STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE A. ODOM,

PETITIONER

APPELLATE CASE NO 2018-001676

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in failing to find that 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?

STATEMENT

In August of 2013, the Edgefield County Grand Jury indicted Petitioner, Maurice A. Odom, for burglary second degree, indictment #2013-GS-19-511. The State called the case for trial in August of 2013, but that trial ended in a mistrial. The State then called the case again for trial in June of 2015. Petitioner proceeded to jury trial before the Honorable R. Knox McMahon on June 8, 2015. Bennett E. Casto and Erik J. Drylie represented Petitioner at trial. Ervin J. Maye and H. Franklin Young prosecuted the case. The jury returned a verdict of guilty and Judge McMahon sentenced Petitioner to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on June 16, 2015, and the direct appeal perfected.

In an unpublished opinion filed June 27, 2018, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Odom, Op. No. 2018-UP-273 (S.C. Ct.App. filed June 27, 2018). A timely petition for rehearing was filed and denied on August 16, 2018. The petition for writ of certiorari was filed on September 17, 2018. The State filed a return on October 15, 2018. On March 6, 2018, this Court granted the petition for writ of certiorari as to question number two presented in the petition. This brief of petitioner follows.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial." S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

The remedy for a speedy trial violation is dismissal of the charges. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. Id. at 442, 735 S.E.2d at 482 (internal citation omitted). An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. at 442, 735 S.E.2d at 482 (internal citation omitted).

State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371–72 (2016).

STATEMENT OF FACTS

On October 17, 2007, just before 2:00 AM two masked men threw a block through the window of the IGA grocery store in Johnston and stole ninety cartons of cigarettes. The store alarm was triggered and the police were notified. As police were investigating the burglary they discovered a white Cadillac parked in the woods about a half a mile from the IGA. (R. p.168, lines 5-9). When the officer shined his flashlight on the Cadillac he saw two people changing clothes and then flee into the woods. (R. p.168, lines 15-24). Officers searched the Cadillac and found identification documents belonging to Petitioner. (R. pp. 192-194). Officers also found a bill of sale for the Cadillac reflecting that Dukes Boys Auto Sales sold the car to Demetrius Odom on September 22, 2007. (R p. 203, lines 12-21). The officers also found an insurance identification card with Demetrius Odom's name on it. (R. p. 203, line 22 – p. 204, lines 1-7). Jessie James Dukes from Dukes Boys Auto Sales testified that he sold the Cadillac to "Temetrius" Odom and Petitioner was present at the time of the sale. (R. pp. 289-290).

Officers also found inside the car a cell phone belonging to Petitioner as well as another phone. (R. p. 263, line 22 – p. 264, lines 1-17). On the other phone the police called a contact labeled "Momma" and learned that this phone belonged to the co-defendant and Petitioner's half - brother, Brandon Donaldson. Both Petitioner and Donaldson were charged with the IGA burglary. Donaldson testified against Petitioner at trial. The jury found Petitioner guilty and the judge sentenced Petitioner to life without parole pursuant to S.C. Code §17-25-45.

ARGUMENT

The Court of Appeals erred in failing to find that 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 burglary of an IGA grocery store on October 30, 2007. (R. p. 41, lines 10-14). The State did not call the case for trial until almost six years later in August of 2013. In August 2013, trial ended in mistrial because of a hung jury. (R. 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 the second 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 stating:

> You know, it seems to me, with him being out on bond and even the State attempting to revoke bond before Judge Keesley in September of '14. He's been always represented by either an appointed or a retained attorney, all of whom have the highest competency and professional standards; Judge Seigler, Mr. Moses, Mr. Screen, and of course now Mr. Casto. That – specifically that that motion was never made before the August 6th, '13 trial. If you go from August 6th of '13, this is actually a 2013 indictment now. He was indicted 7/31/13 with a trial August 6th of'13. From August 6th, August '13 until now, is only twenty-two months which is less than Langford.
>
> 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. I'm not – I'm no top psychologist, but it seems to me he has a lot more to worry about and a lot more to be anxious about than just this Edgefield case. He has Lexington charges, Barnwell charges, Newberry charges, Laurens charges. Then he has a Newberry conviction, a Laurens plea, and a fifteen years sentence. And he's incarcerated, so when I start weighing those various things, I don't think it meets the standard that Langford indicates is – indicates should be met.

