(5)

ORIGINAL

RECEIVED

NOV 18 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
William Jeffrey Young, Circuit Court Judge

C.A. No.: 2013-000700

The State of South Carolina ..... Respondent

v.

MARC A. PALMER ..... Appellant

**FINAL REPLY BRIEF OF APPELLANT**

Ryan L. Beasley, No. 68307
RYAN L. BEASLEY, P.A.
650 E. Washington Street
Greenville, SC 29601
(864) 679-7777 (Phone)
(864) 672-1406 (Fax)
rlb@ryanbeasleylaw.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 (Phone)
(803) 734-1397 (Fax)

Other counsel of record:

Donald J. Zelenka, Office of the Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

## REPLY TO RESPONDENT'S STATEMENT OF THE FACTS

The appellant has consistently maintained his innocence and disagrees with the respondent's characterization of the facts. The respondent asserts that "appellant indicated that the victim had threatened to rob appellant." (Response Brief p. 4). This is not a true recitation of the facts. The appellant denied that the victim threatened him, and in fact, the victim did not want to rob the appellant because he wanted "a big man".

Q: We are investigating the murder of Therris Keels. That's what this is about. He got shot Wednesday night. Your name has been thrown up in it as the person who did it.

A: No, I didn't.

Q: But he threatened you the other day.

A: Well, no.

Q: But he threatened you?

A: No, not really.

Q: Tell me about that.

A: Well, Therris threatened to rob me. Then he said I don't want you, I want a big man.

Q: Who is a big man?

A: I don't know. He said you ain't got enough for me. . . .

(R. p. 578).

The victim was shot with a 45 caliber pistol. (R. p. 261, ln. 17-24). The appellant never asked "Dominique" for a gun, as asserted by the respondent. (R. p. 121; 375, ln. 2-9). Maurice Smith testified that saw the appellant drop a gun during an altercation between the appellant and an individual named Dominique (R. p 121, ln. 7-9). However, Smith had "no idea" what kind of gun it was (R p. 121, ln 15-18). Detrel

Matthews similarly testified that he did not know what type of gun the appellant dropped. (R. p. 228, ln 3-10). The appellant testified that it was a .38 caliber handgun. (R. p. 375, ln. 2-4, 380, ln. 15-24).

Smith testified that he saw the victim, "Keels," go into the "Shop" with Joseph Sabb, "TT," but Sabb testified that he was never at the Shop with the victim prior to the shooting. (R p. 435, ln. 2-4) Wesley Walker and Sabb both testified that Sabb and the victim were walking to the Shop when the shooting occurred, not from the Shop. (R. p. 149, ln. 8-25; 432, ln. 18 – p. 435, ln. 4). Brittany Croskey testified the shooter was walking under the garage light seconds before the shooting, but Sabb and Walker testified that the shooter came from the Shop and was nowhere near the garage, nor was there light were the shooting occurred. (R p. 164, ln. 23-24; 199, ln. 3-6; 456, ln. 2-18).

Smith testified that the appellant had dreadlocks on October 28, 2010, the night of the shooting. (R. p. 114, ln. 21-25; 115, ln. 1-2). However, the appellant could not have dreadlocks on October 28, 2010 because Officer McFadden testified that on October 29, 2010, the appellant's hair was braided back in cornrows. (R. p. 342, 6-17). Further, the appellant's November 15, 2010 mug shot depicts his hair in cornrows, not dreadlocks. (R. p 419, ln. 11-24; R. p. 602). Matthews also testified that the appellant normally wore his hair in braids, not dreadlocks. (R. p. 246, ln. 22-25; 247, 1n. 1-10). No witnesses, besides Smith, testified that the appellant wore dreadlocks.

## ARGUMENT

**I. DID THE TRIAL COURT ERROR IN GRANTING THE STATE'S BATSON V. KENTUCKY MOTION AND QUASHING THE ORIGINAL JURY?**

The trial court committed legal error by improperly placing the ultimate burden of persuasion on the appellant This case is strikingly similar to the recent South Carolina Supreme Court case State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014).

