THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of General Sessions
William Jeffrey Young, Circuit Court Judge

Opinion No. 5382 (S.C. Ct. App. filed February 24, 2016)
2011-GS-45-00095

The State of South Carolina . . . . . Respondent

v.

Marc A. Palmer . . . . . Petitioner

APPELLATE CASE NO. 2013-000700

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 21, 2016.

QUESTIONS PRESENTED

I. **Did the Court of Appeals error in finding that the trial court properly granted the State's Batson v. Kentucky motion and quashing the original jury?**

II. **Did the Court of Appeals error in finding that the trial court properly denied the petitioner's motion for a mistrial and motion for a new trial after a witness testified that he took and passed a polygraph test, clearing the witness of the murder for which the petitioner was on trial?**

III. **Did the Court of Appeals error in finding that the trial court properly denied the petitioner's motion for a speedy trial?**

IV. **Did the Court of Appeals error in finding that the trial court properly admitted into evidence the petitioner's statement to law enforcement after he invoked his right to counsel?**

STATEMENT OF THE CASE

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

The petitioner timely made motions for a speedy trial, yet his case took over two years to be tried. (R. p. 4-6, 11). The speedy trial motion was also renewed along with a motion to dismiss. (R. p. 21). While the petitioner was awaiting trial, two eyewitnesses to the murder changed their stories to implicate the petitioner. (R. p. 134; ln. 17-25; 135, ln. 1-2; R. p. 137, ln. 18-25; 138, ln. 12-14; R. p. 210, ln. 3-9; R. p. 210, ln. 19-25; 211, ln. 1-6; R. p. 211, ln. 7-22; R. p. 211, ln. 14-22). The other two closest witnesses to the murder did not implicate or identify the

petitioner. (R. p. 171, ln. 3-5; 435, ln. 5-15; 452, ln. 15-18; 454, ln. 10-16). The petitioner's speedy trial motions were denied by the trial court. (R. p. 20 ln. 22-25; 21 ln. 1-6; R. p. 11; R. p. 49, ln. 3-4; 55, ln. 11-14).

Jury selection began on March 11, 2013. During the initial jury selection, the petitioner exercised peremptory strikes on both white and black jurors. (R. p. 601). After the jury was selected, the State requested a Batson v. Kentucky hearing, asserting that the petitioner's strikes were not race neutral. (R. p. 33). Despite the motion being brought by the State, the trial court improperly placed the ultimate burden of persuasion on the petitioner. (R. p. 40, ln. 9-12). A disputed juror was seated on the second jury. (R. p. 33, ln. 8; 45, ln. 16-21).

At trial, the petitioner's counsel implied that Michael Montgomery could have murdered the victim in retaliation for a robbery the night before. (R. p. 423, ln. 6-8; 425, ln. 12-25; 426, ln. 1-25; 427, ln. 1-25; 428, ln. 1-3). Over the objection of the petitioner, the court permitted Montgomery's testimony that he took and successfully passed a polygraph exam, clearing himself of the murder. (R. p. 430, ln. 13-24).

At the trial, the court also permitted evidence of the petitioner's statement to law enforcement, despite the petitioner's invocation of his right to counsel. (R. p. 11; R. p. 59, ln. 23-25, 60, ln. 1-8).

On March 14, 2013, the jury found the petitioner guilty of murder and possession of a weapon during the commission of a violent crime. (R. p. 1). The same day, the petitioner was sentenced to five years imprisonment on the possession of a weapon during the commission of a violent crime and life imprisonment on the murder. (R. p. 2 (murder); R. p. 3 (possession of a

weapon); R. p. 530, ln. 8-25; 531, ln. 1-4). The petitioner timely filed his Notice of Appeal. (R. p. 8).

The petitioner briefed the following issues to the Court of Appeals: (1) Did the trial court error in granting the State's Batson v. Kentucky motion and quashing the original jury?; (2) Did the trial court error in deny the petitioner's motion for a mistrial and new trial after the admission of a witness taking and successfully passing a polygraph examination?; (3) Did the trial court error in refusing to dismiss this case after the state violated the petitioner's right to a speedy trial?; (4) Did the trial court error in admitting the petitioner's statement after he unambiguously invoked his right to counsel?; and (5) Did the trial court error imposing a five-year sentence on the possession of a weapon during the commission of a violent crime after sentencing the petitioner to life without parole on the murder? (Appellant's Brief).

