing yourself, do you still desire to represent yourself and give up your right to be represented by a lawyer, or do you want to think about it?

DEFENDANT: It's a good question, sir. I do have an ego, being a Gemini. That's a good question because I, I will admit, now, pretrial, et cetera, I'm a beast. Yes, I will admit. Trial, I'm really not familiar with besides watching Law and Order , et cetera, et cetera, et cetera.

THE COURT: You understand that Law and Order is there for entertainment purposes?

DEFENDANT: Yes, sir, but I, I do watch True TV, too.

THE COURT: I like to watch it myself sometimes.

DEFENDANT: Let me talk with [her] -- I'll ask her some questions.

THE COURT: All right. Sure, sure.

DEFENDANT: And then I can give you an answer, if you don't mind.

THE COURT: We'll take a break in this proceeding. You can take your time, talk with her. We'll move on to something else and then later on come back to you.

(OFF THE RECORD.)

THE COURT: All right, Mr. Moseley, what did you figure out?

DEFENDANT: I think I'll go with myself, sir, because it's as if each of these attorneys don't care about none of my rights in which I've attempted to have an advocate. So, I put my life in my own hand, and if something bad happens, I'll be back in and appeal. That's how I feel about it, sir, because nobody's going to get no money off of railroading me, sir. They already got enough money off of me for a year for nothing. That's how I feel about it, sir.

THE COURT: All right.

DEFENDANT: I'll represent myself.

THE COURT: Is your decision entirely voluntary on your part?

DEFENDANT: Voluntary on myself, sir.

1/21/14 Tr. p. 40, line 14 – p. 42, line 4; R. p. 40, line 14 – p. 42, line 4.

Based upon the evidence before him, including Appellant's responses to the lengthy colloquies, Judge Newman found that Appellant "has knowingly and voluntarily waived his right to counsel." **1/21/14 Tr. p. 42, lines 5-6; R. p. 42, lines 5-6**. However, Judge Newman directed that Ms. Butcher should act as standby counsel. He also explained the purpose of standby

counsel to Appellant, and Appellant indicated that he understood this explanation. **1/21/14 Tr. p. 42, line 6 – p. 43, line 4; R. . p. 42, line 6 – p. 43, line 4.**

B. Discussion.

Appellant is not entitled to relief. The Sixth Amendment expressly guarantees a criminal defendant only "the Assistance of Counsel for his defence." U.S. Const. amend. VI. However, in *Faretta*, the United States Supreme Court held that the Sixth Amendment also protects an implied inverse right of self-representation. Generally, this right must be honored even if the trial court believes that the accused would be better served by the advice of counsel. *Id.* at 834, 95 S.Ct. 2525.

"The right of self-representation exists 'to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.' " *United States v. Frazier-El*, 204 F.3d 553, 558-561 (4th Cir. 2000) (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S.Ct. 944 (1984). *See also State v. Barnes*, 407 S.C. 27, 35-36, 753 S.E.2d 545, 550 (2014) ("Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se*, his knowing, intelligent and voluntary decision "must be honored out of that respect for the individual which is the lifeblood of the law") (quoting *Faretta,* 422 U.S. at 834, 95 S.Ct. 2525).[4] The *Faretta* Court cautioned that, because "[w]hen an

[4] The *Faretta* Court "did not lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct to determine whether the defendant's decision was 'knowing and intelligent.' " *United States v. Gallop*, 838 F.2d 105, 109 (4th Cir. 1988). As the Fourth Circuit Court of Appeals explained in *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997), the rights to counsel and to self-representation are merely two sides of the same coin:

> [N]o Supreme Court case has discussed in any detail the requirements for a waiver of the right to self-representation. This can, perhaps, be explained by recognizing that courts have assumed that the right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and thus that assertion of one constitutes a *de*

accused manages his own defense, he relinquishes ... many of the traditional benefits associated with the right to counsel ... [,] in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Id.* at 835, 95 S.Ct. 2525.

