STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL AVERY HUMPHREY,

APPELLANT.

Appellate Case No. 2011-191566

FINAL BRIEF OF APPELLANT

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II. Did the trial court err in refusing to dismiss Appellant's case when Appellant was denied his right to a speedy trial after the State unreasonably waited more than six years to call Appellant's case to trial?

STATEMENT OF THE CASE

On April 11, 2011, Appellant Michael Avery Humphrey was indicted by the Lexington County Grand Jury for involuntary manslaughter. R. 483 – 484.

On April 25, 2011, Appellant proceeded to trial before the Honorable William P. Keesley and a jury. R. 1. Appellant was represented by Robert M. Madsen, and the State was represented by Deputy Solicitor Samuel R. Hubbard and Assistant Solicitor Lawrence G. Wedekind. R 1.

On April 27, 2011, the jury found Appellant guilty of involuntary manslaughter. R. 476, ll. 3-13. The trial court sentenced Appellant to one year imprisonment followed by two years probation. R. 481, ll. 11-21.

This appeal follows.

STATEMENT OF FACTS

State's Theory of the Case

The State sought to prove that Appellant "with criminal negligence and with reckless disregard for the safety of [his girlfriend] Ms. [Megan D.] Jackson, engaged in a physical altercation with her [on October 17, 2004,] . . . [which] led to her to fall from a moving vehicle resulting in injuries that caused her death [on October 21, 2004]." R. 7, ll. 3-14. Specifically, the State alleged:

> [T]he facts asserted by the State are that [Megan Jackson] was driving the vehicle to go to work. [Appellant] jumped in the back [of the truck], smashed out the back window in an attempt to gain control of the vehicle and [Megan Jackson]. And she either – during the struggle for the control of the vehicle, she lost that physical fight and she decided that either she had to get out of that vehicle because of what was going on in the cab or what was about to go on, but she deemed it safer or less pleasant to hit the road than it was to stay in the car with [Appellant].

R. 69, l. 23 – 70, l. 9.

Relevant Facts

On October 22, 2004, Appellant was arrested for causing the death of Megan Jackson. R. 58, ll. 13-14. More than ***one year*** after he was arrested, Appellant was *initially* indicted for involuntarily manslaughter on November 14, 2005. R. 58, ll. 14-17. ***Five years*** after Appellant was arrested, Appellant's *first* attorney moved to be relieved on November 17, 2009, and that request was granted on November 25, 2009. R. 106, ll. 4-9. Defense counsel was then appointed to represent Appellant.

More than ***six years*** after his arrest, Appellant proceeded to his *first* trial before the Honorable R. Knox McMahon and a jury in December of 2010. R. 105, ll. 3-8. Judge McMahon declared a mistrial after the jury was hung "eight to four." R. 105, ll. 8-10.

Approximately ***two thousand, three hundred and seventy-four days*** after his arrest, Appellant was *again* indicted for involuntary manslaughter on April 11, 2011, which led to his conviction and this appeal. R.483 – 484.

Motion to Dismiss

Pretrial, defense counsel moved for dismissal based on a violation of Appellant's due process right to present a defense and right to a speedy trial. R. 60, l. 14 – 65, l. 2. Defense counsel argued that the State's delay in calling this case to trial "*is presumptively prejudicial*" because the trial will occur "*about six and half years from the alleged incident date*" and "*there are numerous witnesses who have either testified in the past or . . . given the nature of the delay, have either no memory or their memory is not nearly as clear as it used to be.*" R. 62, l. 15 – 63, l. 5 (emphasis added).

Specifically, defense counsel explained: (1) Michael Squire, a former SLED agent who was involved in the investigation could not be found and the photos he took of the accident scene are missing; (2) Kimberly Hahn, a former SLED agent who conducted DNA tests on blood found in the truck had moved to Texas and was not present to testify; (3) Wanda McNair, the coroner, had since died; (4) Lieutenant James Day of the Multidisciplinary Accident Investigation Team (MAIT) did not have any notes or reports of the reconstruction of the accident; (5) William Maye, a witness who was present at the scene moments after the accident, "does not remember everything" that occurred; and (7) John Daily, the EMS driver had no recollection of the case; and (8) the nurses who provided care for Megan Jackson also had no recollection of the case. R. 63, l. 5 – 65, l. 2; R. 70, l. 10 – 73, l. 16.

