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S.C. SUPREME COURT

June 5, 2017

The Honorable Scott S. Harris
Clerk, United States Supreme Court
1 First Street, NE
Washington, DC 20543

Re: State of South Carolina v. Alexander L. Hunsberger
No. 16-1142

Dear Sir:

Enclosed for filing are forty (40) copies of South Carolina's Reply Brief of Petitioner in the above-referenced case; a certificate of compliance; and, a certificate of service. Thank you for your assistance in the filing of these documents.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

Enclosures

cc: Susan Barber Hackett, Appellate Defender
The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina
The Honorable S.R. Hubbard, III, Solicitor, Eleventh Judicial Circuit
Trisha Allen, Victim Services, Office of the Attorney General, State of South Carolina

No. 16-1142

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

ALEXANDER L. HUNSBERGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

In the Brief in Opposition, Respondent Hunsberger hunkers down behind a familiar litany of non-cert-worthy misfits: he alleges a factbound case limited in reach; and, a case where an alternate state law basis supports the judgment. He is absolutely correct such things make a petition less worthy of review. He is absolutely wrong they apply to this case. This case presents a clean, strong vehicle for resolution of fundamental legal error in application of federal law. Most troubling to Respondent's effort to push the Court away from granting the petition is that the record and state court opinion fail to support his assertions.

Petitioner, State of South Carolina, makes the following brief points in reply to the Brief in Opposition:

I.

Respondent Hunsberger's suggestion the Court should deny the petition as factbound is incorrect. The questions presented are narrowly drawn questions of law neither calling for nor requiring new or different factual determinations.

Respondent's suggestion the matter is fact-bound misconstrues the state court opinion and the relief sought. Any matter involving a speedy trial

question will turn on its facts: “A balancing test [as required in analysis of a speedy trial violation claim] necessarily compels courts to approach speedy trial cases on an ad hoc basis.” *Barker v. Wingo*, 407 U.S. 514, 530 (1972). However, it is the state supreme court’s failure to faithfully apply *Barker* to the established facts of record that is the nub of Petitioner’s complaint. See *Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (noting “the balance arrived at in close cases ordinarily would not prompt this Court’s review. But the Vermont Supreme Court made a fundamental error in its application of *Barker* that calls for this Court’s correction.”)

Further, Petitioner does not agree with all of the factual assertions and/or inferences therefrom as presented in the Brief in Opposition; however, Petitioner does not bring this case to this Court for determination of the facts. Neither the Petitioner nor the dissenters contest the relevant facts, or even encourage disagreement about the facts. (See, for example, Petition, p. 4 (“not the facts at issue, but the legal inferences that could be properly drawn from those facts”; Petition App. p. 25 (dissent disagreeing only with the majority’s failure to adhere to *Barker*). Rather, Petitioner, like the dissent, submits the majority parted ways with the clear direction of this Court’s precedent on consideration of the legal impact of those facts of record.

A prime example of such departure is the

shocking full excuse of Respondent's failure to assert the right to a speedy trial for *seven* years – an inexplicable gift in direct conflict with this Court's precedent. The majority wrote:

... we hold that under the circumstances of this case, including the fact that Alex's appeal from his 2006 Georgia conviction was still unresolved when the State sought extradition in 2011, *his failure to press his right during this period is understandable*. While Alex's assertion of his right to a speedy trial three times was sufficient to demonstrate Alex's desire for a speedy resolution of his charges, we find *his seven-year silence renders this factor largely neutral in our overall evaluation*.

(Petition App. p. 16) (emphasis added).¹ There is no

¹ The majority included Respondent's two demands for dismissal at the 2012 trial as assertions of the right. (Petition App. pp. 8 and 16).

citation to authority at all in support of this declaration.

In stark contrast, supported by this Court's well-established precedent, the dissent wrote: "In my opinion, [his] failure to assert his right during this time period weighs against him." (Petition App. p. 28). The dissent cited to cases relying on this spot-on quote from *Barker*: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532. (See Petition App. pp. 28-29).

This is not a hopelessly factbound matter. The facts are plain, clear and well-developed for the Court's consideration of the legal error. Further, the basis for asserting legal error is also plain, clear and well-developed. It would be a mighty task to find even a scintilla of support in *Barker* for the generous excuse bestowed by the majority – it simply is not there.

