STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Williamsburg County

Honorable George C. James, Circuit Court Judge

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OCT 11 2016

S.C. SUPREME COURT

Opinion No. 2016-UP-403 (S.C. Ct. App. Filed August 24, 2016)

2007-GS-45-0052

THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

PETITIONER

APPELLATE CASE NO 2014-000199

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 23, 2016. App. 23.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's decision to allow Petitioner Moseley, who had a history of mental illness, to represent himself in his murder trial when the judge conducted a very inadequate Faretta[1] questioning after the judge suggested that Moseley could represent himself and continued to emphasize that Moseley had a constitutional right to represent himself after Moseley said he couldn't because it was a murder case?

2. Whether the Court of Appeals erred in affirming the trial court's denial of Moseley's motion to dismiss based on the violation of his Sixth Amendment constitutional right to a speedy trial when the incident occurred in 2001, thirteen years before he went to trial, and eight years after his arrest in 2006?

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

STATEMENT OF THE CASE

On July 9, 2007, The Williamsburg County Grand Jury indicted Arthur Moseley and co-defendants, Corey Liner and Steve Durant, on the charges of murder, attempted armed robbery, and criminal conspiracy. Moseley and Durant were also indicted on the possession of a weapon during a violent crime. On January 21, 2014, Moseley appeared before the Honorable Clifton B. Newman for a pretrial motions hearing. Moseley was represented by Deborah J. Butcher, and the state was represented by Kimberly V. Barr. R. 1. On January 27, 28, and 31, 2014, Appellant Moseley and Liner proceeded to trial before the Honorable George James and a jury on the charges as indicted.[2] Moseley proceeded *pro se;* Liner was represented by Legrand Carraway. The state was represented by Kimberly V. Barr and Tyler B. Brown. R. 1. At the close of the state's case, Liner entered a guilty plea to attempted armed robbery and criminal conspiracy. R. 345, ll. 20 – R. 346, ll. 25. The jury returned verdicts of guilty on the four charges for Moseley. R. 597, ll. 3 – 22. Judge James sentenced Moseley to fifty years on the murder charge; twenty years on the attempted armed robbery; five years on the gun charge; and five years on the criminal conspiracy charge. R. 610, ll. 6 –R. 611, ll. 10. Moseley filed a notice of appeal. The Court of Appeals affirmed Moseley's convictions and sentences on August 24, 2016. State v. Moseley, Op. No. 2016-UP-403 (Ct. App. Filed August 24, 2016). App. 1-4. Appellate counsel filed a petition for rehearing which was denied on September 23, 2016. App. 23. This petition for a writ of certiorari to the Court of Appeals follows.

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[2] The solicitor reported that Steve Durant was deceased by the time of trial. Supp. R 1, ll. 10 – 18.

ARGUMENT

1.

The Court of Appeals erred in affirming the trial court's decision to allow Petitioner Moseley, 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 Moseley could represent himself and continued to emphasize that Moseley had a constitutional right to represent himself after Moseley said he couldn't because it was a murder case.

On March 23, 2001, twenty-two year old Tory York was shot to death in his own yard. The word on the street was that York had stolen half a kilogram of cocaine and money from David Brockington, and that York was killed because of this. R. 397, ll. 3 – R. 399, ll. 3.

The Federal Bureau of Investigation (FBI) conducted a drug investigation of this case and the murder from 2003-2006. However, the case was a cold case until 2006. R. 409, ll. 1 – 8.

In 2003, Agent Flamini received information from ATF that he should talk to Lonnie Dozier about this murder which he did. It was not known who was involved in the murder until Dozier gave a statement to Agent Flamini on August 7, 2003 that Dozier, Liner and Moseley were involved. They heard that York had stolen the drugs and money and the plan was to rob him. Durant provided the gun but did not go with them. The agent did not feel, due to a sense of equity, that Dozier should be charged with this murder since he cooperated. Dozier's sentence for robbery was reduced due to his cooperation in another murder. R. 409, ll. 7- R. 423, ll. 15.

The FBI officially changed the focus of the investigation in March 2005 to Moseley, Liner, and Dozier. The Kingstree Police Department knew of Dozier's interview and had the names of Moseley, Liner and Dozier in 2003 as soon as Agent Flamini interviewed Dozier. The state could still have proceeded with prosecution as the state was under no obligation to the Feds. R. 421, ll. 9 –

R. 427, ll. 8. On July 9, 2007, the Williamsburg County Grand Jury indicted Arthur Moseley and his co-defendants, Corey Liner and Steve Durant, on the charges of murder, attempted armed robbery, and criminal conspiracy.

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

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

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

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

R.13, ll. 25 – R. 14, ll. 10.

