

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

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**RECEIVED**

SEP 10 2013

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

APPELLANT

Appellate Case No. 2012-206608

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FINAL BRIEF OF APPELLANT

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### STATEMENT OF ISSUE ON APPEAL

Did the trial court's failure to dismiss the pending criminal charge against Appellant violate his state and federal constitutional rights to a speedy trial where the crime allegedly took place on September 3, 2001, Appellant was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Appellant's arrest?

### STATEMENT OF THE CASE

Appellant was indicted by the Edgefield Grand Jury for murder on March 25, 2002 pursuant to Indictment 2002-GS-19-109. Indictment. The prosecution, represented by Ervin Maye and Frank Young, called the case for trial on January 3, 2012 before the Honorable Clifton Newman. Michael Chesser represented Appellant at the trial. R. 1. The jury found Appellant guilty of murder. R. 198, lines 9-12. Judge Newman sentenced Appellant to thirty-three years. R. 220, line 25 – R. 220, line 2; Sentence sheet.

Appellant filed a timely notice of appeal. This brief follows.

## ARGUMENT

The trial court's failure to dismiss the pending criminal charge against Appellant violated his state and federal constitutional rights to a speedy trial where the crime allegedly took place on September 3, 2001, Appellant was arrested on January 25, 2002, but the case was not called for trial until January 3, 2012, almost a decade after Appellant's arrest.

On January 25, 2002, the state charged Appellant with the murder of Samuel J. Sturup, which the state alleged occurred on September 3, 2001. R. 2, lines 10-15; R. 7, lines 14-15; R. 8, line 3; R. 29, lines 22-23; Indictment. Thereafter, the Grand Jury indicted him for murder on March 25, 2002. R. 7, lines 9-14; Indictment.

### Pretrial Motions

On June 14, 2002, Appellant was denied bail. Subsequently, a bond hearing was held before the Honorable William P. Keesley on April 29, 2004. Judge Keesley denied bail again; however, he provided that if the state failed to try Appellant during the next term, then Appellant could renew his motion. On November 17, 2004, Appellant filed a motion to dismiss the charges against him or release him on a personal recognizance bond based upon the state's failure to give him a speedy trial, denial of due process, unreasonable confinement without bail, and a violation of S.C. Code Ann. § 17-23-90. Judge Keesley heard arguments on the motion in December 2004. R. 8, lines 4-16; Motion filed 11/17/2004.

By order filed December 3, 2004, Judge Keesley denied the motions. Nevertheless, he remarked: "the court is deeply concerned about the length of time that has transpired without bringing [Appellant] to trial." Judge Keesley found "[t]here years in jail awaiting trial on this charge is clearly bordering on excessive." As a result, Judge Keesley offered to

establish a special term of court to resolve the case “during February.” Judge Keesley provided that Appellant could renew his motions if the case were not tried in February 2005. R. 8, lines 4-16; Order filed 12/3/2004.

Judge Keesley’s order recognized the unique nature of Appellant’s criminal charge – the involvement of multiple co-defendants and jurisdictions and the possibility that South Carolina could seek the death penalty. Despite these challenges, Georgia “ha[d] disposed of the cases involving the co-defendants over a year ago.” Additionally, the “court ha[d] instructed the Solicitor’s office on at least two prior occasions that it must make a decision about whether to serve the death penalty notice.” The court “again admonished [the state] that unless immediate steps [were] taken to bring this case to trial promptly, the court [would] have no option under the constitutions of the United States and South Carolina except to release the defendant from jail in South Carolina.” Order filed 12/3/2004

Thereafter, Appellant renewed his motion for dismissal of the charge based upon the state’s failure to give him a speedy trial, denial of due process, unreasonable confinement without bail, and a violation of S.C. Code Ann. § 17-23-90. By order filed January 28, 2005, Judge Keesley denied the motion to dismiss, but granted Appellant a personal recognizance bond in the amount of \$50,000. His order noted that Appellant would be released to Georgia due to the hold placed on him. According to the order, the prosecution informed the court that it would not “take advantage of the offer to create a special term” of court and had no intention of trying the case in February 2005. R. 8, lines 16-21; Order filed 1/28/2005.

The state agreed to release custody of Appellant to the State of Georgia. R. 8, line 22 – R. 9, line 20; R. 23, line 25 – R. 24, line 2; R. 30, lines 13-16. On September 12, 2006,

Appellant was tried and convicted in Georgia for kidnapping Sturup. R. 9, lines 21-22; R. 23, lines 17-24.

