

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Williamsburg County

George C. James, Circuit Court Judge

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

2007-GS-45-0052

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THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

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PETITIONER

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APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Arthur Moseley, Appellant.

Appellate Case No. 2014-000199

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Appeal From Williamsburg County  
Clifton Newman, Circuit Court Judge  
George C. James, Jr., Circuit Court Judge

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Unpublished Opinion No. 2016-UP-403  
Heard June 8, 2016 – Filed August 24, 2016

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**AFFIRMED**

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Appellate Defender LaNelle Cantey DuRant, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, Senior  
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Sumter, for Respondent.

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**PER CURIAM:** Arthur Moseley appeals his convictions and sentences for murder, attempted armed robbery, criminal conspiracy, and possession of a weapon during a violent crime. He contends the circuit court erred in allowing him to represent himself when he informed the court of his history of mental illness. He also maintains his right to a speedy trial was violated when his trial was held thirteen years after the commission of the crime and eight years after his arrest. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the circuit court erred in allowing him to represent himself when he informed the court of his history of mental illness: *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions."); *id.* (holding any criminal defendant may waive his or her right to counsel); *id.* ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta*.<sup>[1]</sup>"); *id.* at 35-36, 753 S.E.2d at 550 ("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)); *id.* at 36, 753 S.E.2d at 550 ("Under *Faretta*, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel."); *id.* (declining "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"); *id.* ("A defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty."); *id.* ("[T]he Sixth Amendment guarantees every criminal defendant the 'right to proceed *without* counsel when he voluntarily and intelligently elects to do so.'" (emphasis added by court) (quoting *Faretta*, 422 U.S. at 807)).

2. As to whether his right to a speedy trial was violated when his trial was held thirteen years after the commission of the crime and eight years after his arrest<sup>2</sup>:

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<sup>1</sup> *Faretta v. California*, 422 U.S. 806 (1975).

<sup>2</sup> The State contends this issue is unpreserved for review on appeal because the bulk of Moseley's argument at trial was based on the federal speedy trial act whereas here he focuses on the Sixth Amendment. Moseley did mention the Sixth

*State v. Palmer*, 415 S.C. 502, 518, 783 S.E.2d 823, 831 (Ct. App. 2016) ("A criminal defendant is guaranteed the right to a speedy trial."), *cert. pending*; *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." (quoting *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008))); *id.* at 441, 735 S.E.2d at 481-82 (stating "[a] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay" (alterations by court) (quoting *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966))); *id.* at 440-41, 735 S.E.2d at 481 (noting the Supreme Court has found the right to a speedy trial different from other rights provided by the Constitution because "'[d]elay is not an uncommon defense tactic' and 'deprivation of the right to a speedy trial does not per se prejudice the accused's ability to defend himself'" (alteration by court) (quoting *Barker v. Wingo*, 407 U.S. 514, 521 (1972))); *id.* at 441, 735 S.E.2d at 481 ("Accordingly, '[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.'" (alteration by court) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905))); *id.* at 441, 735 S.E.2d at 482 (noting some factors courts should consider are "the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered"); *id.* ("[N]one of these factors is 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.'" (quoting *Barker*, 407 U.S. at 533)); *Palmer*, 415 S.C. at 519, 783 S.E.2d at 832 ("These four factors are related and must be considered together with any other relevant circumstances."); *State v. Reaves*, 414 S.C. 118, 129-30, 777 S.E.2d 213, 219 (2015) ("[T]he determination that a defendant has been deprived of this right is

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Amendment at one point when making his argument during trial, and the circuit court denied his motion for dismissal, finding the delay after the time of arrest was due to Moseley's request for continuances and failure to appear. Accordingly, we address this issue on the merits out of an abundance of caution. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) "[I]t may be good practice for us to reach the merits of an issue when error preservation is doubtful . . ."; *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." (alteration by court) (quoting *State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008))), *cert. denied*, 136 S. Ct. 855 (2016); *id.* at 130, 777 S.E.2d at 219 ("The length of the delay serves as a trigger mechanism for the analysis of the other three factors. The delay begins to be measured when a defendant is indicted, arrested, or otherwise accused. . . . However, there is no length of delay which is per se unconstitutional; the right to a speedy trial may be violated where the delay is arbitrary or unreasonable." (citations omitted)); *id.* ("Delays caused by the defendant should weigh against him."); *id.* ("The third factor—assertion of the right—recognizes that while a criminal defendant has no responsibility to bring himself to trial, the extent to which he exercises his right to a speedy trial is significant. This consideration prevents a criminal defendant from strategically acquiescing in a delay which works to his advantage, then asking the case be dismissed at the last moment once it is called for trial. Accordingly, 'the defendant's failure to assert the right, although not conclusive, makes it more difficult to show that the right was violated.'" (quoting *Pittman*, 373 S.C. at 550, 647 S.E.2d at 155) (citation omitted)); *Miller v. State*, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) ("Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.").