In Inman, the State raised Batson challenges to jurors struck by the appellant. Inman, 409 S.C. at 23-24, 760 S.E.2d at 107. One of the contested jurors - - Juror 60 in Inman and Juror 173 here - - sat on the jury Inman, 409 S.C. at 24, 760 S.E.2d at 107. Appellant's counsel in both Inman and here met the minimal burden to produce a valid, race-neutral reason for striking prospective jurors. Inman, 409 S.C. at 28, 760 S.E.2d at 109

In both Inman and here, the State did not argue why the race-neutral reason given for Juror 60 (in Inman) and Juror 173 (here) was pre-textual. Inman, 409 S.C. at 24, 760 S.E.2d at 107. Instead, the State just relied on the bare assertion that the reason was given pre-textual. Inman, 409 S.C at 24, 760 S.E.2d at 107; R p. 37 – 39 (wherein, with respect to Juror 173, the State relied on the assertion that "some of the reasons advanced to the court for the strike [are] pretextual in nature").

In both Inman and here, the trial court improperly placed the ultimate burden of persuasion on the appellant. In Inman, the trial court stated that "I'm going to grant the State's motion based on those three individuals jurors numbers 17, 60, and 166 *that the reasons given I don't believe are sufficient.* Inman, 409 S.C. at 24, 760 S.E 2d at 107 (emphasis that of Supreme Court). Similarly here, the trial court stated that "[t]he defense has stricken and *I'm not convinced that the answers that were race neutral* and therefore I am going to strike this jury. We will re-strike the entire panel." (R. p. 40, ln. 9-12).

"The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." State v. Haigler, 334 S C. 623, 629, 515 S E.2d 88, 90 (1999); *see also* Inman, 409 S.C. at 28, 760 S.E.2d at 109. As in Inman, the appellant's counsel gave race-neutral reasons for striking the prospective jurors. (*See* Appellant's brief at pp 5-6; R. p. 34, ln. 6-17, 37, ln. 15-20). With respect to Juror 173, the appellant's counsel explained that he struck Juror 173 due to his employment as a plant supervisor. (R. p. 36, ln. 13-17). As the Court stated in Inman, employment is sufficiently race-neutral to meet the burden of production during step two of a Batson hearing. Inman, 409 S.C. at 28, 760 S.E 2d at 108 (citing State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999)). At this point, "the circuit court should have shifted the ultimate burden of persuasion back to the State to show that the proffered reason was pretextual." Inman, 409 S.C. at 28, 760 S.E.2d at 108 (citing State v. Evins, 373 S.C. 404, 415, 645 S.E 2d 904, 909 (2007)). Instead, the trial court held that it "was not convinced" that appellant's counsel's answers were race neutral. (R. p. 40, ln 9-12).

"When an appellate court finds that the circuit court improperly granted a *Batson* motion, and one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." Inman, 409 S.C. at 29, 760 S.E.2d at 109 (citing State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (internal quotation marks omitted). Here, contested Juror 173 sat on the jury. The respondent incredibly argues that *because* the State did not explain why the proffered reason for striking Juror

173 was pretextual, the State somehow withdrew its challenge to Juror 173. (Respondent's brief at 15-16).

Not only is the respondent's assertion in direct contrast to the Court's holding in Inman, it is not supported by the record. The State made the Batson motion with respect to nine prospective jurors, including Juror 173. (R. p 32, ln. 25; 33, ln. 1-18; *see also* Appellant's Brief at pp. 4-5). The appellant's counsel gave a race-neutral explanation for each one of those nine prospective jurors, including Juror 173. (R. p. 34, ln. 8-25; 35, ln. 1-25; 36, ln. 1-25, 37, ln. 1-20; *see also* Appellant's Brief at pp. 5-6). The State then *gave examples* as to why it believed appellant's counsel's explanations were pretextual. (R. p 37, ln. 24-25; 38, ln. 1-25, 39, ln. 1-15). The State even used the phrase "for example." (R. p. 38, ln. 3). It said it was giving examples because it "hadn't had quite an opportunity to go down through everybody." (R. p. 39, ln 2-3). The State was using examples in attempt to show that the appellant's counsel's reasons were pretextual. In fact, the definition of an example is "something or someone chosen from a group in order to show what the whole group is like." Merriam Webster Dictionary online, defining "example"; *see also* Oxford Dictionary online (defining "example" as "a thing characteristic of its kind or illustrating a general rule"). By using examples, the appellant did not withdraw his challenge to Juror 173. The respondent's assertion is illogical.

