

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR MOSELEY,

APPELLANT

APPELLATE CASE NO. 2014-000199

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err 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 Faretta¹ 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. Did the trial court err in denying Appellant's motion to dismiss based on the violation of his Sixth Amendment constitutional right to a speedy trial when the incident occurred in 2001, thirteen years before he went to trial, and eight years after his arrest in 2006?

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. This appeal follows.

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

STATEMENT OF FACTS

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. FBI Agent Vince Flamini had a statement from Arlo Fulton who allegedly saw Brockington pay Steve Singletary \$400 to \$600 to kill Tory York. R. 400, ll. 6 – R. 404, ll. 25. However, the investigation concluded that Singletary not involved in the murder. 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.

Lonnie Dozier testified for the state. His story was that he was granted immunity from prosecution of this murder because he cooperated. Agent Flamini told him that the information he provided about York's murder could not be used against him. Dozier told Agent Flamini that he, Moseley, and Liner were all present at the killing of York. R. 133, ll. 1 – R. 134, ll. 20.

Dozier's details were that the three of them met at Steve Durant's house. Durant told them about York's robbing "Little D" of drugs. Durant gave a gun to Liner and then the three of them went to York's house to rob him. When they arrived, Liner, who was the driver, was talking to York while all three of them were still in the car. Moseley picked up the gun from the center armrest, and walked around the front of the car. Moseley shot York several times. Dozier and Liner were shocked because shooting York was not part of the plan. R. 113, ll. 1 – R. 134, ll. 20.

Shannon Coker was an investigator with the Williamsburg Sheriff's Department. He went to the scene and recovered a .38 bullet from the house next door. It was sent to SLED. There were no non-participant eyewitnesses to the crime, and it went unsolved for many years. They received word of Moseley's involvement from the FBI in 2006. R. 227, ll.- R. 237, ll. 18.

Investigator Coker testified that Dozier was granted immunity from prosecution on giving the information he provided. R. 266, ll. 13 –R. 267, ll. 2.

The firearm experts from SLED, Vello Paavel, reported that no firearm was ever submitted for testing. The bullet was too damaged to tell what kind of firearm fired it. R. 268, ll. 23 – R. 271, ll. 16; R. 278, ll. 15 –R. 284, ll. 25.

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 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.

The solicitor said the case was first called for trial in 2007 when Attorney Verdell Barr was Moseley's attorney. At that time, Attorney Barr asked for a continuance. Rule 5 disclosure of forty-two documents was made in October 2007 to Mr. Barr. Mr. Barr asked to be relieved in October 2012 but died thereafter. Attorney Amanda Shuler of the Public Defender's Office was appointed then. The solicitor "believed" Mr. Barr gave the discovery to Ms. Shuler. When Ms. Butcher was appointed in July 2013 to represent Moseley, the solicitor "assumed" Ms. Shuler gave the discovery to Ms. Butcher. R. 6, ll. 24 – R. 12, ll. 21.

The solicitor stated that bench warrants were issued against Moseley for failure to appear several times. He was picked up the end of 2012. Moseley argued that he was at his home in White Oak and did not know of bench warrants. R. 11, ll. 1 – R. 13, ll. 14.

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 my self 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.

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.

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 had been eight years since he was arrested. R. 56, ll. 8 – R. 58, ll. 18; R. 61, ll. 15 – R. 62, ll. 16.

Moseley filed a motion to dismiss July 3, 2013. R. 63, ll. 21 – R. 65, ll. 6. he again argued to the judge that his case should be dismissed because it was not tried in a speedy fashion. R. 67, ll. 1 – 25. His right had been violated by presumptive prejudice. He was arrested January 31, 2006 and indicted July 2007. The solicitor could not explain the delay of the first five years except that the investigation focused on another person named Steve “Rab” Singletary. It was determined by the FBI investigation that Moseley was the guilty party. R. 68, ll. 1 – R. 69, ll. 19.

Moseley named two witnesses who saw Tony York, brother of the deceased Tory York, with blood on his shirt and with lots of drugs on the night of the murder. This was in a statement the witness gave to the FBI in March 2002. She was the driver when they stole the drugs from Brockington. There was another witness, Andy White who was the cousin of the victim, who also saw Tony York with blood on his shirt because he asked Andy White for another shirt. R. 59, ll. 1 – 19.