> 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. 50, line 17 - p. 51, lines 18-24).

The trial judge erred in failing to properly weigh the factors from Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The trial judge erred in only considering the twenty-two months between the mistrial and the second trial without considering the almost six-year period between arrest in October of 2007, and the indictment and first trial in August of 2013. The trial judge failed to weigh the reason for the delay against the State. While the State argued that arrests in neighboring counties were a reason for the delay, the trial judge did not. Instead, the trial judge indicated that because of the other pending charges, Petitioner had more to be anxious about than the Edgefield charge stating, "I'm not – I'm no top psychologist, but it seems to me he has a lot more to worry about and a lot more to be anxious about than just this Edgefield case. He has Lexington charges, Barnwell charges, Newberry charges, Laurens charges. Then he has a Newberry conviction, a Laurens plea, and a fifteen-year sentence. And he's incarcerated, so when I start weighing those various things, I don't think it meets the standard that Langford indicates is – indicates should be met." (R. p. 51, lines 9-17). The trial judge put undue emphasis on the timing of the assertion of the right. The failure to weigh the factors properly is an error of law constituting an abuse of discretion.

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.Ed.2d 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). The State's failure to call the case for trial for almost six years and then, upon mistrial, failure to call the case for trial for almost another two years violated Petitioner right to a speedy trial provided by the United States and South Carolina Constitutions.

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) this 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 eight years. The State concedes that the length of the delay is sufficient to trigger further review. (Return to Petition for Writ of Certiorari p. 11). While at trial 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. Although the trial judge erred in only considering the twenty-two-month period between the first mistrial in August of 2013, and the second trial in June of 2015, this period of time alone would be sufficient to trigger further analysis. Additionally, the almost six-year time frame between the arrest on October 30, 2007, and indictment and the first trial in August of 2013, 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. The total eight-year delay is presumptively prejudicial.

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 State v. Hunsberger, 418 S.C. 335, 346, 794 S.E.2d 368, 374 (2016), this Court wrote:

> The State's justifications for delay in trying a defendant are weighted differently: (1) a deliberate attempt to delay trial as a means to hamper the defense weighs heavily against the State; (2) negligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility; (3) a valid reason, such as a missing witness, justifies an appropriate delay; and (4) delays occasioned by the accused weigh against him. Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted). Ultimately, justifying the delay between charge and trial is the responsibility of the State. Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted).

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, however, no evidence in the record 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. The State did not obtain

the burglary indictment for which Petitioner eventually went to trial until August of 2013, almost six years after the arrest in October of 2007.

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 advised the judge, "At that point in time, he was represented by another attorney, Mr. Marion Moses. So I had forgotten, in this case, that he had an interceding attorney in between Mr. Seigler and Mr. Screen. And the State would also assert that that was part of the delay. We at first thought Mr. Moses would have him on all of this, and he ended up just representing him for purposes of the bond hearing, Your Honor." (R. p. 43, lines 10-17). The fact that another attorney represented Petitioner for a bond revocation hearing for Lexington County charges does not justify the State's delay in calling the Edgefield County burglary case for trial.

When the judge asked if there was a time when Petitioner was out on bond and was not reporting in general sessions court in Edgefield County, Petitioner's counsel answered, "No, sir, Your Honor. I don't have any paperwork to that effect. I beg the Court's indulgence." (R. p. 43, lines 21-22). The prosecutor then stated:

> The Clerk of Court has some paperwork in the file. He was initially indicted, it looks like March 2008, here, on the Indictment 2008-GS-19-106 for grand larceny and indictment 2008-GS-19-105, and at some point in time he did not appear, and there were – these indictments I see are signed off by Solicitor Young as failure to appear on 2/12 of 2009. So there was apparently at least some term of court when we believe he was not appearing on these charges, Your Honor. Some of that may have been his arrest in other counties. I don't know why he was not here, but he got arrested so many times. Like I said, he was out on Barnwell charges, got arrested in Edgefield, was out on the Edgefield and Barnwell charges, got arrested in Lexington. And then, it is my understanding, was out on Barnwell, Edgefield, and Lexington charges and got rearrested over in the Eighth Circuit, was ultimately tried and convicted on those charges, Your Honor.

