STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001204

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I. Whether the PCR Court erred by limiting Petitioner's testimony and PCR counsel's questioning at a post-conviction relief evidentiary, where the PCR court relied on Rule 11, SCRCP, in limiting the hearing to only a fraction of Petitioner's claims, and where Rule 11, SCRCP, has been held not to apply to PCR proceedings?

II. Whether the PCR court erred in denying relief, where trial counsel failed to introduce a witness statement which would have provided evidence to support a self-defense charge, where counsel also failed to request a continuance to secure the witness' attendance?

III. Whether the PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner's right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested?

STATEMENT

On May 19, 2011, Petitioner was indicted by a Beaufort County grand jury on the charges of attempted murder, possession of a weapon during a violent crime, and possession of a firearm by a person convicted of a felony. App. 332 – 337. He proceeded to trial before the Honorable J. Ernest Kinard and a jury on November 18, 2013. App. 29. Thomasine Trasi Campbell represented Petitioner, and Hunter Swanson appeared on behalf of the State. The jury found Petitioner not guilty of attempted murder but found him guilty of the lesser-included charge of assault and battery of a high and aggravated nature. App. 233 l. 8 – App. 234 l. 3. Petitioner was found guilty of the two possession of a weapon charges. Id. Judge Kinard sentenced Petitioner to two years' incarceration on the possession of a person previously convicted of a violent crime charge, five years' incarceration on the possession of a weapon while committing a violent crime charge, and fifteen years for the assault and battery of a high and aggravated nature. App. 243 ll. 3 – 8.

Appellant appealed his convictions and sentences, and the Court of Appeals affirmed. State v. Green, Op. No. 2015-UP-458 (filed on September 16, 2015). App. 346 – 372. Petitioner then filed a timely application for post-conviction relief on October 1, 2015. App. 245 – App. 254. Through the original application and follow-up amendments, Petitioner alleged that trial counsel and appellate counsel provided him with ineffective assistance of counsel for multiple reasons, including claims that trial counsel failed to object and present witnesses, and that appellate counsel failed to raise certain issues. Id.

The State made its Return on or about May 13, 2016. App. 255 – 261. An evidentiary hearing was convened on January 29, 2018 before the Honorable R. Lawton McIntosh. App. 262. James Falk represented Petitioner, and DeShawn Mitchell appeared on behalf of the State.

At the conclusion of the hearing, Judge McIntosh denied relief as to certain allegations and requested follow-up briefing from the parties on an issue regarding a witness' statement. App. 308 l. 4 – App. 311 l. 2. The parties submitted memoranda. App. 338 – 345. An Order of Dismissal was issued on or about June 18, 2018. App. 317 – 331. It contained the PCR court's finding that Petitioner "failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel." App. 324. The PCR court noted its imposition of Rule 11, SCRCP: "[P]rior to testimony being taken, Applicant proceeded on only the following grounds for relief as additional grounds were disallowed by this court over Applicant's objections." Id.

This petition follows.

ARGUMENT

I. The PCR Court erred by limiting Petitioner's testimony and PCR counsel's questioning at a post-conviction relief evidentiary, where the PCR court relied on Rule 11, SCRCP, in limiting the hearing to only a fraction of Petitioner's claims, and where Rule 11, SCRCP, has been held not to apply to PCR proceedings.

At the outset of the evidentiary hearing in Petitioner's matter, the PCR court inquired as to Petitioner's allegations. In response, PCR counsel began articulating Petitioner's claims but was interrupted by the PCR court within seconds. App. 267 l. 12 – App. 269 l. 25. After only being allowed to remark that Petitioner was "alleging that he is prejudiced by the fact - -" the PCR court cited Rule 11, SCRCP:

> No. Pursuant to Rule 11 and by other grounds, what are his grounds? And we're going to go forward with that. I'm not going to let him just throw out anything and see if it sticks. I want to hear what the grounds are that we're going to pursue, and not just throw everything out there. Okay, sir?

App. 267 l. 23 – App. 268 l. 3. The court noted PCR counsel's objection but indicated that the hearing would proceed following a ruling that Petitioner could proceed under only one claim, that counsel failed to object to prejudicial hearsay. App. 268 l. 25 – App. 269 l. 25.

In the middle of trial counsel's testimony at the evidentiary hearing, a bench conference took place with the following remarks being offered by the PCR court afterwards:

> For the record, we had a bench conference, and counsel is concerned - - counsel for applicant is concerned that the applicant has brought here to these proceedings. I, of my own volition, *sua sponte*, have excluded the grounds that I'll articulate on the record earlier as not being relevant or acknowledged, grounds that we can - - what's the term I'm looking for, I'm drawing a blank. They are - - they're not meritorious grounds, and therefore, I'm excluding them from the testimony.
>
> And I'm going to tell you, Mr. Green, that your attorney is fighting for you, and he is concerned that you're not going to be allowed to testify as to these other

> grounds that you're claiming. But I'm not going to let you testify as to that. You're protected on the record that if I make a mistake in saying that they're not meritorious or recognizable grounds, then, somebody will correct me. But I'm not going to let you testify to them, and your attorney is fighting for you on that behalf. Okay?

App. 281 l. 22 – App. 282 l. 16. The PCR court indicated that he felt like that "cover[ed] [Petitioner] sufficiently and [PCR counsel]." App. 282 ll. 18 – 19.

Ten years ago, this Court addressed the applicability of Rule 11, SCRCP in PCR proceedings. Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009). In Hiott, the applicant was convicted following a two-day trial in 2003 and filed his PCR application the same year. Id. at 624, 674 S.E.2d at 491. The PCR judge found Hiott's claims were "absurd" and "patently frivolous" and ruled that many issued raised by Hiott were without merit. Id. at 624, 674 S.E.2d at 492. The PCR judge imposed a $3,000 sanction on Hiott under Rule 11, SCRCP after finding that both Hiott's testimony and claims were frivolous. Id. The Court of Appeals affirmed the sanction imposition. Hiott v. State, 375 S.C. 354, 652 S.E.2d 436 (Ct. App. 2007). This Court granted certiorari and reversed.

Noting the standard of review, namely that a decision by the PCR judge may be reversed when it is controlled by an error of law, this Court determined that Rule 11, SCRCP, is inapplicable to PCR proceedings. Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). This Court analyzed the legislative and judicial systems already in place designed to deter abuse in the PCR process, including the statutory requirements that a petitioner must raise all available grounds in the first PCR application, that an applicant must abide by the one year statute of limitations, and that an application asserting a newly created standard or newly discovered fact must be raised within one year and reached the conclusion that as a matter of public policy,

"Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings." Id. at 630, 674 S.E.2d at 630.

The PCR judge in the matter *sub judice* did not allow Petitioner to testify on the stand. This action was more egregious than the situation in Hiott, wherein the PCR judge at least listened to Hiott's testimony. Here, the PCR judge *sua sponte* ruled that Petitioner could not testify regarding issues which were not deemed to be meritorious, in direct contravention to the law created in Hiott:

> Given the public policy considerations involved, including our recognition in Wade that PCR actions are treated differently than traditional civil cases and that sanctions of any kind could chill a petitioner's pursuit of PCR, as well as the fact that there are already limitations in place that serve to curb the potential abuse of the PCR process, we hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.

Id. at 629, 674 S.E.2d at 494-5.

The facts allegedly giving rise to Petitioner's arrest stem from an incident at Food Lion on April 6, 2011. App. 129 l. 16 – App. 132 l. 10. Clifton Henry testified that Petitioner and "his wife" drove up to the house where Henry was. According to Henry, Petitioner gave him approximately forty dollars after supposedly bragging about spending $700. Id. Henry and Channon Preston then walked to Food Lion where Petitioner then purportedly requested his money back. App. 132 ll. 1 – 10. Henry testified that he gave Petitioner the money back and then Petitioner shot him with a shotgun. Id.

Petitioner listed approximately nineteen claims in his subsequent post-conviction relief application amendments. App. 252 – 254. Petitioner was not allowed to testify or otherwise expand on allegations such as counsel's failure to object to judge's improper comments in the presence of the jury, impeaching witnesses, failure to object to false statements by the State, failure to object contemporaneously and preserve claims for appellate review, unreasonable and

prejudicial conduct during sentencing, and others. It is difficult to recognize what these claims were in reference to considering the original source of the claims, Petitioner, was not allowed to testify about them.

Of note, on the failure to speak adequately in mitigation, counsel did not offer much following the jury's verdict. The trial judge noted that defense counsel did not tell him "anything" in mitigation and asked Petitioner if he would like to say anything. App. 240 ll. 3 – 7. Petitioner responded that he would miss his family and children. App. 240 ll. 8 – 9. When counsel did finally speak up, she did not mention anything about Petitioner's work history or education background.

Under S.C. Code Ann. 16-3-600(B)(2), the maximum sentence for assault and battery of a high and aggravated nature is twenty years. Petitioner received fifteen; on this single allegation, one of the few upon which enough information can be gleaned to analyze, Petitioner did not appear prepared to speak in mitigation. The trial judge even noted Petitioner "has a problem allocating" and inquired to counsel whether Petitioner was married or employed App. 240 ll. 8 – 9. Neither trial counsel nor Petitioner were prepared for this phase of trial.

The remaining, unaddressed allegations cannot be adequately analyzed without Petitioner's testimony. In other words, although Petitioner bore the burden of proving his claims, that opportunity was taken from him. The PCR court prejudged his allegations and forced an arbitrary and irrelevant limitation on Petitioner's "one bite at the apple." Petitioner did not waive this right; the decision was made for him, without his consent, and against his will. After filing an application for post-conviction relief and two subsequent amendments, the majority of his claims were not considered by the PCR court under the guise of Rule 11 which this Court has held to be irrelevant in PCR proceedings.

II. The PCR court erred in denying relief, where trial counsel failed to introduce a witness statement which would have provided evidence to support a self-defense charge, where counsel also failed to request a continuance to secure the witness' attendance.

Trial counsel testified that Ashley Thomas "was with Charles throughout most of these events" and would have been useful to the defense:

> So she would have been someone that I could have argued to the jury was there and saw that Charles was taking fire, and not giving fire, and it was more of a self-defense sort of situation.

App. 277 ll. 18 – 24.

Although Thomas did not testify at trial, she gave a statement to investigators. App. 278 l. 17 – App. 282 l. 19; App. 313. Trial counsel believed she could have gotten the statement into evidence through the investigator. Id.

Counsel characterized the statement as "helpful to the defense" but noted that Thomas was difficult to reach. Id. Counsel admitted that had Thomas testified consistently with the statement, she would have wanted Thomas to testify at trial. App. 278 l. 24 – App. 279 l. 23. Additionally, Thomas's testimony could have helped secure a self-defense charge. App. 279 l. 24 – App. 280 l. 1.

An attempt to serve Thomas with a subpoena was unsuccessful. Id. However, counsel did not move for a continuance on the day of trial when Thomas did not appear. App. 280 l. 9 – App. 281 l. 1. Even though the Grand Marquis car belonging to Thomas and seen on surveillance video was found at Thomas's house, counsel did not move for a continuance. App. 295 ll. 12 – 24.

Following the PCR court's refusal to allow Petitioner to testify fully and "[s]ubject to [PCR counsel's] prior objection," Petitioner was allowed to testify briefly. App. 285 l. 24. –

App. 295 l. 24. While on the stand, he explained that Thomas was his girlfriend. App. 286 l. 23 – App. 287 l. 3. She would have testified that Petitioner was robbed, thereby setting the stage for a self-defense charge. App. 287 l. 15 – App. 288 l. 15.

While the court waited for appellate counsel to return to court, the PCR judge questioned counsel for the State regarding Thomas's statement. App. 298 ll. 11 – 19. The State conceded that the statement "would raise the issue of whether or not these alleged victims were trying to rob [Petitioner]." Id. Upon review of the trial transcript, counsel for the State observed that the defendant requested a self-defense charge. App. 182 l. 6 – App. 183 l. 9; App. 299 ll. 20 – 25. After counsel for the State suggested that the statement was not corroborated, the PCR court recited the standard for jury charges, that "if there's any evidence in the record, the trial judge is required, as a matter of law, required to charge what the record would present to the jury." App. 300 ll. 1 – 21.

When counsel for the State noted that trial counsel attempted to subpoena Thomas, the PCR court immediately responded that "there was no request for a continuance." App. 301 ll. 6 – 20. Counsel for the State agreed that "would be the second step in that process." Id. The PCR court requested additional briefing on that issue from the parties. App. 301 ll. 18 – 20.

At the conclusion of the hearing, the PCR judge expressed his concern over trial counsel's failure to call Thomas and the trial judge's refusal to charge on self-defense:

> Now, I have to tell you… I am concerned that this failure to call Ms. Thomas and the judge's refusal to charge on self-defense is concerning to me. Number one, I don't think that there is a speedy trial issue here … because to the extent there is, your applicant has not met his burden of proof. You've got to show the reason for the delay. You've got to show that the delay caused you prejudice by a loss of evidence or witness testimony, et cetera, et cetera. In this case, that's not what was going on. They tried to find Ms. Thomas. The witness himself said she was in the courtroom. The trial counsel said I didn't want to call her because I didn't feel like she was credible.

> **My concern is that if she would have testified consistently with her written statement to the police that this was a self-defense situation, that matter would've been charged to the jury**. There's already a lesser-included finding from the jury of … assault and battery of a high and aggravated nature[.]

App. 309 ll. 2 – 23. (emphasis added). The PCR judge noted "the jury was leading that direction." App. 309 l. 24.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that counsel's performance was deficient, and he was prejudiced by counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Cherry v. State, 300 S.C. at 117–18, 386 S.E.2d at 625. In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Prior to trial, defense counsel proffered Thomas's testimony, specifically that she began screaming "They started it; they shot at him first." App. 40 l. 20 – App. 41 l. 16. Notably, the State indicated it did not object to those two sentences being elicited. Id. Not only did this testimony came in through the State's investigator, Jeremiah Fraser, but Fraser also spoke about Thomas's statement. App. 141 ll. 3 – 6; App. 163 ll. 6 – 20. As such, defense counsel could have admitted the statement on cross-examination.

Defense counsel was able to inquire whether Thomas's statement matched the accounts of other witnesses on cross-examination. App. 168 ll. 9 – 18. The assistant solicitor, on redirect, questioned Fraser with the specific contents of Thomas's statement:

> Q: Investigator Fraser, did you find any evidence throughout this investigation that corroborated Ashley Thomas's statement: They started it, they shot at him first?
>
> A: No. And that's actually why we went back to the house and talked to the grandmother. We looked all through the yard. There was no evidence of any kind of altercation. It was a dirt yard, if I remember right, so you would have seen where an altercation took place.

App. 171 l. 24 – App. 172 l. 6. Fraser then admitted that his reports indicated that the dirt yard had been raked up. App. 172 ll. 10 – 12.