Thus, the right attaches when a defendant "clearly and unequivocally declare[s] to the trial judge that [the defendant] want[s] to represent himself and d[oes] not want counsel." *Id.* at 835, 95 S.Ct. 2525. As a result, *Faretta* permits an accused to make a (1) timely waiver of his right to counsel if (2) he is advised of his right to counsel, and (3) he is adequately warned of the dangers of self-representation. *See State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010); *State v. Samuel*, Op. No. 5346, 2015 WL 5027596, *2 (S.C. Ct. App., Aug. 26, 2015); *Gardner v. State*, 351 S.C. 407, 411, 570 S.E.2d 184, 186-87 (2002); *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990). *See also Frazier-El*, 204 F.3d at 558; *accord Barnes*, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta*").

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facto waiver of the other. *See, e.g., Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel "); *Tuitt v. Fair*, 822 F.2d 166 (1st Cir.1987) (holding that the right to counsel and the right to self-representation are mutually exclusive and thus that granting the right to proceed pro se may be conditioned on unequivocal waiver of the right to counsel).

* * *

Of the two rights, however, the right to counsel is preeminent and hence, the default position. [*Fields v. Murray*, 49 F.3d 1024, 1028 (4th Cir.1995) (en banc)]; *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir.1985); *Tuitt*, 822 F.2d at 174 ("Where the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel which, if denied, leaves the average defendant helpless").

Judge Newman's ruling must be affirmed. A trial judge's ruling on a defendant's waiver of his right to counsel will be affirmed unless there is an abuse of discretion. *Samuel*, Op. No. 5346, 2015 WL 5027596, at *3. Here, there was no abuse.

First, even though Judge Newman held an *in camera* hearing, *Faretta* does not require a formal hearing. Instead, *Faretta* merely requires that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236 (1942)). More importantly, the record is replete with evidence that Appellant understood both his right to counsel and the dangers of self-representation before Judge Newman found that he had knowingly and voluntarily waived his right to counsel.

Specifically, the record before Judge Newman reflected that Appellant had gone to the tenth grade in high school and had acquired a GED; that he had been found competent to stand trial by the South Carolina Department of Mental Health in both 2002 and a 2013; that the Department of Mental Health had also found that he was criminally responsible and that he had the capacity to conform his conduct to the requirements of the law; that he understood the Constitution guaranteed him the right to counsel; that he understood counsel had been appointed to represent him and that it was dangerous for an untrained person to represent himself; that he understood attorneys were trained in the rules of evidence and criminal procedure, whereas he lacked this extensive training; that he understood Judge Newman strongly disagreed with his decision and urged him to accept appointed counsel to represent him; that he had represented himself previously in two civil cases, which involved twenty different attorneys; that he stated that he was familiar with the rules of criminal procedure and the rules of evidence; that he

understood that he was charged with very serious crimes, including murder; that he understood he faced a potential sentence of life imprisonment if convicted of murder; that he understood that the trial judge would rule on objections made by him or the State relating to questions of hearsay; that he understood motions practice; that he understood he had a potential defense to the charges against him of alibi, as well as what the term "alibi" means; that he understood his right to testify and his right not to testify; that he understood if he testified, he would be subject to possible impeachment with certain prior convictions, if any; and that he understood if he proceeded *pro se*, then the trial judge would not be able to advise him as to how to try the case and could not provide any advice, whatsoever, to him. Also, he was able to give an adequate understanding of the rule against hearsay. *E.g.*, **1/21/14 Tr. p. 17, line 11 – p. 18, line 12; p. 31, line 25 – p. 33, line 23; p. 37, line 21 – p. 40, line, 13; p. 42, line 6 – p. 43, line 4; R. p. 17, line 11 – p. 18, line 12; p. 31, line 25 – p. 33, line 23; p. 37, line 21 – p. 40, line, 13; p. 42, line 6 – p. 43, line 4**. The record further reflects that he was given several opportunities to change his mind about whether or not to appear *pro se* but that, after consulting with counsel, he ultimately made a decision to represent himself.

