STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Edgefield County

Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5749 (S.C. Ct. App. Filed July 22, 2020)

2017-GS-19-1788

THE STATE,

RESPONDENT,

V.

STEVEN LOUIS BARNES,

PETITIONER

APPELLATE CASE NO 2017-002140

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 13, 2020.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the trial judge correctly refused to dismiss the indictment based on a violation of Petitioner's state and federal constitutional right to a speedy trial?

STATEMENT OF THE CASE

In August of 2005, the Edgefield County Grand Jury indicted Appellant, Steven Louis Barnes, for murder and kidnapping, indictments #2005-GS-19-273, 457. In December of 2005, Appellant was served with written notice of the State's intention to seek the death penalty. On November 8, 2010, Appellant proceeded to jury trial before the Honorable R. Knox McMahon. Robert J. Harte and David B. Tarr represented Appellant. Donald V. Meyers, Ervin J. Maye and H. Franklin Young, III prosecuted the case. The jury found Appellant guilty of both charges. Following the guilty verdict, a full sentencing hearing was conducted. The jury determined that two aggravating circumstances existed, torture and kidnapping. The jury recommended a sentence of death. Judge McMahon imposed the death sentence. Appellant timely filed and perfected a direct appeal. On January 15, 2014, the South Carolina Supreme Court reversed the convictions and sentences and remanded for a new trial. State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014).

In October of 2017, the Edgefield County Grand Jury re-indicted Appellant for murder, indictment #2017-GS-19-01788. On October 9, 2017, Appellant proceeded to jury trial before the Honorable Diane S. Goodstein. Jeffrey P. Bloom and William S. McGuire represented Appellant at trial. S.R. Hubbard, III, L. Suzanne Mayes, David Shawn Graham and Lucas A. Pencelli prosecuted the case. The jury found Appellant guilty and Judge Goodstein sentenced Appellant to life without the possibility of parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was served on October 16, 2017, and the direct appeal perfected.

On May 5, 2020, a three- judge panel of the South Carolina Court of Appeals heard oral arguments on the Webex virtual platform because of the Coronavirus. On July 22, 2020, the Court of Appeals affirmed the conviction. State v. Barnes, 846 S.E.2d 389 (S.C. Ct. App. 2020).

A timely petition for rehearing was filed and then denied on August 13, 2020. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in finding that the trial judge correctly refused to dismiss the indictment based on a violation of Petitioner's state and federal constitutional right to a speedy trial.

The jury found Petitioner guilty in the fatal shooting of Samuel J. Sturrup in Edgefield County on September 3, 2001. An arrest warrant for murder was issued for Petitioner on January 25, 2002. Eight years and ten months later, on November 8, 2010, the case went to trial. Petitioner was found guilty and sentenced to death. The conviction and sentence were reversed by the South Carolina Supreme Court on January 15, 2014. State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014).

On October 9, 2017, over fifteen years after the arrest warrant was issued, the case went to trial a second time. Prior to the second trial, on August 14, 2017, Petitioner filed a motion to dismiss the indictments based upon the violation of Petitioner's speedy trial rights under both the state and federal constitution. (R. pp. 704-724). The motion was heard at the time of trial on October 9, 2017. (R. pp. 38-102; 131-139; 144-165). The judge refused to dismiss the indictment and on November 17, 2017, filed a written order denying Petitioner's motion to dismiss the indictment based on the speedy trial violation and denying Petitioner's motion to dismiss based on a violation of the Interstate Agreement of Detainers Act [IAD]. (R. pp. 850-867). At the close of the case Petitioner renewed the previously made motions. (R. p. 634, lines 17-19). The judge declined to change her ruling. The trial judge erred in refusing to dismiss the indictment based on the speedy trial violation.

In State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016), the South Carolina Supreme Court wrote, "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)). In Smith v. Hooey, 393 U.S. 374, 374–75, 89 S. Ct. 575, 575, 21 L. Ed. 2d 607 (1969), the United States Supreme Court wrote, "In Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1, this Court held that, by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.' Id., at 226, 87 S.Ct. at 995." 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).