Furthermore, the trial court noted, "*I've got a serious question about why in the heck we're trying this case.*" R. 90, ll. 5-9 (emphasis added). The trial court later inquired as to how many speedy trial motions were filed in this case, and defense counsel indicated that no speedy trial motions were filed prior to trial. R. 100, ll. 9-12. The trial court then asked the State, "So why has it taken six years to bring this case to trial?" R. 103, ll. 9-10. The State replied:

> A couple years had passed - - usually, as you know, it doesn't really come to fruition until we get it - - *most cases [do not come] up for trial until they're about two and half to three years in age anyway.* So we [, the State,] started realizing that this was not going to plea out, we started to prepare for a trial.

R. 103, ll. 13-17 (emphasis added).

The State maintained that, "after two or three trial notices and requests for continuances," Appellant's *first* attorney was relieved as counsel on November 25, 2009, and Solicitor "Mr. Stumbo" inherited the case after Assistant Solicitor Wedekind was deployed to Afghanistan. R. 103, l. 20 – 104, l. 6. The State noted that Assistant Solicitor Wedekind returned from deployment in April of 2010 and regained control of the case. R. 104, ll. 6-11. The State further noted that after the Honorable Thomas A. Russo appointed defense counsel to represent Appellant, defense counsel moved to be relieved as counsel and that the trial court denied defense counsel's motion. R. 104, l. 25 – 105, l. 1-2.

In response, the trial court stated, "*[T]he length of the delay until the first trial, I think, is really the most relevant point, but even to this trial, it is a long time to try - - to wait to try a case.*" R. 185, ll. 4-8 (emphasis added). Despite finding that "*[t]he delay is troubling*[,]" the trial court denied defense counsel's motion to dismiss. R. 184, l. 24 – 191, l. 14 (emphasis added). The trial court held, "I'm compelled to deny the motion related to

the delay . . . the motion to dismiss" and "[t]he reasons for the delay seem to be acceptable" because "[t]hey don't seem to be the product of any type of – certainly no intentional misconduct" as the delay "was related, as I said earlier, primarily to the different involvement of the attorneys." R. 190, l. 24 – 191, l. 6. To support his denial of defense counsel's motion, the trial court held:

> At this point, there just has not been a sufficient demonstration in the Court's view that there was a failure to record what was being investigated early on. And it seems to me that either this evidence is not going to be able to be offered against the defendant or that it's stuff that benefits him or that it doesn't really prejudice him substantially.

R. 187, ll. 7-14.

Trial

At trial, William Maye testified that on the morning of October 17, 2004, he "was awakened by a loud sound . . . [a]nd a few minutes later," his wife heard "somebody hollering for help." R. 215, ll. 1-13. Maye recalled that when he walked outside the front of his house, he saw "a [pick-up truck] that was sitting in the road and the horn was going off." R. 215, ll. 14-16. Maye also stated that he saw "a young lady [Megan Jackson] laying on the ground [who] appeared to have been injured from the wreck" and "a black male [Appellant]" who "was hollering, Help me, help her." [1] R. 216, ll. 9-20. Maye further testified that Appellant "was distraught and [that Megan Jackson] was laying there and she had a head injury." R. 216, ll. 17-22. Maye noted that, although he did not see the wreck occur and that it did not appear to him that Appellant was trying to hurt Megan Jackson. R. 223, ll. 3-8.

[1] Maye identified Appellant as the "black male" he observed on the morning of October 17, 2004. R. 217, ll. 10-23.

Charles Thomas, a patrolman at the Batesburg-Leesville Police Department, maintained at trial that on October 17, 2004, he responded to a 911 call: (1) the "first thing [he] saw was a white female [Megan Jackson] laid on the side of the road on her back[;]" (2) "[t]here was a black male [Appellant] on top of her straddling her[;]" and (3) "another witness [Maye] that was standing around trying to assist in any way that he could." R. 225, l. 2 – 226, l. 8. Thomas claimed that "while [Appellant] was straddling [Megan Jackson], he was screaming, I'm sorry, baby. I'm sorry." R. 231, ll. 16-20.