In support of his claim of error, Appellant asserts that he "did not understand the subpoena process nor jury charges. He did not understand the rules about hearsay, and lost evidence because of this." However, his actual performance at trial is not relevant to whether his decision to waive counsel was intelligent, knowing and voluntary. *Faretta v. California*, 422 U.S. at 836, 95 S.Ct. at 2540-41 ("The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his

choice must be honored out of 'that respect for the individual which is the lifeblood of the law' ") (citation omitted). *See also Id.* at 836, 95 S.Ct. at 2541 ("We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself") (footnote omitted); *Lopez v. Thompson*, 202 F.3d 1110, 1119 (9th Cir. 2000) ("In assessing waiver of counsel, the trial judge is required to focus on the defendant's understanding of the importance of counsel, not the defendant's understanding of the substantive law or the procedural details"); *United States v. McKinley*, 58 F.3d 1475, 1481 (10th Cir. 1995) (listing cases finding error when a court denies self-representation based on its evaluation of a defendant's skills or preparation).

Further, there is no merit to the suggestion that the decision to appear *pro se* originated with Judge Newman. Rather, Judge Newman was faced with a situation where Appellant, a criminal defendant, was adamantly determined to present his *pro se* motions to the trial court. Also, he had apparently been trying to get these motions presented for some time, but his then-current counsel and his two previous attorneys had disagreed with his motions and, as a result of their disagreement, had failed to present those motions to the trial court. Because of the attorneys' failure to present his motions to the trial court, Appellant had either filed grievances against them with the South Carolina Bar or he had sued them, civilly, or both. Also, after his retained attorney was apparently relieved because of Appellant's failure to comply with the terms of his retainer (**Tr. p. 109; R. p. 66**), each of Appellant's appointed attorneys moved to be relieved because of her conflict with him over the direction of the case and his insistence that counsel present motions that counsel considered to be frivolous and not in his best interest.

Thus, Judge Newman was merely explaining to him - in terms that he, as a layman could understand - the well-settled rule that South Carolina does not permit hybrid representation and that a criminal defendant who is represented by counsel may not file motions with the court. *See, e.g., State v. Rivera*, 402 S.C. 225, 239, 741 S.E.2d 694, 701 (2013) (" 'There is no constitutional right to hybrid representation either at trial or on appeal' ") (citation omitted); *State v. Stuckey*, 333 S.C. 56, 58, 508 S.E.2d 564, 564 (1998) ("[Because] there is no right to hybrid representation, substantive documents filed [*pro se*] by a person represented by counsel are not accepted unless submitted by counsel"); *Foster v. State*, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (holding that there is no right to hybrid representation at trial); *Koon v. Clare*, 338 S.C. 423, 527 S.E.2d 357 (2000) (Supreme Court refused to take action on *pro se* petition filed by defendant who was represented by counsel in connection with appeal currently pending in Court of Appeals, and Court directed the Clerk of Court not to accept similar filings from him in the future).[5] Thus, the only way for Appellant to present his motions to the trial court, when counsel failed to present the same motions on his behalf, was to appear *pro se* and make these motions himself. While a decision to waive counsel and appear *pro se* may not be a wise one in many if not most instances, it is a right that the United States Supreme Court in *Faretta* held was guaranteed by the Sixth Amendment to the United States Constitution. Also, the decision to forego the right to counsel and to appear *pro se* was solely made by Appellant. Indeed, it is disingenuous for him to suggest that the decision emanated from Judge Newman when the record clearly reflects that Judge Newman made every possible effort to convince Appellant to accept appointed counsel. *Cf. Swiger v. Brown*, 86 Fed. Appx. 877, 882 (6th Cir. 2004) (a "defendant

[5] Respondent would note that, in this case, the Clerk of this Court returned a writ of mandamus to Appellant on September 11, 2015, because the Court could not act on his *pro se* writ, since he was represented by counsel.

cannot be permitted to stop the criminal justice system in its tracks by rejecting appointed counsel and refusing self-representation").

Nor is there any merit to Appellant's claim that Judge Newman's ruling amounted to an abuse of discretion because of Appellant's prior history of mental illness. In *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789 (1960) *(per curiam)*, the United States Supreme Court held that the standard for competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." (Internal quotation marks omitted). *Accord Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"). "'Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.' " *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000) (quoting *United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir.1984)). Similarly, "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Burket*, 208 F.3d at 192.