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

In Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012) the 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 his 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).

As in Hunsberger, because the timeline is essential to determining that Petitioner's speedy trial rights were violated, important dates are outlined below.

- January 25, 2002 – Arrest warrant for murder. (Court's Exhibit #3, R. p. 773)
- March 7, 2002 – Extradition Order lodged against Petitioner as he awaits trial in Georgia. (Court's Exhibit #3, R. p. 777).
- December 15, 2003 – Conviction in Georgia.
- December 2004-January 2005 – IAD claim filed by Petitioner.
- May 18, 2005 – Petitioner extradited to South Carolina.
- May 25, 2005 – Hearing before the Honorable William P. Keesley on IAD claim. Petitioner was not represented by counsel.
- May 27, 2005 – IAD claim denied and continuance granted. (Court's Exhibit #3, R. pp. 779-781).
- June 6, 2005 – Attorney O. Lee Sturkey appointed to represent Petitioner. Sturkey, however, never met with Petitioner. (Court's Exhibit #3, R. p. 782).
- August 10, 2005 – Petitioner indicted for murder and kidnapping.
- September 1, 2005 – Attorney Robert Harte appointed to replace Attorney Sturkey. (Court's Exhibit #3, R. pp. 785-786).
- September 8, 2005 – Petitioner filed motion to represent himself. (Court's Exhibit #3, R. pp. 787-789).
- September 8, 2005 – Petitioner filed a written motion to dismiss pursuant to the violation of the IAD. (Court's Exhibit #3, R. pp. 790-797).
- September 14, 2005 – Petitioner filed with the Edgefield County Clerk of Court a letter requesting that the attorney move for a speedy trial and dismissal pursuant to the IAD. Petitioner's motion to represent himself not yet heard. (Court's Exhibit #3, R. pp. 800-802).
- October 31, 2005 – The Honorable J. Cordell Maddox vested with exclusive jurisdiction over the case. (Court's Exhibit #3, R. p. 803).

- November 18, 2005 – Petitioner filed with the Edgefield County Clerk of Court a letter requesting that the attorney oppose any continuance motions and specifically referenced undue delay and the IAD. Petitioner's motion to represent himself not yet heard. (Court's Exhibit #3, R. pp. 804-808).

- December 13, 2005 – Petitioner served with State's notice of intent to seek the death penalty. A letter from the Solicitor to counsel indicated that the case would be called for trial in 2006. (Court's Exhibit #3, R. pp. 811-812).

- February 8, 2006 – Attorney David Tarr is appointed as co-counsel. (Court's Exhibit #3, R. p. 813).

- May 16, 2006 – Trial date moved to January or February 2007. (Court's Exhibit #3, R. p. 815).

- April 17, 2008 – Trial date moved to June 2008. (Court's Exhibit #3, R. p. 816).

- May 13, 2008 – Attorneys for Petitioner moved for a continuance and that motion was granted. (Court's Exhibit #3, R. p. 817).

- January 25, 2010 – The Honorable R. Knox McMahon vested with exclusive jurisdiction over the case, replacing Judge Maddox. (Court's Exhibit #3, R. p. 820).

- November 8-17, 2010 – First trial.

- January 15, 2014 - South Carolina Supreme Court reversed the convictions and sentences and remanded for a new trial. State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014).

- January 31, 2014 – Remittitur issued.

- April 23, 2014 – Appointment of counsel hearing held.

- June 9, 2014 – The Honorable Diane S. Goodstein vested with exclusive jurisdiction over the case.

- September 11, 2014 – Attorneys Jeffrey P. Bloom and William S. McGuire appointed to represent Petitioner. The State objects to the appointment of counsel.

- September 17, 2014 – The State filed an interlocutory appeal in regard to the appointment of counsel.

- July 1, 2015 – The South Carolina Supreme Court affirmed the appointment of counsel. State v. Barnes, 413 S.C. 1. 774 S.E.2d 454 (2015).

- July 14, 2015 – The State filed a petition for rehearing.
- August 6, 2015 – The South Carolina Supreme Court denied the petition for rehearing.
- August 14, 2017 – Petitioner filed motions to dismiss for violation of the speedy trial right and violation of the IAD.
- October 9, 2017- Second trial.