Even further, the trial court stated it was "not convinced" that the "answers" offered by appellant's counsel "were race neutral." (R. p. 40, ln. 9-12 stating "[t]he defense has stricken and I'm not convinced that the answers that were race neutral and therefore I am going to strike this jury"). In other words, the trial court was not convinced that the explanations given by appellant's counsel for striking the nine jurors

were race neutral. Even if the State somehow withdrew its objection to Juror 173 by using examples, the trial court's ruling clearly encompassed Juror 173. The appellant therefore could not strike Juror 173 during the re-paneling. Prejudice is presumed and the appellant should be granted a new trial.

## II. DID THE TRIAL COURT ERROR IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL AND NEW TRIAL AFTER THE ADMISSION OF A WITNESS TAKING AND SUCCESSFULLY PASSING A POLYGRAPH EXAMINATION?

The appellant's counsel implied that Michael Montgomery could have murdered the victim in retaliation for a robbery the night before. (R. p. 423, ln. 6-8; 425, ln. 12-25; 426, ln. 1-25; 427, ln. 1-25; 428, ln. 1-3). Over the objection of the appellant, the court permitted testimony that Montgomery took a polygraph exam and was "cleared" by the police:

Q: You voluntarily submitted yourself to a polygraph right?

Mr. Ballinger: Objection.

The Court: No overruled.

Q: You voluntarily submitted yourself to a polygraph right?

A: Correct.

Q Anything they asked of you, you gave it to them right?

A. That's correct

Q And you were cleared by the police?

A: Correct.

(R p. 430, ln. 13-24).

Despite the numerous cases holding that the mention of a polygraph test should not be placed before the jury, the respondent argues that the trial court did not error in

placing this evidence before the jury. (Response Brief at 21). Although the respondent argues that no mention of the results of the polygraph were made, the undeniable implication of this evidence is that Montgomery passed the polygraph because he was "cleared by the police." Prosecutors know that testimony regarding passing a polygraph is clearly inadmissible as improper bolstering evidence.

The respondent asserts that the polygraph evidence was intended to show Montgomery cooperated with law enforcement, not that he was "cleared by the police." (Response Brief at 21). However, the inference from this evidence is that the appellant either did not "voluntarily submit[]" to a polygraph test or failed a polygraph test because he obviously was not "cleared by the police." Both of these inferences are impermissible. State v. McGuire, 272 S.C 547, 551, 253 S.E.2d 103, 105 (1979) ("The record here presents a close question. From the testimony it is inferable that McGuire was offered a polygraph examination. It left the jury to speculate and to conclude that he refused to take the test. Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid any mention of a polygraph examination"); State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986) ("Evidence regarding the results of a polygraph test . . . is inadmissible"); State v. Thrift, 312 S.C. 282, 302, 440 S.E.2d 341, 352 (1994) ("It is well settled that any evidence flowing from an experience with a polygraph is in admissible at trial in South Carolina"); State v. Johnson, 376 S C. 8, 11, 654 S E 2d 835, 836 (2007) ("The general rule is that no mention of a polygraph test should be placed before the jury").

The respondent next argues that even if the trial court erred in permitting the polygraph evidence, the appellant was not prejudiced The appellant need not show that

he was prejudiced. The trial court here failed to ensure that no improper inference would be drawn from the polygraph evidence. *See* McGuire, 272 S.C. at 551, 253 S.E.2d at 105 ("If such [polygraph evidence] is brought out in the testimony, the trial judge should be meticulous to see that no improper inference is created); Johnson, 654 S.E.2d at 836 (It is . . . incumbent upon the trial judge to ensure that should such a reference be made, no improper inference be drawn therefrom"). As held by the Court in State v. Britt, "[w]hat effect the testimony as to the reputation of the appellant . . . and of his failure to take a lie detector test had upon the jury is only known to the members thereof. We reach the conclusion that it could have affected the verdict in this case. When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law." State v. Britt, 235 S.C. 395, 425, 111 S.E.2d 669, 685 (1959), *reversed on other grounds by* State v Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The appellant should therefore be granted a new trial

Even though prejudice need not be shown, the appellant was prejudiced. Montgomery was a key witness. As stated above, appellant's counsel implied that Montgomery could have murdered the victim in retaliation for a robbery the night before (R. p 423, ln. 6-8; 425, ln. 12-25; 426, ln. 1-25; 427, ln 1-25; 428, ln. 1-3). On cross examination, the State elicited evidence that at the time of the murder, Montgomery did not have the same physical characteristics as the shooter. (R. p. 429, ln. 2-23). It further elicited testimony that Montgomery was not near the scene of the shooting on the night of the murder. (R. p. 430, ln. 2-4). It thereafter elicited the testimony that Montgomery

submitted to the polygraph test and was "cleared by the police." (R. p 430, ln. 13-24). The appellant was prejudiced by this improper bolstering evidence. The appellant should therefore be granted a new trial.