Furthermore, Thomas claimed that Appellant told him that "he was dropped off by his cousins" and defense counsel objected based on the trial court's pretrial ruling to exclude that statement and moved for a mistrial. R. 232, ll. 1-3. The trial court denied defense counsel's mistrial motion and read a curative instruction to the jury at defense counsel's request. R. 233, l. 15 – 235, l. 14. Thomas recalled that the "[t]he hood and the front fender of [of the truck] was bent in." R. 228, ll. 13-15. Thomas also stated that he saw a shoe "about 30 to 40 feet . . . directly behind the vehicle." R. 230, ll. 3-6. Thomas further maintained that Appellant smelled of alcohol, "was very, just very irate and panicked[,]" and was wearing a red sweater and no shoes on the morning of the accident. R. 236, ll. 3-9.

On cross-examination, Thomas admitted he testified in Appellant's *first* trial that Appellant was crying, asking for help, and requesting an ambulance. R. 245, ll. 1-8. Thomas also admitted that he designated Megan Jackson as the driver on his traffic collision report and that he did not arrest Appellant the morning of the accident. R. 245, l. 22 – 246, l. 11.

Nicolas Vanput, a Batesburg-Leesville police officer, stated that he also responded to the 911 call on October 17, 2004. R. 258, l. 9 – 260, l. 14. Vanput's testimony mirrored

Thomas's recollection of the scene: "When I saw [Appellant], he was upset, hysterical and he was comforting the victim, Ms. Jackson, in his arms." R. 260, ll. 4-8. Vanput maintained that Appellant "made comments . . . that some friends had dropped him off at first." R. 260, ll. 11-14. Defense counsel objected again based on the trial court's pretrial ruling to exclude that statement and moved for a mistrial. R. 260, l. 21 – 261, l. 11. The trial court denied defense counsel's motion for a mistrial and stated, "I think it's mainly cumulative and I don't really see where it rises to the level of granting a mistrial." R. 267, ll. 20-23. The trial court then provided the jury with its second curative instruction. R. 267, l. 1 – 269, l. 4.

On cross-examination, Vanput stated that when he went to the hospital, Megan Jackson was in a coma and "[b]oth her left and right arms had injuries . . . [which] *appeared to be scratch marks, could be road rash.*" R. 275, ll. 9-20 (emphasis added). Vanput maintained that he examined the vehicle and found "damage to the steering wheel column and a lot of glass, that appears [to be] from the back window." R. 278, ll. 16-20. Vanput further noted that he "found some red fleece material that matched or appeared to match the same material that the defendant was wearing on the day in question." R. 280, ll. 19-23.

James Day, executive officer of the MAIT team, stated that he was called to view the vehicle at an impound garage the day after the accident occurred. R. 299, l. 3 – 300, l. 22. Notably, Day did not visit the accident scene until years several later when the scene had changed due to the addition of a driveway, retaining wall, and shrubbery. R. 301, l. 2 – 302, l. 16. Day claimed that if a wrecked vehicle is ahead of a shoe found on the roadway, then his "first thought would be that somebody has come out of the vehicle

and the shoe came off the person." R. 304, ll. 4-8. Day was subsequently qualified as an expert in accident reconstruction. R. 307, ll. 1-5.

Day maintained that the door to the vehicle was shut when it hit the tree because "the springs on the door were normal." R. 307, l. 7 – 308, l. 6. Day asserted that the speed of the vehicle at the time of impact with the tree "was 25 to 28 miles an hour" and that the damage to the steering wheel was not consistent with someone sitting in the driver's seat during a head-on collision. R. 309, l. 2 – 310, l. 17. Day further stated that the back window came inward because he found glass from the back window in the vehicle. R. 311, l. 12 – 312, l. 16.

