STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MAURICE A. ODOM,

PETITIONER

APPELLATE CASE NO 2015-001294

Appeal from Edgefield County

Honorable R. Knox McMahon, Circuit Court Judge

Opinion No. 2018-UP-273

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Maurice A. Odom petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that the State bore the burden of proving that a prior conviction qualified as a most serious offense triggering a sentence of life without parole [LWOP]. The State failed to meet that burden. Additionally, counsel respectfully submits that this Court misapprehended the plain language of S.C. Code §17-25-45 (C)(1) which specifically excludes from the list of offenses designated as most serious offenses cases in which "there is evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from

consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3)." The plain language of the statute provides that the prior conviction did not qualify as a most serious offense triggering the LWOP sentence.

In regard to the speedy trial violation, counsel respectfully submits that the Court overlooked the fact that the State's purported reasons for the delay, Petitioner's change in trial counsel and arrests in other counties, do not justify the almost six year time frame between arrest and the first trial and the almost two year delay between the mistrial and the second trial, especially in light of the fact that there is no evidence that Petitioner ever sought a continuance based on changes in trial counsel and the fact that Petitioner at all times during the time frame remained in South Carolina, at many times incarcerated on charges in other counties and easily located. Counsel respectfully submits that the Court overlooked the fact that the cause of the delay should not be attributed to Petitioner and instead should be weighed heavily against the State.

1. **The trial judge erred in sentencing Petitioner to life without parole, pursuant to S.C. Code §17-25-45, for a burglary second degree conviction when a prior conviction for criminal sexual conduct with a minor second degree should not have been considered a most serious offense pursuant to the statute because there is evidence in the record that the conduct was consensual.**

In seeking an LWOP sentence based upon section 17–25–45, the State bears the burden of establishing the defendant's prior convictions for serious or most serious offenses. See State v. Phillips, 400 S.C. 460, 734 S.E.2d 650 (2012); State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003). The State bore the burden of establishing that Petitioner's prior criminal sexual conduct with a minor second degree conviction qualified as a most serious offense. The State failed to meet its burden. The judge erroneously ruled, relying on State v. Payne, 332 S.C. 266, 504 S.E.2d 335 (Ct. App. 1998), that ". . . the defendant bears the burden of proof in collateral –prior

convictions that the State seeks to use in the sentence enhancement statute." (R. p. 439, lines 5-7). The judge's reliance on Payne is misplaced as Petitioner did not challenge the prior conviction for criminal sexual conduct with a minor. Instead, Petitioner challenged whether the conviction qualified as a most serious offense. The trial judge erred in placing the burden on the Petitioner.

The trial judge additionally erred in finding that the prior conviction qualified as a most serious offense and triggered imposition of the LWOP sentence. After conviction but prior to sentencing, Petitioner objected to the imposition of a sentence of life without parole pursuant to S.C. Code §17-25-45. Petitioner argued that the conviction for criminal sexual conduct with a minor second degree should not count as a strike because the conduct was consensual and Petitioner was older than the minor. (R. p. 428, lines 21-25; p. 437, lines 6-14). Petitioner argued, "Your Honor, we would simply stand by the transcript. If you consider that and the memorandum that's been provided to you that said this does not count as a strike. We're not arguing Jessie's Law; we're arguing the **plain language of the statute**. It says where potential criminal sexual conduct occurred where the victim is younger than the actor, then it's not a most serious offense and we believe that is the case that we have here." (R. p. 437, lines 7-14, emphasis added). The trial judge correctly calculated that Petitioner was twenty-one years of age at the time of the incident and the minor was fourteen years of age. (R. p. 440, lines 2-8).

In support of the objection counsel for Petitioner submitted a Memorandum, marked as Court's Exhibit #12 (R. p. 471 - Memorandum in Support of Defense Counsel's Challenge to Sentencing Under SC 17-25-45 (LWOP)) and a transcript from the original guilty plea dated

October 27, 1997[1], marked as Court's Exhibit #11 (R. p. 454- October 27, 1997, Guilty Plea Transcript). The indictment for criminal sexual conduct with a minor second degree, #97-GS-06-365, and the sentencing sheet from the subsequent guilty plea on August 12, 2002, were marked as Court's Exhibit #3. (R. p. 445 - Indictment #97-GS-06-365 and sentencing sheet). The Petitioner also marked an incident report in reference to the criminal sexual conduct with a minor indictment as Court's Exhibit #10. (R. p. 425 - Incident Report).