In the subsequent case of *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008), the Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178, 128 S.Ct. at 2388. The Court therefore recognized that it does not violate the United

States Constitution for a trial judge to "take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. *Id.* at 177-78, 128 S.Ct. at 2387-88.[6]

However, the South Carolina Supreme Court, in *Barnes*, rejected the State's argument that South Carolina should adopt the more stringent standard approved by the United States Supreme Court in *Edwards*, particularly where the defendant was facing a possible death sentence for murder. The defendant in *Barnes* requested that counsel be relieved and that he be allowed to appear *pro se*. *Barnes*, 407 S.C. at 31, 753 S.E.2d at 547. So, the trial judge conducted a *Faretta* waiver hearing, which included expert testimony of a defense psychologist that even though Barnes was competent to stand trial, his lengthy history of mental illness prevented him from making a knowing and intelligent waiver of his right to counsel. *Id.* at 31-34, 753 S.E.2d at 547-49.

Relying upon the expert opinion of this defense psychologist, the trial judge in *Barnes* concluded that Barnes had not knowingly and intelligently waived his right to counsel because he did not have "a clear understanding of the dangers of self-representation in the guilt nor the sentencing phase of the trial," and because he did "not knowingly [and] intelligently understand the dangers inherent in self-representation." *Id.* at 34, 753 S.E.2d at 549. On direct appeal, Barnes asserted that the trial judge had erred by requiring a different standard for competency to waive his right to counsel from the competency standard set forth in *Dusky*.

A majority of the South Carolina Supreme Court agreed and, rejecting the State's arguments, expressly declined to adopt the more stringent standard set forth in *Edwards*:

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[6] The Court in *Edwards* declined to adopt a federal constitutional competency standard. *Id.* at 178, 128 S.Ct. at 2388.

> We decline to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. *See Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty. *Sims v. State,* 313 S.C. 420, 438 S.E.2d 253 (1993). We do not find public policy supports a distinction between a defendant who wishes to plead guilty and the defendant who wishes to proceed to trial as the Sixth Amendment guarantees every criminal defendant the "right to proceed *without* counsel when he voluntarily and intelligently elects to do so." *Faretta,* 422 U.S. at 807, 95 S.Ct. 2525.

Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014).

Thus, when the South Carolina Supreme Court has previously refused to adopt the more stringent standard permitted by *Edwards* in a capital case involving a defendant with a similar mental health history, it would be error for this Court to conclude that Appellant's history of mental illness rendered his waiver of his right to counsel unintelligent or unknowing, since he was competent to stand trial. *Id.* Additionally, Respondent submits that his efforts to distinguish his case from *Barnes* are without merit, as the above discussion makes clear. Therefore, Appellant's first argument lacks merit.

II. Appellant's claim of a Sixth Amendment speedy trial violation is not properly before this Court on appeal because it was not raised at trial, and the trial judge did not abuse his discretion by denying Appellant's motion to dismiss for violation of the federal Speedy Trial Act because that act does not apply to state court prosecutions.

Appellant's remaining contention is that he was denied his right to a speedy trial under the Sixth Amendment and *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182 (1972). However, his Sixth Amendment speedy trial argument is not properly before this Court on appeal because it was not raised at trial. Further, the trial judge did not abuse his discretion by denying Appellant's argument that the Speedy Trial Act, 18 U.S.C. §§ 3161–3174, had been violated because that Act does not apply to state court prosecutions.

A. Appellant's motion in the trial judge's ruling.

The trial judge allowed Appellant to raise his pretrial motions after jury selection. He first argued his motion to dismiss. He maintained that he had "documentation" and "proof of innocence" in addition to the motion to dismiss because, in his opinion, other persons could have committed the offense or knew who committed the offense, and because he had not known of any investigation by the federal government. **Tr. pp. 99-100; R. pp. 56-57.**

In support of his motion to dismiss based on the lack of a speedy trial, he asserted that he had been prejudiced by three-year delay, and that he had not waived his right to a trial by trial counsel's motion for continuance at the January 21, 2014 hearing. He observed that he had attempted to assert his speedy trial motion in April 2013 but his then-counsel, Ms. Shuler, did not bring into the trial court's attention. **Tr. pp. 100-01; R. pp. 57-58.** The trial judge correctly explained to Appellant that "[f]ederal law doesn't apply." Appellant, however, insisted it did because of the Fourteenth Amendment. **Tr. p. 101; R. p. 58.**