On November 3, 2015, the Court of Appeals held oral arguments. On February 24, 2016, it filed an opinion holding that the trial court did not error in (1) granting the State's Batson v. Kentucky motion; (2) denying the petitioner's motion for a mistrial and motion for a new trial; (3) denying his motion for a speedy trial; and (4) admitting his statement to law enforcement after he invoked his right to counsel. State v. Palmer, Opinion No. 5382 (Ct. App. 2016) (Appx. 1-16). It held that the trial court erred in sentencing the petitioner for possession of a weapon during the commission of a violent crime after sentencing him to life imprisonment without parole for murder. Id. It therefore affirmed the petitioner's convictions for murder and possession of a weapon during the commission of a violent crime and vacated his sentence for possession of a weapon during the commission of a violent crime. Id.

On March 8, 2016, the petitioner timely filed and served his Petition for Rehearing. (Appx. 17-27). On April 4, 2016, the respondent filed a Return to the Petition for Rehearing. (Appx. 28-38). On April 21, 2016, the Court of Appeals filed an Order denying the petitioner's Petition for Rehearing. (Appx. 39-40). This Petition follows.

ARGUMENT

I. Did the Court of Appeals error in finding that the trial court properly granted the State's Batson v. Kentucky motion and quashing the original jury?

The Court of Appeals decision is in direct conflict with this Court's decision in State v. Inman, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). As stated by this Court, the three-step inquiry for evaluating whether a party executed a peremptory challenge in a matter which violated the Equal Protection clause is as follows:

> First, the party asserting the *Batson* challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the party opposing the *Batson* challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the party asserting the challenge has proved purposeful discrimination. The ultimate burden always rests with the party asserting the *Batson* challenge to prove purposeful discrimination.

Inman, 409 S.C. at 26, 760 S.E.2d at 108 (citations omitted). Like in Inman, the trial court here committed legal error by improperly placing the ultimate burden of persuasion on the petitioner.

The petitioner struck 11 jurors, both white and black. (R. p. 33, ln. 1-18). The State made a Batson motion as to the white jurors, arguing that the petitioner should be required to provide a race neutral reason to why he struck them. (R. p. 33, ln. 1-18). One of those jurors was Juror 173, who sat on the second jury. (R. p. 33, ln. 8; 45, ln. 16-21).

The petitioner gave race-neutral reasons for striking the prospective white jurors. (R. p. 34, ln. 6 – 37, ln. 20; p. 39, ln. 21 – 40, ln. 8). With respect to Juror 173, the petitioner's counsel explained that he struck Juror 173 due to his employment as a plant supervisor. (R. p. 36, ln. 13-17). Given Juror 173's supervisory capacity, counsel was concerned that if he was appointed foreman on the jury and was unsympathetic to the petitioner, there could be improper influence. (R. p. 36, ln. 13-17).

At this point, "the circuit court should have shifted the ultimate burden of persuasion back to the State to show that the proffered reason was pretextual." Inman, 409 S.C. at 28, 760 S.E.2d at 108 (citing State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007)). The State never gave a reason why it thought the petitioner's reason for striking Juror 173 was pretextual. (*See* R. p. 37, ln. 24 – p. 39, ln. 15). It acknowledged that it "hadn't had quite an opportunity to go down through everybody." (R. p. 29, ln. 1-3). Yet, it was the State's burden to do so. *See* Inman, 409 S.C. at 26, 760 S.E.2d at 108 ("The ultimate burden always rests with the party asserting the *Batson* challenge to prove purposeful discrimination") (citations omitted).

In both Inman and here, the trial court improperly placed the ultimate burden of persuasion on the petitioner. In Inman, the trial court stated that "I'm going to grant the State's motion based on those three individuals jurors numbers 17, 60, and 166 *that the reasons given I don't believe are sufficient.*" Inman, 409 S.C. at 24, 760 S.E.2d at 107 (emphasis that of the Court). Similarly here, the trial court stated that "[t]he defense has stricken and *I'm not convinced that the answers that were race neutral* and therefore I am going to strike this jury. We will re-strike the entire panel." (R. p. 40, ln. 9-12). It was not the petitioner's burden to

convince the court that his answers were race neutral. *See* Inman, 409 S.C. at 26, 760 S.E.2d at 108. It was the State's burden to prove purposeful discrimination. Id.

Even assuming that that the trial court applied the correct burden, its holding that it was "not convinced that the answers that were given were race neutral" is clearly erroneous. (*See* R. p. 40, ln. 9-12). Every reason the petitioner gave, including the reason for striking Juror 173, was race neutral. (R. p. 34 – 37). This is undisputed.