Day claimed that based on his examination of the vehicle, "[t]here was nobody behind the driver's steering wheel at the time of impact" and that it was not feasible for a person to have been ejected through the side window of the vehicle. R. 314, l. 16 – 315, l. 17. Day noted that Megan Jackson's injuries consisted of "a cracked skull, which is consistent with hitting the ground" and "*road rash on her arms, hands and head, which are consistent with being on the pavement sliding, creating, what we call, road rash, which is rubbing of the skin.* So all of [Megan Jackson's] injuries were consistent of being outside of the vehicle and in contact with the roadway and not behind the steering wheel." R. 316, ll. 13-21 (emphasis added). Day maintained that it was his opinion, "[Megan Jackson] was not in the vehicle at the time of the collision. She . . . had came out of the vehicle prior to the collision." R. 316, ll. 21-24.

Day admitted that he did *not* prepare a written report of the accident recreation in 2004, and no one from the MAIT team investigated the scene on the day the accident occurred. R. 317, l. 5 – 319, l. 15. Day also admitted that he visited the accident scene

approximately five years later and that it was significantly different than it was on the morning of the incident. R. 324, l. 11 – 325, l. 14. When defense counsel asked Day, "[S]o, realistically, your independent recollection of what happened on the 18th is not real good with no notes, no reports, correct?" and Day replied, "I was not at the scene at the time of the collision. Once we found out it was a criminal investigation, we backed out of it and turned it back over to Batesburg-Leesville to do their criminal investigation." R. 322, ll. 2-6.

Emitt Gilliam, a former Batesburg-Leesville police officer, maintained that he spoke to Appellant at the hospital on the day of the incident, Appellant waived his Miranda rights, and Appellant voluntarily gave a statement. R. 333, l. 25 – 347, l. 8. Gilliam then read Appellant's statement aloud to the jury. R. 348, l. 1 – 350, l. 1. In that statement, Appellant stated: (1) that he came home drunk and told his girlfriend Megan Jackson that she could not go to work because she had to watch their children; (2) that they argued and she got in the truck and proceeded to drive away; (3) that he then jumped in the back of the truck and was instructing her to stop; and (4) that

> *Megan was trying to fall out - - fall out [of the truck], so [he] punched the back window [out] and grabbed Megan by the back of her pants. . . . [S]o that Megan wouldn't fall out. . . . [B]efore I knew anything else, we hit a light pole*, then Megan stumbled out of the truck to the passenger side and fell down. Then I ran over to her and stated screaming and crying. I don't remember anything else after that, but telling the police to get in contact with someone like my father to make sure my kids was okay.

R. 348, l. 5 – 349, l. 23 (emphasis added). Appellant also denied in his statement that he tried to scare Megan Jackson into stopping the truck. R. 351, ll. 8-11.

Wallace Oswald, the Batesburg-Leesville chief of police, admitted that he has never seen the photographs taken by the SLED agent of the scene nor does he know where those photographs are located. R. 370, ll. 3-7. Oswald also admitted that the SLED agent who processed the scene no longer works for SLED and that he also does not know where the SLED agent is located. R. 375, ll. 1-12. Oswald speculated that Megan Jackson was not attempting to commit suicide when the collision occurred. R. 381, ll. 6-12.

William Armstrong, a licensed medical doctor who was qualified at trial as an expert in forensic pathology, examined photographs of the Megan Jackson's autopsy, the investigating coroner's verbal description, and the police department's summary of events. R. 394, ll. 1-18. Armstrong noted that Megan Jackson had a "severe closed head injury with skull fractures" and that "*based on the somewhat limited information [he] had since a second party was involved, [he] called it a homicide*." R. 395, ll. 7-23 (emphasis added).

Armstrong stated that Megan Jackson had "scrapes and abrasions along the arms, upper arms, and in the elbow area . . ., some scrapes over the surface of the hand, both hands" that was consistent with "*road rash*." R. 399, l. 17 – 400, l. 21 (emphasis added). Armstrong found that "there were no chest imprints of the steering wheel" on Megan Jackson's body and that he "*can't completely exclude that*" the scratch marks on Megan's arms were caused by a road surface. R. 403, ll. 7-14 (emphasis added).