## III. DID THE TRIAL COURT ERROR IN REFUSING TO DISMISS THIS CASE AFTER THE STATE VIOLATED THE APPELLANT'S RIGHT TO A SPEEDY TRIAL?

"The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed." Dickey v. Florida, 398 U S. 30, 37, 90 S.Ct 1564, 1568, 26 L.Ed.2d 26 (1970).

In Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972), the United States Supreme Court identified four factors to determine whether a defendant has been deprived of his right to a speedy trial: the length of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker, 407 U.S. at 531, 92 S Ct. at 2192.

Here, it is undisputed that the time between the appellant's arrest and trial was lengthy. (Respondent's Brief p. 28). The respondent asserts that although this time was lengthy, it was not outside the parameters of cases in which a lengthy delay was not considered to constitute a violation of the right to a speedy trial. (Respondent's Brief p. 28) However, in addition to the actual length of delay and type of case, other circumstances fall within the "length of delay" factor. "For example, the First Circuit thought a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony." Barker, 407 U.S. at 531, fn. 31, 92 S.Ct. at 21925, fn. 31, 33 L.Ed.2d 101 (citing United States v Butler, 426 F 2d 1275, 1277 (1st Cir. 1970). Further, "[i]f the case for the prosecution calls on the accused to meet charges rather than rest on

infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh." Dickey, 398 U.S. at 37, 90 S.Ct at 1568, 26 L.Ed.2d 26. Here, not only was the delay lengthy, but this case also depended on eyewitness testimony and required the appellant to present a defense. This factor weighs in favor of the defendant.

In denying the appellant's motions for a speedy trial, the trial court stated that one of the reasons for the delay is that "it appears to be at least [the appellant] being unsatisfied with his attorneys." (R p. 55, ln. 7-9). In so holding, the trial court abused its discretion. There is no evidence that any of the appellant's attorneys requested a continuance, or indicated that they needed time to get up-to-speed on the case. *See* State v. Tindall, 388 S.C 518, 521, 698 S.E.2d 203, 205 (2010) (this Court may conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence). Instead, appellant made numerous motions for a speedy trial, and each of them was denied.

The record reflects that the appellant's change of attorneys *could not* have been the reason for the delay, and instead the failure was due to the actions of the State. As recognized by the United States Supreme Court, the "State" does not only encompass the Solicitor's Office, but also includes the Court, Court personnel, and other branches of government. Dickey, 398 U.S. at 51, 90 S.Ct. at 1575, 26 L.Ed.2d 26, J. Brennan, concurring ("If the defendant does not cause the delay of his prosecution, the responsibility for it will almost always rest with one or another governmental authority. The police and prosecutor are not the only governmental officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well . . . And the public officials responsible for delay may not even be associated with law

enforcement agencies or the courts. Delay, for example, may spring from a refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for speedy trials").

Here, the appellant made numerous requests for a speedy trial Attorney Carraway initially represented the appellant from December 2010 until March or early April 2011. He was relieved because he previously represented the victim in a criminal charge (R p. 52, ln. 1-6). The appellant's actions did not cause this conflict of interest. Even if this was not a "true" conflict as asserted by the Assistant Solicitor at the trial, this change of attorney did not cause any delay in the trial date. (R. p 52, ln 3-6). Attorney Carraway was relieved very early in the case. Attorney Cezar McKnight was also relieved because he represented the estate of the victim. (R. p. 558, ln. 22-24; 559, ln.1-2) This was of no fault of the appellant and there is no indication that this delayed the trial date.