At some point, the prosecutor learned that although Appellant received a life sentence in Georgia, he was eligible for parole after service of a term of years. R. 3, line 24 – R. 4, line 4 (Prosecutor informed the judge that he received conflicting information from the Georgia authorities, but believed Appellant would be eligible for parole “sometime within the next six, seven years.”); R. 15, line 16 – R. 18, line 15. After Appellant was tried and convicted in Georgia in 2006, the first attempt by the prosecutor to extradite Appellant to South Carolina was “in the first part of 2011” following Barnes’ conviction in November of 2010. R. 25, lines 21-23. The prosecutor claimed that South Carolina was unable to pick up Appellant from Georgia in order to try him during the previous term of court, October of 2011. R. 25 line 25 – R. 26, line 9.

When the prosecutor was preparing the case against Barnes for trial, he sought Appellant’s cooperation. He asked Appellant to testify against Barnes. Appellant declined to assist the state in its prosecution of Barnes. According to the prosecutor, Solicitor Myers “did not know whether or not he would notice” Appellant for death. Ultimately, the Solicitor elected not to seek Appellant’s death, and instructed the prosecutor to proceed against Appellant on the outstanding murder charge. R. 4, lines 14-25; R. 25, lines 3-17; R. 29, lines 15-19.

Prior to the start of Appellant’s trial in South Carolina, Appellant filed a written motion to dismiss the charge against him based upon the state’s violation of his right to a speedy trial. As an initial matter, Appellant explained the state set his trial a decade after his arrest. Appellant argued the state’s significant delay in calling his case for trial resulted in

presumptive prejudice. R. 11, line 17 – R. 15, line 15; Motion dated 1/3/12. Appellant argued that he had “no burden of pointing to specific prejudice.” R. 19, lines 12-24; Motion dated 1/3/12. Nevertheless, Appellant provided at least one example of prejudice - during the capital trial of Steven Barnes, Appellant’s co-defendant, a witness, Richard Cave, testified that his testimony was the result of what he actually remembered and what he read in transcripts and statements. R. 20, line 24 – R. 21, line 18.

The prosecutor countered that “[a]t the outset of this case, Solicitor Myers did determine that he intended to seek the death penalty against Mr. Barnes. Up until the time that Mr. Barnes was convicted in November of 2010, Solicitor Myers was not sure whether or not he intended to seek the death penalty against [Appellant] or not. He delayed that decision until after Steven Louis Barnes’ trial was finished and he was sentenced to death as to whether or not he was going to notice [Appellant].” R. 23, lines 3-16.

The prosecutor also argued that Appellant “knew this charge was outstanding against him in South Carolina” and that he could not “assert his right once or twice and then rest on his laurels and do nothing.” R. 24, lines 12-20. According to the prosecutor, Appellant did nothing in seven years, since 2005, “other than attempt to delay coming back here and being tried through his contesting extradition and not wanting us to proceed at the last term of court.” R. 24, lines 21-25; R. 27, lines 6-11. According to the prosecutor, Appellant was required to make “some continual effort” to assert his constitutional rights. R. 31, lines 2-10.

The prosecutor further argued that the delay was to Appellant’s benefit. He “felt like [Appellant] should ... have the same opportunity to cooperate that the other codefendants in this case received.” R. 26, lines 10-16; R. 26, line 24 – R. 28, line 10. The

prosecutor claimed "it was the intent of the State at all times to proceed against [Appellant], but [he] was over in Georgia serving a life sentence." R. 27, lines 3-6; R. 38, lines 18-23. He claimed "there was certainly no malice in any decision on the State to delay the prosecution.... It was my hope that they would testify against Mr. Barnes. I felt like they should receive the same opportunity as the other codefendants." R. 29, lines 10-15; R. 31, lines 10-12.

The prosecutor claimed Appellant contested extradition. R. 25, lines 23-24. On this issue, Appellant testified that in September 2011, his counselor presented him with a form explaining that if he signed the form, he would be consenting to extradition to South Carolina. If he chose not to sign the form, then he would have twenty days to file a writ of habeas corpus to contest extradition. Appellant did not sign the form, explaining he wanted to speak with his attorney to determine any impact upon his appeal, which was pending in Georgia. Appellant did not file any paperwork or make any motions to contest extradition. Appellant stated unequivocally that he was willing to go to South Carolina. R. 35, line 6 - R. 38, line 9.