In the written motion to dismiss based on the speedy trial violation Petitioner argued that the fifteen-year delay between January of 2002, when the arrest warrant was issued and October of 2017, the date of the second trial date, triggered the speedy trial analysis. (Motion to Dismiss based on Speedy Trial Violation, R. p. 708). The trial judge, however, ruled that the time frame for the speedy trial analysis started on January 31, 2014, when the South Carolina Supreme Court issued the remittitur after reversing the first conviction and sentence. (Order Denying Defendant's Motion to Dismiss, R. p. 857). The judge then found that the three year and seven-month delay between the issuance of the remittitur on January 31, 2014, and the October 9, 2017, second trial date triggered the speedy trial analysis. (Order Denying Defendant's Motion to Dismiss, R. p. 858). Petitioner met the initial burden of establishing the threshold time frame triggering the speedy trial analysis under either time frame. In State v. Hunsberger, 418 S.C. 335, 343, 794 S.E.2d 368, 372 (2016), the South Carolina Supreme Court wrote, "Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied. Barker v. Wingo, 407 U.S. 514, 530–31, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also Langford, 400 S.C. at 441, 735 S.E.2d at 482." The Barker v. Wingo factors are discussed below.

1. Length of Delay

As to the first Barker factor, length of the delay, based on the totality of the circumstances, this Court should consider the entire over fifteen-year delay – the eight-year and ten-month delay between issuance of the arrest warrant in January of 2002, and Petitioner's first trial in November of 2010, the over three-year period during the automatic direct appeal process from November 2010, until January of 2014, and the three-year and seven-month delay between the issuance of the remittitur on January 31, 2014, and the second trial on October 9, 2017. The trial judge erred in refusing to consider the fifteen-year time frame. While the entire fifteen-year time period cannot be attributed solely to the State, much of the fifteen-year delay is attributed to the State[1]. This extraordinary delay weighs heavily against the State. See Hunsberger, 418 S.C. at 346, 794 S.E.2d at 373. (Finding that the eight-year delay attributable to the State weighs heavily against the State.).

2. Reason for Delay

As to the second factor from Barker, the reason for the delay, "A speedy trial claim must be 'analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.' State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing *Barker*, 407 U.S. at 530, 92 S.Ct. 2182)." Hunsberger, 418 S.C. at 343, 794 S.E.2d at 372. Based on the particular circumstances of the present case and balancing the conduct of the prosecution and the defense, the reasons for the delay weigh heavily against the State.

The delay between January of 2002, and Petitioner's conviction in Georgia in December of 2003, is neutral as Petitioner awaited trial in another state. The delay between December 2003, and May of 2008, however, is directly attributable to the State. During this four-year and seven-

[1] In the motion to dismiss Petitioner argued that eight years and seven months of the delay were attributable to the State. (Motion to Dismiss for Speedy Trial Violation, R. p. 717).

month time frame nothing prevented the State from bringing the case to trial. While counsel for Petitioner moved for a continuance on May 13, 2008, the case was still not tried until November 2010, two and a half years later. After a reasonable period of time following the continuance, the State had a duty to call the case for trial. At least one year of this delay should be attributed to the State, resulting in a five year and seven-month delay attributable to the State.

The delay between November of 2010 and January 2014, is neutral because the case was pending automatic appellate review. The eleven-month delay between September 11, 2014, when counsel was appointed to represent Petitioner and August 6, 2015, when the South Carolina Supreme Court affirmed the trial judge's appointment of counsel and denied the State's petition for rehearing, is directly attributable to the State. The State, rather than proceeding to trial, chose to challenge the appointment of counsel by filing a common law petition for writ of certiorari or an interlocutory appeal. The State's choice in appealing the judge's appointment of counsel is distinguished from the automatic appellate review following Petitioner's first conviction. While the automatic appellate review is neutral, the State's decision to challenge the appointment of counsel, a firmly established fundamental constitutional right[2], is solely attributable to the State. The remaining delay between August 2015, and the second trial date of October 9, 2017 is neutral. The State is responsible for a total six year and six- month delay. This delay is analogous to the eight-year extraordinary delay in Hunsberger and weighs heavily against the State.