The appellant made a speedy trial motion on March 24, 2011. (R. p. 4). The appellant renewed this motion on July 22, 2011 (R. p. 540, ln 22-25). The Solicitor's Office scheduled a case in September 2011 to go to trial the January 2012 term of court, ignoring the appellant's July 22, 2011 speedy trial request (R. p 556, ln 17-21). This was not due to any change in the appellant's attorneys. The Assistant Solicitor indicated that the appellant's trial would "probably" be set for the spring term of 2012, but never officially set a trial date, nor brought appellant to trial the spring of the 2012 term. (R. p. 540, ln. 18-21). Attorney Barr was not relieved as counsel until *after* the 2012 spring term. (R. p. 569, ln. 23). Moreover, on July 1, 2012, the appellant wrote a letter to the Clerk of Court asking for his trial to be immediately scheduled, regardless of the matter

between the appellant and Attorney Barr. (R p. 615). Thus, the failure to schedule the appellant's trial was not due to the appellant's change in attorneys.

The State of South Carolina failed to ensure the appellant's right to a speedy trial The State's failure "virtually as damaging to the interests protected by the right as an intentional failure." Dickey, 398 U.S. at 51, 90 S.Ct. at 1575, 26 L.Ed.2d 26, J. Brennan, concurring; *see also* State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (holding S.C. Stat. § 1-7-330 unconstitutional and reiterating that "a court's power to hear and decide cases carries with it the inherent power to control the order of its business"). The appellant asked the trial court if he could be tried in January 2012. (R. p. 557, ln. 17-21). In response, the trial court stated that "I'm not - - I understand your request, but I'm not in control. The Solicitor controls the criminal dockets and they decide what order what goes to trial " (R p. 557, ln. 22-25). On May 29, 2011, the appellant wrote a letter to the South Carolina Supreme Court requesting that he be tried. (R. p. 608). This letter was forwarded to the Clerk of the trial court. (R. p. 605). On May 30, 2012 the appellant wrote a letter to the trial court requesting that he be immediately tried. (R. p. 612). On June 11, 2012, the appellant wrote a letter to the Clerk of the trial court requesting that he be immediately tried (R p. 615). On or about August 27, 2012, the appellant wrote another letter to the South Carolina Supreme Court requesting to go to trial. (R. p. 617,620). This letter was forwarded to the Clerk of the trial court (R. p. 617, 620). Despite the appellant's continuous efforts, the trial court never set a deadline for the appellant's trail. (R. p. 541, ln. 7-13). The State never offered an excuse for their conduct. The State was the reason for the delay, and this factor weighs in favor of the appellant.

It is undisputed that the third factor, the appellant's assertion of the right, weighs in favor of the appellant. (Respondent's Brief pp 29-30). The appellant asserted his Constitutional right to a speedy trial early in the case and numerous times thereafter

The appellant was also unfairly prejudiced. As explained in the appellant's opening brief, there was no direct physical evidence linking the appellant to the murder. The respondent does not dispute that this was an eye witness driven case. Nevertheless, it relies on the trial court's assertion that the delay *could* work in the appellant's favor because the eyewitness may not be able recall certain facts. (*See* Respondent's Brief p. 31) However, this was not the reality.

Maurice Smith was a drug dealer, (R. p. 112, ln. 7-20), who gave inconsistent statements of what happened the night of the murder. In the first statement, given close in time to the night of the murder, Smith never mentioned the appellant being the shooter. (R. p 134; ln. 17-25; 135, ln. 1-2). After giving this statement, Smith was charged with drug offenses. (R. p. 136, ln. 14-20). In December 2011, while in custody on the drug charges, Smith and the appellant got into a verbal altercation. (R. p. 136, ln. 21-25; 137, ln 1-2). It was not until February 2012 that Smith first implicated the appellant in the 2010 murder. (R. p. 137, ln. 18-25; 138, ln. 12-14). Smith's implication of the appellant occurred after the appellant's numerous requests for a speedy trial. None of this is disputed by the respondent

Further, as explained in appellant's opening brief, Brittany Croskey testified at trial that she "assumed" the appellant was the shooter because he had a specific kind of walk. (R p 210, ln. 3-9). However, when law enforcement asked her about the shooter in November 2010, she did not have a feeling who it was. (R. p 210, ln. 19-25; 211, ln

1-6). She only began thinking that the appellant could be the shooter when people started talking around town. (R. p. 211, ln. 7-22). She, in fact, had no independent knowledge that the appellant was the shooter. (R p. 211, ln. 14-22). None of this is disputed by the respondent. In fact, Joseph Sabb, who was the in close proximity to the victim and the shooter at the time the victim was shot, testified that he did not notice anything particular about the shooter's walk (R. p. 435, ln. 5-7).