(R. p. 43, line 23 – p. 44, lines 1-14).

The State admitted that the reason Petitioner may not have appeared, for what appears to have been a roll call rather than a trial date, was because he may have been incarcerated in another county. (R. p. 43, line 23 – p. 44, lines 1-19). The present case is distinguished from Smith v. State, 579 S.E.2d 829 (Ga. Ct.App.2003), cited by the State, where there was no evidence that Smith was in jail on his trial date and unable to appear. Additionally, the State was not ready to proceed with the burglary trial in February of 2009, when Petitioner did not appear, because the State did not obtain the burglary indictment until August of 2013, over four years later and almost six years after the arrest in October of 2007.

The other arrests were from counties within South Carolina, all close to Edgefield County. The Lexington charges were in the same judicial circuit as the Edgefield charge. The record does not reflect what, if any, steps the State took in an attempt to locate Petitioner or contact the bonding company when he did not appear in February of 2009. "Ultimately, justifying the delay between charge and trial is the responsibility of the State." Langford, 400 S.C. at 443, 735 S.E.2d at 483 (internal citation omitted). 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, and then again refusing to call the case for re-trial for almost another two years 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). In the present case the trial judge erred in refusing to weigh the reason for the delay against the State.

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 asserted until the second trial in June of 2015. Petitioner's failure to previously assert the right to a speedy trial is, however, simply one factor 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.
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> Barker v. Wingo, 407 U.S. 514, 528-529, 92 S.Ct. 2182, 2191 (1972).
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> In State v. Hunsberger, 418 S.C. 335, 349, 794 S.E.2d 368, 375 (2016), this Court wrote:

> Whether a defendant previously asserted the right to a speedy trial is not alone dispositive of whether he is entitled to relief. See Barker, 407 U.S. at 533, 92 S.Ct. 2182 (holding none of the four factors are either necessary or sufficient to find a denial of the right to a speedy trial). The accused's assertion of the right, however, is entitled strong evidentiary weight in determining whether the accused is being deprived of the right. Barker, 407 U.S. at 531–32, 92 S.Ct. 2182. Failure by the accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial. Id. at 532, 92 S.Ct. 2182.

Based on other factors present in this case this Court can and should find a speedy trial violation although Petitioner did not assert the right until the second trial in June of 2015. The trial judge placed undue influence on the fact that Petitioner did not assert his speedy trial right until the second trial and failed to balance this factor against the cause of the delay which is heavily weighed against the State.

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 present 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 almost eight-year 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) this 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 eight-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 for the first trial and then almost two additional years for the re-trial 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 because of the eight-year delay. The charge must be dismissed.

In affirming the conviction the Court of Appeals 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.").

The cause of the delay should not be attributed to Petitioner and instead should be weighed heavily against the State. The trial judge and the South Carolina Court of Appeals erred in failing to properly weigh the factors from Barker v. Wingo. The eight-year delay is presumptively prejudicial. The purported reasons for the delay weigh heavily against the State and outweigh the fact that Petitioner did not assert the speedy trial right until June 8, 2015, at the start of the second trial. The failure to properly weigh the Barker factors is an error of law constituting an abuse of discretion. Properly reviewing the factors, Petitioner's speedy trial rights, provided by the United States and South Carolina Constitutions, were violated requiring dismissal of the conviction and sentence.

CONCLUSION

Based on the above argument, the conviction and sentence must be reversed.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Edgefield County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MAURICE A. ODOM,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Maurice Anthony Odom, #199677, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of April, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of April, 2019.

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