When the judge asked the solicitor about this exculpatory evidence, she confirmed what Moseley had presented which came out during the FBI investigation. She did not know where Tony York was. He could be local. The solicitor had had no contact with the witness who saw Tony York with blood on his shirt. Moseley said her name was Keisha Burgess. R. 71, ll. 1 – R. 73, ll. 7.

The solicitor stated the case was first called for trial November 2, 2007 after she had delivered the discovery under Rule 5 to Attorney Verdell Barr. The case was continued then at the request of defense counsel Barr. Bench warrants were issued for Moseley in 2007, 2008, 2009, and 2010. He was picked up at his home or a relative’s home in December 2012 or January 2013. R. 73, ll. 1 – R. 74, ll. 14.

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 competent and criminally responsible. Judge Newman also found him capable of representing himself. R. 74, ll. 16 – R. 76, ll. 11.

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.

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.

Moseley called Investigator Shannon Coker. When Moseley asked him if during his investigation he learned of anybody leaving the scene with a bloody shirt who had braids and gold teeth, the state objected to hearsay. An in-camera hearing was held. Investigator Coker said there was nothing in his notes about that. Moseley produced statement that a person named Ijel York gave to Shannon Coker on October 30, 2001. In this statement, Ijel York stated that she was at the victim's house on the day he was killed. Several men were there arguing with the victim about money. "Little D" (David Brockington), who was the

person allegedly robbed by Tory York of drugs and money, drove up in his green expedition. Ijel left to get her hair done. As she was on her way back, she heard shots coming from Thorn Street where the victim lived. Then she saw the green expedition pass by on Thorn Street. She also was present later when she heard Andy White say he saw Tony York with blood on his shirt. Investigator Coker never talked to Andy White. R. 450, ll. 1 – R. 458, ll. 19.

The judge said all of this by 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.

The state called a reply witness, Lewellyn Jordan, who was a police officer in Florence in March 2001. He stopped Moseley on March 17, 2001 for driving 65 mph in a 45 mph zone. He was arrested and taken to the Florence County Detention Center for driving while his license was suspended. Mr. Jordan presented no evidence as to how long Moseley was incarcerated. R. 496, ll. 8 –R. 507, ll. 24.

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.

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 absencing 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.

ARGUMENT

The trial court erred in allowing Appellant Moseley to represent himself in his murder trial when he explained that he had a history of mental illness and received Social Security disability based on mental illness.

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 at trial.

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 bipolar 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. 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.

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.

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.

ARGUMENT

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.

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). However, “none of the four factors identified [are] a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial.” Barker, 407 U.S. at 533.

In order to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial “has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” Doggett, 505 U.S. at 652 (quoting Barker, 407 U.S. at 530-531).³ The length of the delay that will trigger the inquiry is dependent upon the peculiar circumstances of the case. Barker, 407 U.S. at 530-531. Generally, the delay tolerated for an ordinary street crime is less than for a serious, complex conspiracy charge. Id. at 531.

The Barker Court found a delay between arrest and trial of well over five years to be clearly “extraordinary.” Barker, 407 U.S. at 533. Although seven months of that period was excused by the illness of a witness, the delay of “more than four years was too long a period.” Id. at 534. In Doggett, the Supreme Court noted that, depending on the nature of the charges, lower courts have generally found post-accusation delay “presumptively prejudicial” as it approaches one year. Doggett, 505 U.S. at 652; see also State v. Cooper,

³ “The clock begins running on a defendant’s speedy trial right when he is ‘indicted, arrested, or otherwise officially accused.’” Langford, 400 S.C. at ___, 735 S.E.2d at 482 (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982)).

386 S.C. 210, 217, 687 S.E.2d 62, 66 (Ct. App. 2009). The South Carolina Supreme Court found a two-year and four-month delay sufficient to trigger further review. Waites, 270 S.C. at 108, 240 S.E.2d at 653. The Court found a twenty-three month delay presumptively prejudicial where the charges were serious, but the factual proof was not complicated. Langford, 400 S.C. 421, 735 S.E.2d at 482. Our Court also found a three year and five month delay sufficient to trigger the analysis. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997). This Court affirmed a circuit court's decision that a delay of forty-four months triggered the speedy trial inquiry. State v. Cooper, 386 S.C. 210, 216-217, 687 S.E.2d 62, 66-67 (Ct. App. 2009)

The second factor concerns the reason for the delay. The Supreme Court has afforded different weights to the different reasons for the presumptively prejudicial delay. On the far end of the spectrum is a deliberate delay by the prosecution to impede the defendant's ability to defend himself. A prosecutor acts improperly if he intentionally delays a trial to gain some tactical advantage over a defendant or to harass a defendant. Barker, 407 U.S. at 531, n. 32 (citing United States v. Marion, 404 U.S. 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957)). Such a reason should be weighted heavily against the prosecution. Even neutral reasons weigh against the state because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531.

Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's

trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned to a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett, 505 U.S. at 657. Obviously, delays contributed to the defendant's conduct weighs against him. Brillon, 556 U.S. at ___, 129 S.Ct. at 1290.

The third factor of the speedy trial analysis is the defendant's assertion of his right to a speedy trial. According to the Supreme Court, "[w]hether and how a defendant asserts his right is closely related to the other factors" because the strength of his efforts will be affected by the other factors. Barker, 407 U.S. at 531-532.

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 as the Belmont Hospital records were no 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.

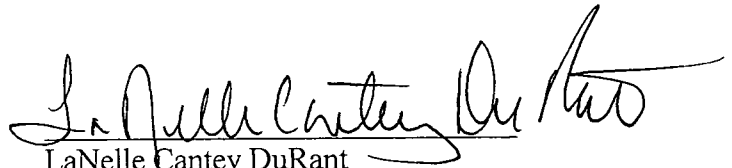
Under the second factor from Brazell, the state offered no explanation for the five year pre-indictment delay.

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 Issue One, Appellant's convictions and sentences should be reversed and the case remanded for a new trial. Based on Issue Two, the case should be dismissed.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

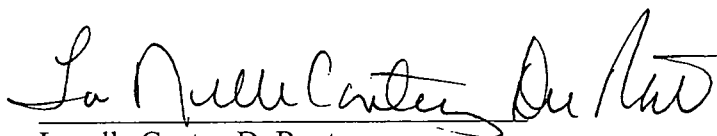
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This 27th day of January, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

January 27, 2016

A handwritten signature in black ink, reading "Lanelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

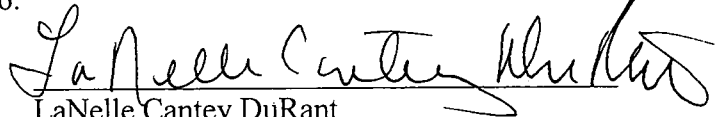
V.

ARTHUR MOSELEY,

APPELLANT

CERTIFICATE OF SERVICE

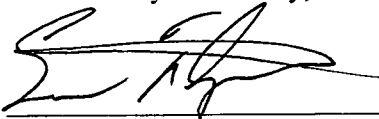
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of January, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

RECEIVED

Appellate Case No. 2014-000199

JAN 28 2016

SC Court of Appeals

THE STATE,

Respondent,

vs.

ARTHUR MOSELEY,

Appellant.

FINAL BRIEF OF RESONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in allowing Appellant, who had a history of mental illness to represent himself in his murder trial when the judge conducted a very inadequate *Faretta* questioning after the judge suggested that Appellant could represent himself and continued to emphasize that Appellant had a constitutional right to represent himself after Appellant said he couldn't because it was a murder case?
2. Did the trial court err in denying Appellant's motion to dismiss based on the violation of his Sixth Amendment constitutional right to a speedy trial when the incident occurred in 2001, thirteen years before he went to trial, and eight years after his arrest in 2006?

COUNTER STATEMENT OF ISSUES ON APPEAL

1. Did the motions hearing judge err by finding that Appellant voluntarily, knowingly and intelligently waived his right to counsel under *Faretta* because his finding was supported by the record, notwithstanding possible evidence of mental illness, since the South Carolina Supreme Court has expressly declined the requirement of a higher competency standard for waiver of the right to counsel than competency to stand trial and the record supports the finding that he was competent to stand trial.
2. Is Appellant's claim of a Sixth Amendment speedy trial violation properly before this Court on appeal because it was not raised at trial? Also, whether the trial judge abused his discretion by denying Appellant's motion to dismiss for violation of the Federal Speedy Trial Act because that act does not apply to state court prosecutions?

STATEMENT OF THE CASE

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

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

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

¹ Steve Durant was deceased by the time of trial.