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

The judge then placed Moseley under oath and proceeded to determine if he was competent to represent himself. The state reported that Moseley was evaluated by the Department of Mental Health on August 28, 2013 by Dr. Kimberly Harrison. Her opinion was that he competent to stand trial. He was also evaluated for criminal responsibility on the same date and was found to be responsible. The report did not make a finding that he was competent to stand trial which was then left to this judge. The report indicated that Moseley had been receiving disability for mental health issues. He had several head injuries and a stroke. He was diagnosed as being bi-polar and schizophrenic with addiction problems. R. 21, ll. 1 – R. 24, ll. 25.

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

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

scheduled. The judge appointed Ms. Butcher as standby counsel during the trial. R. 32, ll. 1 – R. 42, ll. 25.

The Court of Appeals overlooked the very cursory Faretta questioning the pretrial judge conducted. Moseley did not initiate the issue of representing himself. He did not ask to represent himself. The judge initiated the issue by asking Moseley if he wanted to represent himself. The Court of Appeals overlooked the fact that Moseley did not request to represent himself. The hearing judge asked him if he wanted to represent himself and Moseley said he could not because this was a murder case. The judge told him he could because he had a constitutional right to do so. The judge said he had had three attorneys and was not happy with any.

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

At the beginning of the trial the following week, it was explained that Moseley had written the solicitor about the state's failure to comply with the request for a speedy trial. One reason was the failure for him to be evaluated for competency and criminal responsibility. The solicitor said he was evaluated August 28, 2013 and was found competent. She told of the hearing before Judge Newman the previous week where Judge Newman found Moseley to be competent and criminally responsible. Judge Newman also found him capable of representing himself. R. 74, ll. 16 – R. 76, ll. 11.

Moseley told the court that he had to represent himself in order for his motions to be heard. He needed documents from Belmont Psychiatric Hospital in Philadelphia indicating that he was there at the time of this crime. His standby counsel, who was his most recent attorney, had sent subpoenas to Belmont without a response. The solicitor reported that the competency evaluation report indicated that DMH was unable to get the documents from Belmont because they were in outside storage. R. 188, ll. 4 – R. 193, ll. 5.

The judge then said to the solicitor:

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

R. 193, ll. 6 – 10.

Moseley wanted to present alibi witnesses which included his parents, his former girlfriend, and other witnesses from the federal documents regarding third parties who had information about other suspicious people. He sent those names to the solicitor on the first day of trial. The solicitor argued that she was entitled to proper notice as stated in the rule or at least ten days before trial. Moseley said he did not know of any such rule. When asked, he said he did not designate them as alibi witnesses as he did not know he should do that. The judge asked if he had his girlfriend, Ms. Britt, subpoenaed. Moseley said no as it depended on them. The judge told him that the state would not issue a subpoena for him. R. 179, ll. 14 – R. 194, ll. 10. Moseley then asked;

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

R. 194, ll. 20 – 21.

The judge said yes. R. 194, ll. 22. His mother and stepfather were allowed to testify that they thought he was in Philadelphia during the murder, but were not absolutely certain. R. 374, ll. 18 – R. 387, ll. 17; R. 447, ll. 1 – R. 449, ll. 14.

FBI Agent, Vince Flamini, testified for the defense. When he started to present statements from witnesses he talked to during the FBI investigation, the state objected as hearsay. An in camera hearing was held where Agent Flamini presented the statements of several witnesses. One was from Steve Durant, now deceased who denied giving a gun to any of the defendants. R. 388, ll. 1- R. 395, ll. 24.

Another witness was Arlo Fulton who told Agent Flamini on March 20, 2002, that he saw David Brockington pay Steve Singletary $400 to $600 to kill Tory York. R. 397, ll. 1 – R. 404, ll. 25.

The witness, Don Burgess, told Agent Flamini that Keisha Burgess told him that after the murder, she saw Tony York, brother of the victim Tory York, with blood on his shirt and with lots of drugs. R. 412, ll. 7 – R. 413, ll. 16.

The witness, Ferrell Shaw, told Agent Flamini, that Singletary admitted to Shaw that he killed Tory York and Brockington still owed him money. R. 413, ll. 19 – R. 414, ll. 14.

Moseley told the judge that he wanted to present these statements and Dozier's, to the jury. The judge allowed him to ask questions of Agent Flamini about Dozier. The other statements were hearsay. Moseley did not understand the hearsay ruling which the judge had to explain hearsay. If Moseley had the witnesses present to testify, then he might be able to get their statements in before the jury. The judge ruled that he could not question Agent Flamini about any of those witnesses because they were hearsay. R. 414, ll. 18 - R. 417, ll. 25.