**AFFIRMED.**

**HUFF, KONDUROS, and GEATHERS, JJ., concur.**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

APPELLANT

APPELLATE CASE NO 2014-000199

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Appeal from Williamsburg County

George C. James, Circuit Court Judge

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Opinion No. 2016-UP-403

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PETITION FOR REHEARING

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On August 24, 2016, the Court of Appeals affirmed the above named appellant's convictions and sentences. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant Moseley raised two issues on appeal: (1) the trial court erred in allowing Appellant Moseley, who had a history of mental illness, to represent himself in his murder trial

when the judge conducted a very inadequate Faretta<sup>1</sup> questioning after the judge suggested that Appellant 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) the trial court erred 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.

On Issue One, this Court cited State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014), for the proposition that a South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions, but a defendant may waive his right to counsel. The Court then cited Faretta v. California, *supra*, for the rule that the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel. This Court continued to cite Faretta where that court refused to impose a higher competency for an individual who desires to waive his right to counsel and represent himself than for defendants who waive other constitutional rights.

On Issue Two, this Court cited State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) for the rule that a court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion which occurs when the trial court's decision is based on an error of law or factual findings without evidentiary support. This Court cited Beavers v. Haubert, 198 U.S. 77, 87 (1905) that held that the right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. This Court then cited State v. Reaves, 414 S.C. 118, 129030, 777 S.E.2d 213 (2015) for the holding that the determination that a defendant has been deprived of this

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<sup>1</sup> Faretta v. California, 422 U.S. 806 (1975).

right is not based on the passage of time but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.

Respectfully, this Court misapprehended the issues.

**Issue One:** 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.

This Court 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. This Court 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. 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 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 this 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 by not having legal counsel to represent him in several ways. 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, this Court 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.

**Issue Two:** 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 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. He argued that it h 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, our state 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 (6<sup>th</sup> Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5<sup>th</sup> Cir. 2009); United States v. Frith, 181 F.3d 92 (4<sup>th</sup> Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11<sup>th</sup> 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 (4<sup>th</sup> Cir.), cert. denied, 498 U.S. 1016, 111 S.Ct. 590 (1990); United States v. Automated Medical Laboratories, Inc., 770 F.2d 399 (4<sup>th</sup> 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.

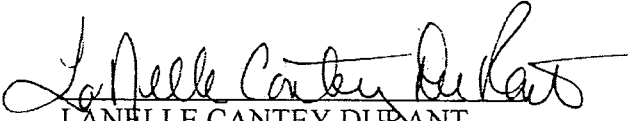
Under the second factor from Brazell, the state offered no explanation for the five year pre-indictment delay.

This Court overlooked the unusual circumstances of the delay in Moseley's case. 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.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Moseley's case for a new trial.

Respectfully Submitted,

  
LANELLE CANTEY DURANT  
Appellate Defender

This 2nd day of September, 2016.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable George C. James, Circuit Court Judge

THE STATE,

RESPONDENT,

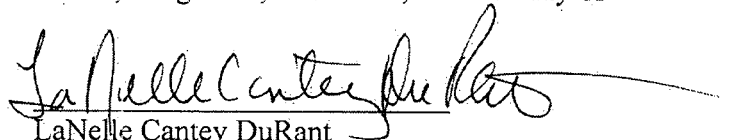
V.

ARTHUR MOSELEY,

APPELLANT

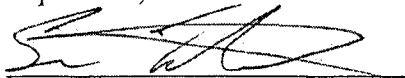
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon 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 2nd day of September, 2016.



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day of  
September, 2016.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Arthur Moseley, Appellant.

Appellate Case No. 2014-000199

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

*Thomas E. Luff* J.  
 \_\_\_\_\_  
*A. Ke* J.  
 \_\_\_\_\_  
*John W. McIntosh* J.  
 \_\_\_\_\_

Columbia, South Carolina

cc:  
 Alan McCrory Wilson, Esquire  
 Donald J. Zelenka, Esquire  
 LaNelle Cantey DuRant, Esquire  
 W. Edgar Salter, III, Esquire  
 John W. McIntosh, Esquire

RECEIVED  
 SEP 23 2016  
 APPELLATE COURT OF APPEALS  
 SOUTH CAROLINA

**FILED**  
 September 23, 2016

Ernest Adolphus Finney, III, Esquire  
The Honorable George C. James, Jr.  
The Honorable Clifton Newman