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

Moseley timely served and filed a notice of appeal.

ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFENDANT: I'll represent myself, sir.

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

DEFENDANT: Yes, sir.

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

DEFENDANT: Yes, sir.

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

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

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

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

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

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

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

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

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

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

In summary, [Appellant] currently possesses the capacity to understand the legal proceedings against him and to assist in his own defense.

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

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

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

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

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

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

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

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

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

Judge Newman found that:

the record ... contains a diagnosis, information related to criminal responsibility, and the opinion of the evaluators who evaluated your situation. And the conclusions of the doctor[s] who saw you said, [in] their view, that you are competent to stand trial. That you demonstrated some factual understanding of courtroom personnel and legal procedures, and the ability to learn and recall information relevant to your case. You appeared to have an adequate rational appreciation of your legal situation, and the ability to evaluate your options in a logical manner. He did not exhibit any overt difficulties with memory, attention, or concentration. You have the ability to work with your returning control your behavior if you choose to do so. There is no evidence your behaviors, thought process ability, or ability to communicate are currently influenced by mental disorders and, therefore, you have the capacity to stand trial. And similarly, based on the evaluation, [you] have the ability to conform your conduct to the requirements of the law.

So, taking into consideration your medical records that you gave me, the medical records from the mental health department, and our communications here today, I find that you are competent to stand trial, and that you are legally responsible for any act that you may be found guilty of committing because you had the capacity to conform your conduct to the requirements of the law.

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

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

- Appellant understood the dangers of self-representation;

- he understood that he was charged with most serious crimes, including murder;
- he understood that the sentencing range for the crime of murder was between thirty years imprisonment and life imprisonment;
- he understood that he could receive up to five years imprisonment for possession of a weapon during a violent crime;
- he understood that if he represented himself, then the trial judge would not be able to advise him as to how to try the case and could not provide any advice, whatsoever, to him;
- he was able to give a plausible definition of “the rule against hearsay” as “basically he say, she say I saw him do this and that, whatever basically;” and
- he understood that the trial judge would rule on objections made by him or the State relating to questions of hearsay.

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

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

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

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

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

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

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

- he understood that an attorney could help him with the matters that the judge had discussed with him, including the rules of evidence, the rules of criminal procedure and presenting his defense;
- he understood that this was the reason why Ms. Butcher and others had been appointed to represent him; and
- he understood Judge Newman's opinion that "you'd be far better in defending yourself by a trained lawyer than you, despite your own personal view of your own wisdom. That you'd be better defended by a lawyer representing you rather than you attempting to represent yourself."
- he also understood that Judge Newman thought that it was "unwise of you to try to represent yourself because though you may have been exposed to some books and cases and all that, you do not seem to be sufficiently familiar with the rules and procedures and all to represent yourself as well as you can be represented by a lawyer;" and
- he understood that Judge Newman "strongly urge[d]" him to not attempt to represent himself, but to "take advantage of the assistance of a lawyer and ... to direct whatever input you might have through the lawyer."

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

The following exchange occurred immediately thereafter:

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

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

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

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

THE COURT: I like to watch it myself sometimes.

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

THE COURT: All right. Sure, sure.

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

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

(OFF THE RECORD.)

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

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

THE COURT: All right.

DEFENDANT: I'll represent myself.

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

DEFENDANT: Voluntary on myself, sir.

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

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

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

B. Discussion.

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

States Constitution for a trial judge to “take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. *Id.* at 177-78, 128 S.Ct. at 2387-88.⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: So ... you say the case should be dismissed because you were tried not in a speedy fashion?

THE DEFENDANT: Yes, sir, that also, sir.

THE COURT: All right.

THE DEFENDANT: Then move to dismiss once that period expires or merely move to dismiss if the statutory period expires by trial date

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

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

THE DEFENDANT: Yeah.

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

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

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

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

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

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

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

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

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

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

Tr. p. 117; R. p. 74.

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

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

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

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

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

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

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

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

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

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

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

B. Discussion.

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

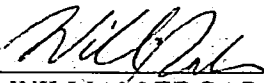
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January 28, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2014-000199

THE STATE,

Respondent,

vs.

ARTHUR MOSELEY,

Appellant.

CERTIFICATE OF COMPLIANCE

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

This 28th day of January, 2016.


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Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

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

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

This 28th day of January, 2016.



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