Moseley's mother, Gloria Smith, testified for the defense. She confirmed that Moseley was mentally ill and had been in and out of mental hospitals. She said that he was mentally ill now. She testified that he went to Philadelphia to live with her sister due to his illness in 2000 and returned in 2001. R. 374, ll. 18 –R. 376, ll. 10.

Moseley testified in his own behalf. R. 470, ll. 22 – R. 495, ll. 25. He told the jury that he received SSI disability. R. 489, ll. 1 – 25. When asked about the crime, Moseley said that he was not there. R. 463, ll. 12 – R. 495, ll. 12; R. 481, ll. 1 – R. 482, ll. 21.

The judge said information from one of the witnesses, Ijel York, was hearsay and could not come in. Moseley did not understand why it was hearsay. The judge said that if Ijel York was present, Moseley could ask her these questions, but he could not get it in through a different witness. R. 459, ll. 11 – R. 460, ll. 25.

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

> What do you mean exactly by charges, sir?

R. 510, ll. 1 – R. 512, ll. 1.

The judge then explained jury charges. R. 511, ll. 7 –R. 512, ll. 1.

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

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

trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

The Court in Edwards wrote choosing to forgo counsel presents a very different set of circumstances than the mental competency determination for a defendant to stand trial. The Court pointed out that the "nature of mental illness –which is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways-cautions against using a single competency standard to decide both whether a defendant who is represented can proceed to trial and whether a defendant who goes to trial must be permitted to represent himself.

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

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

Moseley's case is distinguished from Barnes in that Barnes was a capital case. Barnes requested to represent himself. He understood the subpoena process as he asked the judge if he could subpoena witnesses. He finished the eleventh grade and was self-employed. The judge questioned him about specific rules of evidence which he understood. He asked to pursue a third party guilt defense. Moseley did not ask to represent himself. The judge suggested it to him first.

The record shows that Moseley did not understand the subpoena process nor jury charges. He did not understand the rules about hearsay, and lost evidence because of this.

Moseley's case is similar to Edwards in that they both had a history of being diagnosed with schizophrenia. Moseley also had a history of the additional diagnosis of bi-polar disorder. Moseley was receiving SSI disability based on schizophrenia and bipolar disorder. However, at the time of the evaluation in 2013, he was diagnosed with personality disorder not otherwise specified with antisocial features. The evaluation stated: "Personality disorders are defined by persistent and inflexible patterns of thought, emotion, and behavior that are stable over time and lead to subjective distress or functional impairment." Neither case was a capital case. Both had been determined to be competent to stand trial.

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

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

Moseley was prejudiced in several ways by not having legal counsel to represent him. An attorney would have had the witnesses who gave exculpatory statements to FBI Agent Flamini subpoenaed to testify. An attorney could have investigated and pursued a possible defense of third

party guilt. The attorney would have known the rule regarding notice of alibi and the subpoena process and could have had other alibi witnesses available. The attorney would have understood the hearsay rule and possible exceptions such as the admission of guilt by Singletary to Shaw.

Respectfully, the Court of Appeals overlooked these facts that Moseley did not have enough legal knowledge to represent himself. The above examples demonstrate that Moseley missed presenting evidence that was significant to his case. He was prejudiced by the judge allowing him to represent himself in a murder case where was facing a lengthy sentence –potentially a life sentence. App. 1-2.

ARGUMENT

2.

The Court of Appeals erred in affirming the trial court's denial of Moseley'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.

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

In the pretrial motions hearing at the beginning of the trial before Judge James, Moseley made his motion to dismiss for a violation of his right to a speedy trial. He argued that his constitutional rights under the Fifth and Sixth Amendments were violated for lack of speedy prosecution. He tried to file a motion for a speedy trial in April 2013 but was denied access due to his attorney at the time. He filed a speedy trial motion several years before when he had a prior counsel. Moseley argued that he never consented to the continuance in 2007 that Attorney Barr requested. He knew of only one bench warrant issued October 29, 2012. He was in the psychiatric ward of Carolina Hospital in October 2012, and transferred to MUSC in November. The judge denied Moseley's motions. R. 81, ll. 12 – R. 88, ll. 5. It had been eight years since he was arrested. R. 56, ll. 8 – R. 58, ll. 18; R. 61, ll. 15 – R. 62, ll. 16.

After closing arguments, the judge clarified his ruling on Moseley's motion to dismiss for delay in the trial. The judge considered the factors as stated in Barker v. Wingo, 407 U.S. 514

(1972): length of the delay, reason for the delay, Moseley's assertion of his right, and prejudice to the defendant. The judge's ruling was:

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

R. 552, ll. 13 – R. 553, ll. 4.

Moseley told the court that he had no knowledge of Attorney Barr asking for a continuance because Moseley filed a speedy trial motion in 2006. He was at his house in White Oak during the time of the bench warrants. R.551, ll. 1 – 25.