When the judge asked the prosecutor to explain why the case was not called for ten years, the prosecutor explained the prosecution "intended to proceed against Steven Louis Barnes first." R. 30, lines 6-12. He further stated "in all candor, the State tried for years to try Steven Louis Barnes and eventually it took another judge being assigned to the case in order for us to get it tried." R. 30, lines 20-24; R. 31, lines 12-14.

According to Judge Newman, this was the first case he had where ten years had passed between the arrest and trial. R. 39, lines 6-9. He described it as a unique situation because of the "cross-border issues" of Georgia and South Carolina wanting to pursue cases

against the same individuals, of each defendant asserting individual constitutional rights, and of the prosecution wanting to pursue a capital case. R. 41, line 24 – R. 42, line 6. Judge Newman refused to presume prejudice “given the facts.” He found the prosecutor “ha[d] demonstrated legitimate reasons for the delay given the complex nature of the cases, the problems involving prosecutions in multiple jurisdictions.” R. 42, line 20 – R. 43, line 2. In a later discussion, Judge Newman characterized the case as follows: “what I heard from the solicitor is that they wanted to first do the capital trial and that they delayed this case to do the capital trial and it was their hope and desire that [Appellant] would testify in that case.” R. 48, lines 15-19.

#### Testimony of Richard Cave

At the trial, the prosecution presented testimony from Richard Cave, an individual charged in Georgia and South Carolina regarding criminal acts against Sturup. R. 95, lines 16-25; R. 96, lines 1-5. Cave testified that he was friends with Barnes and that on Labor Day weekend of 2001, he and Antonio Griffin were with Barnes and others at a house in Georgia. R. 73, line 5 – R. 74, line 2; R. 75, lines 7-10. Cave observed Barnes arguing and fighting with Sturup. R. 74, line 18 – R. 75, line 6; R. 76 line 16 – R. 77, line 9. Later, Appellant and his brother arrived at the house in Augusta. R. 79, lines 12-14. Everyone got into cars and arrived at a field in South Carolina. R. 82, lines 1-8; R. 82, line 24 – R. 83, line 1; R. 85, lines 15-18. Cave observed Sturup exit the trunk of the car in which the Hunsbergers were traveling. R. 86, lines 9-13. The group walked to a wooded area where Barnes instructed each person to shoot Sturup. R. 86, lines 17-25; R. 88, line 18 – R. 89, line 1. Cave testified that after Charlene Thatcher shot Sturup, he shot Sturup. R. 89, lines

3-12. He and Thatcher left the area. He heard four more shots, but did not see the shooter.

R. 89, lines 15-20.

On cross-examination, Cave agreed that he had testified in 2006 in a trial against Appellant in Georgia and in 2010 against Barnes regarding the events of that evening. R. 97, lines 14-16. He admitted that his testimony during the 2006 and 2010 trials was different from his testimony in 2012 in at least one respect – whether any one conversed after the shooting. R. 98, line 11 – R. 100, line 19; R. 112, lines 12-23.

#### Testimony of Antonio Griffin

Antonio Griffin testified against Appellant as well. He testified similarly to Cave regarding how the two arrived at Barnes' house and what they observed. R. 125, lines 8-24; R. 126, lines 6-19; R. 128, lines 1-25. Griffin testified that Barnes instructed him to fight Sturup. Griffin and Sturup fought for about twenty seconds before Barnes broke it up. R. 126, line 20 – R. 127, line 4. According to Griffin, Appellant and his brother arrived after the fight. R. 132, lines 8-12. In line with Cave's testimony, Griffin testified that everyone got in to cars, left Georgia, and went to South Carolina. R. 133, lines 2-6. Barnes instructed everyone to exit the cars at gunpoint. R. 135, lines 9-11. Griffin also observed Sturup exit the trunk of the car. R. 135, lines 11-24.

According to Griffin, everyone walked through the woods to an open space. Barnes told everyone they would shoot Sturup. When Thatcher resisted shooting Sturup, Barnes threatened to shoot her if she disobeyed him. Griffin testified that after Thatcher shot Sturup, one of the Hunsbergers grabbed the gun from her and shot Sturup. Someone thrust the gun at Griffin who "shot at the ground." Cave got the gun, but Barnes instructed them to

go to the car. While walking across the field, Griffin heard another shot. R. 138, line 25 – R. 138, line 13.

At the time of Appellant's trial, Griffin had pled guilty to assault in Georgia and received an eighteen year sentence for his involvement in the beating of Sturup, but he had "potential charges for the events that occurred related to the murder" in South Carolina. R. 143, lines 1-11.