The appellant was prejudiced by witness James Palmer's lack of memory of what the appellant looked like before he left the house the night of the murder. (R. p. 357, ln. 25; 358, ln 1-3). This is not disputed by the respondent.

Further, the government's failure hindered the appellant's relationship with attorney James Hoffmeyer and the appellant requested that he be relieved. (R. p. 551, ln. 22-25; 552, ln 1-25, 553, ln. 1-25; 554, ln 1-25, 555, ln. 1-25, 556, ln. 1-15). At this hearing, the appellant proposed to keep Attorney Hoffmeyer as his counsel if the respondent would call his case to trial during the January 2012 court term because the trial originally scheduled for that court term was just delayed. (R. p. at 557, ln. 17-25; 558, ln 1-12) However, the appellant's request was ignored. Due to this inaction, the appellant asked Attorney Hoffmeyer to be relieved. (R. p. 559, ln. 4-20) This is not disputed by the respondent.

In fact, the only prejudice that the respondent disputes is the unavailability of Elijah Kennedy due to his death. (Response Brief at 31). The respondent does *not* assert that the appellant was not prejudiced by Kennedy's death (Response Brief at 31). It only asserts that the appellant cannot raise prejudice due to Kennedy's death because he did not raise it at trial (Response Brief at 31). Appellant's counsel argued that the

appellant was unfairly prejudiced by the State's delay because this was an eye witness driven case. (R. p. 54, ln. 12-14) This was sufficient to preserve Kennedy's unavailability, as it relates to unfair prejudice due, for appellate review. Even if not preserved, the record reflects that the appellant was still unfairly prejudiced (*See* Appellant's Opening Brief and arguments, *supra*)

Again, "[i]f the case for the prosecution calls on the accused to meet charges rather than rest on infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh." Dickey, 398 U.S. at 37, 90 S.Ct. at 1568, 26 L.Ed 2d 26. It was the appellant's right to meet the charges against him when the case was fresh The appellant was continually denied this right. For these reasons, and those as stated in appellant's opening brief, this Court should reverse the trial court, and order that the charges be dismissed with prejudice.

## IV. DID THE TRIAL COURT ERROR IN ADMITTING THE APPELLANT'S STATEMENT AFTER HE UNAMBIGUOUSLY INVOKED HIS RIGHT TO COUNSEL?

The appellant gave a statement to law enforcement on October 29, 2010. Officer Creech read the appellant his Miranda warnings. (R. p. 57, ln 22-25, 58, ln. 1-11). He then asked the appellant if he wished to speak to the officers. The transcript of the interview states in pertinent part:

| | |
|---|---|
| Question by Officer Creech | "Do you wish to talk to us." |
| Answer by appellant: | "I wish to talk to you, but I need for you to call Charles Barr too " |
| Question by Officer Creech: | "You want him here?" |
| Answer by appellant: | "I want him to come, yes." |

(R. p. 11; R p. 59, ln. 23-25, 60, ln. 1-8; R. p. 578). At this point, the appellant's request for counsel was sufficiently clear that a reasonable police officer in the circumstances

would understand the statement to be a request for an attorney. *See* State v Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998). There was no ambiguity or equivocation in the appellant's statements. Questioning should have ceased at this point. The alleged ambiguity as asserted by the respondent came *after* the appellant's unambiguous invocation of his right to counsel.

The appellant did not reinitiate the questioning as asserted by the respondent. (*See* Response Brief at 42; R. p. 83, ln. 7-8) "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards v. Arizona, 451 U.S. 477, 484, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378 (1981). Here, after the appellant invoked his right to have counsel present during the custodial interrogation, *law enforcement* continued to question the appellant. (R. p 578, R. p. 577-578). It is clear from the transcript of the interview and the tape recording of the interview that the appellant was responding to police-initiated custodial interrogation. (R p. 578, R. p. 577; State's Exhibit 2, audio recording). Any ruling from the trial court or argument from the respondent that the appellant reinitiated the questioning is not supported by the record. For these reasons, this Court should reverse the trial court and order that the appellant be granted a new trial.

## V. DID THE TRIAL COURT ERROR IN IMPOSING A FIVE-YEAR SENTENCE ON THE POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME AFTER SENTENCING THE APPELLANT TO LIFE WITHOUT PAROLE ON THE MURDER?

The respondent agrees that the trial court erred in imposing a five-year sentence on the possession of a weapon during the commission of a violent crime after sentencing

the appellant to life without parole on the murder. (Respondent's Brief pp 44-45). For the reasons explained in the appellant's opining brief, this Court should vacate the appellant's five year sentence for possession of a weapon. (*See* Appellant's Opening Brief, Section V).

## CONCLUSION

This Court should order that the charges be dismissed with prejudice because the State violated the appellant's right to a speedy trial. In the alternative, this Court should order that the appellant receive a new trial because the trial court erred in granting the State's Batson v. Kentucky motion and quashing the original jury and prejudice is presumed, the trial court erred in failing to grant a mistrial and the appellant's motion for a new trial after a witness testified about taking and successfully passing a polygraph examination, and the trial court erred in admitting the appellant's statement after he unambiguously invoked his right to counsel. In the alternative to the remedies specified above, this Court should vacate the appellant's five year sentence for possession of a weapon

Dated this 18th day of November, 2014

Respectfully Submitted,

By: RLM

Ryan L. Beasley, No. 68307
RYAN L BEASLEY, P.A.
650 E. Washington Street
Greenville, SC 29601
(864) 679-7777 (Phone)
(864) 672-1406 (Fax)
rlb@ryanbeasleylaw.com

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 (Phone)
(803) 734-1397 (Fax)

RECEIVED
NOV 18 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
William Jeffrey Young, Circuit Court Judge

The State of South Carolina ..... Respondent

v.

Marc Anthony Palmer ..... Appellant

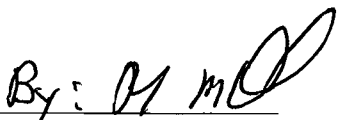
---

CERTIFICATE OF COMPLIANCE

The Undersigned certifies that this Final Reply Brief of Mark Anthony Palmer complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 18th day of November, 2014

RYAN L BEASLEY, PA

By: 

Ryan L Beasley
650 E Washington Street
Greenville, S C 29601
(864) 679-7777
Attorney for Appellant

RECEIVED
NOV 1 8 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
William Jeffrey Young, Circuit Court Judge

C.A. No · 2013-000700

The State of South Carolina . . . . . Respondent

v.

Marc Anthony Palmer . . . . . Appellant

---

PROOF OF SERVICE

---

I, Ryan Beasley, counsel for the Appellant, certify that I have served Appellant's Final Reply Brief and Certificate of Compliance on the persons listed below by depositing the same via U.S. mail, first class, postage prepaid:

*Sharon W Staggers, Clerk of Court*
*125 West Main Street*
*Kingstree, SC 29556*

*Robert M Dudek, Chief Appellate Defender*
*Division of Appellate Defense*
*1330 Lady Street, Suite 401*
*Columbia, SC 29201*

*Donald J Zelenka*
*Office of the Attorney General*
*Rembert Dennis Building*
*1000 Assembly Street, Room 519*
*Columbia, SC 29201*

*Marc Palmer, # 354634*
*Perry Correctional Institute, Q3A-107*
*430 Oaklawn Road*
*Pelzer, SC 29669*

I further certify that I have served fifteen (15) copies of the Final Reply Brief and Certificate of Compliance on the Clerk of the Court of Appeals, with one copy being unbound, by depositing the same via U.S. mail, first class, postage prepaid:

*The Honorable Jenny Abbott Kitchings*
*Clerk of Court of Appeals*
*Post Office Box 11629*
*Columbia, South Carolina 29211*

I further certify that all parties required by Rule to be served have been served.

This 18th day of November, 2014

RYAN L. BEASLEY, PA
Ryan L. Beasley
650 E. Washington Street
Greenville, S.C. 29601
(864) 679-7777

By: [signature]
Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense, Appellate Division
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330 (Phone)
(803) 734-1397 (Fax)

*Attorneys for the Appellant*