On cross-examination, Armstrong admitted that the scratches were superficial and that he also could *not* exclude the possibility the scratches occurred after the accident when she was being restrained on the pavement. R. 406, ll. 2-22. Armstrong also admitted that he did not find slap marks or knuckle prints on Megan's body. R. 407, l. 21 – 408, l. 10.

Directed Verdict Motion

At the close of the State's case, defense counsel moved for a directed verdict. R. 411, l. 22 – 414, l. 21. Defense counsel argued, "given the lack of direct evidence, we believe that their case is largely circumstantial and we believe that the evidence submitted to the jury - - submitted does not rise to the level of substantial circumstantial evidence sufficient to submit this case." R. 412, ll. 4-9. The trial court denied the directed verdict motion:

> I don't know what I might ultimately have to do with this case, but at this stage having to view all the evidence in the light most favorable to the State, *I think I am required to deny the directed verdict motion as it related to engaging in an unlawful act not naturally tending to result in death or serious bodily injury that does in fact result in the death of another person. As for the theory of responsibility for involuntarily manslaughter arising from a lawful act, there's no evidence to support that form which a jury could convict.* If [Appellant] was acting lawfully, then punching out the window to try to rescue her is not criminal recklessness.

R. 425, l. 15 – 426, l. 3 (emphasis added).

ARGUMENT

I. The trial court erred by refusing to grant a directed verdict because the State failed to present substantial circumstantial evidence that Appellant was guilty of involuntary manslaughter.

The South Carolina Supreme Court "has repeatedly affirmed the principle that when the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (emphasis added). In *Odems*, this Court cited *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001), as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." *Id.* Specifically, the trial court "should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty." *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (internal quotation omitted).

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Wharton,* 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." *State v. Crosby,* 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "Recklessness is a state of mind in which the actor is aware of his or

her conduct, yet consciously disregards a risk which his or her conduct is creating." *State v. Pittman,* 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

In this case, the State only presented circumstantial evidence that "*merely rais[ed] a suspicion*" of Appellant's guilt. *See Bostick*, 392 S.C. 134, 708 S.E.2d 774. Specifically, the State admitted that "there was *no preserved evidence* taken from [Appellant] to show that [he scratched Megan Jackson]- - underneath his fingernails or any cuttings like that." R. 92, ll. 1-5 (emphasis added). The State's witnesses admitted that the scratches on Megan Jackson's arms were consistent with road rash. Nicolas Vanput stated that when he went to the hospital, Megan Jackson was in a coma and "[b]oth her left and right arms had injuries . . . [which] appeared to be scratch marks, could be *road rash.*" R. 275, ll. 9-20 (emphasis added). James Day noted that Megan Jackson had "*road rash* on her arms, hands and head, which are consistent with being on the pavement sliding, creating, what we call, road rash, which is rubbing of the skin. R. 316, ll. 13-18 (emphasis added).

Furthermore, William Armstrong stated that Megan Jackson had "scrapes and abrasions along the arms, upper arms, and in the elbow area . . ., some scrapes over the surface of the hand, both hands" that was consistent with "*road rash.*" R. 399, l. 17 – 400, l. 21. Armstrong admitted that he "*can't completely exclude that*" the scratch marks on Megan's arms were caused by a road surface. R. 403, ll. 7-14 (emphasis added); R. 406, ll. 2-22. Armstrong also admitted that he did not find slap marks or knuckle prints on Megan's body. R. 407, l. 21 – 408, l. 10.

Additionally, Appellant did not admit guilt in his statement to police: "*Megan was trying to fall out - - fall out [of the truck], so [he] punched the back window [out] and grabbed Megan by the back of her pants. . . . [S]o that Megan wouldn't fall out. . . . [B]efore*

I knew anything else, we hit a light pole . . . ." R. 349, ll. 10-20 (emphasis added). Accordingly, the trial court erred by refusing to grant Appellant's directed verdict motion because the State failed to present substantial circumstantial evidence that Appellant was guilty of involuntary manslaughter. *See Odems*, 395 S.C. at 586, 720 S.E.2d at 50.

II. The trial court erred in refusing to dismiss Appellant's case when Appellant was denied his right to a speedy trial after the State unreasonably waited more than six years to call Appellant's case to trial.