Griffin did not remember everything he said in his statement to law enforcement on January 23, 2002. R. 143, line 19 – R. 144, line 1. He agreed that his testimony had been different from his statement regarding which of the Hunsbergers he observed do what. R. 144, lines 2-24. Griffin testified against Appellant in 2006 in Georgia. His testimony was different then as well. R. 143, line 25 – R. 146, line 11.

#### Testimony of Charlene Thatcher

Charlene Thatcher testified similarly to Cave and Griffin. She was a prostitute from Massachusetts who moved to Augusta, Georgia in August of 2001. R. 160, lines 3-10. She was with Barnes on Labor Day weekend of 2001. R. 160, lines 19-25. She observed Barnes, Griffin, Cave, William Harris, and Sturup outside the green house. She and Sturup were beaten for allegedly stealing money. R. 161, lines 1-24. She testified that Appellant and Julio arrived after the beatings. R. 162, lines 14-16. Barnes instructed Sturup to get into the trunk of the Hunsbergers' car. The others got into vehicles and left the area. R. 163, lines 7-22. When the cars stopped, she saw Sturup get out of the trunk. The group then walked into the woods. Barnes instructed Sturup to pick a place to die. R. 164, line 7 – R. 165, line 9. After the group stopped, they "shot him, each one time." She

shot Sturup first in the stomach, then Barnes shot Sturup in the head. She “freaked out and got crazy” and did not remember anything else. R. 165, lines 11-19.

On cross-examination, Thatcher testified that it was difficult to remember what she said ten years ago. R. 172, lines 7-14. After being confronted with her statement to police, she admitted that she had engaged in multiple armed robberies with Barnes. R. 172, line 15 – R. 173, line 13. Initially, she denied that Barnes threatened everyone present that if they did not shoot Sturup, then he would shoot the resister. R. 181, lines 4-7; R. 181, lines 21-23; R. 184, lines 10-24. However, when she was confronted with her testimony from Barnes’ trial, she agreed she had testified that Barnes threatened everyone. R. 185, line 8 – R. 186, line 17.

At the time of Appellant’s trial, Thatcher had pleaded guilty to aggravated assault in relation to beating Sturup in Georgia. She understood she faced potential charges for her conduct in South Carolina. R. 168, lines 1-6; R. 179, lines 2-6. She had been convicted of armed robbery on August 26, 2003 and of prostitution on January 1, 2002. R. 170, lines 5-21.

#### Renewal of Motion

Appellant renewed his motion to dismiss at the close of the state’s case. Appellant argued that the changes in the testimony of the witnesses, which had been demonstrated through cross examination, provided an example of the prejudice Appellant suffered. Appellant pointed to the poor memories of Griffin and Thatcher due to the passage of time. Concerning the prejudice factor, Appellant indicated the delay was “so substantial and was due entirely to prosecutorial discretion” and therefore, Appellant had no burden to show

specific prejudice. Appellant also reminded the court that prejudice is only one factor for consideration. R. 194, line 22 – R. 195, line 25.

Judge Newman again denied the motion. He was persuaded that “given the number of trials and different proceedings that were taking place both here and in the state of Georgia involving these defendants and others ... it’s something that is inherent after sorting out that process.” Judge Newman remarked that Appellant had not “been deprived his liberty because he’s incarcerated under another sentence.” He found no prejudice to Appellant. R. 196, line 9 – R. 197, line 13.

#### Sentencing proceeding

During the sentencing proceedings, Appellant asked Judge Newman for a thirty-year sentence and to start his sentence as of the date of his arrest on January 25, 2002. R. 201, line 3 – R. 202, line 13; R. 204, lines 11-18. The prosecution asked for the judge to “hand down a sentence that would ensure that he is never released again.” R. 203, line 10 – R. 204, line 1. Judge Newman stated that “[t]he law of this state for anything who is sentenced would be entitled to credit for the time that they’ve served. ... I would think that you’d be entitled to credit for time served.” R. 217, lines 10-16. Although the sentence sheet indicated Judge Newman ordered Appellant to receive credit for time served as calculated by the Department of Corrections pursuant to the statute, the record lacked any affirmative indication that Appellant would receive credit for the ten years he waited disposition of this matter. R. 234

#### **Discussion**

The Sixth Amendment to the United States Constitution provides “In all criminal prosecutions, the accused shall enjoy the right to a speedy trial.” U.S. Const. amend. VI; see

also Klopper v. North Carolina, 386 U.S. 213 (1967); Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966). Additionally, our state constitution guarantees that “[a]ny person charged with an offense shall enjoy the right to a speedy trial.” S.C. Const. art. I, § 14. “The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused’s defense.” State v. Langford, 400 S.C. 421, \_\_\_, 735 S.E.2d 471, 481 (2012)(citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)). If a court concludes a defendant’s right to a speedy trial has been violated, dismissal of the charges “is the only possible remedy.” Barker v. Wingo, 407 U.S. 514, 522 (1972).