First, the trial judge erred in refusing to consider the delay in calling the case to trial the first time. As discussed above, there was a five-year and seven-month delay attributable to the State between the issuance of the arrest warrant and the first trial. The trial judge in the present case first found that the prior time frame should not be considered because the speedy trial issue was not

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[2] See Gideon v. Wainwright, 372 U.S. 335 (1963).

raised during the first trial. (R. p. 857). Petitioner asserted the right to a speedy trial at the first trial and that issue will be addressed below. Later in the order, however, the trial judge provided an alternative analysis and timeline which included the time frame between the issuance of the arrest warrant in January of 2002, and the first trial in November 2010. (R. pp. 863-867). In the order the trial judge wrote:

> January 25, 2002 through May 13, 2008, a period of 6 years and 4 months is attributable to the Defendant. By requesting a continuance, the Defendant waived his right to dismissal of the charges under a speedy trial claim. The Supreme Court in *Barnes I* ruled that this was the effect on Defendant's IAD claim. Although the two types of speedy trial claims are not analyzed the same, the fact that a continuance was sought necessarily reflects that the defense was not ready for trial. I find that the defense was not ready for trial, but under case law it is clear that when there is a request for continuance that there is a waiver of the dismissal request under speedy trial for the period up to the present or continuously. This doesn't mean that the constitutional right is gone, but that at that time the right to have the charges dismissed is waived. The Defendant's waiver results in a delay attributable to the Defendant and must be weighed against him.

(Order Denying Motion to Dismiss, R. p. 866).

The trial judge erred. Petitioner did not move for a continuance until May 13, 2008. Petitioner began seeking relief under the IAD and opposing continuances starting in December 2004/January 2005, when he first filed his IAD claim. As discussed above, the delay between December 2003, and May of 2008, and the delay of at least one year during the two and a half years between the continuance and the first trial are directly attributable to the State.

Second, the trial judge erred in finding that the delay between November 14, 2014, and July 1, 2015, when the State chose to file a common law petition for writ of certiorari or an interlocutory appeal was neutral. (R. pp. 858-859). As discussed above, the eleven-month delay between September 11, 2014, when counsel was appointed to represent Petitioner and August 6, 2015, when the South Carolina Supreme Court affirmed the trial judge's appointment of counsel and denied the State's petition for rehearing, is directly attributable to the State. The trial judge correctly

attributed to the State the one-month period from July 1, 2015, to July 27, 2015, when the State sought rehearing.

The judge also erred in attributing the one-year and four-month time frame from August 10, 2015, to December 16, 2016, to Petitioner when Petitioner's attorney was under an order of protection during that time frame. (R. pp. 859-860). As argued above, this time frame as well as the time frame from December 16, 2016, to the time of trial on October 9, 2017, which the trial judge attributed to the State, is neutral. This Court should find that the State is responsible for an extraordinary delay of six years and six months.

In Hunsberger, 418 S.C. at 346, 794 S.E.2d at 374, the South Carolina Supreme 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).

As noted by the trial judge in the order denying the motion to dismiss, "While death penalty cases are inherently complex, the State had already tried this case so the complexity argument is not as strong here, as most, if not all of the witnesses and evidence were known at the time of the remittitur. It is true that a new judge had to be appointed and that defense counsel had to be appointed and given time to prepare for a capital trial. Accordingly, if there is any weight against the State it would only be weighted slightly for this period of time." (R. p. 858). While Petitioner's first trial was a capital case, the nature of the capital case does not justify the six year and six- month delay. This factor weighs heavily against the State.