The Court of Appeals never addressed the issue of whether the trial court committed legal error by placing the ultimate burden of persuasion on the petitioner. It instead held that the trial court "did not err in granting the State's *Batson* motion" because "the State demonstrated the explanations were pretextual by showing [the petitioner] did not strike similarly-situated members of another race." (Appx. 7). However, this was a finding for the trial court to make, not the Court of Appeals. *See* Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1869, 114 L.Ed.2d 395 (1991) ("*Batson's* treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases").

Even if the Court of Appeals could appropriately make this finding, its conclusion that the State met its burden was in error. The State never gave a reason why it thought the proffered reason for Juror 173 was pretextual. (*See* R. p. 37, ln. 24 – p. 39, ln. 15). It instead told the trial court that it "hadn't had quite an opportunity to go down through everybody." (R. p. 29, ln. 1-3).

Moreover, State did not meet its burden in proving purposeful discrimination with respect to any of the other jurors. As stated by the petitioner's counsel, the petitioner used his very first strike against black juror. (R. p. 33, ln. 23 – 34, ln. 4; *see also* R. p. 601, showing defendant's

first strike against Juror 99, a black female). The State attempted to make a "similarly situated" argument of governmental employment, stating that one of the reasons proffered by the petitioner for striking some white jurors was being in government-related employment. (R. p. 38, ln. 3-5). However, as detailed by petitioner's counsel, this was not the case. He struck Juror 31 because she was employed with the Department of Social Services. (R. p. 35, ln. 9-10). The petitioner's counsel did a substantial amount of Family Court work and was very familiar with DSS child abuse and neglect cases, and felt that those involved with DSS may be potentially sympathetic to law enforcement. (R. p. 35, ln. 11-15). Similarly, he struck Juror 97 who worked at the United States Postal Service, because based on the Juror's employment he may have some sympathies for law enforcement. (R. p. 35, ln. 17-20). Counsel explained that he seated Juror 27 who was a bus driver because, while Juror 27 was technically a county employee, she was not employed within the county walls and he was not concerned that a bus driver out amongst the community is going to have similar law enforcement leanings. (R. p. 40, ln. 1-7). The State offered explanation as to why a bus driver was similarly situated to DSS and USPS employees. It was the State's burden to do so.

The State also tried to make a "similarly situated" argument that the petitioner struck potential white jurors who were from Hemmingway, yet seated potential black jurors who were from Hemmingway. (R. p. 39, ln. 3-9). Despite the State's argument, the petitioner's counsel only struck one juror from Hemmingway (Juror 136), who happened to be white. As explained by petitioner's counsel, counsel did not strike him for being from Hemmingway. Counsel struck Juror 136 for being an electrician because the case involved mechanical issues with the petitioner's vehicle, and if he had any more knowledge about those things he could potentially

sway the jurors. (R. p. 36, ln. 1-10; p. 29, ln. 21-25). In fact, the petitioner's counsel seated a white juror from Hemmingway, which weighs against a discriminatory intent. (R. p. 29, ln. 7-8; R. p. 603); State v. Haigler, 334 S.C. 623, 361-32, 515 S.E.2d 88, 92 (1999) (the prosecutor's seating of other black jurors weighed against discriminatory intent).

The State also attempted to make a "similarly situated" argument of employment in the medical field, stating that one of petitioner's proffered reasons for striking jurors was he did not want anyone in the medical field. (R. p. 38, ln. 17-19). Again, as detailed by petitioner's counsel, this was not the case. The petitioner struck Juror 5 because his wife was a registered nurse in an operating room. (R. p. 37, ln. 2-3). As the petitioner's counsel explained: "I'm familiar with the relationship of a lot of operating room nurses have with law enforcement. There's a lot of contact between operating nurses and law enforcement because you know you've got wrecks or traumas things of that nature so I found that especially nurses in the operating room can be sympathetic to law enforcement." (R. p. 37, ln. 2-8). He similarly struck Juror 30 because she was a paramedic, and like registered nurses who work in operating rooms, paramedics have a close working relationship with law enforcement. (R. p. 37, ln. 17-20). The petitioner seated Juror 12, a certified nursing assistant at a hospital. (R. p. 28, ln. 23-24). However, the State failed to show how Juror 12 was similarly situated to Juror 5 or Juror 30. There is nothing in the record to suggest that Juror 12 worked closely with law enforcement as a certified nursing assistant, as do registered nurses in the operating room and paramedics. This was the State's burden to meet.

The trial court committed legal error by placing the ultimate burden on the petitioner. Even assuming that the trial court did not commit legal error, its holding that it was "not

convinced that the answers that were given [by the petitioner] were race neutral" is clearly erroneous. Moreover, the State did not meet its burden of purposeful discrimination with respect to Juror 173 or any of the other jurors. Because Juror 173 sat on the second jury, prejudice is presumed and the proper remedy is a new trial. Inman, 409 S.C. at 29, 760 S.E.2d at 110.