The United States Supreme Court explained “[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon the circumstances.” Beavers v. Haubert, 198 U.S. 77, 87 (1905). Therefore, the Court explained the appropriate analysis for a speedy trial claim is “a balancing test, in which the conduct of both the prosecution and defendant are weighed.” Barker, 407 U.S. at 529. The Barker Court “identif[ied] some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.” Those four factors are the length of the delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant. Id. at 530; see also Doggett v. United States, 505 U.S. 647 (1992); Vermont v. Brillon, 556 U.S. 81, 129 S.Ct. 1283 (2009); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973); State v. Monroe, 262 S.C. 346, 204 S.E.2d 433 (1974); Waites, 270 S.C. at 107, 240 S.E.2d at 653; State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997); State v. Evans, 386 S.C. 418, 688 S.E.2d 583 (Ct. App. 2009). However, “none of the four factors

identified [are] a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial.” Barker, 407 U.S. at 533.

In order to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial “has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” Doggett, 505 U.S. at 652 (quoting Barker, 407 U.S. at 530-531).<sup>1</sup> The length of the delay that will trigger the inquiry is dependent upon the peculiar circumstances of the case. Barker, 407 U.S. at 530-531. Generally, the delay tolerated for an ordinary street crime is less than for a serious, complex conspiracy charge. Id. at 531.

The Barker Court found a delay between arrest and trial of well over five years to be clearly “extraordinary.” Barker, 407 U.S. at 533. Although seven months of that period was excused by the illness of a witness, the delay of “more than four years was too long a period.” Id. at 534. In Doggett, the Supreme Court noted that, depending on the nature of the charges, lower courts have generally found post-accusation delay “presumptively prejudicial” as it approaches one year. Doggett, 505 U.S. at 652; see also State v. Cooper, 386 S.C. 210, 217, 687 S.E.2d 62, 66 (Ct. App. 2009). The South Carolina Supreme Court found a two-year and four-month delay sufficient to trigger further review. Waites, 270 S.C. at 108, 240 S.E.2d at 653. The Court found a twenty-three month delay presumptively prejudicial where the charges were serious, but the factual proof was not complicated. Langford, 400 S.C. at \_\_\_, 735 S.E.2d at 482. Our Court also found a three year and five month delay sufficient to trigger the analysis. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64

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

(1997). This Court affirmed a circuit court's decision that a delay of forty-four months triggered the speedy trial inquiry. State v. Cooper, 386 S.C. 210, 216-217, 687 S.E.2d 62, 66-67 (Ct. App. 2009)

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

Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned to a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

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

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

As an initial matter, a defendant is not required to show prejudice affirmatively to win a speedy trial claim. Moore v. Arizona, 414 U.S. 25, 26 (1973); see also United States v. Ferreira, 665 F.3d 701, 706-707 (6<sup>th</sup> Cir. 2011); U.S. v. Molina-Solorio, 577 F.3d 300, 307-308 (5<sup>th</sup> Cir. 2009); United States v. Frith, 181 F.3d 92 (4<sup>th</sup> Cir. 1999); United States v. Clark, 83 F.3d 1350, 1353-1354 (11<sup>th</sup> Cir. 1996). The Court granted relief to Doggett while noting that he "did indeed come up short" in making "any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence." As a result, the Court explained "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." In light of the difficult nature of proving prejudice, the Court held that the importance of presumptive prejudice increases with the length of delay. Doggett, 505 U.S. at 655-656. In the absence of proof of particularized prejudice, the state's negligence and a substantial delay will compel relief unless the presumption of prejudice is either "extenuated, as by the defendant's acquiescence, or persuasively rebutted" by the prosecution. Id. at 658.