3. **Assertion of the Right**

As to the third factor from Barker, as discussed above, before conducting an alternative analysis, the trial judge first refused to consider the time frame between January 2002, and the first trial in November of 2010, because she found that Petitioner failed to assert the speedy trial right during the first trial. (R. p. 857). The trial judge wrote:

> It is the opinion of this Court that Barnes' IAD claim does not amount to an assertion of a violation of his constitutional rights to a speedy trial. Any other attempts to raise the constitutional speedy trial rights would have been raised by letters written by the Defendant when he was represented by counsel and this court does not recognize hybrid representation. Barnes' letter of September 2005 would have been written just after counsel was appointed. It is unclear to this Court whether Barnes was aware that he had counsel at that time. The letter appears to be a request under the IAD. In the event it could be considered a constitutional speedy trial request, it was never heard or ruled upon as a constitutional speedy trial request prior to trial. Additionally, it was never raised at the original trial or subsequently for the court to rule upon. Accordingly, I find the Defendant did not properly assert his right and that the issue was not preserved for appeal.

(R. p. 857). The trial judge erred. First, it is undisputed that Petitioner asserted his rights pursuant to the IAD. While the IAD is a statutory right, the IAD should also be considered an assertion of the constitutional right to a speedy trial. Second, apart from the assertion of the right to a speedy trial pursuant to the IAD, Petitioner specifically attempted to assert his constitutional speedy trial right. On September 14, 2005, Petitioner filed with the Edgefield County Clerk of Court a letter requesting that the attorney move for a speedy trial and dismissal pursuant to the IAD. (Court's Exhibit #3, R. pp. 800-802). The trial judge refused to consider this *pro se* assertion because Petitioner was represented by counsel. Prior to filing of the *pro se* assertion of his speedy trial right, however, Petitioner filed a motion to represent himself. (Court's Exhibit #3, R. pp. 787-789). Counsel was appointed on September 1, 2005. In a *pro se* motion dated September 5, 2005, Petitioner moved to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975). (Court's Exhibit #3, R. pp. 787-789).

Petitioner's *pro se* motion for a speedy trial and all of his *pro se* motions pursuant to the IAD should be considered assertions of the constitutional speedy trial right because Petitioner tried to relieve counsel prior to making the *pro se* motions. On September 8, 2005, Petitioner filed a *pro se* written motion to dismiss pursuant to the violation of the IAD. (Court's Exhibit #3, R. pp. 790-797). On November 18, 2005, Petitioner filed with the Edgefield County Clerk of Court a letter requesting that the attorney oppose any continuance motions and specifically referenced undue delay and the IAD. (Court's Exhibit #3, R. pp. 804-808). The notice of intent to seek the death penalty indicated that the case would be called to trial in 2006. (Court's Exhibit #3, R. pp. 811-812). Then, despite Petitioner's expressed request for a speedy trial, addressed in letters to the attorneys because the trial court had still not heard Petitioner's motion to represent himself, the case was continued several times and not called to trial until November of 2010.

When the case was finally called to trial, Petitioner moved to waive counsel and represent himself. The motion was denied. The South Carolina Supreme Court later reversed the sentence and conviction based on the trial judge's failure to allow Petitioner to waive counsel and proceed *pro se.* State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014). Petitioner asserted his speedy trial rights through *pro se* filings while Petitioner was represented by counsel. Petitioner, however, had moved to relieve counsel. The Court found Petitioner had a right to relieve counsel and proceed *pro se.* As a result, his *pro se* filings for a speedy trial and under the IAD constitute an assertion of the constitutional right to a speedy trial. On August 14, 2017, Petitioner again asserted his right to a speedy trial by filing separate written motions to dismiss, one addressing the constitutional speedy trial right and the other addressing the right to a speedy trial pursuant to the IAD. (Motions to Dismiss Based on violation of speedy trial and IAD, R. pp. 704-724, p. 725-730). The assertion factors weigh against the State.

4. Prejudice

As to the fourth factor from Barker, prejudice, 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).

The lack of a showing prejudice, however, does not preclude finding 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 because of the extraordinary delay of six years and six months.