Because Appellant digressed into his motion to dismiss based on supposedly "exculpatory" statements by witnesses in the case, (**Tr. pp. 102-04; R. pp. 59-61**), the trial judge asked him if his motion to dismiss was based upon the eyewitnesses' statements. In his response, Appellant clearly stated that he was asserting a violation of 18 U.S.C. § 3161(b) and (c), which are part of the Speedy Trial Act. Specifically, he argued that he had not been indicted within thirty days of his arrest, in accordance with § 3161(b). Rather, he was indicted approximately eighteen months after his arrest. He also was not tried within seventy days of indictment, which he asserted was required by § 3161(c). He claimed that neither of these violations was his fault, and he cited to a number of cases applying the Speedy Trial Act, or similar state court

provisions, such as *People v. Healy*, 293 Ill.App.3d 684, 688 N.E.2d 786 (1998). **Tr. pp. 104-05; 107; R. pp. 61-62, 64.**

Appellant further maintained that the continuances in his case had not complied with the Speedy Trial Act, and that his original trial attorney, Mr. Barr, was relieved as counsel because of a conflict of interest based on the fact that Mr. Barr was related to Assistant Solicitor Barr. Assistant Solicitor Bar denied that she and Mr. Barr were related and she denied that he had been relieved based upon his relationship to her. Instead, Mr. Barr moved to be relieved because Appellant had failed to comply with the terms of his retainer. **Tr. pp. 107-09; R. pp. 64-66.**

Appellant noted that he had sued both Judge Newman and the Assistant Solicitor because they had denied him his rights under the Speedy Trial Act. **Tr. pp. 109-10; R. pp. 66-67.** Then, the following exchange occurred between Appellant and the trial judge:

> THE DEFENDANT: Okay. The government should never rely on the defendant's unilateral waiver of his rights **under the act**. The government must make sure the judge enters an ends of justice continuance and sets forth his reasons for doing so, see U.S. case Northern v. U.S. 9th Circuit, 1972. The defendant did ask for copies of speedy trial motions, trial motions from former private counsel, et cetera. The speedy trial act in U.S. case James Rogers Sikes vs. Superior Court 1973, sites Jones v. Superior Court, defendant's rights should likewise not be spiteful by the neglect of those officially concerned. Also, citing the only duty placed upon an accused in protecting his right to a speedy trial is to object when his trial is set forth for the date beyond the **statutory** period.
>
> THE COURT: So ... you say the case should be dismissed because you were tried not in a speedy fashion?
>
> THE DEFENDANT: Yes, sir, that also, sir.
>
> THE COURT: All right.
>
> THE DEFENDANT: Then move to dismiss once that period expires or merely move to dismiss if the statutory period expires by trial date

being set. The petitioner done this and more, although not required of him to perfect his speedy trial claim, petitioner, in fact, repeatedly attempted to remind the authorities of his status and of the need of his speedy trial and no circumstances which suggest that he waived his right to a speedy trial. The risk of clerical error or neglect on the part of those charged with official action must [rest] with the people not with the defendant in a criminal case. That's U.S. case Plezburg vs. Superior Court, 1971. U. S. case -- vs. North Carolina, 1966, clearly cites the right to a speedy trial is a fundamental right secured by the Sixth Amendment to the federal constitution --

THE COURT: I understand ... your right to a speedy trial.

THE DEFENDANT: Yeah.

THE COURT: How ... has that been violated, if you can explain that to me?

THE DEFENDANT: It has been violated through the presumption of ... prejudice that I presented with State v. Maryland. The Feds investigated this case from 2003 to 2006 and did not inquire any of this, sir. They did not -- that's -- I presented that in **3161(b)**, the indictment was 14 months or 18 months later, **3161(c)** --

Tr. p. 110, line 7 – p. 112, line 2; R. p. 67, line 7 – p. 69, line 2 (emphasis added).

At that point, the Assistant Solicitor explained that Appellant was indicted in July 2007. She did not know the precise reason for the five year delay between the time of his arrest and his indictment, but she stated that the file "would seem to suggest that initially there was a belief that Steve 'Rab' Singletary was the person who committed the crime. And then later investigations by the Federal Bureau of Investigation and [information supplied by] some inmates who were in federal custody as a result of continued investigation, it was determined that Mr. Moseley was the one that committed the murder." **Tr. p. 112; R. p. 69**.

With the trial judge's permission, Appellant resumed his argument. He cited a number of cases involving the Speedy Trial Act, and he moved "for a dismissal of [this] frivolous charge"

for violation of his right to speedy trial. He also cited to "South Carolina rules of criminal procedure Rule 48 granting the trial court discretion to dismiss cases that are not brought to trial promptly," as a basis for dismissal of the charges against him. **Tr. pp. 113-14; R. pp. 70-71.** [7]

Thereafter, the Assistant Solicitor explained that Appellant's original counsel, Mr. Barr, was originally given notice that the case was ready for trial in December 2007. However, the case was continued at trial counsel's request. The Assistant Solicitor added that "the clerk's record should reflect that in 2007, 2008, 2009 and 2012 bench warrants were issued against [Appellant] ... for failure to appear." His failure to appear "hampered our ability to bring the case forward for trial because a lot of judges understandably are hesitant to try a defendant in his absence when he's charged with the offense of murder." **Tr. p. 116; R. p. 73.** *See also* **Tr. pp. 122-23; R. pp. 79-80.**

In response to the judge's query about the bench warrants, the Assistant Solicitor stated that:

> I know for sure Judge Cochran issued a bench warrant on May 7, 2007. Judge Milling issued a bench warrant on March 12th of 2008. Your Honor issued a bench warrant on March 13th of 2009. And Judge Newman issued a bench warrant in October 2012. And I believe there may be another bench warrant contained within the clerk's file.

Tr. p. 117; R. p. 74. Appellant was arrested in either late December 2012 early in January 2013. **Tr. p. 117; R. p. 74.**

While the Assistant Solicitor did not clearly understand when Appellant claimed that he had first filed a motion for speedy trial, she explained that he had written her "a couple of times" about the fact he had yet been evaluated for his competency and criminal responsibility. She stated that he had, in fact, been evaluated for competency and criminal responsibility on August

[7] The South Carolina Rules of Criminal Procedure do not contain a Rule 48. Apparently his citation was to Rule 48(b), F.R.C.P.

28, 2013; that reports were issued in September 2013; and that, in light of the evaluations, Judge Newman had found that Appellant was competent to stand trial and criminally responsible, at the January 21, 2014 pretrial hearing. She further informed the trial judge that Judge Newman had already found that Appellant "was capable of representing himself pursuant to [*Faretta*]." **Tr. pp. 117-19; R. pp. 74-76**.

Minutes later, the Assistant Solicitor again addressed the present issue. She noted that Mr. Barr had some health problems in late 2012, and that he was thereafter relieved as counsel on January 29, 2013. She confirmed that Appellant had sued her, but she stated that the district court had dismissed the case without service of process on the defendants, and that the appellate court had dismissed Appellant's appeal of that order on January 24, 2014. **Tr. pp. 123-24; R. pp. 80-81**.

Again, Appellant disputed the Assistant Solicitor's representations about the bench warrants, and he asserted that there had "only been one technical bench warrant placed on me … until October 29, 2012, sir." On October 29th, he was admitted to Carolina Hospital and therefore missed a roll call of which he was unaware. This resulted in issuance of a bench warrant, and he had been incarcerated since his arrest on that warrant. He conceded that he "was messed up" in October 2012 and was not capable of going to trial at that point. He claimed that the State could not produce the other bench warrants at issue. He further claimed that the State knew his address and that he had not been "on the run." He had been in touch with Mr. Barr during the five years in question, but he, again, stated that he had not consented to a continuance. **Tr. pp. 124-27; R. pp. 81-84**.

Appellant indicated that he understood the trial judge's explanation that the dispute about whether bench warrants were wrongfully entered against him was a civil dispute that did not

have anything to do with present charges, and he reiterated that he had not consented to any continuance. He further represented that he had made his motion for speedy trial in April 2013 and, again, in July 2013. However, his attorney failed to file any of his motions. **Tr. pp. 128-29; R. pp. 85-86**.

The trial judge stated that he would consider the matter over a luncheon recess. **Tr. p. 129; R. p. 86**. When court resumed, the trial judge denied Appellant's motion, as follows:

> All right. I've reviewed the materials provided to me by Mr. Moseley, also, considered his arguments and, also, Ms. Barr's arguments. Mr. Moseley 's motion to dismiss all of the charges is denied. I accept -- first of all, I accept Ms. Barr's explanation about the bench warrants as her role as an officer of the court. The -- any delay, first of all, post-indictment was result of a request made by Mr. Moseley's attorneys or attorney, obviously, acting in his behalf at the time after the initial trial date in 2007 or 2008 was continued by the request of Mr. Verdell Barr. Mr. Moseley absented himself from the proceedings by virtue of not appearing and bench warrants were issued.

Tr. p. 130, line 18 – p. 131, line 5; R. p. 87, line 18 – p. 88, line 5.

Following this ruling, the trial judge stated that he wanted to ensure that all exculpatory material in the State's possession, or the possession of law enforcement, had been disclosed. The Assistant Solicitor stated that she had a list of forty-two items that had been disclosed, forty-one of which were disclosed to Mr. Barr in 2007. These same documents and the list were disclosed, again, to Ms. Shuler and the list was provided to Ms. Butcher. Appellant had left a detailed message on her voice mail detailing certain things that he did not have and he also referenced these items during the pretrial hearing. So, the Assistant Solicitor agreed to disclose the items if they were in her file. **Tr. pp. 131-32; R. pp. 88-89**.

B. Discussion.

Initially, Respondent submits that Appellant's argument that the trial judge erroneously denied his motion to dismiss based upon a violation of his Sixth Amendment right to a speedy

trial under *Barker*[8] is not properly before this court because it was not raised at trial. As demonstrated, Appellant did not argue in the trial court that his Sixth Amendment right to speedy

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[8] In *Barker*, the Supreme Court adopted a now familiar four-part balancing test to determine whether an accused has been denied his right to a speedy trial. Courts must balance (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The Court in *Barker* stated that reviewing courts must engage in a balancing test with these "related factors," which "must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. Prejudice under factor (4) must be prejudice attributable to delay and not some other reason. These factors are also recognized by the state appellate courts. *See State v. Chapman*, 289 S.C. 42, 144 S.E.2d 611 (1986); *State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984); *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978); *State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973); *State v. Kennedy*, 339 S.C. 243, 528 S.E.2d 700, 703 (Ct. App. 2000), *aff'd*, 348 S.C. 32, 558 S.E.2d 527 (2002).

In *Vermont v. Brillon*, 556 U.S. 81, 89-90, 129 S.Ct. 1283, 1290 (2009), the Court explained that:

> The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." The speedy-trial right is "amorphous," "slippery," and "necessarily relative." *Barker,* 407 U.S., at 522, 92 S.Ct. 2182 (quoting *Beavers v. Haubert* , 198 U.S. 77, 87, 25 S.Ct. 573, 49 L.Ed. 950 (1905)). It is "consistent with delays and depend[ent] upon circumstances." 407 U.S., at 522, 92 S.Ct. 2182 (internal quotation marks omitted). In *Barker,* the Court refused to "quantif[y]" the right "into a specified number of days or months" or to hinge the right on a defendant's explicit request for a speedy trial. *Id* ., at 522-525, 92 S.Ct. 2182. Rejecting such "inflexible approaches," *Barker* established a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.,* at 529, 530, 92 S.Ct. 2182. "[S]ome of the factors" that courts should weigh include "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid.*

Further, "*Barker*'s formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,' [*Barker*,] 407 U.S., at 530, 92 S.Ct. 2182, and the balance arrived at in close cases ordinarily w[ill] not prompt this Court's review." *Brillon*, 556 U.S. at 91, 129 S.Ct. at 1291.