II. Did the Court of Appeals error in finding that the trial court properly denied the petitioner's motion for a mistrial and motion for a new trial after a witness testified that he took and passed a polygraph test, clearing the witness of the murder for which the petitioner was on trial?

This Court "has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable." State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 529 (1999). Although the State did not ask the witness whether he "passed" or "failed" the polygraph, by its use of the term "cleared," it elicited evidence concerning the result of the test:

Q: You voluntarily submitted yourself to a polygraph right?

Mr. Ballinger: Objection.

The Court: No overruled.

Q: You voluntarily submitted yourself to a polygraph right?

A: Correct.

Q: Anything they asked of you, you gave it to them right?

A: That's correct.

Q: And you were cleared by the police?

A: Correct.

(R. p. 430, ln. 13-24).

The term "cleared" is often used rather than "passed" when discussing polygraph results. *See, e.g.*, People v. Barbara, 255 N.W.2d 171, 178 (Mich. 1977) (The witness "testified to the common policy in many states that individuals who are cleared by the polygraph examiner are not prosecuted"); Kirby v. Williamson Oil Co., 510 So.2d 176, 179 (Ala. 1987) ("Neu had once accused Kirby of being involved in a store inventory shortage, though he later cleared her of involvement when he gave her a polygraph examination"); Davern v. Midwest Communications, Inc., 1993 WL 527905, *8 (Ct. App. Minn. 1993) ("Another example is the polygraph examination of the suspected driver. ... The polygraph cleared, to the limited extent a polygraph examination can, the driver of criminal involvement in the accident"); Leonard v. State, 385 S.W.3d 570, 573 (Ct. App. Tx. 2012) ("The appellant had failed three polygraphs prior to April 2007, at which point the appellant 'made several admissions' and 'cleared' a polygraph. After that 'cleared' polygraph, the appellant then failed five polygraphs ..."); Laney v. South Carolina Dept. of Corrections, 2012 WL 4069680, *1 (D.S.C. 2012) ("Apparently Plaintiff took a polygraph exam which 'cleared Plaintiff' ..."); King v. Oakland County Prosecutor, 842 N.W.2d 403, 406 (Ct. App. Mich. 2013) ("Busch was briefly considered a suspect in the murder of the first OCCK victim, but he was allegedly cleared by law enforcement officials following a polygraph examination"); Martin v. Citibank, N.A., 762 F.2d 212, 215 (2nd Cir. 1985) ("The second person tested was cleared, but the third failed the polygraph and was discharged"). By the very use of the term "cleared," the unmistakable evidence was that the witness passed the polygraph.

Even if the term "cleared" is not synonymous with "passed" when discussing a polygraph, the above-quoted testimony was inadmissible and prejudicial. The Court of Appeals

incorrectly adopts a *per se* rule that so long as the results of a polygraph are not introduced into evidence, there is no prejudice from this evidence. (Appx. 10) (holding that "[b]ecause there was no evidence regarding the results of the witness' polygraph test, Palmer failed to meet his burden of establishing the prejudicial impact of this evidence").

The Court of Appeals' conclusion and *per se* rule directly contradicts this Court's precedent. As held by this Court, there may be prejudice even if the results of a polygraph are not introduced into evidence. The question becomes whether the reference to a polygraph creates an impermissible inference thereby prejudicing the defendant. Bruno v. State, 347 S.C. 446, 451, 556 S.E.2d 393, 395 (2001); State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007).

In Bruno, the Court found that there was no prejudice where the jury could have inferred that the witness passed the polygraph, or it could have made an "equally plausible" inference that the witness failed the polygraph. Bruno, 347 S.C. at 451-52 556 S.E.2d at 396. This reasoning makes sense because if it plausible that the witness passed the polygraph, and it is not equally plausible that the witness failed the polygraph, the results of the polygraph would, in effect, be introduced as evidence.

The Court of Appeals here incorrectly framed the issue. It stated that there was no prejudice to the petitioner because the jury could have inferred that the witness passed the polygraph or it could have made an "equally plausible inference" that petitioner was not asked to take a polygraph. (Appx. 9-10). The correct issue is whether it was "equally plausible" that the witness passed the polygraph as it was that he failed the polygraph.

The plausible inference from the above-quoted testimony was that the witness passed the polygraph.[1] There was not an "equally plausible inference" that the witness failed the polygraph. The *only* plausible inference is that the witness passed the polygraph.

In Johnson, this Court addressed a second impermissible inference created by a reference to a polygraph - - one that bolsters the credibility of the witness. Johnson, 376 S.C. at 11, 654 S.E.2d at 836. The Court of Appeals overlooked this point and did not address this issue.

Like in Johnson, the case against the petitioner here essentially consisted of witness testimony, and the credibility of each witness was crucial to the verdict. Id. In fact, Montgomery (the witness whose testimony is at issue) was a key witness. The petitioner's counsel implied that Montgomery could have murdered the victim in retaliation for a robbery the night before. (R. p. 423, ln. 6-8; 425, ln. 12 – 428, ln. 2). On cross examination, the State elicited evidence that at the time of the murder, Montgomery did not have the same physical characteristics as the shooter. (R. p. 429, ln. 2-23). It also elicited testimony that Montgomery was not near the scene of the shooting on the night of the murder. (R. p. 430, ln. 2-4). It thereafter elicited the testimony that Montgomery submitted to the polygraph test and was "cleared by the police." (R. p. 430, ln. 13-24).

Courts across the country have held that this is improper bolstering evidence. For example, the Texas Court of Appeals found that where the State asked the witness if he took a polygraph, and the witness's answer was affirmative, it improperly bolstered the witness testimony:

[1] Nevertheless, as explained above, no inference had to be made, as being "cleared" with respect to a polygraph means "passing" a polygraph.

> [W]e think that the learned trial judge fell into error in not granting appellant's motion for a mistrial. We think it fair to observe that the only reason that anyone would possibly take a lie detector test would be to determine whether or not they were telling the truth. The state not only inquired about a test, the results of which were not admissible, but when it asked the question and received an affirmative reply it no doubt very effectively bolstered the prosecutrix's testimony before the jury. This, we think was highly prejudicial to the rights of the appellant, and the harm done was so great that no instruction from the court could remove it. This testimony in effect revealed the results of the lie detector test and this was inadmissible.

Nichols v. State, 378 S.W.2d 335, 336 (Ct. App. Tex. 1964); *see also* United States v. Marlinga, 2005 WL 1459138, *4 (E.D. Mich. 2005) (polygraph excluded under Rule 403, FRE, because the purpose was to bolster the defendants' claims of innocence); Commonwealth v. York, 486 A.2d 502, 503 (Pa. 1984) (Commonwealth's question to the witness whether he had the occasion to take a polygraph, to which he replied 'yes,' improperly bolstered the testimony of the witness because the question was asked by the Commonwealth's attorney after the witness gave his version of events); People v. Rocha, 312 N.W.2d 657, 661 (Ct. App. Mich. 1991) (evidence that the witness was willing to take a polygraph improperly bolstered the witness's testimony, warranting a new trial).

The Court of Appeals mentioned that the State's asserted purpose for eliciting the above-quoted evidence -- that Montgomery voluntarily took a polygraph and was "cleared" by police -- was to show that Montgomery cooperated with law enforcement. (Appx. 9). However, even if this were true, it is still improper bolstering evidence and was inadmissible when analyzed under Rule 403. Marlinga, 2005 WL 1459138, *4 (polygraph excluded under Rule 403, FRE, because the purpose was to bolster the defendants' claims of innocence); State v. Russell, 2008 WL 201594, *10 (Ct. App. Ohio 2008) (The court acknowledged that it wrongfully upheld the admissibility of evidence of a cooperation agreement that specifically included, over the

defendant's objection, a reference to the witness's willingness to take a polygraph examination. "[W]e were wrong in holding that a witness's willingness to take a polygraph examination may properly be admitted in evidence over objection"); United States v. Hayes, 2007 WL 1594455, *7 (W.D. Vir. 2007) ("The Fourth Circuit has held that the introduction by the government of a plea agreement with a reference to possible polygraph testing constitutes improper bolstering of the witness's testimony and the reference should be redacted before the plea agreement is admitted as evidence") (citing United States v. Herrera, 832 F.2d 833, 835-36 (4th Cir. 1987); United States v. Porter, 821 F.2d 968, 974 (4th Cir. 1987); United States v. Suarez-Milian, 1992 WL 252495, *8 (4th Cir. 1992)). The above-quoted testimony was improperly admitted and it prejudiced the petitioner.

III. Did the Court of Appeals error in finding that the trial court properly denied the petitioner's motion for a speedy trial?

On November 15, 2010, the petitioner responded to a warrant for his arrest by turning himself in to law enforcement. (R. p. 572). On March 24, 2011, the petitioner filed a motion for a speedy trial. (R. p. 4). On July 22, 2011, the petitioner renewed his speedy trial motion and made an oral motion to dismiss the case because he had not been tried. (R. p. 20, ln. 22 – p. 21, ln. 6). The trial court denied the petitioner's motion. (R. p. 24, ln. 203). At the July 22, 2011 hearing, the Assistant Solicitor told the trial court that the petitioner would not be tried in 2011 and the earliest would be spring of 2012. (R. p. 20, ln. 18-21). The trial court denied the petitioner's motions. (R. p. 24, ln. 2-3). On March 26, 2012, the petitioner filed another motion for a speedy trial. (R. p. 6). The petitioner thereafter made a motion in limine to dismiss the case due to speedy trial violations. (R. p. 11; R. p. 49, ln. 3-4). The trial court denied the

motion, finding that the petitioner was not unfairly prejudiced. (R. p. 55, ln. 11-14). The petitioner was tried on March 11, 2013.

"The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed." Dickey v. Florida, 398 U.S. 30, 37, 90 S.Ct. 1564, 1568, 26 L.Ed.2d 26 (1970). In Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972), the United States Supreme Court identified four factors to determine whether a defendant has been deprived of his right to a speedy trial: the length of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

Here, the length of delay was substantial. It was nearly two years from the petitioner's arrest until his trial date. *See* State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). Moreover, in addition to the actual length of delay and type of case, other circumstances fall within the "length of delay" factor. "For example, the First Circuit thought a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony." Barker, 407 U.S. at 531, fn. 31, 92 S.Ct. at 21925, fn. 31, 33 L.Ed.2d 101 (citing United States v. Butler, 426 F.2d 1275, 1277 (1st Cir. 1970). Further, "[i]f the case for the prosecution calls on the accused to meet charges rather than rest on infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh." Dickey, 398 U.S. at 37, 90 S.Ct. at 1568, 26 L.Ed.2d 26. Here, not only was the delay lengthy, but this case also depended on eyewitness testimony and required the petitioner to present a defense. This factor weighs in favor of the petitioner.

In denying the petitioner's motions for a speedy trial, the trial court stated that one of the reasons for the delay is that "it appears to be at least [the petitioner] being unsatisfied with his attorneys." (R. p. 55, ln. 7-9). In so holding, the trial court abused its discretion. There is no evidence that any of the petitioner's attorneys requested a continuance, or indicated that they needed time to get up-to-speed on the case. *See* State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (this Court may conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence). Instead, the petitioner made numerous motions for a speedy trial, and each of them was denied.

The Court of Appeals also incorrectly stated that "[a]n additional reason for the delay was due to [the petitioner] having four attorneys prior to trial." (Appx. 12). However, unlike State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000), on which the Court of Appeals relies, there is nothing in the record here to support the notion that any of the petitioner's attorneys needed substantial time to investigate and prepare. (Appx. 12).

In fact, the record reflects that the petitioner's change of attorneys *could not* have been the reason for the delay, and instead the failure was due to the actions of the State. As recognized by the United States Supreme Court, the "State" does not only encompass the Solicitor's Office, but also includes the Court, Court personnel, and other branches of government. Dickey, 398 U.S. at 51, 90 S.Ct. at 1575, 26 L.Ed.2d 26, J. Brennan, concurring ("If the defendant does not cause the delay of his prosecution, the responsibility for it will almost always rest with one or another governmental authority. The police and prosecutor are not the only governmental officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well . . . And the public officials responsible for delay may not even be

associated with law enforcement agencies or the courts. Delay, for example, may spring from a refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for speedy trials").

Here, the petitioner made numerous requests for a speedy trial. Attorney Carraway initially represented the petitioner from December 2010 until March or early April 2011. He was relieved because he previously represented the victim in a criminal charge. (R. p. 52, ln. 1-6). The petitioner's actions did not cause this conflict of interest. Even if this was not a "true" conflict as asserted by the Assistant Solicitor at the trial, this change of attorney did not cause any delay in the trial date. (R. p. 52, ln. 3-6). Attorney Carraway was relieved very early in the case. Attorney Cezar McKnight was also relieved because he represented the estate of the victim. (R. p. 558, ln. 22-24; 559, ln. 1-2). This was of no fault of the petitioner and there is no indication that this delayed the trial date.