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 Hunsberger the South Carolina Supreme Court wrote:

> First, we note that the trial court's ruling was influenced by an error of law in so much as it rested on a belief that actual prejudice—to the exclusion of presumptive prejudice—was the only type of prejudice that would support a speedy trial claim. In fact, an accused can assert actual prejudice or presumptive prejudice as the result of the State's violation of his right to a speedy trial. Actual prejudice occurs when the trial delay has weakened the accused's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. See Doggett, 505 U.S. at 655, 112 S.Ct. 2686 (accepting the State's definition of actual prejudice). The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify. Id. (internal citation omitted). This is so because "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" Doggett, 505 U.S. at 655, 112 S.Ct. 2686 (citing Barker, 407 U.S. at 532, 92 S.Ct. 2182). When the government persistently fails to try an accused and the delay is excessive, the accused need not show actual prejudice in order to prevail in his speedy trial claim. Doggett, 505 U.S. at 657–58, 112 S.Ct. 2686.

> While presumptive prejudice cannot alone support a speedy trial claim, it is part of the mix of relevant facts, and its importance increases with the length of time. Doggett, 505 U.S. at 656, 112 S.Ct. 2686 (internal citation omitted).

418 S.C. at 351, 794 S.E.2d at 376. Prejudice should be presumed in the present case.

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

> The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. 2182. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." Id. Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." Id. at 529–30, 92 S.Ct. 2182.

Based on the presumptive prejudice and a proper balancing of the other Barker factors, Petitioner's state and federal right to a speedy trial was violated.

In affirming the conviction the South Carolina Court of Appeals erred in finding that Petitioner waived his speedy trial rights in his first trial. As discussed above, on September 5, 2005, Petitioner moved to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975). (Court's Exhibit #3, R. pp. 787-789). Then, on September 14, 2005, Petitioner filed with the Edgefield County Clerk of Court a letter requesting that the attorney move for a speedy trial and dismissal pursuant to the IAD. (Court's Exhibit #3, R. pp. 800-802). The trial judge refused to consider this *pro se* speedy trial assertion because Petitioner was represented by counsel. Petitioner's motion to proceed *pro se* was denied at trial. The South Carolina Supreme Court, however, reversed the first conviction based on the trial judge's failure to allow Petitioner to waive counsel and proceed *pro se,* State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014). Petitioner was precluded from asserting his speedy trial rights in his first trial by the trial judge's erroneous ruling that prohibited Petitioner from proceeding *pro se* and acting on the September 14, 2005, letter asking the attorney to move for a speedy trial. The fact that Petitioner was precluded from

asserting his speedy rights, a factor overlooked by the Court of Appeals, changes the speedy trial analysis, with regard to the time period to be considered, the overall length of the delay and the assertion of the right. Additionally, the Court of Appeals misapprehended some of the reasons for delay, weighing trial counsel's order of protection against Petitioner and considering the State's interlocutory appeal or common law petition for writ of certiorari as a neutral factor rather than weighing that factor against the State.

The Court of Appeals first found that the date on which a defendant's speedy trial rights attach in a retrial following the reversal of a conviction on direct appeal is a novel question of law in South Carolina writing:

> Generally, "[a]n accused's speedy trial right begins when he is 'indicted, arrested, or otherwise officially accused.' " *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 372 (quoting *Langford*, 400 S.C. at 442, 735 S.E.2d at 482). However, after conducting our own research, we agree with the circuit court's conclusion that the date on which a defendant's speedy trial rights attach in a retrial following the reversal of a conviction on direct appeal is a novel question of law in South Carolina. Accordingly, this court is free to decide this issue with no particular deference to the conclusions of the circuit court. *See Sweat*, 379 S.C. at 373, 665 S.E.2d at 649 ("When addressing [a] novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right.").
>
> We find two rationales in support of the circuit court's conclusion that Barnes's speedy trial rights attached in his retrial on January 31, 2014, the date of remittitur. First, Barnes waived his speedy trial rights in the previous case by failing to raise the issue to the circuit court or the supreme court. *See Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) ("Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive."). Barnes's argument that the circuit court erred in not considering the entire period between 2002 and 2017 ignores one crucial fact: Barnes received a trial in November 2010. *See Hunsberger*, 418 S.C. at 342–43, 794 S.E.2d at 372 (indicating the speedy trial analysis focuses on the *interval between an official accusation and the trial*). Further, Barnes conceded that he never filed a motion or otherwise challenged the eight-year period between the issuance of his arrest warrant and his trial while before the circuit court or the supreme court.[7] Thus, we conclude that Barnes's failure to challenge the period of delay in his previous trial while before the circuit court or the supreme court