Following the jury verdict, the judge told Moseley that since Moseley had cited Barker v. Wingo, id., regarding the violation of his right to a speedy trial, the judge had examined those factors on the record. That was something that Moseley could put in his new trial motion or appeal or both. R. 609, ll. 10 – 16.

The Court of Appeals misapprehended this issue.

The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial." U.S. Const. amend. VI; see also Klopfer v. North Carolina, 386 U.S. 213 (1967); Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966). Additionally, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy trial." S.C. Const. art. I, § 14. "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense."

State v. Langford, 400 S.C. 421, 735 S.E.2d 471, 481 (2012) (citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). If a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the only possible remedy." Barker v. Wingo, 407 U.S. 514, 522 (1972).

The United States Supreme Court explained "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon the circumstances." Beavers v. Haubert, 198 U.S. 77, 87 (1905). Therefore, the Court explained the appropriate analysis for a speedy trial claim is "a balancing test, in which the conduct of both the prosecution and defendant are weighed." Barker, 407 U.S. at 529.

The Barker Court "identif[ied] some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." Those four factors are the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Id. at 530; see also Doggett v. United States, 505 U.S. 647 (1992); Vermont v. Brillon, 556, U.S. 81, 129 S.Ct. 1283 (2009); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973); State v. Monroe, 262 S.C. 346, 204 S.E.2d 433 (1974); Waites, 270 S.C. at 107, 240 S.E.2d at 653; State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997); State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009).

As an initial matter, a defendant is not required to show prejudice affirmatively to win a speedy trial claim. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6th Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5th Cir. 2009); United States v. Frith, 181 F.3d 92 (4th Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11th Cir. 1996). The Court granted relief to Doggett while noting that he "did indeed come up short" in making "any affirmative showing that the delay weakened his ability to raise

specific defenses, elicit specific testimony, or produce specific items of evidence." As a result, the Court explained "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." In light of the difficult nature of proving prejudice, the Court held that the importance of presumptive prejudice increases with the length of delay. Doggett, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state's negligence and a substantial delay will compel relief unless the presumption of prejudice is either "extenuated, as by the defendant's acquiescence, or persuasively rebutted" by the prosecution. Id. at 658.

As the United States Supreme Court has observed, unreasonable delay threatens to produce more than one sort of harm, including "the possibility that the [accused's] defense will be impaired" by the loss of memories and exculpatory evidence. Barker 507 U.S at 532. The Court observed that loss of memory "is not always reflected in the record because what has been forgotten can rarely be shown." Id. Even a defendant who is not in jail prior to trial is disadvantaged "by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." Id.

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

The reason for the delay was cited by the state as being a continuance which was sought by defense counsel in 2007 when the case was first called for trial. Then the state blamed later delay on

Moseley for not appearing and bench warrants were issued. Moseley claimed he was at home and in the community. No evidence was presented that the state had sought to locate Moseley. The state had no explanation for the five year pre-indictment delay.

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

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application.

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

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

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

with his two stepdaughters. The records from Family Court case had been destroyed, and his original attorney could not be located. Lee had no record of the DSS investigation.

Moseley suffered prejudice due to the pre-indictment delay and the seven year delay following indictment. Some witnesses were deceased. Some were not located. The Belmont Hospital records could not be located. The memories of witnesses were impaired. Moseley suffered prejudice as the Belmont Hospital records were no longer available.

He claimed that he was hospitalized there at the time of the incident. Although he was arrested in Florence on March 17, 2001, it was still possible for him to be in the psychiatric ward of Belmont Hospital on March 23. Moseley's original retained attorney was relieved in 2013 and deceased at the time of trial. He could not be consulted on the case.

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

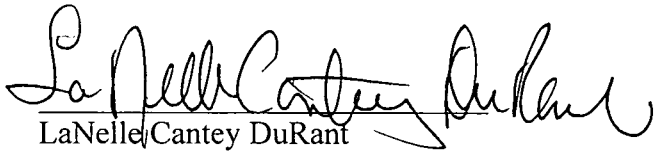
The Court of Appeals overlooked the unusual circumstances of the delay in Moseley's case. App. 2-4. The fact that the case was a cold case with no activity is an extraordinary circumstance that was damaging to any defense Moseley presented. The delay was unreasonable and unnecessary.

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

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County
Honorable George C. James, Circuit Court Judge

Opinion No. 2016-UP-403 (S.C. Ct. App. filed August 24, 2016)
2007-GS-45-0052

THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Arthur Moseley, #199398, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of October, 2016.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day of October, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.