Because Appellant did not give the trial judge an opportunity to apply *Barker*, Respondent will not address each of the five factors, unless called upon by this Court to do so. However, Respondent would point out that while the delay in this case was approximately a year and a half and, thus, presumptively prejudicial under *Doggett v. United States*, 505 U.S. 647, 651-52,112 S.Ct. 2686, 2690-91 (1992), Appellant's trial counsel was not prepared for trial and moved for continuance. Thereafter, all delay was attributable solely to Appellant, who violated the terms of his bond and had four or five bench warrants issued, or his attorneys. Indeed, on the same day that Appellant first attempted to argue his motion to dismiss, January 21, 2014, his then-attorney

trial been violated. Instead, he asserted that the prosecution had failed to comply with the terms of the federal Speedy Trial Act. In particular, he asserted that the State had not complied with either § 3161(b) or § 3161(c). However, compliance with the Speedy Trial Act is not constitutionally required, either by the Sixth Amendment or otherwise. *See Franklin v. Bartow*, No. 09-CV-664, 2009 WL 4906346, at *4 (E.D. Wis. Dec. 18, 2009) ("a claim based on an alleged violation of the federal Speedy Trial Act fails to state a federal constitutional claim").

It is well settled that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001). Also, a party cannot argue one ground in support of motion at trial and then, on appeal, asserted an alternative ground in support of the motion. *State v. Prioleau*, 345 S.C. 404, 548 S.E.2d 213 (2001); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1999). Thus, Appellant's argument based upon the Speedy Trial Act did not preserve the present claim for appellate review. *Id.*

Further, the trial judge did not abuse his discretion by denying Appellant's motion to dismiss based upon the failure of the prosecution to comply with the provisions of the Speedy Trial Act because he correctly recognized that the Act does not apply to state court trials. **Tr. p. 101, lines 15-16; R. p. 58, lines 15-16**. § 3172(2) of the Act provides that "[a]s used in this chapter ... the term 'offense' means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal)." As a result, courts addressing claims by state court

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moved for an additional continuance. Moreover, he was tried within days of asserting his right to a speedy trial. These factors alone demonstrate the frivolous nature of his Sixth Amendment claim.

prisoners that the state court did not comply with provisions of and the Act have held that the act does not apply to state court trials. *E.g.*, *Cain v. Petrovsky*, 798 F.2d 1194, 1195 n. 2 (8th Cir. 1986) ("As the District Court noted, the Federal Speedy Trial Act does not apply to state prosecutions"); *Sneed v. Florida Dep't of Corr.*, 496 F. App'x 20, 24 (11th Cir. 2012) ("The federal Speedy Trial Act, 18 U.S.C. §§ 3161–3174, does not apply to state court proceedings"); *United States v. Bell,* 833 F.2d 272, 277 (11th Cir.1987) (same); *Franklin*, No. 09-CV-664, 2009 WL 4906346, at *4; *Wright v. Crews*, No. 4:11-CV-4-RS-CAS, 2013 WL 5658328, at *5 (N.D. Fla. Oct. 16, 2013); *People v. Ilarraza*, No. SX-12-CR-0568, 2013 WL 6504792, at *2 (V.I. Super. Dec. 5, 2013) ("Because the Speedy Trial Act does not apply to territorial offenses, Angel's claim alleging a violation of the Speedy Trial Act will be denied").

South Carolina law does not contain any similar provisions to those found in §§ 3161-3174. Additionally, and as argued in the preceding footnote, virtually all of the delay in this case was attributable to either Appellant or his counsel. Contrary to his contention that the prosecution had violated the Speedy Trial Act, his attorneys reasonably understood that asserting his right to a speedy trial was not in his best interest. Therefore, this Court must affirm the trial judge's ruling because he did not abuse his discretion by denying Appellant's motion.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment, convictions and sentence.

Respectfully submitted,

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January 28, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2014-000199

THE STATE,

Respondent,

vs.

ARTHUR MOSELEY,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 28th day of January, 2016.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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SC Court of Appeals

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CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, LaNelle Cantey DuRant, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

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

This 28th day of January, 2016.

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