> constitutes a waiver of his right to challenge the delay as unreasonable. *See Bonnette*, 277 S.C. at 18, 282 S.E.2d at 598 ("Acts inconsistent with the continued assertion of a right, *such as a failure to insist upon the right*, may constitute waiver." (emphasis added)). Accordingly, we find that a defendant should not be permitted to waive an alleged violation of his speedy trial rights while before the supreme court only to load the deck with the alleged violation in his subsequent retrial. *Cf. Wheeler*, 247 S.C. at 402–03, 147 S.E.2d at 631 (finding the circuit court's rejection of the defendant's contention that he had been denied his speedy trial rights could not be reviewed in post-conviction relief proceedings when the defendant failed to challenge the ruling on appeal); *State v. Cooper*, 386 S.C. 210, 212–18, 687 S.E.2d 62, 64–67 (Ct. App. 2009) (measuring the period of delay in the appellant's retrial from the date of remittitur after the supreme court affirmed the grant of post-conviction relief to the appellant).

State v. Barnes, 846 S.E.2d 389, 397 (S.C. Ct. App. 2020).

The Court of Appeals then cited cases from other jurisdictions as a second rational in support of finding that Petitioner's speedy trial right attached on January 31, 2014, the date of the remittitur. The Court of Appeals overlooked the fact that based on the procedural history of the case and the fact that this Court reversed the first conviction based on the trial judge's failure to allow Petitioner to waive counsel and proceed *pro se,* State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014), Petitioner did not waive his speedy trial rights in his first trial. Petitioner was precluded from asserting his speedy trial rights in his first trial by the trial judge's erroneous ruling that prohibited Petitioner from proceeding *pro se* and acting on the September 14, 2005, letter asking the attorney to move for a speedy trial. If Petitioner's motion to proceed *pro se* had been properly granted during the first trial, Petitioner could have raised the speedy trial issue and, if litigated, should have had the same outcome as his co-defendants, the Hunsbergers.

The entire over fifteen-year time frame between arrest in January of 2002, and the second trial in October of 2017, should be considered because Petitioner was erroneously deprived the right to proceed *pro se* and properly assert his right to a speedy trial in the first trial. The fifteen-year time frame should be considered for purposes of the period of delay to trigger

the speedy trial analysis. The fifteen-year delay should be considered among the totality of circumstances this Court considers in finding a speedy trial violation. In considering length of delay as the first of the four Barker factors, the fifteen-year delay should weigh heavily against the State with six years and six months of the delay directly attributed to the State.

In finding that the third Barker factor, assertion of the right to a speedy trial, should be weighed against Petitioner the Court of Appeals wrote:

> As indicated in Section I(a), the circuit court properly determined that Barnes's speedy trial rights attached on January 31, 2014. Accordingly, the only time Barnes asserted his speedy trial rights after they attached was August 14, 2017, when he filed his motion to dismiss. Moreover, we note that Barnes, who was represented by counsel, waited approximately forty-two months before invoking his speedy trial rights.

State v. Barnes, 846 S.E.2d 389, 400 (S.C. Ct. App. 2020). Again, the Court of Appeals overlooked the fact that Petitioner attempted to assert his right to a speedy trial in September of 2005. The fact that Petitioner was precluded from asserting the right based on the erroneous ruling by the trial judge should not be weighed against Petitioner.

As to the second Barker factor, reason for the delay, the Court of Appeals wrote:

> First, Barnes argues the circuit court erred in attributing sixteen months of the delay to Barnes. We disagree.
>
> The circuit court properly attributed this delay to Barnes. The State indicated that it was ready to proceed to trial prior to its interlocutory appeal regarding the appointment of counsel in *Barnes II*. During the State's interlocutory appeal, one of Barnes's attorneys was placed under an order of protection. After the case was remitted on August 10, 2015, the order of protection continued until December 16, 2016. Therefore, despite being prepared for trial, the State could not proceed with Barnes's trial because Barnes chose to continue retention of counsel who he knew was subject to an order of protection. While we acknowledge that Barnes was entitled to retain counsel of his choice, this decision and the resulting delay cannot be properly attributed to the State. Consequently, the delay cannot be characterized as neutral and must be attributed to Barnes.