As the United States Supreme Court has observed, unreasonable delay threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by the loss of memories and exculpatory evidence. Barker 507 U.S. at 532. The

Court observed that loss of memory “is not always reflected in the record because what has been forgotten can rarely be shown.” Id. According to the Court, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” Id. Being locked up hinders a defendant’s ability to gather evidence, contact witnesses, and prepare his defense. Id. at 533. Even a defendant who is not in jail prior to trial is disadvantaged “by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.” Id.

#### Length of the delay

The ten year delay between Appellant’s arrest and trial was uncommonly long. Eight years prior, in 2004, Judge Keesley called the delay “clearly bordering on excessive.” The trial judge described this as “the first case he had where ten years had passed between the arrest and trial.” In light of the case law, Appellant’s case obviously triggers the speedy trial analysis as it is presumptively prejudicial. Although the case was a very serious one, it was not a complicated case to try. Primarily, the trial involved the testimony of three eyewitnesses regarding a single charge. The extraordinary length of the delay weighs heavily against the prosecution.

#### Reason for the delay

The stated reasons for the delay in the prosecutor calling Appellant’s case to trial was Solicitor Myers was deciding whether to seek the death penalty against Appellant and obtaining Appellant’s cooperation against Barnes. Although Solicitor Myers decided very early on to seek death against Barnes, he was not sure whether he would seek death against Appellant until after Barnes’ trial. By failing to try Appellant by February 2005 as instructed by Judge Keesley, the state consented to Appellant’s extradition to Georgia.

Appellant was tried in Georgia shortly thereafter – in 2006. Nevertheless, the first attempt by the prosecutor to extradite Appellant to South Carolina was “in the first part of 2011” following Barnes’ conviction in November of 2010.

The delay was a deliberate attempt by the prosecution to force Appellant to testify against Barnes. The prosecutor held a “sword of Damocles” in the form of a threat of a death sentence over the head of Appellant for ten years in hopes of receiving Appellant’s assistance in the prosecution of Barnes. There is simply no reason the prosecution had to wait for Barnes’ trial to conclude before trying Appellant.

Without question, South Carolina had physical possession of Appellant from January 2002 until January 2005 when Judge Keesley granted Appellant a bond. During those three years, the prosecution made no attempt to prosecute Appellant. Appellant’s trial in Georgia, and the disposition of the testifying co-defendants’ charges were resolved in 2006. Therefore, any cross-border issues were resolved by the end of 2006.

There is no argument that the state can present except that Appellant’s trial was delayed deliberately by the state in order for the state to gain an advantage in the trial of Steven Barnes. The prosecution rightly did not argue a crowded docket prevented trial of Appellant, as the order of Judge Keesley offered the creation of a special term of court in 2005. Additionally, the prosecution rightly did not argue the factual presentation of the case was complicated as it consisted primarily of the testimony of three eyewitnesses who cooperated immediately with law enforcement.

### Assertion of right to speedy trial

Without question, Appellant asserted his right to a speedy trial. He filed multiple motions in 2004 and 2005 demanding to be tried in a timely manner. When the prosecution placed his case on the trial docket, Appellant again asserted his right to a speedy trial.

### Prejudice

Appellant had “no burden of pointing to specific prejudice.” In light of the outrageous length of the delay and the admitted reason for the delay, the presumption of prejudice to Appellant is great. Nevertheless, Appellant provided at least one example of prejudice - during the capital trial of Steven Barnes, Appellant’s co-defendant, a witness, Richard Cave, testified that his testimony was the result of what he actually remembered and what he read in transcripts and statements, not the basis of his own memory. Appellant also demonstrated through cross-examination that the memories of the witnesses were impaired by the passage of time. Additionally, the mental and emotional anguish Appellant suffered from the “sword of Damocles” controlled by the prosecution must receive significant weight and consideration. For almost a decade, Appellant lived in a state of mental and emotional turmoil waiting for the state to make a life-or-death decision.

Although the record is unclear at this time, Appellant’s ability to receive credit for time served from the date of arrest is likely hindered by the state’s failure to prosecute him earlier. The Department of Correction often discounts pre-trial detainment in another state or detainment subsequent to a conviction in a different jurisdiction.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the lower court, hold that his federal and state constitutional rights to a speedy trial have been violated, and dismiss the charge of murder against him.

Respectfully submitted,

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 10<sup>th</sup> day of September, 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."

September 10, 2013

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Clifton Newman, Circuit Court Judge

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SEP 10 2013

**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

ALEXANDER L. HUNSBERGER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 10th day of September, 2013.

Susan B. Hackett

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
This 10th day of September, 2013.

Sen. [Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.