The petitioner made a speedy trial motion on March 24, 2011. (R. p. 4). The petitioner renewed this motion on July 22, 2011. (R. p. 540, ln. 22-25). The Solicitor's Office scheduled a case in September 2011 to go to trial the January 2012 term of court, ignoring the petitioner's July 22, 2011 speedy trial request. (R. p. 556, ln. 17-21). This was not due to any change in the petitioner's attorneys. The Assistant Solicitor indicated that the petitioner's trial would "probably" be set for the spring term of 2012, but never officially set a trial date, nor brought the petitioner to trial the spring of the 2012 term. (R. p. 540, ln. 18-21). Attorney Barr was not relieved as counsel until *after* the 2012 spring term. (R. p. 569, ln. 23). Moreover, on July 1, 2012, the petitioner wrote a letter to the Clerk of Court asking for his trial to be immediately scheduled, regardless of the matter between the petitioner and Attorney Barr. (R. p. 615).

There is nothing in the record to support the conclusion that the failure to schedule the petitioner's trial was due to the petitioner's change in attorneys. There is no evidence that any of the petitioner's attorneys requested a continuance, or indicated that they needed time to get up-to-speed on the case. Instead, the petitioner made numerous motions for a speedy trial, and they were denied. There is no indication that the changes of the petitioner's attorneys caused the delay of the petitioner's prosecution, and there is no indication that the petitioner himself caused the delay of his prosecution. The responsibility rested with the State. *See* Dickey, 398 U.S. at 51, 90 S.Ct. at 1575, J. Brennan, concurring.

The record demonstrates that the State failed to ensure the petitioner's right to a speedy trial. The State's failure "virtually as damaging to the interests protected by the right as an intentional failure." Dickey, 398 U.S. at 51, 90 S.Ct. at 1575, 26 L.Ed.2d 26, J. Brennan, concurring; *see also* State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (holding S.C. Stat. § 1-7-330 unconstitutional and reiterating that "a court's power to hear and decide cases carries with it the inherent power to control the order of its business"). The petitioner asked the trial court if he could be tried in January 2012. (R. p. 557, ln. 17-21). In response, the trial court stated that "I'm not - - I understand your request, but I'm not in control. The Solicitor controls the criminal dockets and they decide what order what goes to trial." (R. p. 557, ln. 22-25). On May 29, 2011, the petitioner wrote a letter to this Court requesting that he be tried. (R. p. 608). This letter was forwarded to the Clerk of the trial court. (R. p. 605). On May 30, 2012, the petitioner wrote a letter to the trial court requesting that he be immediately tried. (R. p. 612). On June 11, 2012, the petitioner wrote a letter to the Clerk of the trial court requesting that he be immediately tried. (R. p. 615). On or about August 27, 2012, the petitioner wrote another letter

to this Court requesting to go to trial. (R. p. 617,620). This letter was forwarded to the Clerk of the trial court. (R. p. 617, 620). Despite the petitioner's continuous efforts, the trial court never set a deadline for the petitioner's trail. (R. p. 541, ln. 7-13). The State never offered an excuse for their conduct. The State was the reason for the delay, and this factor weighs in favor of the petitioner.

It is undisputed that the third factor, the petitioner's assertion of the right, weighs in favor of the petitioner. (Respondent's Brief pp. 29-30). The petitioner asserted his Constitutional right to a speedy trial early in the case and numerous times thereafter.

The petitioner was also unfairly prejudiced. There was no direct physical evidence linking the petitioner to the murder. This was an eye witness driven case. The two eye witnesses who implicated the petitioner at trial, Maurice Smith and Brittany Croskey, were both inconsistent in their testimony and statements.

Maurice Smith was a drug dealer, (R. p. 112, ln. 7-20), who gave inconsistent statements of what happened the night of the murder. In the first statement, given close in time to the night of the murder, Smith never mentioned the petitioner being the shooter. (R. p. 134; ln. 17-25; 135, ln. 1-2). After giving this statement, Smith was charged with drug offenses. (R. p. 136, ln. 14-20). In December 2011, while in custody on the drug charges, Smith and the petitioner got into a verbal altercation. (R. p. 136, ln. 21-25; 137, ln. 1-2). It was not until February 2012 that Smith first implicated the petitioner in the 2010 murder. (R. p. 137, ln. 18-25; 138, ln. 12-14). Smith's implication of the petitioner occurred after the petitioner's numerous requests for a speedy trial. This was undisputed by the respondent.

Brittany Croskey testified at trial that she "assumed" the petitioner was the shooter because he had a specific kind of walk. (R. p. 210, ln. 3-9). However, when law enforcement asked her about the shooter in November 2010, she did not have a feeling who it was. (R. p. 210, ln. 19-25; 211, ln. 1-6). She only began thinking that the petitioner could be the shooter when people started talking around town. (R. p. 211, ln. 7-22). She had no independent knowledge that the petitioner was the shooter. (R. p. 211, ln. 14-22). None of this was disputed by the respondent. In fact, Joseph Sabb, who was the in close proximity to the victim and the shooter at the time the victim was shot, testified that he did not notice anything particular about the shooter's walk. (R. p. 435, ln. 5-7).

The petitioner was prejudiced by witness James Palmer's lack of memory of what the petitioner looked like before he left the house the night of the murder. (R. p. 357, ln. 25; 358, ln. 1-3). This is not disputed by the respondent.

Further, the State's failure hindered the petitioner's relationship with attorney James Hoffmeyer and the petitioner requested that he be relieved. (R. p. 551, ln. 22-25; 552, ln. 1-25; 553, ln. 1-25; 554, ln. 1-25, 555, ln. 1-25; 556, ln. 1-15). At this hearing, the petitioner proposed to keep Attorney Hoffmeyer as his counsel if the respondent would call his case to trial during the January 2012 court term because the trial originally scheduled for that court term was just delayed. (R. p. at 557, ln. 17-25; 558, ln. 1-12). However, the petitioner's request was ignored. Due to this inaction, the petitioner asked Attorney Hoffmeyer to be relieved. (R. p. 559, ln. 4-20). This was not disputed by the respondent.

The only prejudice that the respondent disputed is the unavailability of Elijah Kennedy due to his death. (Response Brief at 31). The respondent did *not* assert that the petitioner was

not prejudiced by Kennedy's death. (Response Brief at 31). It only asserted that the petitioner cannot raise prejudice due to Kennedy's death because he did not raise it at trial. (Response Brief at 31). The Court of Appeals did not consider Kennedy's death finding that it had not been preserved. (Appx. 13).

The prejudice resulting from Kennedy's death is properly before the appellate courts. The petitioner's counsel argued that the petitioner was unfairly prejudiced by the State's delay because this was an eye witness driven case. (R. p. 54, ln. 12-14). This was sufficient to preserve Kennedy's unavailability, as it relates to unfair prejudice due, for appellate review. *See* State v. Brannon, 388 S.C. 498, 502, 679 S.E.2d 593, 595-96 (2010). Even if the fact of Kennedy's death not preserved, as shown above, the record reflects that the petitioner was still unfairly prejudiced.

It was the petitioner's right to meet the charges against him when the case was fresh. The petitioner was continually denied this right.

IV. Did the Court of Appeals error in finding that the trial court properly admitted into evidence the petitioner's statement to law enforcement after he invoked his right to counsel?

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

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

(R. p. 11; R. p. 59, ln. 23-25, 60, ln. 1-8; R. p. 578). At this point, the petitioner's request for counsel was sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *See* State v. Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998); State v. Conner, 821 N.W.2d 267, 273 (Ct. App. Wis. 2012) ("the record makes clear that Conner unequivocally requested an attorney. The first time Conner requested counsel, he said 'I want to talk to ya'll, but I want an attorney present'"); Commonwealth v. Hilliard, 613 S.E.2d 579, 586 (Vir. 2005) (the following exchange was an unequivocal request for counsel: The defendant asked "Can I get a lawyer here? The detective responded "Do you want to do that?" The defendant then stated "I already have a lawyer. I mean, I can talk to you, don't get me wrong. But I just want to make sure I don't, like I said before, just jam myself up").

There was no ambiguity or equivocation in the petitioner's statements. Questioning should have ceased at this point.

The Court of Appeals wrongfully held that the petitioner's statements were not an unambiguous invocation of his right to counsel. (Appx. 15). However, the alleged ambiguity as asserted by the Court of Appeals came *after* the petitioner's unambiguous invocation of his right to counsel. The petitioner did not reinitiate the questioning. (*See* Response Brief at 42; R. p. 83, ln. 7-8). "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards v. Arizona, 451 U.S. 477, 484, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378 (1981). Here, after the petitioner invoked his right to have counsel present during the custodial

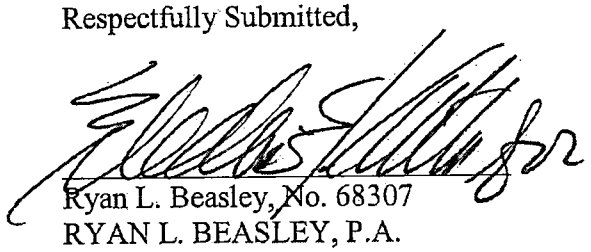
interrogation, law enforcement continued to question the petitioner. (R. p. 578, R. p. 577-578). The petitioner's statement should have not been admitted into evidence.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Dated this 23rd day of May, 2016

Respectfully Submitted,



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