An accused is entitled to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 14, of the Constitution of South Carolina. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967); *see also State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978). "This right 'is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but 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.' " *Id.* (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)). Notably, "[w]hether or not a person accused of a crime has been denied his constitutional right to a speedy trial is a question to be answered in the light of the circumstances of each case." *State v. Dukes*, 256 S.C. 218, 222, 182 S.E.2d 286, 288 (1971) (quoting *Wheeler v. State*, 247 S.C. 393, 400 147 S.E.2d 627, 630 (1966)).

In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court identified several factors to be used when resolving a speedy trial issue: (1) the length of the delay; (2) the reason the government asserts to justify the delay; (3) when and how the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant. *See State v. Foster*, 260 S.C. 511, 197 S.E.2d 280 (1973) (recognizing these factors in South Carolina). However, "[i]n order to establish the denial of a speedy trial, it must be demonstrated the delay was attributable to the State." *See Waites*, 270 S.C. at 108, 240 S.E.2d at 654 (citation omitted). The constitutional guarantee of a speedy trial only protects a criminal defendant against delay which is arbitrary or unreasonable. *Id.*

In *Doggett v. United States*, 505 U.S. 647, 652, n. 1 (1992), the United States Supreme Court suggested in dicta that a delay of more than a year is "presumptively prejudicial." *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (finding a two-year and four month delay was sufficient to trigger further review of the other three factors enumerated in *Barker v. Wingo*, 407 U.S. 514). The Court has also noted, "[W]e 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." *Doggett*, 505 U.S. at 655 (emphasis added). There is also a presumption that the prejudice to the accused "intensifies over time." *Id.* at 652. Therefore, "a delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155.

In this case, more than ***five years*** had passed since Appellant was arrested when Appellant's *first* attorney moved to be relieved and his case had not been called to trial. R. 106, ll. 4-9. More than ***six years*** after his arrest, Appellant proceeded to his *first* trial before the Honorable R. Knox McMahon and a jury in December of 2010. R. 105, ll. 3-8. Judge McMahon declared a mistrial after the jury was hung "eight to four." R. 105, ll. 8-10. Approximately ***two thousand, three hundred and seventy-four days*** after his arrest, Appellant was *again* indicted for involuntary manslaughter on April 11, 2011, and proceeded to trial before the Honorable William P. Keesley and a jury on April 25, 2011. R. 1.

Appellant was denied his right to a speedy trial and was unduly prejudiced by the State's unreasonable delay in waiting more than six years to call Appellant's case to trial. *See Doggett v. United States*, 505 U.S. 647; *see also Strunk v. United States*, 412 U.S.

434 (1973) (finding the relief granted where an accused has been denied the right to a speedy trial is generally dismissal of the criminal charge). The ***six year*** delay is sufficient to trigger further review of the other three factors enumerated in *Barker v. Wingo*, 407 U.S. 514, particularly when the trial court noted, "*I've got a serious question about why in the heck we're trying this case*" and "*[t]he delay is troubling.*" R. 90, ll. 5-9; R. 185, ll. 3-4 (emphasis added). *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653.

Notably, the State gave no reason for the initial five year delay prior to Appellant's *first* attorney being relieved as counsel. When the trial court asked the State, "So why has it taken six years to bring this case to trial?" R. 103, ll. 9-10. The State informed the trial court:

> A couple years had passed - - usually, as you know, it doesn't really come to fruition until we get it - - ***most cases [do not come] up for trial until they're about two and half to three years in age anyway.*** So we [the State] started realizing that this was not going to plea out, we started to prepare for a trial.

R. 103, ll. 13-17 (emphasis added). The State also focused on events that occurred in Appellant's case after ***five years*** had passed since he was arrested. R. 103, l. 25 – 105, l. 2. The initial five year delay was clearly attributable to the State because the solicitors have exclusive control over the docket. *See* S.C. Code Ann. § 1-7-330 (2011) (providing in pertinent part: "Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and *the solicitor shall determine the order in which cases on the docket are called for trial.*") (emphasis added).

Although trial counsel did not file a speedy trial motion prior to trial, it is imperative to note that trial counsel was not appointed to represent Appellant until more than ***five years*** after Appellant was arrested, and the trial court ruled upon the issue that was before the

court. R. 100, ll. 9-12; 184, l. 24 – 191, l. 6. However, the trial court did correctly find, "*[T]he length of the delay until the first trial, I think, is really the most relevant point, but even to this trial, it is a long time to try - - to wait to try a case.*" R. 185, ll. 4-8 (emphasis added).

As to prejudice to Appellant, defense counsel argued that the State's delay in calling this case to trial "*is presumptively prejudicial*" because the trial will occur "*about six and half years from the alleged incident date*" and "*there are numerous witnesses who have either testified in the past or . . . given the nature of the delay, have either no memory or their memory is not nearly as clear as it used to be.*" R. 62, l. 15 – 63, l. 5 (emphasis added). Specifically, defense counsel explained: (1) Michael Squire, a former SLED agent who was involved in the investigation could not be found and the photos he took of the accident scene are missing; (2) Kimberly Hahn, a former SLED agent who conducted DNA tests on blood found in the truck had moved to Texas and was not present to testify; (3) Wanda McNair, the coroner, had since deceased; (4) Lieutenant James Day of the Multidisciplinary Accident Investigation Team (MAIT) does not have any notes or reports of the reconstruction of the accident; (5) William Maye, a witness who was present at the scene moments after the accident, "does not remember everything" that occurred; and (7) John Daily, the EMS driver had no recollection of the case; and (8) the nurses who provided care for Megan Jackson also had no recollection of the case. R. 63, l. 5 – 65, l. 2; R. 70, l. 10 – 73, l. 16.

Notably, the trial court then asked the State, "So why has it taken six years to bring this case to trial?" and the State admitted:

> A couple years had passed - - usually, as you know, it doesn't really come to fruition until we get it - - *most cases [do not*

> *come] up for trial until they're about two and half to three years in age anyway.* So we [, the State,] started realizing that this was not going to plea out, we started to prepare for a trial.

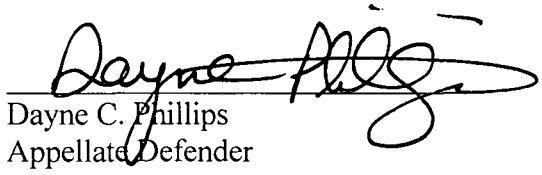
R. 103, ll. 9-17 (emphasis added). *See Doggett*, 505 U.S. at 652 (noting there is also a presumption that the prejudice to the accused "intensifies over time"). Wallace Oswald, the Batesburg-Leesville chief of police, testified that he has never seen the photographs taken by the SLED agent of the scene nor does he know where those photographs are located. R. 370, ll. 3-7. Oswald also testified that the SLED agent who processed the scene no longer works for SLED and that he also does not know where the SLED agent is located. R. 375, ll. 1-12. *See Id.* at 657 ("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.").

Accordingly, the trial court erred in refusing to dismiss Appellant's case when Appellant was denied his right to a speedy trial after the State unreasonably waited more than six years to call Appellant's case to trial. *See Id.* at 655 (noting "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"); *see also Strunk*, 412 U.S. 434 (finding the relief granted where an accused has been denied the right to a speedy trial is generally dismissal of the criminal charge).

CONCLUSION

For the foregoing reasons, Appellant Michael Humphrey respectfully requests that this Court issue an Order of acquittal (Issue I), or in the alternative, reverse Appellant's conviction and dismiss the case with prejudice (Issue II).

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

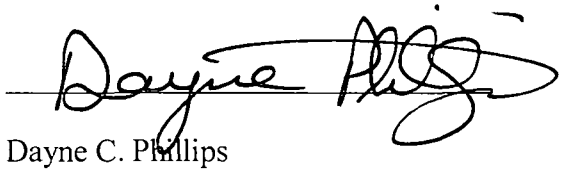
ATTORNEY FOR APPELLANT

This 28th day of January, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 28, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL AVERY HUMPHREY,

APPELLANT.

Appellate Case No. 2011-191566

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Mr. Michael Avery Humphrey, 100 Stanford Street, Columbia, SC 20903, this 28th day of January, 2013.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .