

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal From Lexington County  
The Honorable Daniel F. Pieper, Circuit Court Judge

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**RECEIVED**

JUN 15 2012

S.C. Supreme Court

THE STATE,

Respondent,

-vs-

GENE TONY COOPER, JR.,

Appellant.

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**BRIEF OF RESPONDENT**

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ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III  
Senior Assistant Attorney General

South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

DAVID M. PASCOE, JR.  
Solicitor, First Judicial Circuit  
P.O. Box  
Orangeburg, South Carolina 29116-1525  
(803) 533-6252

ATTORNEYS FOR RESPONDENT

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## PETITION'S QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by ruling petitioner was not denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where the forty-four month delay was caused by the Eleventh Circuit Solicitor's admission he "did nothing" to prepare for petitioner's retrial from August, 2002 forward, the state then failed to keep its promise to try the case in the Spring of 2004, and later also failed to comply with the court's order to try the case by the end of 2005, since the state's lackadaisical approach was prejudicial to the incarcerated petitioner who had always maintained his innocence?
2. Whether the Court of Appeals erred by ruling petitioner was not denied his Sixth Amendment right to confront witness Red Farmer where the state did not make reasonable efforts to secure his presence from the Texas correctional system for petitioner's trial, since Farmer should not have been considered "unavailable" under these circumstances, and the jury was denied the opportunity to observe Farmer's demeanor, particularly where Farmer was a key witness?
3. Whether the Court of Appeals erred by ruling it was not reversible error for petitioner to be impeached with his 1977 convictions for house breaking and grand larceny since these convictions were too remote under Rule 609, SCRE, and the trial court did not conduct a State vs. Colf analysis for admitting these highly prejudicial crimes of dishonesty?

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals properly held that the trial judge did not abuse his discretion by denying Cooper's motion to dismiss the charges against him based upon an alleged violation of his Sixth Amendment right to a speedy trial, where Cooper did not meet his burden of showing that he was entitled to relief under *Barker v. Wingo* and its progeny?
- II. Assuming that the trial judge's *in limine* ruling is preserved for appellate review, whether the trial judge abused his discretion by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, such that his prior, sworn testimony could be presented to the jury, where the State made reasonable, good-faith efforts to secure his presence, but were unable to do so as the result of the Texas Department of Corrections' failure to act upon its request?
- III. Whether, assuming that the issue is preserved for appellate review, the Court of Appeals properly found that the trial judge did not abuse his discretion by ruling that Cooper could be impeached with his 1977 housebreaking and grand larceny convictions, under Rule 609(b), SCRE, where the State rebutted the presumption against admissibility of remote convictions and established that the probative value of the evidence substantially outweighed its prejudicial effect. Also, whether any error was harmless?

## **STATEMENT OF THE CASE**

The State accepts Petitioner Cooper's Statement of the case for purposes of this Brief.

## STATEMENT OF FACTS

The evidence presented at trial, viewed in the light most favorable to the State, proved that Cooper kidnapped, robbed and murdered the victim (Kimberly Ann Quinn) as the result of a premeditated and sinister plot that originated with a state prison inmate and Cooper conspiring to rob Kim of an insurance settlement check from a car wreck. Cooper and Robert H. "Bo" Southerland carried out the crimes, with the aid and assistance of Brenda McLauren (Cooper's niece), even after they were aware that Kim did not have the insurance check. Cooper netted \$ 149.00 for his savagely brutal crimes. Cooper's co-defendant, Southerland was the chief prosecution witness. However, much of his testimony was corroborated by other witnesses, including two who saw him and Cooper casing Kim's home on the day of the murder.<sup>1</sup>

Southerland testified that he had been convicted of murder, armed robbery, forgery and conspiracy to commit robbery; and that Cooper was with him when these crimes were committed. Cooper "came by my trailer and woke me up Thursday morning about 8:30 and asked me if I'd help rob this gal, kill her." After he agreed, Cooper explained that "Red" Farmer had called and told him that she was getting an insurance check for \$2800 and "she wanted to buy half a pound of reefer." Southerland did not know either Farmer or Kim Quinn. **R. pp. 681-682; 686.**

The men went down to where Cooper's niece, McLauren, was working "because he didn't know where [Kim] lived ... . And when he walked in, she told him that Red wanted him to call ... him, so she gave him a phone number." Cooper called Farmer and had a conversation. Cooper went back into the store and McLauren wrote down the instructions where she lived. Next, the men went

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<sup>1</sup> As will be seen, only one witness identified both men. The other witness identified only Southerland.

down to Platt Springs Road.<sup>2</sup> There was only one house fitting the description that McLauren had given, and it was “right across from some apartments.” Southerland told Cooper that people would notice the car, so he pulled into the apartment complex and parked and waited for several minutes.

**R. pp. 686-688.**

Next, Cooper drove to NAPA auto parts right off Charleston Highway and used the phone to call her house. After he got an answering machine, Cooper got back into the car, and they drove back and forth for a period before pulling into the parking lot of the apartment complex again. Cooper got out and told Southerland to go to a payphone and call Kim. He then did as he was instructed. When Kim picked up the phone, he acted as if he had the wrong number by asking for someone else. Next, he drove back and picked up Cooper. He also told Cooper that she had answered the phone. **R. pp. 688-690.**

Cooper got into the car and began driving up and down the road again and then pulled back into the apartment complex and “sat there for a while.” Cooper then drove to a pay phone and called Kim. Again, he got the answering machine. It was before 3:00 p.m. Afterwards, Cooper drove to the apartment complex, backed the car into a space and they sat there. A blonde haired lady that lived across from where they were parked “come out and was looking at the car.”<sup>3</sup> **R. pp. 690-91.**

They left the apartments, and Cooper drove to the store where McLauren worked. Cooper instructed her to go to Kim’s house; and see if she had the money and if she still wanted the marijuana. They followed her to Kim’s house in their car and stopped about a half block away. After they saw her pull up to the house, they realized that this was not the house they had previously been

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<sup>2</sup> They were riding in Cooper’s Mercury Cougar (State’s Ex. 17), with Cooper driving. Southerland admitted he had been driving this car for a couple of weeks. **R. p. 687.**

<sup>3</sup> Southerland, who was on the passenger side of the car, thought that she left the complex.

watching. She came out roughly fifteen minutes later, and they followed her to the West Columbia Post Office. Cooper “blew up” when McLauren told him that Kim didn’t have the money, that she wouldn’t be getting the check until that Tuesday and that the check she had was only for \$240. Cooper told her that she lied to him. He then leaned into the car, and spoke to her. Then he said, “damn the money, I’m going to kill the bitch.” **R. pp. 691-94.**

This happened between 3:00 and 4:00 p.m. McLauren went home and Cooper took Southerland back to the South Congaree trailer park where he was living.<sup>4</sup> Cooper said that he would come pick him up at eight; and that they would go to a bar on Platt Springs Road, near Kim’s house, and drink some beer. Southerland went to Donnie Shumpert’s house around 6:30 or 7:00p.m., where he smoked marijuana and he waited for Cooper, in a trailer belonging to Shumpert’s nephew, located on the same property. When Cooper arrived, he was in his green truck.<sup>5</sup> They then went to a “beer joint” off of Platt Springs Rd., and they had a few beers. **R. pp. 693-97.**

From there, they went to the store in “Triangle City,” where Cooper used the telephone to call his wife at 9:00 p.m. As they passed Kim’s house on their way to the store, a flat bed truck was sitting in the driveway. Farmer had told Cooper that Kim had a boyfriend and they figured that was him. After Cooper called his wife, they rode by Kim’s house and saw that the truck was still there. So, they returned to the bar and shot a game of pool. **R. pp. 697-98.**

When they later rode past Kim’s house again, they saw a man saying goodbye to her. So, they “rode back down and turned around and come back, went to the club and we sat there just a bit. And we rode back down there and the truck was gone.” **R. pp. 697-98.**

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<sup>4</sup> He knew a few people in the trailer park and that Mr. Cooper, who is Cooper’s father, lived on Greenwood Dr.

<sup>5</sup> Southerland had bought a half ounce of marijuana so that Kim could smoke it to see if she wanted to buy a half pound of it.

After Cooper stopped at a store to buy a six pack of Budweiser, they went Kim's house and pulled into her driveway. It was after 10:00 p.m. Cooper got out, walked up to the door and went inside with Kim when she answered the door. A few minutes later, Cooper came to the screen door and motioned for Southerland to come in the house. Southerland grabbed the six pack and went into the house. Amanda was sleeping in the front part of the house. **R. pp. 698-99.**

Cooper told Kim that he heard that she wanted to buy some marijuana, and that Southerland had some for her to sample. After Southerland "rolled a joint" and smoked it with her, she said it was good. She told him that she had been on morphine and felt bad, but that this calmed her down. Kim refused Cooper's offer of a beer, and she said she wanted a Coke and something to eat. So, Cooper offered to drive her while Southerland would babysit. Kim agreed, and she left with Cooper. **R. pp. 698-99.**

As Southerland was finishing his third beer, Cooper came into the house, saying "we got to go, we got to go." When Southerland asked where Kim was, Cooper said that she was at the pond. Southerland knew the pond to which Cooper was referring, a pond they had been to a couple of times off Beckman Drive, in South Congaree. After Cooper told Southerland where he had parked the truck (a short distance from Kim's house), Southerland went and sat in it. About ten minutes later, Cooper walked up carrying a black plastic bag. In response to Southerland's inquiry, he said a leather jacket was in it. As they headed to the pond, Southerland asked what Cooper was going to do; and Cooper said that "he was going to kill her." **R. pp. 699-700.**

They arrived at the abandoned house near the pond; and Cooper got out with a pump shotgun that came from a trailer Cooper and Southerland had broken into a few weeks earlier.<sup>6</sup> Kim was

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<sup>6</sup> Southerland had fired off a round in this weapon at Donnie Shumpert's house on the previous night. **R. p. 701.**

inside the house. She was tied to the door, her hands were handcuffed behind her with a stick run through it, and she was “tied in” with strips from a curtain that had apparently been hanging in the house. Cooper then untied her. When he took a gag out of her mouth, she asked Southerland for help; but he did nothing because Cooper was armed and Southerland could not help her. Kim told Southerland that Cooper had beat her with a stick; and when Cooper pulled her pants down and shined his flashlight, Southerland could see “the stripes on her bottom where he had beat her.” Cooper told Kim that he wanted to know the names of the people for whom she worked, and whether they had drugs or money. **R. pp. 700-02.**

Then, Cooper pulled her outside and told her that he was going to kill her. He shot her after she begged for him not to kill her, and she fell over on her left side. She was still breathing. So, Cooper said; “she ain’t dead;” and shot her again in the neck. He shot her two more times, and all of the shells were gone. Afraid that authorities might recognize the handcuffs he had used had been stolen from C.C.I., Cooper got his ax from the gun rack of his truck and chopped off both of Kim’s hands. **R. pp. 702-03.**

On Cooper’s Orders, Southerland chopped off her feet. Because her pants made this difficult, Cooper removed her pants and threw them in the pond. Cooper dragged her body closer to the pond and put limbs on it. Southerland retrieved a chair from near the steps to the house at Cooper’s direction; and set it on her. Cooper said “that’s her seat in Hell.” He then got a gas can from his truck, poured gas on her and lit it. As her body was burning, Cooper took the rings from her severed hand and threw them in the pond. He gathered her hands, her feet and the handcuffs, and Southerland picked up the gun, the ax and the gas can. Then, they left. **R. pp. 703-04.**

Their next stop was the Congaree Creek bridge on 302. Cooper had placed Kim’s hands and feet in a plastic shopping bag and they threw them into the water along with the ax. After these

grizzly events, Cooper drove to the Crown Store, he bought two hot dogs and ate them. Finally, they went to Cooper's trailer and washed the clothes that they had been wearing. Southerland took a shower and slept on the couch. They buried the murder weapon the next morning in some woods near Cooper's trailer. **R. pp. 705-06.**

Later, the men went to a bank in Cayce, where Cooper used Kim's state I.D. card and cashed the check he had stolen from Kim's purse. After they had driven around for some time, Cooper went to a car wash and washed the truck and vacuumed it. Later Saturday night, Southerland went to Cooper's trailer and saw Cooper painting parts of the cab of the truck, a tool box and the rear window black. **R. pp. 705; 707-08.**

On Sunday that he was going down 302 into West Columbia and ran into Cooper near the residence of Cooper's father, where Cooper had picked up a camper that he kept there. Cooper told him that "they must have found the body because you could see the cars going down the dirt road." Southerland followed Cooper back to Pelion.<sup>7</sup> The camper had a t.v. and Cooper wanted to watch the news to see if there was any coverage about the murder. He also wanted to get a newspaper to see if it was in there as well. **R. pp. 708-09.**

The remaining evidence offered by the prosecution, including testimony from a number of witnesses without any interest in the various players in the case, corroborated many aspects of Southerland's testimony. This evidence proved that Kim and her six-year-old daughter, Amanda, lived in a West Columbia, South Carolina home in October 1989. She was unemployed and received a monthly AFDC check of \$149.00. This check was mailed so that she received it by October 1<sup>st</sup>. At the time of her murder, Kim's boyfriend, Eugene Carter, was incarcerated at C.C.I. Carter was

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<sup>7</sup> Cooper told him that he could rent the camper for \$50 a week. **R. p. 709.**

friends with Philip “Red” Farmer, another inmate who was also friends with Cooper and Cooper’s niece, Brenda McLauren. **R. pp. 424-25; 433-36; 441-42; 639-40; 943-52.**<sup>8</sup>

Farmer was housed in Cell Block 3 (CB-3), from where he was able to make collect telephone calls. Also, Farmer worked in C.C.I.’s educational department, located in the Stoney Building, which gave him access to additional State telephones. On Tuesday, October 3, 1989, Carter told Farmer that Kim was supposed to be receiving an insurance check for \$2,800.00, as settlement of a claim against an automobile insurance carrier.<sup>9</sup> The following day, October 4, Farmer received a visit from McLauren, (Cooper’s niece and co-defendant), who routinely visited him. During this visit, Farmer instructed her to have Cooper contact him. Farmer called Cooper at his home around 7:30 p.m. **R. pp. 1200-05.**<sup>10</sup>

Farmer told Cooper that Kim was “receiving an insurance check for \$2,800.00. I also told him it would be a good opportunity to rob her.” Cooper “. . . said he didn’t see any problem with it.” Also, he “[t]old me that he didn’t have any respect for the bitch.” For his part in the robbery scheme, Farmer was supposed to receive \$500.00. Following this conversation around 9:30 p.m., Cooper called Kim at her home. **R. pp. 957-58.**

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<sup>8</sup> The trial judge ruled that Farmer was an unavailable witness. The State published his 1991 testimony on direct examination over objection. **R. pp. 942-63.** See also **Argument II.**

<sup>9</sup> Farmer testified that he, Kim, Gerald Legrand and two other people were engaged in an ongoing conspiracy to smuggle drugs into C.C.I. **R. pp. 975-76.** Legrand’s testimony corroborated this. **R. pp. 924-33; 688-90.**

Also, the parties stipulated that Kim had been involved in an accident in January 1989. Jonathan M. Harvey, Esquire, was her attorney. Kim had settled a claim against the insurance carrier for \$7,750.00. Of this amount, she was to receive \$2,831.18. The rest was to cover her expenses. The money was not to be paid until October 10, 1989. **R. pp. 638-39.** See also **R. pp. 442-43.**

<sup>10</sup> Mr. Blake Taylor, who was Director of S.C.D.C.’s Internal Affairs and Audits testified that there were no records of local calls from the educational unit. However, McLauren’s visit was logged in S.C.D.C. records. **R. pp. 1014-16; State’s Exhibit 41.**

On the morning of Thursday October 5, 1989, Mr. Dana Harley was working as the maintenance man at Lynn Gate Apartments, across the street from Kim's residence. Harley identified Cooper and Southerland as occupants of a white Mercury Cougar. They drove into the complex's parking lot around 9:30 a.m., and they backed into a space from which they could easily watch Kim's house. They left after roughly fifteen minutes. They returned about forty-five minutes later, and the passenger - identified by Mr. Hartley as Cooper - walked up to and sat on the steps of the apartment Mr. Hartley was cleaning.<sup>11</sup> Again, Cooper was positioned so that he could watch Kim's house on Platt Springs Road. Ten or fifteen minutes later, the Cougar returned, picked up Cooper and left. **R. pp. 482-89; 492-94; 499-504.**

Mr. Harley saw Cooper and Southerland pull back into the parking lot sometime "around 3:00 [p.m.] or so." Again, they backed into the same space and sat for a few minutes before leaving. Mr. Hartley got the license tag number of the Cougar (State's Ex. 17) on this occasion. The car left roughly around 3:30 p.m., only to return around 4:00 p.m. This last time, however, the car did not stop in the lot. **R. pp. 490-95.**

The State also published the prior testimony of Mrs. Sharon Freeman Counts. In 1991, she had testified that she was a resident of Lynn Gate. She saw the car parked near her apartment between 2:30 and 3:30 p.m. on October 5, 1989. There were two white males in it, and she identified Southerland as the passenger. She thought this was suspicious since ". . . the parking lot is always empty at that time." Her description of the passenger fit Southerland, and she testified that he had boldly stared at her. **R. pp. 497-506; 516-26.**

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<sup>11</sup> Hartley paid attention to the men because they were suspicious. Also, he kept the apartment he was cleaning dark when they were present. While he watched Cooper through a peephole on the second visit, but otherwise watched both men through the apartment window. **R. pp. 509-11.**

On Friday, October 6<sup>th</sup>, both Mr. Harley and Mrs. Freeman told police what they had seen on the previous day and described the two men (Cooper and Southerland). Mrs. Freeman's description of the two occupants was virtually identical to Mr. Harley's, and she selected Southerland as one of the men she had seen, from a photographic lineup. The only difference between her account and that given by Mr. Harley is that she stated Southerland was a passenger, whereas Mr. Harley remembered Cooper as the passenger. Harley selected both Cooper and Southerland out of a pre-trial photographic lineup, and he positively identified Cooper at trial. **R. pp. 526-32.**

At roughly the same time that Cooper and Southerland were arriving near Kim's residence on the afternoon of October 5, Elizabeth Griffin - a good friend of Kim who drove Amanda and her own son to and from school - saw McLauren at Kim's residence. McLauren was going into Kim's house as Griffin was leaving. Ms. Griffin last spoke to Kim around 11:00 p.m. Kim did not feel well, but was feeling better than she had earlier that evening. **R. pp. 440-46; 454.**

Amanda testified that Kim was home, alone when she went to sleep on Thursday night. Kim was very protective of Amanda because she had previously been in a fire. So, Amanda slept in the living room. Amanda later awoke to the sound of someone knocking at the door. Kim answered it. Two men came into the house although Kim did not want them to enter. "It was mean loud" and too loud for then-six year old Amanda to go back to sleep. "I had rolled over and someone told me to roll back over or they was going to do to me what they were doing to my mother." **R. pp. 424-27.**

Amanda awakened early the following morning, only to discover that her mother was missing. This was unusual for Kim, and the police were called. Neither friends nor law enforcement could find Kim on Friday, October 6th, and her \$149.00 AFDC check was missing. Although her purse was found on the ground outside the house, all of the money was missing, as was her State I.D.

card. Her rings, which she wore each day, were also missing. Further, there were some Budweiser beer cans in Kim's house. **R. pp. 427-32; 434-37; 446-51; 456.**

The parties stipulated that someone other than Kim cashed Kim's AFDC check (State's Ex. 14) at a drive-through window of the Knox Abbott Drive branch of South Carolina National Bank around 9:17 a.m. Friday. The check was forged by someone who simulated Kim's signature and presented a South Carolina Department of Highways and Public Transportation identification card that had belonged to Kim. **R. pp. 639-42.**

Meanwhile, Farmer had a conversation with Eugene Carter on Friday morning and apparently learned that Kim was missing. Farmer then went to the education department. Around 10:00 a.m., he received a telephone call from Cooper.<sup>12</sup> Cooper told Farmer in a coded conversation "[t]hat my intelligence was wrong; that she did not have the twenty-eight hundred; that he completed the construction job that he was working on; . . . that he had burned the excess material[;] and [that he] was real pleased with the job and didn't see any complication." Farmer explained this meant "[t]hat the robbery had been completed, . . . that [Cooper] had killed Kim Quinn, . . . [and] that he had burned the body." **R. pp. 958-63.**

In October 1989, Teresa Shumpert Dunn was married to Donnie Shumpert. They lived in a mobile home on Glenwood Drive. Lee Chavis, Ms. Dunn's nephew, lived next door. Both witnesses knew Southerland and Cooper. Southerland would frequently stop by the Shumpert's residence, and Cooper would come over to see Southland. **R. pp. 901-04; 914-33.** Chavis testified that they seemed to be "good friends." **R. p. 917.** Cooper appeared to be the leader between the two

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<sup>12</sup> There would not be any telephone record for a local call to this State telephone.

men, and Ms. Dunn testified that Southerland was not as friendly when Cooper was present. **R. pp. 904-05.**

On the evening of Tuesday, October 3, 1989, Cooper and Southerland returned an air compressor that they had borrowed from the Shumperts. They were in Cooper's green pickup truck. **State's Exhibit 30.** (Cooper also owned a Mercury Cougar, **State's Exhibit 17**, but he allowed Southerland to drive it). When Cooper and Southerland arrived on Tuesday evening, Southerland got out of the truck, pointed a shotgun in the air and fired it. Mr. Shumpert told Southerland to put the weapon up because the children were outside, and Southerland put the shotgun back in Cooper's truck. Cooper and Southerland later left in the truck. **R. pp. 905-07.**

On Thursday, October 5th, Southerland came over to the Shumperts' shop, which was behind their residence. He asked what time it was and someone told him 10:30 p.m. He said that he had to go somewhere at 10:30. He walked out of the shop and Ms. Dunn did not see him again that night. The Cougar was parked in the yard after he left. The Cougar was still parked at the Shumpert's when Chavis left for work at 7:00a.m. on Friday, October 6. **R. pp. 907-09; 917-19.**

As noted, authorities did not discover Kim on Friday or Saturday, October 7th. However, early Friday afternoon, Forest Ranger Mike Hutchins, with the South Carolina Forestry Commission, was dispatched to a fire in some woods near Beckham Road. This is also near the residence of Cooper's brother. By the time he arrived, the fire was contained in a relatively small area and he did not further investigate after he saw there were no obvious signs of damage to an unoccupied building in the area. **R. pp. 457-66.**

Two boys discovered Kim's burned and mutilated body on Sunday, October 8th, and led their father to it. The father then notified law enforcement. **R. pp. 467-81.** Kim's body was discovered in a condition very consistent with Cooper's statements to Farmer: her brains had literally been

blown out of her skull by a shotgun blast, and a large amount of brain matter was discovered some distance away from Kim's body; her hands and feet had been severed; and a fire, started by gasoline, had badly burned her body and the debris which had been piled on top of it. Again, Budweiser beer cans were found at the scene. Her jeans were discovered in the pond. **Tr. pp. 549-57; 611-13; 617-35; 656-58, 939.**

Divers from the Lexington County Sheriff's Department retrieved Kim's severed feet and her left hand from the Congaree Creek, near a bridge on Highway 302, in South Congaree. Cooper's ax (**State's Exhibit 22**) was found near one of the feet. **R. pp. 561-71.** Even though the ax had been in the creek for several days, there were three separate spots which tested positive for human blood. **Tr. pp. 649-50.** When law enforcement examined Cooper's truck, they did not find any blood. However, the truck's cab had recently been painted black, including the floorboard, a tool box, the rear window and the area behind the seats. This made it difficult to accurately test for the presence of blood. However, samples of paint chips from the ax matched those taken from the cab. **R. pp. 651-54; 667-79.**

Marsha Burroughs Crane testified that she was married to Cooper in October 1989. She and Cooper lived in Pelion, South Carolina at the time. She testified that Cooper kept all of their vehicles clean, and would wash them several times a week. **R. p. 893.** She last saw the ax that was introduced at trial when Southerland returned it on September 30<sup>th</sup>. **R. p. 897.**

Cooper's parents lived on Greenwood Dr., in West Columbia. Their house was near the pond where Kimberly was murdered, and Marsha had been there with Cooper. **R. pp. 880-82.** Ms. Crane also knew Southerland, whom she described as a "business acquaintance" of Cooper, but she admitted that she did not know what else the two men did together. Southerland came to their trailer on Wednesday October 4, 1989, around 9:00 p.m. She worked on Thursday. **R. pp. 897-99.**

On the Sunday after Kim's murder, October 8<sup>th</sup>, 1989, she and Cooper went to his parents' home and picked up Cooper's camper. Consistent with Southerland's account, she testified that they saw Southerland in "his" car along their way home, and they pulled off of the road when he waived them down. Cooper and Southerland exited their vehicles and had a conversation. Then, the Cooper's went home. **R. pp. 882-84.**

Later Sunday evening, Cooper, Marsha and her two boys went to the home of Cooper's sister in Wagner, South Carolina. Southerland and McLauren were also there. At some point, Cooper had a private conversation with his sister, McLauren (his niece) and Southerland. Marsha did not hear the substance of that conversation. **R. pp. 884-85.**

Finally, an autopsy by Dr. Joel Sexton -- who identified the body through medical records -- revealed that there had been three gunshot wounds. The wound to the head would have been immediately fatal and was listed as the cause of death. A wound to her back, near the shoulder blade, was fired before the head wound and caused extensive damage to about three-fourths of Kim's chest cavity. The remaining wound, to Kim's neck, would also have been fatal. Dr. Sexton opined that the post-mortem amputation of Kim's hands and feet were consistent with being caused by Cooper's ax. **R. pp. 578-604.**

Dr. Sexton recovered buckshot, birdshot and wadding from the wounds. The buckshot was recovered from her neck, while the birdshot was found in the head wound. **R. pp. 588-89.**

## ARGUMENTS

**I. The Court of Appeals correctly held that the trial judge did not abuse his discretion by denying Cooper's motion to dismiss the charges against him based upon an alleged violation of his Sixth Amendment right to a speedy trial because Cooper did not meet his burden of showing that he was entitled to relief under *Barker v. Wingo* and its progeny.**

Cooper's first argument is that the trial judge erroneously denied his motion to dismiss the charges against him based upon an alleged violation of his Sixth Amendment right to a speedy trial. However, the State submits that the Court of Appeals correctly held that the trial judge did not abuse his discretion by denying the motion because Cooper did not meet his burden of showing that he was entitled to relief under *Barker v. Wingo* and its progeny.

The Court of Appeals' found that the relevant facts pertaining to this issue were as follows:

Cooper was indicted in January 1990 for murder, kidnapping, armed robbery, forgery, and conspiracy. On February 22, 1991, he was convicted on all charges and sentenced to death. However, almost three years later, the South Carolina Supreme Court reversed Cooper's conviction for murder and remanded the case for a new trial.<sup>FN1</sup> The Supreme Court affirmed Cooper's convictions for kidnapping, armed robbery, forgery, and conspiracy.<sup>FN2</sup> The following year, Cooper filed an application for Post Conviction Relief (PCR) pertaining to his four non-capital convictions. Counsel for both parties agreed that Cooper's retrial for murder should await the disposition of his PCR challenge. Following an evidentiary hearing, the PCR court granted Cooper relief for all of his non-capital convictions. The State appealed, and the South Carolina Supreme Court affirmed the granting of PCR.<sup>FN3</sup> The State did not petition for rehearing, and the Supreme Court sent the remittitur to the Lexington County Circuit Court on August 29, 2002.

FN1. *See State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994).

FN2. Cooper remained incarcerated from his arrest in 1989 until his retrial in 2006.

FN3. *See Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002).

Almost a year later, however, Cooper's retrial had still not been scheduled. On July 15, 2003, Cooper filed an amended demand for speedy trial, and a month later, a hearing was held in the circuit court before Judge Westbrook. <sup>FN4</sup> During the hearing, the State made a motion to disqualify Cooper's attorney, David Bruck, from the case for having contact with Cooper's co-defendant, Bo Southerland. Bruck asserted he had no prior knowledge of the State's motion to disqualify him from the

case. Judge Westbrook took the matter under advisement, and set another hearing to discuss the speedy trial and disqualification issues. On August 25, 2003, the parties held an in-chambers conference to discuss the issues, and at that time, the deputy solicitor stated the solicitor's office would call Cooper's case for trial during spring 2004, between April and June.

FN4. Cooper's motion was titled "Defendant's Amended Demand for Speedy Trial," but the record does not contain a copy of an un-amended motion.

The case was not called in spring 2004, and on February 10, 2005, Cooper filed a renewed demand for a speedy trial. Five days later, a hearing on the motion was held before Judge Keesley. Cooper moved to have the trial set for June or July 2005. The assistant solicitor said he could not set a date without Solicitor Donnie Myers being present, and the court should wait to set a date until a judge was selected for the case. On April 25, 2005, Judge Keesley ordered the case be heard before the end of 2005, or Cooper could move for bail or for dismissal of the charges. The order also provided notice was to be given to defense counsel of the trial date within thirty days of the order.

The following month, Solicitor Myers filed a motion to disqualify and recuse Cooper's attorneys. Myers stated that during Bruck's PCR representation of Cooper, Bruck contacted and communicated with Southerland, and obtained statements from him exculpating Cooper without approval from Southerland's attorneys. Myers asserted Bruck stipulated to the unauthorized communications; thus, Bruck and the other attorneys should be removed from the case and prohibited from talking with Cooper's newly-appointed attorneys.

Cooper filed a motion to dismiss all charges for lack of a speedy trial on June 1st. In the motion, Bruck stated that in response to Judge Keesley's April 25, 2005 Order, he sent an e-mail to the judge opposing counsel's request that the trial be set for the first of August because of a conflict with his schedule as a law professor at an out-of-state school.FN5 On July 12, 2005, a hearing was held before Judge Keesley concerning Cooper's motion for speedy trial; the State's motion to excuse Cooper's counsel; and the Eleventh Circuit Solicitor's motion to withdraw from the case due to a conflict of interest. The solicitor's office moved to be excused because the deputy solicitor was a law clerk to the judge who presided over Cooper's first trial and was present for attorney-client issues.FN6 The State also argued Bruck should be removed from the case because of his improper contact with Southerland. On July 13, 2005, Judge Keesley filed his order, (1) denying the State's motion to remove Cooper's counsel; (2) granting the State's motion to disqualify the Eleventh Circuit Solicitor's Office; (3) denying Cooper's motion to dismiss; and (4) denying Cooper's motion for bail.

FN5. Bruck also sent copies of the e-mail to opposing counsel.

FN6. The motion to have the solicitor's office removed was not made known to Cooper until a June 29, 2005 letter.

In September 2005, the First Circuit Solicitor's Office was appointed to the case, and in December, Chief Justice Toal appointed Judge Pieper to hear the case. Shortly thereafter, on December 29, Cooper filed a renewed motion to dismiss all charges for lack of a speedy trial, or in the alternative for release on bail. Cooper re-asserted everything from his prior motions. Cooper also asserted that despite Judge Keesley's second order, the State appeared to have taken no action other than deliver the file to the Attorney General's Office and request assignment of a new solicitor. The State filed a response to Cooper's Motion, arguing this case was different from most speedy trial cases involving pre-indictment or pre-trial delay because the case had already been tried once. The State conceded the length of delay in this case triggered further analysis of the reasons the trial was delayed and whether Cooper was prejudiced; however, the State claimed the case was delayed for three years and four months, beginning from August 29, 2002, the date the Supreme Court sent down the remittitur. The State contended Cooper was not prejudiced by the delay because he had already been tried and convicted for the crimes. Cooper filed a reply to the State's response, asserting the State cited no authority for its position that Cooper's rights were diminished by his intervening conviction and appellate reversal, and Cooper argued it should have required less time for the State to retry the case. Cooper also claimed his many motions for speedy trial differentiated this case from other speedy trial cases and weighed heavily in granting his motion to dismiss.

On February 8, 2005, a hearing was held before Judge Pieper concerning the speedy trial issue. Judge Pieper issued his order on April 21, 2006, denying Cooper's motion. Cooper's second trial was held before Judge Pieper from May 22 to June 1, 2006. At the conclusion of the State's case and the conclusion of the presentation of evidence, Cooper made motions for directed verdict, which were denied. Cooper also renewed his motion to dismiss the indictments due to a speedy trial violation at the conclusion of all the evidence; however, Judge Pieper denied the motion. The jury convicted Cooper of each of the charged offenses. Judge Pieper sentenced \*216 Cooper to life imprisonment for murder, twenty-five years for armed robbery, and five years for conspiracy to commit armed robbery. He did not impose a sentence for the kidnapping conviction. This appeal followed.

*State v. Cooper*, 386 S.C. 210, 212-16, 687 S.E.2d 62, 64-66 (Ct.App. 2009).

The State generally accepts the Court of Appeals' factual findings. However, it does dispute and would correct several of the Court of Appeals' findings, such as the finding that Cooper filed his first request for a speedy trial on July 11, 2003 because this is the date of the document and not the date on which it was filed. South Carolina does not follow the "mailbox rule." Therefore, the

demand for a speedy trial was not made until filed by the Lexington County Clerk of Court. *Fox v. Union-Buffalo Mills*, 226 S.C. 561, 86 S.E.2d 253 (1955) (when a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer).

Judge Westbrook's hearing on the motion was on August 18, 2003; and Respondent would point out that the date relied upon by the Court of Appeals is a date on which Cooper alleged an unrecorded proceeding was held. **R. pp. 5-15; see also April 25, 2005 Order, R. p. 29.**<sup>13</sup> Also, counsel stated that the prosecution and defense had agreed that the retrial of the murder indictment should not proceed "until the status of his noncapital cases was finally resolved" in PCR. **R. pp. 5-7.** The State would further note that Judge Westbrook took the matter under advisement and he did not thereafter act on Cooper's motion. **R. pp. 10-14.**

Further, at the first hearing held by Judge Keesley, counsel explained that he accepted a job as a law school professor in Virginia after Spring of 2004, but that Cooper was anxious for him to remain on the case. Therefore, counsel suggested a June or July 2005 trial date *to accommodate counsel's school schedule*. **R. pp. 5-6.** Further, counsel Bruck noted Cooper's willingness to have Judge Keesley serve as trial judge. **R. pp. 7-8.** *Contra Floyd v. State*, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) ("in all post-conviction relief hearings held after the date of this opinion, a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought").

The State would also explain that the Solicitor's Office motion to be recused because of a conflict of interest arising from the Office's employment of the original trial judge's law clerk was based on the concern that, as a law clerk, Deputy Assistant Hubbard had been privy to privileged

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<sup>13</sup> Counsel waived Cooper's presence at this hearing and at the February 2005 hearing. **R. p. 5.**

communications between the judge and defense counsel. **R. pp. 68-71**. Additionally, the State would point out that, at the July 12, 2005 hearing into the renewed motion held by Judge Keesley, counsel Bruck conceded that the Solicitor had written Judge Westbrook within thirty days of the April 25<sup>th</sup> Order “concerning the scheduling of a trial date.” however, he claimed that the State had not contacted Court Administration to ask that a judge be assigned. He also conceded that “*at least the last four months of the year ... posed serious logistical problems for me*” because of counsel's unrelated obligations as a law school professor. **R. pp. 8-10** (emphasis added). Judge Keesley’s July 12, 2005 Order concluded by noting that the court would “*probably not be able to accommodate [trial counsel’s] request that the case only be tried when he is not involved in his professional duties, while still trying to schedule the case at the earliest possible time.*” **R. pp. 76-79** (Emphasis added).<sup>14</sup>

The Court of Appeals denied relief on this allegation, as follows:

Cooper argues the trial court erred in denying his motion to dismiss the charges against him because his constitutional right to a speedy trial was violated. We disagree.

A criminal defendant is guaranteed the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14; *State v. Pittman*, 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). “This right ‘is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.’ ” *Id.* (quoting *U.S. v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). There is no universal test to determine whether a defendant's right to a speedy trial has been violated. *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

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<sup>14</sup> Finally, for this Court’s convenience, the State would note that Cooper’s December 29, 2005 Notice of Motion and Renewed Motion to Dismiss All Charges for Lack of a Speedy Trial, Or in the Alternative for Release on Bail is at **R. pp. 81-85**; the “State's Response to Defendant's Motion for Speedy Trial and/or Granting Bail” is on **R. pp. 86-90**; Cooper’s reply to that pleading is on **R. pp. 91-100**; Judge Pieper’s February 8, 2006 *de novo* hearing on Cooper’s motions is on **R. pp. 106-239**; the Solicitor's file, which Cooper introduced as **Defendant’s Exhibit 1** at this hearing, is on **R. pp. 267-95**; a computer generated printout of Eleventh Circuit cases, **Defendant’s Exhibit 2**, is on **R. pp. 296-327**; and Judge Pieper’s Order denying Cooper’s motion, which is dated April 21, 2006, is on **R. pp. 328-43**.

A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) 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); *see also State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155. However, in *Doggett v. U.S.*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the United States Supreme Court suggested in *dicta* that a delay of more than a year is "presumptively prejudicial." Also, in *State v. Waites*, our supreme court found a two-year and four month delay was sufficient to trigger further review. *Waites*, 270 S.C. at 108, 240 S.E.2d at 653. Therefore, "a delay may be so lengthy as to require a finding of presumptive prejudice, and thus trigger the analysis of the other factors." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155.

Cooper argues the delay of forty-four months in bringing his case to trial the second time exceeded any delay in almost any reported South Carolina case, and the State's reason for the delay was both arbitrary and unreasonable. Cooper argues his many motions for speedy trial should be weighted heavily in favor of granting his motion to dismiss. He also asserts his incarceration on death row "amounted to no small prejudice" and his "anxiety and concern as he waited for the state to call his case also cannot be diminished." He further asserts that witnesses' memories were clearly affected by the delay at trial.

In his April 21, 2006 order denying Cooper's motions, Judge Pieper addressed each of the four *Barker* factors. As to the length of delay in bringing the case to trial, Judge Pieper noted that "a total delay of at least forty-four months [was] sufficient to trigger review of the other factors." FN7 However, he found "the delay was to some degree the result of prosecutorial and governmental negligence, and partly justifiable." He also stated that while none of the excuses alone were sufficient to justify the delay, when considered together, they sufficiently justified a majority of the delay. *See Waites*, 270 S.C. at 108, 240 S.E.2d at 653 (holding that the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable"). Specifically, Judge Pieper determined the main excuses for the delay were: (1) the complexity of the case and the amount of time required to prepare for trial; (2) the Eleventh Circuit Solicitor's Office's relocation due to mold contamination and an overcrowded docket; (3) confusion over which judge, if any, had been assigned to the case; and (4) the recusal of the Eleventh Circuit Solicitor's Office from the case in July 2005, preventing the First Circuit Solicitor's Office from being appointed until September 2005. Therefore, Judge Pieper concluded "the state's conduct in this instance was not apparently willful and was largely justifiable."

FN7. We note the forty-four month delay in re-trying Cooper's case is troubling; however, in this case, we find it was justifiable.

In considering Cooper's assertion of his right to a speedy trial, Judge Pieper noted that “[i]t cannot be argued that since 2003 the defendant ever failed to assert his right to a speedy trial” and “nothing in the procedural history of the case could support a finding that the defendant failed to properly assert his right to a speedy trial.” In consideration of the fourth and most important factor, prejudice, Judge Pieper found the main prejudice Cooper suffered was pretrial incarceration.

After weighing the four *Barker* factors and “the lack of demonstrable evidence of trial prejudice,” Judge Pieper determined the “presumption of prejudice has been persuasively rebutted”; therefore, he denied Cooper's motion. Further, Judge Pieper noted the State withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay. *See Brazell*, 325 S.C. at 76, 480 S.E.2d at 70-71 (noting the three-year and five-month delay was negated by the lack of prejudice to the defense). Therefore, we find Judge Pieper's decision was supported by the evidence.

*Cooper*, 386 S.C. at 216-18, 687 S.E.2d at 66-67. There was no error because Cooper has clearly failed to show a prejudicial abuse of discretion resulting from denial of his motion. Instead, Respondent submits that the trial judge correctly applied the *Barker* factors. *See Brazell*, 325 S.C. at 75, 480 S.E.2d at 70 (1997); *State v. Evans*, 386 S.C. 418, 423, 688 S.E.2d 583, 586 (Ct.App. 2009), *cert. denied*, June 23, 2011.

The first factor, length of delay, acts as a threshold requirement. *Barker*, 407 U.S. at 530. However, *Barker* does not set forth a specific time which constitutes a “length of delay” that requires a complete inquiry into the other three factors, but states that it should be determined by the peculiar circumstances of the case. *Id.* In *Doggett*, 505 U.S. at 651-52, the Court explained that this first prong is, itself a two-part inquiry. It is first necessary to determine if the delay breaks the threshold point of presumptive prejudice. If it does not, the inquiry is over and it is unnecessary to consider the other *Barker* factors. *Id.* Conversely, the Court must consider the remaining factors if the delay

is presumptively prejudicial, and *Doggett* indicates that delay has been found “presumptively prejudicial” as it “approaches one year.” 505 U.S. at 652.

Here, the trial judge found that there was a forty-four month delay and Respondent does not dispute that finding because approximately forty-four months passed between the Court’s decision in *Cooper v. Moore*, and the trial judge’s Order. Contrary to Cooper’s representation to this Court, however, the delay here did not “exceed[] that found in almost any reported South Carolina case,” **Brief of Petitioner, p. 16**, as his citation to *Foster* and *State v. Robinson*, 335 S.C. 620, 634, 518 S.E.2d 269 (Ct. App. 1999) (delay of over four years and four months between indictment and trial triggered analysis of other *Barker* factors, but concluding that there was no prejudice) proves. *See also Evans*, 386 S.C. at 423-26, 688 S.E.2d at 586-87 (twelve year delay). Indeed, the delay in *Barker* was more than five years. *See also Brazell, supra* (delay three years and five months).

Nevertheless, the Court must consider the other three factors under *Barker* because this delay was “presumptively prejudicial” under *Doggett*. Cooper conceded below that the delay caused by the lengthy appeals process is not attributable to the prosecution, and that the murder case should not have been tried until the validity of his other convictions had been finally resolved in state PCR. *See State v. Foster*, 260 S.C. 511, 197 S.E.2d 280, 281 (1973) (finding a delay of more than five years was sufficient to require analysis of the other factors without finding presumptive prejudice); *cf. Brazell*, 480 S.E.2d at 76 (a delay of three years and five months was sufficient to trigger review of the other *Barker* factors).

With respect to the second factor of the *Barker* test, Cooper’s suggestion that the reason for delay was the result of “bad faith,” or as he claimed at oral argument “arrogance” on the part of the Eleventh Circuit Solicitor, simply is unsupported by the record. Rather than a “sit-in” or a willful refusal to act by the prosecution, the trial judge correctly found that “the delay was to some degree

the result of result of prosecutorial and governmental negligence, and partly justifiable.” **R. pp. 91-100.** To the extent there was any arrogance involved, it was that of defense counsel. Although he did repeatedly assert Cooper’s right to a speedy trial, he likewise repeatedly asked that the trial date not interfere with his voluntarily assumed responsibilities as a law school professor in a state several hundred miles from South Carolina. *See R. pp. 23-24* (February 15, 2005 hearing before the Honorable William P. Keesley); **R. pp. 41-43** (counsel conceded at July 12, 2005 hearing before Judge Keesley that “at least the last four months of the year ... posed serious logistical problems for me” because of counsel’s unrelated obligations as a law school professor); **65-66** (Judge Keesley addresses Cooper about desire to have Bruck represent him after Bruck took teaching job); **251-53** (scheduling hearing before trial judge).

The trial judge found that Cooper had consistently asserted his right to a speedy trial since 2003; that Cooper timely asserted his right; and that Judge Keesley had not considered defense counsel's Bruck's requests to accommodate his schedule. **R. pp. 328-343.** Still, the trial judge found that *some delay after the trial judge’s assignment to the case was because of his efforts to accommodate Bruck's schedule.* **R. pp. 250-53; 328-43.**

The State agrees with most of the remaining findings by the trial judge on this prong of the *Barker* analysis.<sup>15</sup> Some of the delay was the result of the mold problems in the Lexington County Courthouse, the repeated physical relocation of the Eleventh Circuit Solicitor’s Office and the construction of a new courthouse.

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<sup>15</sup> However, the State disagrees with the finding that the Solicitor had the responsibility of contacting Court Administration and obtaining assignment of a judge to Cooper’s then-capital trial after repeatedly discussing the case with the chief administrative judge.

The trial judge's Order found that court records reflected that "the last general sessions term in the old courthouse was November 13, 2003 .... The first general sessions jury trial in the new courthouse was on April 4, 2004." This accounts for four months and twenty-one days of delay. The trial judge correctly found that, although general sessions pleas and civil court began on January 8, 2004, it was reasonable for the Solicitor's Office "to get settled into the new facility," as Solicitor Myers testified. **R. p. 334.**

Also, the delay occasioned by consideration of the prosecution's motions for recusal, including the motion to recuse the Eleventh Circuit Solicitor's Office because of a conflict of interest, was reasonable and not part of a "pattern of delay," as Cooper argues. The spuriousness of Cooper's attack on the motion to recuse the Eleventh Circuit Solicitor's Office is demonstrated by Judge's Keesley's decision to grant the motion and the trial judge's finding that it was an appropriate motion. If the motion had not been granted, then Cooper most assuredly would have raised the issue, either at trial or, more likely, in PCR.

Likewise, the delay caused by recusal of the Eleventh Circuit Solicitor's Office was reasonable, as were the steps taken by the First Circuit Solicitor's Office to comply with Judge Keesley's July 12, 2005 Order directing trial by the end of 2005. The case was not assigned to the First Circuit Solicitor until September 2005, and Senior Assistant Solicitor Bell took it upon himself to inquire about the assignment of a judge when he realized that Court Administration still had not assigned one despite Judge Keesley's July 12, 2005 Order.

Similarly, the trial judge acted promptly and reasonably once the case was assigned to him. Moreover, the trial judge clearly accommodated the schedule of Cooper's trial counsel when scheduling the case. **R. p. 336-38 & n. 3.** See *Gattis v. Snyder*, 278 F.3d 222, 231 (3<sup>rd</sup> Cir. 2002) (no speedy trial denial for delays sought by petitioner's attorney); *United States v. Tanh Huu Lam*, 251

F.3d 852, 856-7 (9<sup>th</sup> Cir. 2001), amended, 262 F.3d 1033 (9<sup>th</sup> Cir. 2001) (litigants are bound by the conduct of their attorneys and delays caused by continuances granted to the defense precludes a claimed speedy trial violation). Mr. Bruck's unwillingness or inability to try cases throughout the calendar year further delayed the case and his conduct is not the fault of the State. *Id.* See also *Vermont v. Brillon*, 129 S.Ct. 1283, 1291 (2009) ("An assigned counsel's failure "to move the case forward" does not warrant attribution of delay to the State. Contrary to the Vermont Supreme Court's analysis, assigned counsel generally are not state actors for purposes of a speedy-trial claim").

As a result, the trial judge properly concluded that all of the delay between July 12, 2005 and the subsequent trial was reasonable. The delay between July 12, 2005, and the trial judge's April 21, 2006 Order was nine months and nine days. Thus, almost fourteen months of the forty-four month delay was reasonable, notwithstanding Cooper's contrary argument. Therefore, the delay was caused by a combination of reasonable, justifiable matters and simple neglect or inadvertence, rather than any willful act or bad faith by the State. It does not reflect intentional or malicious delay, in an effort to gain any advantage over Cooper or to impede his defense; and he failed to meet his burden. See *Robinson*, 335 S.C. at 626, 518 S.E.2d at 272; see also *Barker*, 407 U.S. at 531 (finding deliberate attempt to delay a trial in order to hamper the defense should be weighed heavily against the government while a more neutral reason such as negligence or overcrowded docket should be weighted less heavily); *Kennedy*, 339 S.C. at 250, 528 S.E.2d at 704 (absence of evidence of purposeful delay by State in considering reason for delay is a factor in speedy trial analysis); *State v. Owens*, 260 S.C. 79, 194 S.E.2d 246 (1973).

The third *Barker* factor, the accused's assertion of his constitutional right to a speedy trial, supports the ruling below. Cooper first asserted his right demand for a speedy trial on July 11, 2003, or almost eleven months after this Court had ruled on the validity of the kidnapping, armed robbery

and conspiracy convictions in *Cooper v. Moore*, *supra*. He thereafter asserted his right, as repeatedly qualified by trial counsel's efforts to have the trial accommodate his schedule, as discussed.

Finally, this Court must examine whether Cooper was prejudiced as a result of the delay. *Barker* emphasizes that prejudice should be assessed in light of the interests of defendants that the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility the defense will be impaired. *Barker*, 407 U.S. at 532. Of these, the most serious is the impairment of the defense because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. *Id*; *see Kennedy*, 528 S.E.2d at 704 (quoting *Barker*). *See also Smith v. Hooey*, 393 U.S. 374, 377-78 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966).

While the *Doggett* Court indicated that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," *Doggett*, 505 U.S. at 654, the delay in the present case was caused, in part, by negligence. "[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." *Id* at 657; *see also Pittman*, 373 S.C. at 550, 647 S.E.2d at 156 (citing *Doggett*).

In support of his claim of prejudice, Cooper points to his "rigid incarceration on death row;" the absence of Phillip "Red" Farmer's physical presence, so that the jury could assess Farmer's testimonial demeanor; and the fact some memories had faded by the time of the retrial, including that of the prosecution's reply witness, Edward Hite. None of these factors shows prejudice by the delay. His reliance upon the first two, subjective components of the *Barker* prejudice analysis is disingenuous, at best. His argument is predicated upon *dicta* from *United States v. MacDonald*, 456 U.S. 1, 8 (1982), that "the Sixth Amendment is not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the due

process clause and by statutes of limitations.” However, he is wrong. The majority in *Doggett* clearly indicated that the lack of prejudice to the defense caused by the passage of time is the primary manner for the prosecution to rebut presumptively prejudicial delay, in most speedy trial cases. Even the dissent in *Doggett* recognizes that *Barker* and other cases emphasize that prejudice to the defense is a chief component in assessing prejudice. The dissent simply faults the majority for not recognizing that there are, in the dissent’s estimation, apparently “two conflicting lines of authority.” *Doggett*, 505 U.S. at 61-62 (Thomas, J., dissenting).

As the record makes abundantly clear, Cooper had previously been under a death sentence for this murder; and he had been housed on death row at least since February 22, 1991, when the original jury sentenced him to death. Thus, his pretrial incarceration cannot seriously be viewed as oppressive. This is particularly true when one considers the other evidence of his criminal history which was more fully developed at the subsequent trial.

For instance, the State’s showing at sentencing was that Cooper has three prior convictions for armed robbery, and convictions for housebreaking and grand larceny from 1977. Once incarcerated, he was caught plotting an escape from Manning Correctional Institution and was then transferred to Central Correctional Institution. He also had three escape attempts from C.C.I. On one occasion, guards shot at him and bloodhounds had to be called out to track him on another. “While he was in the maximum security unit at C.C.I., he ... managed to escape [and] shanked a fellow inmate,” stabbing the other inmate three times. **R. pp. 1527-28.**

Admittedly, his record was not presented in connection with the State’s response to the motion to dismiss because of denial of Cooper’s right to a speedy trial, but this Court must understand how misleading Cooper’s argument is as to this aspect of prejudice under *Barker*. Also, any anxiety that he may have felt while awaiting a retrial must surely have been *de minimus*.

More importantly, the trial judge correctly determined that Cooper had not shown possible trial prejudice. **R. pp. 328-43.** This case had been tried in 1991. Most, if not all, of the evidentiary issues had been “fleshed out” and Cooper had a transcript of the testimony of the witnesses who testified at that time. There was also a transcript available of Southerland’s trial. Thus, he had a roadmap for the retrial. The prior sworn testimony of unavailable witnesses from both sides was preserved; and any witness who testified at the 2006 trial could have his or her memory refreshed by the earlier, sworn testimony. Also, testifying witnesses could be impeached with inconsistencies between their 2006 testimony and the earlier testimony.

That Farmer was not physically present was not prejudicial to Cooper. In this regard, Farmer was no different from any other unavailable witness. Also, for the reasons set forth in **Argument II**, Cooper cannot show any prejudice from the trial judge’s ruling with respect to Farmer. He was also not prejudiced, in any fashion, by supposed deficits in Mr. Hite’s memory or that of any other prosecution witness. *Prantil v. California*, 843 F.2d 314, 318-19 (9<sup>th</sup> Cir. 1988 (dimmed memory by a prosecution witness is insufficient because it helps the defendant)). Nor has Cooper pointed to any witness who died between August 2003 and the date of his trial whose sworn testimony was not preserved, either through his 1991 trial or the trial of his co-defendant, Southerland. Therefore, the trial judge properly concluded that the State “ha[d] proved that the delay has not impaired [Cooper’s] ability to defend himself, contrary to the circumstances in *Doggett*.” **R. pp. 323-43 n. 3.**

Further, Cooper’s heavy reliance upon Southerland’s admission to Bruck or at PCR is not properly before this Court because it was not argued in the Initial Brief of Appellant. *See IBOA, pp. 8-29.* *See* Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina*

309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). This argument has been abandoned and may not be raised on certiorari. *Id.* See also *State v. Primus* 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002) (“The State did not raise this issue in its brief to the Court of Appeals. .... The State offered its present argument for the first time in its petition for rehearing. Because the State failed to raise its current argument in its brief to the Court of Appeals, the issue is not properly preserved for this Court's consideration on writ of certiorari”).<sup>16</sup> As a result, Cooper’s argument lacks merit.

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<sup>16</sup> Additionally, his point is simply a red hearing. His contention that the State “would have been estopped from seeking the death penalty against him because it relied upon Southerland’s statement in PCR and later allowed Southerland to plead guilty is simply wrong. He misses the point of the State’s reliance upon that statement in PCR. The statement was an admission, regardless of his truthfulness; and the State unsuccessfully argued that it procedurally barred his guilt phase ineffectiveness claims under *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981).

**II. Assuming that the trial judge's *in limine* ruling is preserved for appellate review, the trial judge did not abuse his discretion by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, such that his prior, sworn testimony could be presented to the jury because the State made reasonable, good-faith efforts to secure his presence, but was unable to do so as the result of the Texas Department of Corrections' failure to act upon its request.**

Cooper next argues that the trial judge erred by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, such that his prior, sworn testimony could be presented to the jury. Assuming that the trial judge's *in limine* ruling is preserved for appellate review, despite Cooper's failure to renew his objection when the State published Farmer's testimony, the trial judge did not abuse his discretion by finding that Phillip Farmer was an "unavailable" witness within the meaning of Rule 804(a)(5), SCRE, because the State made reasonable, good faith efforts to secure his presence, but was unable to do so as the result of the Texas Department of Corrections' failure to act upon its request. Further, any error in the trial judge's ruling was harmless beyond a reasonable doubt.

The question of Phillip "Red" Farmer's availability as a witness was initially addressed at a pretrial hearing during which the State submitted two affidavits in support of its motion to have Farmer declared an "unavailable" witness under Rule 804(a)(5): one from Senior Assistant Solicitor Bell (**Court's Ex. 4, R. p. 1541**) and one from James M. Frazier, III, Esq., who is an Assistant General Counsel for the Office of General Counsel for the Texas Department of Criminal Justice. (**Court's Ex. 3, R. p. 1539**). That hearing is set forth on **R. pp. 349-401**. The trial judge later revisited the issue during the State's case. **R. p. 836-63**. A copy of the State's paperwork was introduced as **Court's Ex. 9**.

Initially, the State submits that the issue is not preserved for appellate review. The direct examination from Farmer's prior testimony was presented to the jury, without Cooper renewing his

objection. **R. pp. 941-63.** Cooper then published segments of the 1991 cross-examination. **R. pp. 963-69; 975-78.** It is well settled that a ruling on an *in limine* motion is usually not final and the losing party must renew his or her objection when the evidence is presented. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *State v. Gagum*, 328 S.C. 560, 492 S.E.2d 822 (Ct.App. 1997).<sup>17</sup> Here, the *in camera* ruling was not immediately before the State published Farmer's testimony, and the issue is not preserved for appellate review. *See Schumpert*.

Apart from this point, the State submits that the Court of Appeals' decision and the trial judge's ruling correctly applied the appropriate state and federal law, and that Cooper has not advanced any reason warranting reversal. The Court of Appeals denied relief as follows:

Cooper argues the trial court erred in finding Phillip Farmer was an unavailable witness and allowing Farmer's prior testimony to be read into the record because it denied Cooper his constitutional right to confrontation. We disagree.

The confrontation clause of the Sixth Amendment of the Constitution of the United States is applicable to the States, and the primary interest secured by the confrontation clause is the right of cross-examination. *State v. Mizzell*, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); *Starnes v. State*, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991). "The right to confrontation has been referred to as a 'trial right.'" *Starnes*, 307 S.C. at 249, 414 S.E.2d at 583 (quoting *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)). This trial right includes the opportunity to cross-examine and have a jury weigh the demeanor of the witness. *Barber*, 390 U.S. at 725, 88 S.Ct. 1318 (1968). Thus, "the appropriate question under the confrontation clause is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial." *Starnes*, 307 S.C. at 250, 414 S.E.2d at 584.

"[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that

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<sup>17</sup> An exception is recognized only where the motion is ruled on immediately prior to the introduction of the evidence in question. Under those circumstances, no further objection is necessary. *State v. Tufts*, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (S.C. App. 2003); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1998); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995). This exception does not apply here.

defendant.” *Barber*, 390 U.S. at 722, 88 S.Ct. 1318. “[A] witness is not ‘unavailable’ for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” FN8 *Id.* at 724-25, 88 S.Ct. 1318. Rule 804(a)(5), SCRE, provides that a witness may be declared “unavailable” if the declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance ... by process or other reasonable means.”

FN8. In *Barber v. Page*, the United States Supreme Court found Barber’s right to confrontation had been violated when “the State made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain that he was in a federal prison outside of Oklahoma.” 390 U.S. at 723, 88 S.Ct. 1318. Further, the Court found the “sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence.” *Id.* at 725. In contrast, here, the State attempted to have Farmer brought to South Carolina to testify, but was unable to do so due to circumstances beyond the State’s control.

Cooper argues the State’s efforts to procure Farmer’s presence from Texas were unreasonable. Cooper also asserts the State knew it would be unable to obtain Farmer’s presence at trial eleven days prior to the trial; however, the State did not make a motion for continuance, or even bring the problem to the court’s attention. He argues the State’s failure to have Farmer available to testify in person denied him his constitutional right to confrontation because Farmer is a pathological liar and it was imperative for the trial jury to observe his demeanor in person.FN9

FN9. At trial, the State introduced Farmer’s previous testimony that he called Cooper to initiate a conspiracy between himself and Cooper to rob the decedent. To impeach Farmer’s previous testimony, Cooper introduced the testimony of Kimberly Turner, a Ph.D. student in clinical psychology who had interviewed Farmer in jail. In Farmer’s new statement to Turner, he stated he had only heard from Cooper after the murder, and he was “completely surprised” by the phone call. Farmer told her that he had put a “spin” on his testimony in favor of the State at the first trial to make “Cooper look worse than he was.” He said he wanted to “tell the truth this time.”

The State asserted the Solicitor was unable to secure Farmer’s presence from a Texas penitentiary through a normal out-of-state subpoena because South Carolina is not a signatory state to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (the Act). At trial, the State submitted two affidavits in support of its motion to have Farmer declared an “unavailable” witness under Rule 804(a)(5):

one from Senior Assistant Solicitor B. Harrison Bell, and one from James M. Frazier, III, an Assistant General Counsel for the Office of General Counsel for the Texas Department of Criminal Justice.

In his affidavit, Frazier testified that because South Carolina is not a signatory to the Act, the Texas Department of Criminal Justice would not honor a mere subpoena for Farmer to appear as a witness in South Carolina. Instead, Texas required an executive agreement between the governor of South Carolina and the governor of Texas. The prisoner witness must then have a hearing before a district judge who will decide whether the prisoner witness will be transported to the requesting state. Frazier also testified that Texas will not release a prisoner without a hearing and an order of transport from a district judge. He further testified there are only two judges in Texas who hold hearings for prisoner witness renditions to other states. He confirmed Bell made a request to have Farmer transported, and he submitted the appropriate paperwork to Texas, which was received on May 10, 2006. Frazier testified he contacted the court to set up a hearing; however, neither judge was available for the remainder of the month of May. He notified Bell of this on May 11, 2006. He said he had “no reason to believe the South Carolina authorities were aware of that unavailability before this week when I first informed them of such.”

Judge Pieper reviewed the rendition request and noted it was initiated in April, but was delayed because a duplicate had not been submitted to the South Carolina Secretary of State. However, he reviewed the “pertinent procedures and statutory requirements” and did not see any requirement to submit a duplicate; thus, he did not attribute the delay to the prosecution. He found that both the South Carolina and Texas governors had signed the paperwork in early May; however, no Texas judge was available to hold the hearing as required by Texas law. Thus, Judge Pieper stated “it’s difficult for me to say that the State acted unreasonably” when Texas did not have any judges available to hear the rendition request. Additionally, Judge Pieper noted that Farmer was under oath at the first trial and Cooper had engaged in “the full right of confrontation.” Judge Pieper further noted that neither party had requested a continuance. Therefore, we find Judge Pieper’s decision was supported by the evidence.

*Cooper*, 386 S.C. at 218-21, 687 S.E.2d at 67- 69.<sup>18</sup>

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<sup>18</sup>As interpreted by the Court in *Crawford v. Washington*, 541 U.S. 36 (2004), the primary object of the right of confrontation lies in securing for the criminal defendant a basic procedural guarantee: that he is entitled to confront and cross-examine “witnesses” who bear “testimony” against him. *Id.* at 51. *See also State v. Nance*, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011) (*Nance IV*) (“the Sixth Amendment right to “confrontation “(1) insures the witness will give his statement under oath ...; (2) forces the witness to submit to cross-examination ...; and (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement.”) (citation omitted). The Court in *Crawford* ruled that the trial court erred by admitting an unavailable witness’s tape recorded statement, taken during police investigation and

Cooper conceded below that the second prong for admission of Farmer's testimony was satisfied because Cooper had the prior opportunity to cross-examine him in 1991. Thus, the only question for the Court to resolve on appeal is whether the trial judge abused his discretion by finding that Farmer was "unavailable." There was no error. The "unavailability as a witness" requirement of Rule 804, SCRE, is satisfied where the "declarant ... is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means." Rule 804 804(a)(5), SCRE (emphasis added).

Under Rule 804(b)(1), SCRE, "[t]estimony given as a witness at another hearing of the same or a different proceeding" is not hearsay if the declarant is unavailable. *See also State v. Sanders*, 356 S.C. 214, 217, 588 S.E.2d 142, 144 (Ct. App. 2003) ("Here, it is uncontested that the State made numerous unsuccessful attempts to procure Vigier's appearance at the re-trial by subpoena and that Vigier was, therefore, unavailable within the meaning of Rule 804(a) and (b)"). The Supreme Court's prior decisions have recognized the necessity for a limited exception to the confrontation requirement, for the prior testimony of a witness who is unavailable at the defendant's trial. "In keeping with the importance of this provision in our constitutional scheme, however, we have imposed a heavy burden on the prosecution either to secure the presence of the witness or to demonstrate the impossibility of that endeavor." *Ohio v. Roberts*, 448 U.S. 56, 78 (1980), *overruled on other grounds, Crawford, supra*. In *Barber v. Page*, 390 U.S. 719, 724-25 (1968), the Court held that "a witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement

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describing defendant's commission of the crime, because the defendant had no opportunity to cross-examine during the witness's prior statement to the police. However, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior statements.... The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 38 n. 9 (citations and punctuation omitted).

unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” *Accord Mancusi v. Stubbs*, 408 U.S. 204 (1972); *California v. Green*, 399 U.S. 149, 161-62, 165, 167 n. 16 (1968); *Berger v. California*, 393 U.S. 314 (1969).

“The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness.” *Green*, 399 U.S. at 189 n. 22 (Harlan, J., concurring) (citing *Barber, supra*). “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.” *Roberts*, 448 U.S. at 74. Here, the State acted in good faith and utilized “other reasonable means” but was ultimately unsuccessful in procuring Farmer’s attendance.

The present case is clearly distinguishable from *Barber*, since the prosecution immediately “began attempting to subpoena ... Farmer, an inmate in the Texas Department of Corrections” upon learning, “in the beginning to middle of March 2006,” that the trial of this case would begin on May 22, 2006. Farmer was contacted, and the State determined both that he was willing to testify and that his testimony would be consistent with his original trial testimony. However, the Texas Department of Criminal Justice would not honor the subpoena that the State issued because South Carolina is not a signatory state for the Uniform Act to secure rendition of prisoners in criminal proceedings.<sup>19</sup> Instead, Texas required the executive agreement between the governors of both states as described above.

Mr. Bell, the prosecutor, consulted with both with the Governor’s Office and the State of Texas about the process. He then began preparing the necessary paperwork and making other necessary arrangements related to transporting and housing Farmer. By April 20<sup>th</sup>, the State had

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<sup>19</sup> See Vernon’s Ann. Texas C.C.P. Art. 24.29. *Contra Brumley v. Wingard*, 269 F.3d 629, 641 (6<sup>th</sup> Cir. 2001).

obtained the necessary signatures of the trial judge and the Clerk of Court; and it had submitted the rendition request to the Governor of South Carolina.

When Mr. Bell learned of a scrivener's error on April 26<sup>th</sup>, he promptly submitted corrected paperwork. Also, a member of the General Counsel's Office for the Texas Department of Criminal Justice had told Mr. Bell, in their late March or early April conversation, that "the judges were available every week or every other week." However, his reasonable efforts to obtain Farmer were further hampered when the South Carolina Secretary of State added an additional "requirement," of which Mr. Bell was not aware; a signed duplicate of the original.<sup>20</sup>

However, Mr. Bell expeditiously complied with this requirement, and the rendition request was received by the Governor of Texas on May 5<sup>th</sup>. Even with the additional delay unnecessarily caused by the Secretary of State's request for a signed duplicate, the request was in Texas and was ready to be acted upon over two weeks before Farmer's testimony would have been needed. Only after the Texas Department of Criminal Justice received the request on May 10<sup>th</sup> was it ascertained that neither of the two Texas judges with authority to hear the request would be able to hear the request until June 2006. Notwithstanding Cooper's argument to the contrary, these steps constituted a good-faith and objectively reasonable effort to secure Farmer's presence. It was neither bad faith nor unreasonable to assume that a Texas judge would be able to hear the request. *See United States v. Casamento*, 887 F.2d 1141, 1169 -1170 (2<sup>nd</sup> Cir. 1989).<sup>21</sup> A number of cases from other

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<sup>20</sup> Neither Vernon's Ann. Texas C.C.P. Art. 24.29, nor the "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings," of which South Carolina is a signatory state, have such a requirement. *See* S.C. Code Ann. § 19-9-70 (Supp. 2012).

<sup>21</sup> In *Casamento*, the Court concluded that the extent of the government's effort to obtain the witness "was both reasonable and undertaken in good faith-as is implied by the district court's ruling-and therefore satisfied both Rule 804 and the confrontation clause. Having been told by the Italian authority responsible for extraditions that Italy would not extradite [the witness], the government had no obligation to take any further action. [Defendant] implies that the government should have made a formal written request for [the witness']

jurisdictions support the conclusion that the State acted reasonably and in good faith.<sup>22</sup>

Nor did the State act in an objectively unreasonable fashion by not requesting a continuance. The State did not make a continuance request because it thought that the trial judge's ruling on the speedy trial motion precluded it from requesting a continuance. Although the trial judge's Order does not expressly state that a continuance would not be entertained, the last page of that Order contains strong language about the responsibility for an expeditious trial, and the Order shows the reasonableness of the prosecution's failure to seek a continuance. Further, Respondent would note that Cooper's counsel made a strategic decision not to seek a continuance on Cooper's behalf, until Farmer's presence could be secured. **R. p. 876, lines 2 - 23.**

Moreover, there is no guarantee that Texas would have acted during "a temporary delay" of the trial, which the trial judge was willing to grant. **R. p. 397.** Cooper's arguments to the contrary are purely speculative. Further, Cooper's claim that he was deprived of the opportunity to have the jury assess Farmer's testimonial demeanor is specious. This position would negate the reason for Rule 804(a) and it is contrary to the United States Supreme Court's authority recognizing a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial. *See Roberts*, and *Mancusi*, *supra*. *See also Barber*, 390 U.S. at 724-25; *Green*, 399 U.S. at 161-62.

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extradition. While utilizing this formal approach perhaps would have been preferable, such a request would most likely have been futile and '[t]he law does not require the doing of a futile act.' *Roberts*, 448 U.S. at 74, 100 S.Ct. at 2543." *Casamento*, 887 F.2d at 1169. The Court further concluded that "[t]he government's statement in its affidavit that it believed Italy's position was sound was not unreasonable and the statement sufficed to establish that the government made a 'good-faith effort[ ],' *id*, despite the fact that it limited itself to a single conversation with the responsible Italian official in its effort to procure [the witness] for trial. *Id*.

<sup>22</sup>*E.g.*, *United States v. Acevedo-Ramos*, 842 F.2d 5 (1<sup>st</sup> Cir. 1988); *United States v. Sindona*, 636 F.2d 792 (2<sup>d</sup> Cir. 1980); *Bailey v. Southern Pac. Transp. Co.*, 613 F.2d 1385 (5th Cir. 1980), *reh'g denied*, 618 F.2d 781 (5<sup>th</sup> Cir. 1980); *Odato v. Vargo*, 677 F. Supp. 384, 24 Fed. R. Evid. Serv. 753 (W.D. Pa. 1988).

Additionally, Cooper conceded in the lower court that he was permitted full confrontation in the 1991 trial, and his argument ignores the extraordinary latitude that the trial judge gave Cooper to impeach Farmer's 1991 testimony with matters occurring after the 1991 trial. Counsel's cross-examination fully set forth enough information so that the jury could properly assess the witness' credibility and counsel could demonstrate the supposed lack of it. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (the Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills v. Singletary*, 161 F.3d 1273, 1288 (11<sup>th</sup> Cir. 1998).

Finally, any error resulting from the trial judge's ruling must be viewed as harmless. A violation of a defendant's Sixth Amendment right to confront a witness is not *per se* reversible error if the error is harmless beyond a reasonable doubt. *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted).

Here, the ruling was harmless for several reasons:

- While Farmer was an important witness for the reasons argued in the lower court, he was not the State's main witness. Rather, Southerland was the primary witness because he gave graphic, detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery and, of greatest importance, the murder of Kim Quinn.
- Much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her.
- Many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence presented at trial, facts with which this Court is obviously familiar in light of hearing the prior appeals in this case and which are recited in the Statement of Facts of the Final Brief of Respondent.
- It is virtually impossible to imagine how the trial judge could have been any more lenient in his rulings on what Cooper could use to impeach Farmer's 1991 testimony. Indeed, much of what the trial judge permitted Cooper to use to impeach Farmer would not have been admissible if Farmer had testified and the State had raised an objection.<sup>23</sup>
- Of greatest importance, there was overwhelming evidence of Cooper's guilt, separate and apart from Farmer's testimony.

On appeal, Cooper repeatedly attempts to denigrate how overwhelming the State's case was against him. However, this was not merely the evidence presented in his 1991 trial. Rather, Southerland's testimony put the murder weapon in Cooper's hands. Southerland also established Cooper's intent to commit the murder even after Cooper knew that he would get less than two

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<sup>23</sup> Cooper was allowed to publish a summary of drug related charges against Farmer in Aiken County, all of which apparently occurred in 1995. Farmer, however, was not arrested until sometime thereafter on each charge and arrest warrants were not served until 1998. A bench warrant was issued on at least two charges after he fled the jurisdiction. Cooper also published Farmer's 2001 Texas convictions and sentences for manufacturing methamphetamine and possession of methamphetamine. On the manufacturing charge he received a life sentence and a \$144,000.00 fine. On the possession charge, he was sentenced to life and a \$100,000.00 fine. **R. pp. 992-93.** Additionally, Cooper published significant portions of Farmer's testimony from his August 17, 2001 Texas sentencing hearing. **R. pp. 993-1013.** Later, Kimberly Turner testified to statements Farmer had made to her and a Texas attorney when they interviewed him on May 5, 2006, in a Texas prison. Much of what he said at that time impeached his 1991 testimony. **R. pp. 1127-1141.**

hundred dollars for the crime. The macabre and gruesome facts to which Southerland testified demonstrate as much malice as one could possibly imagine; and Cooper's attacks on Southerland's credibility ignore that many of the details to which he testified were corroborated by other witnesses. The bottom line is that, in order to have found Cooper not guilty, the jury would have had to accept that virtually every single fact witness either lied or was mistaken. Thus, any error was harmless.

**III. Assuming that the issue is preserved for appellate review, the Court of Appeals properly found that he trial judge did not abuse his discretion by ruling that Cooper could be impeached with his 1977 housebreaking and grand larceny convictions, under Rule 609(b), SCRE, where the State rebutted the presumption against admissibility of remote convictions and established that the probative value of this evidence substantially outweighed its prejudicial effect. Further, any error was harmless.**

Assuming that the issue is preserved for appellate review, Cooper's remaining argument is that the trial judge erroneously ruled that the State could impeach him with his 1977 housebreaking and grand larceny convictions. There was no abuse of discretion because the prosecution rebutted the presumption against admissibility of remote convictions under Rule 609(b), SCRE, and it established that the probative value of the evidence substantially outweighed its prejudicial effect. Also, any error was harmless.

Before addressing the merits of Cooper's claim, the State submits that his argument is barred on appeal because any error was invited by him. A party "cannot complain of an error which his own conduct has induced." *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (citation omitted). The trial judge addressed this issue at **R. pp. 948-49; 1030-33**. Although not addressed by the Court of Appeals, defense counsel told jurors in his opening statement that:

[o]ne of the things lawyers often object to is anything that shows about the prior record of their client, they don't want the jury to know about that. Well, y'all need to know everything and we are not going to object to the warrants and the things in ... Cooper's background that are relevant to your job. So, we're not going to object. And we want you to know and we'll tell you right now that when Bo Southerland was a career criminal in his early 30's, he committed a long series of crimes and he had along with him a 17-year-old kid named Tony Cooper. And they both went to prison together. And they both got out in 1988."

**R. p. 415, l. 20-p. 416, l. 8.** While counsel quite reasonably made this statement, *see R. p. 1032*, the State submits that any error was made by counsel and therefore not properly before this Court.

*Stroman; State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991). Before finishing his opening statement, counsel reminded jurors of Cooper's previous incarceration. **R. p. 688.**

The jury thereafter heard a great deal of evidence of Cooper's prior convictions and other bad acts, both before and after the murder. Much of this evidence, including evidence of his prior death sentence in this case, was elicited by defense counsel. *See R. pp. 712; 721-24; 756-57; 761-64; 1001-02; 1131.* Cooper's trial counsel elicited evidence of the 1977 convictions at issue on direct examination. **R. p. 1186, ll. 13-20.** Also, the State did not mention the convictions on its relatively brief cross-examination of Cooper (**R. pp. 1252-63**), and neither prosecutor referenced them in closing argument. **R. pp. 1347-54** (Mr. Lupton's opening on the law); **1446-1486** (Mr. Bell's closing argument). This, again, supports the conclusion that any error was invited by Cooper's own conduct.

Alternatively, the issue lacks merit for the reasons found by the Court of Appeals:

[Cooper argues the trial court erred in ruling Cooper could be impeached with his 1977 convictions for housebreaking and grand larceny because the convictions were too remote and were highly prejudicial. We disagree.

Rule 609(b) of the South Carolina Rules of Evidence provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE. "Rule 609(b) establishes a presumption against admissibility of remote convictions ... and the State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption." *State v. Colf*, 337 S.C. 622, 626-27, 525 S.E.2d 246, 248 (2000). In determining whether the probative value of a prior conviction outweighs its prejudicial effect, the court should apply five factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the

past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.* at 627, 525 S.E.2d at 248.

Cooper was released from prison in 1988 for his 1977 convictions for armed robbery, housebreaking, and grand larceny.FN10 Cooper was being retried for a murder that occurred in 1989. Cooper objected to the introduction of his prior crimes under Rule 609 because they were more than ten years old.

FN10. Cooper pleaded guilty to armed robbery, housebreaking, and grand larceny, and received a sentence of fifteen years. He was released from prison in 1988 for his 1977 convictions. Cooper was arrested for murder that occurred in 1989 and his retrial was in May 2006. Thus, although eighteen years had passed between his release for his prior convictions and his retrial for murder, Cooper's 1988 release for the prior crimes was very close in time to the October 1989 offenses for which he was being retried.

After considering the balancing test required by Rule 609(b), Judge Pieper did not allow Cooper's conviction for armed robbery to be used for impeachment because of its similarity to the armed robbery in this case. However, Judge Pieper did allow Cooper's convictions for housebreaking and larceny to be admitted for impeachment purposes because they are crimes of dishonesty that weigh on Cooper's credibility, and the probative value of the convictions outweighed their prejudicial effect. *See Colf*, 337 S.C. at 628, 525 S.E.2d at 249 (“The fact that larceny reflects on credibility and the importance of credibility to the jury's decision are both factors the trial court should have weighed in making the admissibility determination.”). Additionally, Cooper's attorney conceded the crimes of housebreaking and larceny were not so similar to the charge in this case to be prejudicial to Cooper. Furthermore, Judge Pieper gave a limiting charge to the jury explaining Cooper's convictions could only be considered for impeachment purposes. Therefore, we find Judge Pieper's decision was supported by the evidence.

*Cooper*, 386 S.C. at 221-23, 687 S.E.2d at 69.

Additionally, it must be remembered that Cooper's convictions were almost eighteen years old only because he was released in 1988 and testified in May 2006. *See State v. Johnson*, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005). The State rebutted the presumptive inadmissibility of these convictions, *see Colf*, 337 S.C. at 626, 525 S.E.2d at 248, because the impeachment value of these

convictions was great and credibility was a key issue. *See Colf, supra.*<sup>24</sup> Both of the challenged convictions bore on Cooper's credibility, particularly his larceny conviction.

Evidence of guilt of larceny unquestionably goes to the credibility of a witness. *State v. Vaughn*, 268 S.C. 119, 232 S.E.2d 328 (1977); *State v. Shaw*, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997). The State submits that the same is true of housebreaking. *See United States v. DiLorenzo*, 429 F.2d 216 at 220 (2<sup>d</sup> Cir. 1970); *United States v. Spero*, 625 F.2d 779, 780-81 (8<sup>th</sup> Cir. 1980). *See also United States v. Gilbert*, 668 F.2d 94 (2<sup>d</sup> Cir. 1981); *United States v. Cathey*, 591 F.2d 268, 276 (5<sup>th</sup> Cir. 1979); *United States v. Redditt*, 381 F.3d 597, 601 (7<sup>th</sup> Cir. 2004); *United States v. Brown*, 956 F.2d 782 at 787 (8<sup>th</sup> Cir. 1992); *United States v. Jefferson*, 925 F.2d 1242, 1256 (10<sup>th</sup> Cir. 1991). Therefore, Cooper's prior convictions were not such as would have only minimal bearing on the issue of his credibility. *Id.*

Second, because Cooper committed the murder and other crimes roughly within a year of his release in 1988 and he has been incarcerated since his October 1989 arrest, there was no subsequent history with which his testimony could be impeached. This is the second factor in a Rule 609(b) analysis. *See Colf*, 337 S.C. at 627, 525 S.E.2d at 248.

Further, and as the Fifth Circuit Court of Appeals has explained that:

[t]he implicit judgment of the Federal Rules is that evidence of convictions over a decade old is generally more prejudicial to the side which calls the witness than it is helpful to the jury in evaluating the witness' credibility. Alternatively, the ten-year time limit could be conceptualized as a policy statement that if an offender keeps his record unblemished for ten years, he will be presumed to be as truthful as a normal citizen, *i. e.*, that the ten-year period is evidence that the inference supporting use of prior crime impeachment evidence (a lawbreaker is likely to lie) can no longer be drawn

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<sup>24</sup> Southerland gave vivid eyewitness testimony that was corroborated, in many respects, by other circumstantial evidence, and Farmer's published testimony implicated Cooper in the conspiracy as well as the robbery and murder. However, Cooper denied any involvement in the crimes. He claimed alibi and suggested that Southerland was the guilty party.

about a certain person. It should be understood, however, that this judgment is normative rather than empirical: that is, Rule 609(b) stands for the proposition that a jury should not be influenced by prior crime impeachment evidence over ten years old, not that they would not be influenced by such evidence.

*Mills v. Estelle*, 552 F.2d 119, 120 (5<sup>th</sup> Cir. 1977). *See also* Wright and Gold, 28 *Federal Practice & Procedure, Evidence*, § 6136(b).

Here, Cooper was arrested and charged with the present offenses in the year following his release from prison on the impeaching convictions. Therefore, the rehabilitative presumption underlying Rule 609(b) does not apply, and the convictions were properly admitted. *See, e.g., United States v. Jefferson*, 925 F.2d 1242, 1256 (10<sup>th</sup> Cir.1991); *United States v. Holmes*, 822 F.2d 802, 804–805 (8<sup>th</sup> Cir. 1987); *Gilbert*, 668 F.2d at 97.

The third factor under *Colf* - “[t]he similarity between the past crime and the charged crime,” *see* 337 S.C. at 627, 525 S.E.2d at 248 - also supports the trial judge’s ruling because the two crimes, while very probative on the question of whether Cooper is truthful, are not similar to the offenses of murder, armed robbery, kidnapping and conspiracy. To the contrary, the trial judge excluded the two similar armed robbery convictions because of the prejudicial effect of those crimes.<sup>25</sup>

Cooper argues that *Johnson* requires reversal because of the significance of his credibility. However, he did not present these arguments to the trial judge and they are not properly before this

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<sup>25</sup> Further, the jury was already aware that Cooper had served time for crimes that he committed with Southerland from the opening statement of trial counsel. **R. p. 415, l. 20-p. 416, l. 8**. Before Cooper’s testimony, the jury also had already heard evidence that: Cooper had threatened to have Southerland killed, if Southerland did not confess to the murder in a manner which exculpated Cooper (**R. pp. 712; 721-24**); Cooper’s wife left him at some point and went to Sister Care (**R. pp. 756-57**); Cooper was Southerland’s co-defendant in a series of armed robberies (**R. pp. 761-64**); Cooper had received a death sentence in this case (**R. pp. 1001-02**) and Farmer knew Cooper through prison. **R. p. 1131**. Given this evidence, the jury was quite aware of a great deal of his past criminal activity. This evidence thereby lessened whatever prejudicial effect the prior convictions would carry; and the probative value substantially outweighed their prejudicial effect under Rule 609(b). *Cf. Holmes*, 822 F.2d at 804.

Court on appeal. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal).

Again, his only argument in the trial court was that the convictions were too old. *See R. pp. 1032-33*. Further, *Johnson* is clearly distinguishable from this case. In addition to the reasons set forth, the trial judge in *Johnson* did not apply a balancing test required by *Colf*; and his ruling on the admissibility of the remote conviction was guided by legal error: *i.e.*, that the offense was one involving moral turpitude.

Finally, any error resulting from the trial judge's ruling is harmless because the error could not have reasonably affected the outcome of the trial. *See State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). There was overwhelming evidence of Cooper's guilt, which was established by Farmer's testimony, Southerland's testimony and circumstantial evidence. *See Argument II*. Also, defense counsel strategically introduced Cooper's prior convictions on direct examination, in an obvious effort to lessen the impact they might have on his credibility. **R. p. 1186, ll. 13-20**.

Further, the trial judge gave a lengthy limiting charge, both with respect to evidence of earlier proceedings in this case; and evidence of prior crimes or bad acts by a witness. **R. pp. 1489, ll. 2-13; 1490, ll. 13-15.**<sup>26</sup> Therefore, the impact of this evidence "was minimal because other evidence introduced by the prosecution [and trial counsel] likely damaged [Cooper's] credibility" and any error was harmless. *Johnson*, 363 S.C. at 60, 609 S.E.2d at 524. *See also Mitchell*.

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<sup>26</sup> Thus, he properly focused the jury's attention on the fact that the convictions and the other bad acts could only be considered for impeachment purposes. Also, the State did not emphasize his prior convictions, by cross-examination or closing argument. **R. pp. 1252-63; 1347-54; 1446-86**.

CONCLUSION

For the foregoing reasons Respondent respectfully submits this Court should dismiss certiorari as improvidently granted or, alternatively, affirm the the judgment and convictions of the lower court.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III  
Senior Assistant Attorney General

South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

DAVID M. PASCOE, JR.  
Solicitor, First Judicial Circuit  
P.O. Box  
Orangeburg, South Carolina 29116-1525  
(803) 533-6252

BY:  \_\_\_\_\_

WILLIAM EDGAR SALTER, III  
Senior Assistant Attorney General

June 13, 2012.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal From Lexington County  
The Honorable Daniel F. Pieper, Circuit Court Judge

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THE STATE,

Respondent,

-vs-

GENE TONY COOPER, JR.,

Appellant.

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PROOF OF SERVICE

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I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Brief of Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to the attorney of record, Robert M. Dudek, Esquire, South Carolina Comm. on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

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

This 13<sup>th</sup> day of June, 2012.

  
WILLIAM EDGAR SALTER, III

Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305  
ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA  
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Appeal from Lexington County

The Honorable Daniel F. Pieper, Circuit Court Judge

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THE STATE,

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APPELLANT

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

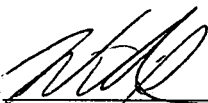
ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III  
Senior Assistant Attorney General

DAVID M. PASCOE, JR.  
Solicitor, Judicial Circuit

By:   
WILLIAM EDGAR SALTER, III  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-6305  
ATTORNEYS FOR RESPONDENT

June 13, 2012.  
Columbia, South Carolina.