S.C. Code §17-25-45 (C)(1) lists most serious offenses. Criminal sexual conduct with minors is included in the list of most serious offenses, "except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3)."

At the time Petitioner entered his guilty plea in 2002, and prior to amendments in 2005 and 2006, S.C. Code §16-3-655(3) read, "A person is guilty of criminal sexual conduct in the second degree if the actor engages in a sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim."

The current version of S.C. Code §16-3-655(B)(2) provides that:

> A person is guilty of criminal sexual conduct with a minor in the second degree if: the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older

---

1 This conviction was reversed in Odom v. State, 350 S.C. 300, 566 S.E.2d 528 (2002) overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). On August 12, 2002, Petitioner appeared before the Honorable William P. Keesley, waived presentment of the indictment to the Barnwell County Grand Jury and again pled guilty to Criminal Sexual Conduct with a Minor Second Degree, indictment #97-GS-06-365. The transcript from the subsequent 2002 guilty plea is no longer available. (R. p. 433, lines 3-8).

> than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

The judge acknowledged that the current version of S.C. Code §16-3-655 was not in place at the time of the initial guilty plea in 1996 writing, "Now, I take that although 16-3-655(b) was not the law in '96 when it was heard. The legislature referred to it and asked and, therefore, if I look at the terms of 16-3-655(b), I find that Mr. Odom was not fit in that because he was older than 18 at the time although she might at her age; he was not." (R. p. 442, lines 1-6). The trial judge erred. Petitioner did not argue that pursuant to the current version of §16-3-655(B)(2) he should not have been prosecuted. Instead, relying on the plain reading of §17-25-45, Petitioner argued that because the conduct was consensual and he was older than the minor, the conviction does not constitute a strike for purposes of sentencing.

The judge also erroneously relied on Judge Keesley's sentencing order requiring that Petitioner register as a sex offender in determining that the conduct was not consensual. (R. p. 442, line 7 – p. 443, lines 1-3). Sex offender registry and consensual conduct are not mutually exclusive. At age twenty-one Petitioner had consensual sexual conduct with a fourteen year old. While the conduct is illegal and Petitioner is required to register as a sex offender, pursuant to §17-25-45, the conviction is not a most serious offense.

The judge finally ruled that there was not sufficient evidence in the record to establish that the conduct was consensual. (R. p. 443, lines 1-12). As discussed above, the State bore the burden of establishing that the prior conviction for criminal sexual conduct with a minor second degree was a most serious offense as defined by §17-25-45. The State failed to meet its burden. In the incident report marked as Court's Exhibit #10 the investigator wrote, "Victim stated that she had had sex with subject on three different occasions; once in June of 1996, once in August of 1996." (R. p. 425

Incident Report). The investigator also wrote in the report that Petitioner admitted that he had sex with the victim three times but she led him to believe that she was nineteen years old. (R. p. 425, Incident Report). The police were contacted after the minor learned that she was pregnant. In the transcript of the original guilty plea, marked as State's Exhibit #11, the Assistant Solicitor told the judge, "Mr. Odom had an ongoing relationship with a fifteen-year-old juvenile. She became pregnant and has since had a child. She indicates that Mr. Odom is the only one that could be the father. I believe he has already admitted that to her and the contact they had was within her home. I believe the mother knew about it. Later on she got a hold of law enforcement and these warrants were from that incidents." (R. p. 454, Guilty plea transcript dated October 27, 1997, p. 11, lines 1-9).

Pursuant to §17-25-45 a conviction for criminal sexual conduct with a minor is a most serious offense except where evidence is presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3). In the present case the State failed to meet its burden of proving that Petitioner's conviction for criminal sexual conduct with a minor was a most serious offense. There was evidence in the record that Petitioner's conviction resulted from consensual sexual conduct where the minor was younger than the actor as contained in Section 16-3-655(3) of the statute in effect at the time Petitioner pled guilty. The judge erred in finding that there was not sufficient evidence in the record to establish that the conduct was consensual and sentencing Petitioner to life without parole.

In affirming the conviction this Court wrote:

> As to Odom's argument his prior conviction for criminal sexual conduct (CSC) with a minor second degree should not have been considered a most serious offense because the record contains sufficient evidence showing the conduct was

> consensual and therefore he should not have been sentenced to life without parole: In re M.B.H, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) ("A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law . . . ."); S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2017) ("'Most serious offense' means: . . . [CSC] with minors, except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor . . . ."); State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) ("The legislature's intent should be ascertained primarily from the plain language of the statute."); id. ("Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation."); id at 102, 606 S.E.2d at 506 ("When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning."); id at 102-03, 606 S.E.2d at 506 ("The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.").

Counsel respectfully submits that the Court misapprehended the plain language of S.C. Code §17-25-45 (C)(1) which specifically excludes from the list of offenses designated as most serious offenses cases in which "there is evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3)." The clear intent of the legislature, based on the plain language of the statute, was to exclude as most serious Petitioner's criminal sexual conduct with a minor second degree conviction because it resulted from consensual sexual conduct where the minor was younger than Petitioner. The statute does not preclude the trial judge from finding that the State failed to meet its burden of proving that the prior criminal sexual conduct second degree qualified as a most serious offense. The statute does not preclude a subsequent judge, in this case Judge McMahon, from making a specific finding on the record that the criminal sexual conduct with a minor second degree conviction resulted from consensual sexual conduct where Petitioner was older than the minor. The State failed to meet its burden to establish that the prior

conviction qualified as a most serious offense. Pursuant to the statute, the prior conviction does not qualify as a most serious offense. The trial judge erred in sentencing Petitioner to LWOP.

2. **The trial judge erred in refusing to dismiss the indictment for burglary second degree when the State failed to call the case for trial until August 6, 2013, almost six years after the arrest in October of 2007, and then when the first trial ended in a mistrial, the State failed to call the case again for trial until June 8, 2015, almost eight years after arrest in violation of Petitioner's state and federal constitutional right to a speedy trial.**

Petitioner was arrested for the IGA burglary in October 30, 2007. (R. p. 41, lines 10-14). The State did not seek an indictment until almost six years later in August of 2013, when the State initially called the case for a trial that ended in mistrial because of a hung jury. (R.1 p. 39, lines 1-5). The State did not call the case for trial a second time for almost two more years after the mistrial. Prior to trial on June 8, 2015, Petitioner moved to dismiss the indictment based on the State's violation of Petitioner's right to a speedy trial guaranteed under both the state and federal constitutions. (R. p. 33, lines 15-22).

The trial judge denied the motion to dismiss writing:

> I don't think – I know the State has the burden of proof in this case beyond a reasonable doubt. But it's almost, I guess, akin to civil laches, it rests back on your lawyers and your rights and then you have an "ah-ha" moment. And I realize he has to have a duty to -- to prove that he's not guilty, he's innocent. I would respectfully deny the motion based on that.

(R. p. 51, lines 18-24). The trial judge erred.

The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy ... trial." S.C. Const. art. I, § 14. In determining whether a defendant has been deprived of the right to a speedy trial, the Court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right;

and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed2d 101 (1972). In State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012), the South Carolina Supreme Court wrote:

> The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy ... trial." S.C. Const. art. I, § 14. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The speedy trial right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007).

1. Length of the Delay

Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978). In a footnote in Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) the Court wrote, "Depending on the nature of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett Fn. 1

In Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012), the South Carolina Supreme Court wrote:

> We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. Barker, 407 U.S. at 530, 92 S.Ct. 2182. We

> should not even examine the remaining factors "[u]ntil there is some delay which is presumptively prejudicial." Id. The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

The length of the delay in this case was almost six years. While the State argued that Petitioner made bond on these charges and was incarcerated on other charges from other counties, (R. p. 38, lines 6-21), as the Court noted in Langford, preventing undue pretrial incarceration is just one goal of the speedy trial right. The fact that Petitioner was arrested and incarcerated in other counties does not justify the undue delay. The almost six year time frame between the arrest on October 30, 2007, and indictment and the first trial in August of 2013, is presumptively prejudicial and triggers the speedy trial analysis with regard to the remaining three factors: (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant.

2. Reason for the Delay

As to the second factor from Barker, the reason for the delay, every circuit to have considered the issue places the burden on the State to explain the reason for the delay. Jackson v. Ray, 390 F.3d 1254, 1262 fn #3(10th Cir. 2004); McNeely v. Blanas, 336 F.3d 822, 827 (9th Cir.2003); United States v. Brown, 169 F.3d 344, 349 (6th Cir.1999); Jones v. Morris, 590 F.2d 684, 686 (7th Cir.1979); Morris v. Wyrick, 516 F.2d 1387, 1390 (8th Cir.1975); Georgiadis v. Superintendent, Eastern Correctional Facility, 450 F.Supp. 975, 980 (S.D.N.Y.), aff'd, 591 F.2d 1330 (2d Cir.1978). In the present case the State argued, "So, Your Honor, the State would respectfully maintain that the delay in this case was on the part of Mr. Odom. He changed lawyers and created some of the delay. He got himself arrested, prosecuted, and convicted in other jurisdictions. And he has never been held on these charges, incarcerated, after the time he

made bond Your Honor. So we're certainly prepared to proceed to trial at this time, Your Honor." (R. p. 39, lines 22 – p. 40, lines 1-4).

The State claimed an attempt to call the case for trial prior to 2013, arguing, "Some of the delay in this case, Your Honor, we attempted to call this case even prior to 2013. It was initially appointed Greg Seigler. The case was not tried. It was delayed, in large part in that case, because he changed lawyers and retained Mr. Screen. So we had to go back through the discovery process and all with Mr. Screen." (R. p. 39, lines 6-12). There is no evidence in the record, however, that the State called the case for trial prior to 2013, and no evidence that Petitioner's public defender or retained counsel sought a continuance.

According to the State, when they moved to revoke Petitioner's bond in 2008, based on an arrest in Lexington County, the judge declined to revoke bond and instead set a curfew. (R. p. 42, line 11 – p. 43, lines 1-9). The State referenced two earlier indictments, #2008-GS-19-105, 106, and advised the judge that Petitioner failed to appear for court on February 12, 2009, but the State admitted that the reason Petitioner may not have appeared for court was because he may have been incarcerated in another county. (R. p. 43, line 23 – p. 44, lines 1-19). The other arrests were from counties within South Carolina. The State's purported reasons for the delay, Petitioner's change in trial counsel and arrests in other counties, do not justify the almost six year time frame between arrest and the first trial and the almost two year delay between the mistrial and the second trial, especially in light of the fact that there is no evidence that Petitioner ever sought a continuance based on changes in trial counsel and the fact that Petitioner at all times during the time frame remained in South Carolina, at many times incarcerated on charges in other counties and easily located.

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.

In Doggett, 505 U.S. at 657, the Court wrote:

> 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.

The State's refusal to call Petitioner's case for trial for almost six years, without sufficient cause, gives the appearance that the State was using the delay as a tactical advantage. This factor should weigh heavily against the State.

The present case is distinguished from State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009) where the South Carolina Court of Appeals, finding no speedy trial violation, found that a twelve year delay was troubling but justified based on an appeal taken by the State and the case being transferred to different prosecuting offices. There was no appeal involved in the present case and the case was never transferred out of the Eleventh Circuit Solicitor's Office. The State delayed

the first trial for almost six years. While the first trial ended in a mistrial, the State delayed the second trial for almost two years. The fact that the State failed to provide a valid reason for the excessive delays should weigh against the State.

The present case is also distinguished from State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct.App. 2000), where the Court found that a two year and two month delay did not violate speedy trial rights when the case was complicated and required substantial time to investigate and prepare. The present case was not complicated. The trial judge even stated, "Also, I don't know anything about the case. I've only read the indictment. I'm informed it's not a complicated case. It's fairly straightforward and although there are – I don't know how many witnesses there are on the witness list, it does not appear to be complicated." (R. p. 51, lines 4-8).

3. Assertion of the Speedy Trial Right

As to the third factor from Barker, Petitioner's assertion of the right to a speedy trial, Petitioner acknowledges that the speedy trial right was not previously asserted. Petitioner's failure to previously assert the right to a speedy trial is only one of four factors to be considered in the speedy trial analysis. In Barker the 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. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.
>
> Barker v. Wingo, 407 U.S. 514, 528-529, 92 S.Ct. 2182, 2191 (1972).

This Court can and should find a speedy trial violation although Petitioner did not previously assert the right.

4. Prejudice

As to prejudice, the fourth factor, the Court in Barker wrote:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972).

Petitioner can demonstrate particularized prejudice in the preset case because a potential witness, Nicholas Jermaine Sapp, died in a car accident in June or July of 2008, prior to the State calling the case for trial. (R. p. 37, lines 15 – 24; p. 44, line 20 – p. 45, lines 1-8). The defense was impaired by the death of the potential witness.

Although Petitioner can demonstrate a particularized prejudice in the present case, such a showing is not a requirement for the Court to find a violation of the speedy trial right. In Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the Court granted relief while noting that Doggett "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. The presumption of prejudice in the present case was neither extenuated by Petitioner's acquiescence, nor persuasively rebutted by the prosecution. Prejudice should be presumed based on the State's negligence in refusing to call the case for trial for almost six years.

In Moore v. Arizona, 414 U.S. 25, 26, 94 S. Ct. 188, 189-90, 38 L. Ed. 2d 183 (1973) the United States Supreme Court wrote:

> A defendant is not required to show prejudice affirmatively to win a speedy trial claim. The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim. Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial:
>
> 'We regard none of the four factors identified above (length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant) as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.' 407 U.S., at 533, 92 S.Ct., at 2193 (footnote omitted).
>
> In addition to possible prejudice, any court must thus carefully weigh the reasons for the delay in bringing an incarcerated defendant to trial. In the face of petitioner's repeated demands, did the State discharge its constitutional duty to make a diligent, good-faith effort to bring him (to trial)'? Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969).

In United States v. Ferreira, 665 F.3d 701, 706 (6th Cir. 2011), the Sixth Circuit Court of Appeals wrote:

> The Sixth Circuit has recognized that "extreme" delays may, on their own, "give rise to a strong presumption of evidentiary prejudice affecting the fourth Barker

> factor." United States v. Smith, 94 F.3d 204, 209 (6th Cir.1996) (quotation omitted); see also Doggett, 505 U.S. at 655, 112 S.Ct.2686 ("[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."). "When a defendant is unable to articulate the harm caused by delay, the reason for the delay (factor 2) will be used to determine whether the defendant was presumptively prejudiced." United States v. Mundt, 29 F.3d 233, 236 (6th Cir.1994). Where the delay has been caused by negligence, "our toleration of such negligence varies inversely with its protractedness." *Doggett,* 505 U.S. at 657, 112 S.Ct. 2686.

In Ferreira the Sixth Circuit found that a three year delay caused by the Government's negligence in filing the writ of habeas corpus in the wrong county created a presumption of prejudice. In United States v. Erenas–Luna, 560 F.3d 772, 780 (8th Cir.2009), the Eighth Circuit applied Doggett and concluded that a three-year delay between indictment and arraignment caused by "the serious negligence of the government" was excessive enough to trigger a presumption of prejudice. In United States v. Ingram, the Eleventh Circuit held that a two-year, post-indictment delay caused by egregious government negligence allowed the court to presume prejudice in the fourth Barker prong. 446 F.3d 1332, 1339 (11th Cir.2006).

In United States v. Molina-Solorio, 577 F.3d 300, 307 (5th Cir. 2009), the Fifth Circuit Court of Appeals wrote:

> The fourth factor is the prejudice suffered by the defendant due to the delay, and ordinarily the burden is on the defendant to demonstrate actual prejudice. Serna-Villarreal, 352 F.3d at 230-31. But where the first three factors together weigh heavily in the defendant's favor, we may conclude that they warrant a presumption of prejudice, relieving the defendant of his burden. Id. Although factor three does not weigh as heavily as it did in prior cases that have found a constitutional speedy trial right violation, the lengthy delay caused by the Government's negligence weighs more heavily than that factor has in our prior cases. The reason for the delay, Government negligence, also weighs heavily in Molina's favor due to the "protractedness of the delay." Bearing in mind that the Barker inquiry is "a difficult and sensitive balancing process," and a constitutional deprivation may be found without mechanical factor-counting, Nelson v. Hargett, 989 F.2d 847, 851 (5th Cir.1993) (quoting Barker, 407 U.S. at 533, 92 S.Ct. 2182) (internal quotation marks omitted), we conclude that together the first three Barker factors weigh heavily in Molina-Solorio's favor, and he is relieved of the

> burden of demonstrating actual prejudice. See Cardona, 302 F.3d at 498-99. (footnote omitted).

The length of the delay and the lack of a valid reason for the delay weigh heavily against the State in the present case and prejudice should be presumed.

In Langford, 400 S.C. 421, 441-442, 735 S.E.2d 471, 482 (2012), the Court wrote:

> The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. 2182. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." Id. Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." Id. at 529–30, 92 S.Ct. 2182. If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy." Id. at 522, 92 S.Ct. 2182. A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct.App.2007) (applying abuse of discretion standard to speedy trial claim), *rev'd on other grounds,* 384 S.C. 504, 682 S.E.2d 820 (2009); see also State v. Redding, 274 Ga. 831, 561 S.E.2d 79, 80 (2002) (noting the inquiry is whether court abused its discretion under Barker). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." Fields v. J. Haynes Waters Builders, Inc. ,376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008).

Petitioner's speedy trial rights were violated in the present case and dismissal is the only possible remedy. The trial judge abused his discretion in refusing to dismiss the charge. The trial judge failed to properly balance the presumptively prejudicial almost six year delay, attaching undue significance to the facts that Petitioner was on bond, the speedy trial right was not asserted previously and that Petitioner had other charges pending in other counties. (R. p. 50, line 17 – p. 51, lines 1-17). Properly balancing the Barker factors, the excessive delay and the fact that the State provided no valid explanation for failing to call the case to trial for almost six years outweigh the fact that the speedy trial right was not previously asserted. While Petitioner can demonstrate particularized prejudice in the death of a potential witness during the six year

delay in the State calling the case for trial, prejudice should be presumed. The charge must be dismissed.

In affirming this Court wrote:

> As to Odom's argument the trial court erred in failing to find his right to a speedy trial had been violated when his first trial began almost six years after his arrest and his second trial began two years after the first trial resulted in a mistrial: State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) ("[A] court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion."); State v. Hewins, 409 S.C. 93, 103, 760 S.E.2d 814, 819 (2014) ("An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support."); Barker v. Wingo, 407 U.S. 514, 530 (1972) ("The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."); Langford, 400 S.C. at 442, 735 S.E.2d at 482 ("The clock starts running on a defendant's speedy trial right when he is 'indicted, arrested, or otherwise officially accused,' and therefore we are to include the time between arrest and indictment." (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982))); Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."); Barker, 407 U.S. at 528 ("[T]he 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."); Langford, 400 S.C. at 443, 735 S.E.2d at 483 ("Delays occasioned by the defendant . . . weigh against him."); id. ("This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be able to procure a dismissal of the charges against him due to delays he caused.").

Counsel respectfully submits that the Court overlooked the fact that the cause of the delay should not be attributed to Petitioner and instead should be weighed heavily against the State. The length of the delay and the purported reasons for the delay weigh heavily against the State and outweigh the fact that Petitioner did not formally assert the right. Petitioner's speedy trial rights were violated requiring dismissal of the conviction and sentence.

Petitioner respectfully submits this Court overlooked or misapprehended factors discussed above that require rehearing and reversal of the conviction or a remand for re-sentencing outside S.C. Code §17-25-45.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 12th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE A. ODOM,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Maurice Anthony Odom, #199677, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of July, 2018.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 12th day of July, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.