Even so, Respondent offers no retreat in his brief, but demands his remedy. However, had he demanded his right during those seven years of silence, he could have received exactly what the right exists to secure – trial, not dismissal and immunization from retrial.² It is fundamental error

² In curious objection to the use of the references to "immunity" in the Petition, Respondent appears to attempt to

by the state supreme court in application of *Barker* to fail to consider, and weigh heavily, a failure to assert the right for seven years. Moreover,

downplay the immunization from retrial. (Brief in Opposition, p. 11 n. 8). It is surely without question at this point in time that it is the immunization from retrial that makes the remedy particularly harsh:

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Barker, 407 U.S. at 522; see also *id.*, at n. 16 (“Mr. Justice White noted in his opinion ... in [United States v.] Ewell, 383 U.S. [116 (1966)] at 121 ... that overzealous application of this remedy would infringe ‘the societal interest in trying people accused of a crime, rather than granting them immunization because of legal error....’”). As such, a grant of immunity upon finding a violation of the right to a speedy trial must be carefully considered in a specific weighing of evidence of intent, demand for the constitutional right, and measurable harm in the specific case at issue. *Id.* The Supreme Court of South Carolina failed to faithfully apply the *Barker* factors to effect the mandated considerations.

Respondent omits any reference to the fact that he not only could assert his right, but could have demanded return under the Interstate Agreement on Detainers (IAD) – he simply does not address this equalizing power at all.

“A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice.” *State v. Johnson*, 167 S.E.2d 274, 278 (N.C. 1969). To omit consideration of the inaction in the face of known charges is error. To sanction such would lead to the abhorrent result of mechanically imposed windfalls due to delay alone.

Moreover, it is routinely recognized that this Court’s precedent instructs not just consideration, but heavy weight, must be given this factor. *See, e.g., Rashad v. Walsh*, 300 F.3d 27, 40 (1st Cir. 2002) (“... petitioner failed to seek a speedy trial with anything remotely approaching diligence. This counts significantly in the speedy trial calculus.”); *United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) (“We are unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire”); *United States v. Tchibassa*, 452 F.3d 918, 926 (D.C. Cir. 2006) (“failure to make any effort to secure a timely trial ... (and his apparent desire to avoid one) manifests a total disregard for his speedy trial right”). The inexplicable failure of the Supreme Court of South Carolina to give weight to this factor

cannot be considered anything other than clear legal error.

Moreover, while relying on this Court's opinion in *Doggett* to excuse his failure to demand trial for seven years, (see Brief in Opposition, pp. 22-23), Respondent fails to address the key component for assessing little to no weight to this factor – knowledge:

... The Government goes against the record again in suggesting that Doggett knew of his indictment years before he was arrested. Were this true, Barker's third factor, concerning invocation of the right to a speedy trial, *would be weighed heavily against him.* ... the trial and appellate courts were entitled to accept the defense's unrebutted and largely substantiated claim of Doggett's ignorance. Thus, Doggett is not to be taxed for invoking his speedy trial right only after his arrest.

Doggett v. United States, 505 U.S. 647, 653–54 (1992) (emphasis added).

Finding a failure to demand trial when a defendant does not know he is to be tried is grounded in fairness – excuse in the face of such knowledge is not.

Further, though Respondent speaks in terms of a factbound and case-specific resolution, the one fact that he consistently returns to and relies upon is the length of the delay. (See Brief in Opposition, pp. 1, 16, 20 and 22-24). It is the failing of the majority opinion, as well. The simple passage of time does not a constitutional violation make. *Barker*, 407 U.S. at 523 (“We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.”). The dissent, in line with this Court’s precedent, properly concluded the “mere passage of time is not enough to find prejudice in this case.” (Petition App. pp. 29-30). The majority erred.

In sum, to the extent Respondent attempts to suggest the petition presents factbound questions not appropriate for certiorari review, that assertion is not supported by the record or the opinion. Moreover, neither *Barker* nor *Doggett* support the conclusion Respondent’s failure to assert his right for seven years could be a “neutral” factor in light of his knowledge of the charges. This case is well-suited for review.³

³ Petitioner largely leaves unaddressed many of the misstatements in the brief in opposition as they are not relevant to the fundamental legal errors at issue; however, several assertions require comment. In one note, (see Brief

in Opposition, p. 21 n. 15), Respondent asserts Petitioner's "suggestion" is that if the Barnes capital trial had resulted in a life sentence, then "the state *would* have sought to kill Alex...." (emphasis in original). That is a grievous misstatement of the State's position. The logical argument actually suggested was the most culpable defendant should be tried first in capital proceedings, *ergo*, if the most culpable defendant did not receive the death sentence, death would likely *not* be sought against a less culpable defendant. This just makes sense. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). Then, in the same note, there is a pointed attack not just upon the prosecution, but toward a single prosecutor. While demonstrating a great deal of zeal against capital punishment, Respondent's argument does nothing to support the state court's determination on a matter of Sixth Amendment law.

Additionally, Respondent's brief misdirects attention to the concept of docket control over non-capital cases, then asserts this is likely a one-case error as state law has changed. (Brief in Opposition, pp. 15-17). First, his argument concedes error in the opinion. Second, this is not a state docket control matter, but one involving the Sixth Amendment. Respondent's argument does not help him.

Respondent also makes rather expanded reference to co-defendant Barnes' separate appeal proceedings. (See Brief in Opposition, p. 4 n. 6). If the Court is curious as to what happened in the unrelated matters, the State welcomes review of the opinions: *State v. Barnes*, 753 S.E.2d 545 (S.C. 2014); and, *State v. Barnes*, 774 S.E.2d 454 (S.C. 2015). The dissent in the 2015 opinion succinctly summarized the cases:

We reversed on [direct] appeal, finding the judge erred in applying the [*Indiana v. Edwards* competency standard

to Respondent's [Barnes'] request to waive his right of counsel and proceed *pro se*.

Now that he has been granted a new trial on this basis, Respondent is requesting counsel. In my opinion, he cannot have it both ways. Therefore, I would find that Respondent has waived his right to counsel in his second trial because he already had a trial where he was represented by counsel. ... Respondent's conduct here should be examined for what it is: an effort to manipulate the system and pollute the administration of justice.

Barnes, 774 S.E.2d at 413 S.C. at 458 (Toal, C.J., dissenting) (citations omitted). Of note, it was defense counsel who used *Indiana v. Edwards*, 554 U.S. 164 (2008), to argue his client's waiver should be rejected. Barnes is still awaiting retrial. On December 8, 2016, new trial counsel filed a status letter in the Supreme Court of South Carolina noting the State was ready to proceed but defense counsel held a standing order of protection from another case. By Order dated December 16, 2016, the Court lifted the protection. The protection Order spanned August 2015 through the lifting of the order in December 2016. The retrial preparations are now proceeding. See <http://ctrack.sccourts.org> (2010-178247, Status Updates).

Petitioner maintains, however, the only relevant reference to the Barnes prosecution is the narrow and accepted fact that the State sought to try the most culpable defendant first, which carried with it the delay well-known – and well-bemoaned – in capital cases.

II.

Respondent's suggestion the Court should deny the petition as there is an alternate state law basis for the relief is contrary to the state court's expression it intended to apply a Sixth Amendment analysis.

Respondent Hunsberger additionally argues the Supreme Court of South Carolina's opinion is also based on state law. (Brief in Opposition, pp. 28-30). In marked contrast to this bold assertion, the majority opinion by the Supreme Court of South Carolina is as follows:

Alex argues that his right to a speedy trial under both the United States and South Carolina Constitutions was violated, and therefore, his murder charge should be dismissed. *We analyze the issue under the Sixth Amendment, and agree.*

(Petition App. p. 5) (emphasis added).

It is difficult to quarrel with such a clear expression of intent.

Moreover, given the unmistakable expression in the opinion, Respondent was constrained to admit within his own argument: "...the South Carolina Supreme Court decided his case under the right to a speedy trial contained in the Sixth Amendment to the United States Constitution..." (Brief in Opposition, p. 28). Though the matter was decided wrongly, the state court clearly relied upon federal law as mandating the result.

While the state court could have analyzed the matter under the state constitution, S.C. Const. art. 1, § 14, it chose not to do so. Consequently, the Supreme Court of South Carolina was bound to apply this Court's precedent:

The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court's decisions. But what a state court cannot do is experiment with our Federal Constitution and expect to elude this Court's review so long as victory goes to the criminal defendant.

Kansas v. Carr, 577 U.S. ___, ___, 136 S. Ct. 633, 641 (2016) (citation omitted).

The argument there is a state law basis supporting the opinion, thus certiorari should be denied, lacks merit. *Id.*, (jurisdiction properly before the Court where the “opinion leaves no room for doubt that it was relying on the Federal Constitution”). *See also Brillon*, 556 U.S. at 89 n. 5 (“Notably, the Vermont Supreme Court made no ruling under the State’s own prescription, but instead relied solely on the Federal Constitution. Because it did so, our review authority was properly invoked and exercised.”).

In summation, Petitioner again asserts this is a matter worthy of this Court’s review. It is fundamentally against the core of this Court’s Sixth Amendment speedy trial jurisprudence, and basic concepts of justice, to reverse Respondent’s murder conviction without consideration of the fact that Respondent failed to assert his right for seven years – a fact that must be weighed against relief in these circumstances. It is also fundamentally against the core of this Court’s Sixth Amendment speedy trial jurisprudence, and basic concepts of justice, to grant relief based only on mere passage of time, especially where there was no actual prejudice to the defense, and in light of the fact that the delay was not intentional for the purpose of harming the defense.

Justice calls for Respondent to stand responsible for his actions – both for his acquiescence in the order of trial, and, critically, for the murder of Samuel Sturup. The Supreme Court

of South Carolina committed fundamental error in its analysis finding relief was warranted under the Sixth Amendment.

CONCLUSION

For the reasons in the petition for writ of certiorari and this reply, Petitioner respectfully requests this Court grant the petition, and reverse the Supreme Court of South Carolina.

Respectfully submitted,

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