The Order of Dismissal gave deference to defense counsel's supposed trial strategy for not calling Ashley Thomas and also noted that "the statement if true did not rise to a valid self-defense argument for Applicant." App. 326. Counsel's reason for not calling Thomas was allegedly based on the witness's criminal record. However, as admitted by counsel, Thomas's testimony could have opened the door to a self-defense charge. App. 277 l. 18 – App. 280 l. 1. The PCR court analyzed the elements of self-defense in the light most favorable to the State, in opposition to the standard Petitioner would have had to establish at trial. Stating "[i]t is uncontested that Applicant returned to his car, turned, retrieved a shotgun from the front passenger floorboard, exited the vehicle, and opened fire" directly contradicts Thomas's statement which Petitioner is alleging defense counsel should have admitted. Had her statement or live testimony been introduced, testimony favorable to Petitioner would have forced the trial judge to allow a self defense charge. The deficiency upon which Petitioner bases this allegation is the reason why an advantageous narrative did not exist. As noted by the Court of Appeals, "[u]pon request, a defendant is entitled to a jury instruction on self defense *if he has produced*

evidence tending to show the four elements of that defense." (emphasis in original). State v. Green, Op. No. 2015-UP-458 (filed on September 16, 2015) citing Stone v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988). Thomas's statement unequivocally shows how Petitioner was without fault in asking for his money, believed he was in imminent danger of losing his life when a gun was pointed at him, where the circumstances would have caused a reasonable person to believe the same, and where Petitioner was unable to act before a gun was pointed at him. App. 313.

The PCR court also failed to take into consideration trial counsel's failure to request a continuance to locate Thomas, the self-described "second step" in the process when a witness is unavailable. App. 301 ll. 13 – 22. Counsel's failure to move for a continuance has been held to be ineffective assistance. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

Petitioner indicated Ashley Thomas was in the lobby of the courthouse at Petitioner's trial. App. 288 l. 18 – App. 2. Had defense counsel moved for a continuance or even considered Thomas's testimony vital to establishing a self-defense charge, she could have possibly been located. Counsel could have made a well-supported argument for a continuance, but the belief that her testimony was unimportant likely preempted such a motion. The result was a trial which did not introduce enough evidence to satisfy the low burden of receiving a favorable self-defense charge. Counsel was deficient, and the prejudice in Petitioner's case manifested itself in the trial judge's refusal to allow a charge on self-defense, a decision affirmed at the Court of Appeals.

III. The PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner's right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested.

At the outset of trial, defense counsel moved to dismiss Petitioner's charges for failure to comply with a previously filed speedy trial motion. App. 41 l. 22 – App. 43 l. 14. Counsel articulated the following rationale for the motion to dismiss:

> I will hand up to Your Honor a bond paperwork that was signed by Judge Stephanie McDonald, September 17, 2012. Within that paperwork, Judge McDonald orders the State of South Carolina to dispose of and try this case by a certain date in 2012. And the State failed to do that. And we would take an interpretation of Judge McDonald's order that by the State failing to bring Mr. Green to trial under her order, that the State lost the opportunity to bring him to trial. And that the charges against Mr. Green, per that order, should be dismissed at this time for the State's failure to meet that deadline set by the Circuit Court.

Id. The motion was denied. App. 42 l. 22 – App. 43 l. 12. The same paperwork was before the PCR judge at the evidentiary hearing. App. 292 ll. 8 – 12; App. 314 – App. 316.

Petitioner testified that he was prejudiced by appellate counsel's failure to raise a meritorious issue on appeal, namely the denial of his motion for a speedy trial. App. 289 l. 4 – App. 291 l. 25. Petitioner expanded upon this allegation with great detail, noting that he had a date certain for trial on November 26, 2012. App. 292 l. 15 – App. 294 l. 18. Judge McDonald's Order from September 17, 2012 clearly sets forth "Defendant must be tried by conclusion of November 26, 2012 term of General Sessions Court." App. 315. Almost a year after that date certain, on November 13, 2012, his trial began.

Appellate counsel did not recall specifically the motion to dismiss at the outset of Petitioner's trial. App. 303 ll. 4 – 7. The applicable pages were not included in the record on appeal. App. 303 ll. 11 – 23. Appellate counsel indicated that he would have read and thought

about this issue. App. 304 ll. 13 – 15. Regarding his choice to brief a different issue, counsel noted that it was a strategical decision. App. 305 ll. 5 – 20.

In response, PCR counsel cited Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2181, 33 K.Ed.2d 101 (1972). App. 305 l. 21 – App. 306 l. 6. Appellate counsel agreed that Petitioner had arguable grounds for prejudice. Id. On cross-examination, appellate counsel speculated that this issue was not a meritorious one, after looking at the transcript and "knowing [his] practice of looking up that issue specifically." App. 307 ll. 10 – 18.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, Petitioner must prove that appellate counsel's performance was deficient, and that he was prejudiced by appellate counsel's deficient performance.

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 right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in

providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. Barker v. Wingo, 407 U.S. 514, 519, 92 S. Ct. 2182, 2186, 33 L. Ed. 2d 101 (1972).

The Supreme Court of the United States, in Barker v. Wingo, introduced a balancing test to allow circuit courts to approach speedy trials on an ad hoc basis. Id. at 530, 92 S.Ct. at 2192. The four factors to be assessed are lengthy of delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Id. None of these factors appear to have been weighed by the trial court in Petitioner's case.

An accused's speedy trial right begins when he is "indicted, arrested, or otherwise officially accused." Langford, 400 S.C. at 442, 735 S.E.2d at 482 (citing United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. Doggett v. U.S., 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness. See Doggett, 505 U.S. at 651–52, 112 S.Ct. 2686 (1992).

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, supra; see also Langford, 400 S.C. at 441, 735 S.E.2d at 482. 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).

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).

In State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368, (2016), this Court held that the trial court erred in denying the petitioner's speedy trial motion.

Petitioner was arrested on April 7, 2011, the day after the altercation. App. 46 ll. 3 – 11. He was indicted the following month. App. 332 – 337. Judge McDonald's order was issued over a year later, in September 2012. App. 315. It was not until over thirteen months later that Petitioner's trial began. The violation of Judge McDonald's order should have been sufficient to trigger review by the trial court. As articulated by defense counsel, the State failed to try Petitioner by the date certain, and the remedy should have been dismissal of the charges. App. 41 l. 25 – App. 43 l. 1.

A twenty-three month delay was presumptively prejudicial in Langford. In State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), a twenty-eight month delay was enough to prompt a speedy trial analysis. Even if there had not been a date certain, the approximately thirty-three month delay from Petitioner's arrest in April 2011 to trial in November 2013 should have been enough to trigger an analysis by the trial judge.

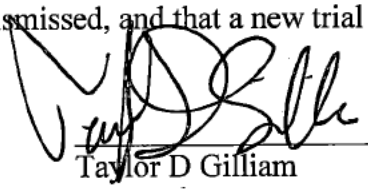
At the evidentiary hearing in Petitioner's case, the State does not suggest that the reasons for delay could be attributed to Petitioner. Nor is this factor, or any other of the speedy factors, discussed in the Order of Dismissal. Petitioner noted that he requested a speedy trial motion be

filed during one of his first meetings with defense counsel. App. 292 l. 19 – App. 294 l. 12. The unnecessary delay resulted in presumptive prejudice especially considering the inability to track down Ashley Thomas, Petitioner's girlfriend at the time of the incident.

Appellate counsel was ineffective for failing to raise this issue on appeal. It was unquestionably preserved by trial counsel, contained merit as shown above, and there was a reasonable likelihood for success on appeal. Given the potential remedy—dismissal of the charges—there was no downside to raising this issue. The PCR court's findings of fact and conclusions of law regarding the ineffective assistance of appellate counsel claim did not contain a lengthy analysis, rather a general overview of the concept. Following an analysis of the above factors in Petitioner's case, the Court of Appeals may have granted relief following the State's failure to try Petitioner in accordance with the date certain.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the PCR court's decision to deny relief be reversed, that the charges be dismissed, and that a new trial be granted.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ben Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Charles Green, #320693, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 28th day of January, 2019.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 28th day of January, 2019.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027