State v. Barnes, 846 S.E.2d 389, 399 (S.C. Ct. App. 2020). The sixteen-month time frame during which trial counsel was under an order of protection should not be weighed against Petitioner but instead should be considered a neutral factor.

Additionally, the Court of Appeals found that the State's interlocutory appeal or common law petition for writ of certiorari was neutral writing:

> Second, Barnes argues the circuit court erred in finding that the State's interlocutory appeal was neutral and did not weigh heavily against the State. Barnes contends that the interlocutory appeal was an unjustified attempt to preclude Barnes from asserting his constitutional right to counsel. The State argues the circuit court properly determined the interlocutory appeal was a legitimate reason for delay. We agree with the State.
>
> [A]n interlocutory appeal by the [State] ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the [State]'s position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime.
>
> *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986); *see also United States v. Jackson*, 508 F.2d 1001, 1005 (7th Cir. 1975) (finding that unless an interlocutory appeal was taken in bad faith or for the sole purpose of delay, "to put the onus of appellate delay on the [State] would severely infringe the [State]'s right to appeal").
>
> The circuit court found that the State's interlocutory appeal was not taken in bad faith or for purpose of delay because (1) the supreme court granted the petition, (2) the supreme court heard the petition in its original jurisdiction, and (3) the supreme court held oral arguments on the case. Moreover, we note the supreme court affirmed the circuit court's ruling in favor of Barnes in a split decision. Consequently, we find the circuit court's determination that the interlocutory appeal was not taken in bad faith or for purpose of delay is not "clearly erroneous." *See Baccus*, 367 S.C. at 48, 625 S.E.2d at 220 ("[Appellate courts are] bound by the [circuit] court's factual findings unless they are clearly erroneous."). Thus, the circuit court properly determined the State's interlocutory appeal was a neutral reason for delay.

State v. Barnes, 846 S.E.2d 389, 399 (S.C. Ct. App. 2020).

The State's interlocutory appeal or common law petition for writ of certiorari spanning an eleven-month time period between September 11, 2014, when counsel was appointed to

represent Petitioner, to August 6, 2015, when the South Carolina Supreme Court affirmed the trial judge's appointment of counsel and denied the State's petition for rehearing, should be weighed heavily against the State. The State's maneuver was an unreasonable and an unjustified attempt to prevent Petitioner from exercising his fundamental and constitutional right to counsel.

This Court should grant the petition for writ of certiorari because Petitioner did not waive his right to a speedy trial in the first trial. Petitioner was erroneously precluded from representing himself. If Petitioner had properly been allowed to proceed *pro se*, the trial judge could have heard the speedy trial motion. This Court should consider the entire fifteen-year time frame with six years and six months of the delay directly attributed to the State. Additionally, the petition for writ of certiorari should be granted because trial counsel's order of protection should not weigh against Petitioner and the State's common law petition for writ of certiorari or interlocutory appeal should be weighed heavily against the State. Based on the fifteen-year time period, the six-year and six-month delay caused by the State, the continued assertions by Petitioner of his right to a speedy trial in the first and second trial and the presumed prejudice, Petitioner's constitutional rights under both the state and federal constitutions were violated. The trial judge abused her discretion in refusing to dismiss the indictment. The Court of Appeals erred in affirming the decision of the trial judge.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2020.

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Sep 14 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Edgefield County
Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5749 (S.C. Ct. App. filed 8/13/2020)
2017-GS-19-1788

THE STATE,

RESPONDENT,

V.

STEVEN LOUIS BARNES,

PETITIONER

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Steven Louis Barnes, #327117, at Ware State Prison, 3620 Harris Road, Waycross, GA 31503; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 14th day of September, 2020.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER