2010-152786

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Daniel F Pieper, Circuit Court Judge

Opinion No 4633 (S C Ct App filed 11/19/2009)
90-GS-32-83-84

THE STATE,

RESPONDENT,

V

GENE TONY COOPER, JR ,

PETITIONER

APPENDIX Volume I

ROBERT M DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorney for Petitioner

HENRY DARGAN MCMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V MYERS
Solicitor, Eleventh Judicial Circuit
205 East Main Street
Lexington, SC 29072
(803) 785-8352

Attorneys for Respondent

INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v

Gene Tony Cooper, Jr , Appellant

Appeal From Lexington County
Daniel F Pieper, Circuit Court Judge

Opinion No 4633
Heard September 15, 2009 – Filed November 19, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M Dudek, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W McIntosh, Assistant Deputy Attorney General Donald J Zelenka and Senior Assistant Attorney General William Edgar Salter, III, of Columbia, and Solicitor Donald V Myers, of Lexington, for Respondent

SHORT, J Gene Cooper appeals his convictions for murder, armed robbery, conspiracy to commit armed robbery, and kidnapping, arguing the

trial court erred in (1) denying Cooper's motion to dismiss the charges against him because his constitutional right to a speedy trial was violated, (2) 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, and (3) 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 affirm

FACTS

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 [1] The Supreme Court affirmed Cooper's convictions for kidnapping, armed robbery, forgery, and conspiracy [2] 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 [3] The State did not petition for rehearing, and the Supreme Court sent the remittitur to the Lexington County Circuit Court on August 29, 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

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[1] See State v Cooper, 312 S C 90, 439 S E 2d 276 (1994)

[2] Cooper remained incarcerated from his arrest in 1989 until his retrial in 2006

[3] See State v Moore, 351 S C 207, 569 S E 2d 330 (2002)

Westbrook [4] 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

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

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[4] 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

his schedule as a law professor at an out-of-state school [5] 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 [6] 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

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

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[5] Bruck also sent copies of the e-mail to opposing counsel

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

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 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

STANDARD OF REVIEW

In a criminal case, the appellate court reviews errors of law only State v Wilson, 345 S C 1, 5, 545 S E 2d 827, 829 (2001) The court is bound by the findings of the trial court unless they are unsupported by the evidence, clearly wrong, or controlled by an error of law State v Williams, 326 S C 130, 135, 485 S E 2d 99, 102 (1997) The reviewing "[c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence " Wilson, 345 S C at 6, 545 S E 2d at 829

LAW/ANALYSIS

I Speedy Trial

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 (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)

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 (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 "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 (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."[7] 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."

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

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

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

II Unavailable Witness

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 (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 (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 defendant" Barber, 390 U S at 722 "[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"[8] Id at 724-25 Rule

[8] 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

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 "

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 [9]

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

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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 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

[9] 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 "

"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

III Prior Crimes

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 [10] Cooper was being re-

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[10] 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

tried 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

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

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED

WILLIAMS and GEATHERS, JJ , concur

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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

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V

GENE TONY COOPER, JR.,

PETITIONER

Appeal from Lexington County

Daniel F. Pieper, Circuit Court Judge

Opinion No. 4633

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221 (a), SCACR because this Court apparently overlooked the fact that the trial judge did not perform the balancing test required by Rule 609 (b), SCRE *to determine and articulate on the record*, the specific reasons for his ruling that the probative value of the remote convictions substantially outweighed their prejudicial effect. See State v. Colf, 337 S.C. 262, 626, 525 S.E.2d 246, 248 (2000), State v. Johnson, 363 S.C. 53, 59-60, 609 S.E.2d 520 (2005).

After informing petitioner of his right to testify and his right to remain silent, the judge inquired about petitioner's criminal record for impeachment purposes. After the solicitor and defense counsel weighed in, the judge noted petitioner had convictions for armed robbery

housebreaking, and larceny in 1977 The solicitor then argued that all three of these were crimes of dishonesty and go to the credibility of the witness " He also argued that since defense counsel mentioned petitioner's record in his opening statement that he did not think the 'prejudicial effect would outweigh the probative value in this thing " R 1028 line 22- 1031 line 17

Defense counsel Bruck countered that he only mentioned petitioner's record in his opening statement to call the jury's attention to the disparity in age between petitioner and Southerland R p 1032 lines 6- 24 The judge then ruled that he would allow petitioner to be impeached with the housebreaking and larceny convictions, but not the armed robbery convictions because it was too similar to the crime for which petitioner was on trial R 1032 line 25- 1033 line 25

At *no time* before making his ruling did the judge articulate why he thought the probative value of these remote convictions substantially outweighed their prejudicial effect by placing on the record his weighing of the following factors

> (1) The impeachment value of the prior crime, (2) The point in time of the conviction and the witnesses' 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

Further, petitioner's 1977 convictions for housebreaking and larceny were very remote since this trial began on May 22 2006 -- nearly thirty years after petitioner was convicted of

these crimes These thirty-year-old convictions added almost nothing to the jury s determination of petitioner's credibility given that they occurred when petitioner was a young man

If the judge had conducted the proper analysis and articulated it on the record pursuant to State v Colf, 337 S C 622, 525 S E 2d 246 (2000) and State v Johnson, 363 S C 53, 609 S E 2d 520 (2005), he would have determined that these very remote crimes could not be allowed for impeachment purposes

Since the judge did not conduct the Rule 609, SCRE analysis as this Court stated in its opinion rehearing should be granted See State v Cooper, Op No 4633, Shearouse's Adv Sh # 50 at p 55

Speedy trial

This Court wrote that the judge "determined the presumption of prejudice had been persuasively rebutted " This Court also found that petitioner benefited from the delay because the state withdrew its notice to seek the death penalty" See State v Cooper, Op No 4633, Shearouse's Adv Sh # 50 at p 51

Petitioner respectfully requests that this Court reconsider these findings As this Court will recall, Robert "Bo" Southerland told anyone who would listen following his own 1992 conviction for the murder of the victim, and his death sentence that he, Southerland, - - killed the decedent - - and that petitioner, Tony Cooper was not present Death row inmate Norman Starnes testified Bo Southerland admitted to him, and Southerland later confessed in court, that '[T]ony didn't have anything to do with it and Tony was not present when it happened" R 1044, l 19 – 1045 l 15

Bessie Davis started a prison ministry after she retired as a school teacher She and fellow ministry worker Nilda Knotts often met with Bo Southerland and other death row inmates R 1051,

l 11 – 1052, l 17 Davis recalled I never asked [Bo Southerland], but he shared with me that he did the crime alone, that Tony did not have anything to do with it R 1056, l 22 – 1057 l 3 R 1062, ll 1 – 5

Knotts remembered that Southerland started telling her 'about the crime" R 1066, ll 4 – 11 Although Knotts did not bring up the subject of the crime Southerland talking about it piqued her interest At one point Knotts recalled "I said, well what about Tony? What did he do? And he [Southerland] said, well, Tony wasn't even there He didn't have anything to do with it "[1] R 1066, ll 9 – 25, R 1068, ll 1 – 4

It was not until April 21, 2006, "sixteen-and-a-half years after Kimberly Quinn's death," and after Southerland received a new sentencing hearing, and after the state no longer sought the death penalty against him in exchange for his testimony, and where Southerland had a chance for a thirty year sentence upon re-sentencing, that Southerland claimed petitioner was the killer and he essentially was just along for the ride R 799, l 6 – 807, l 22, R 940, ll 5-20

Norman Starnes scoffed at Southerland's subsequent claim that Southerland was scared of petitioner and therefore told everyone that he killed the decedent, and that petitioner was not present during the crime Starnes recalled they [petitioner and Southerland] interacted just like most of us did" Starnes remembered that petitioner at times bought items for other death row inmates including Southerland when Southland was without any funds R 1045, l 16 – 1046, l 8 Starnes said Southerland was not coerced into saying anything by petitioner R 1046, l 16 – 1047, l 3

This Court can take judicial notice of the fact that *when Southerland s case was on direct appeal the Attorney General moved to strike all guilt phase issues from the initial brief* of petitioner, or, in the alternative to supplement record on appeal ' R 1549 (emphasis added) The

June 25 1993 motion filed in the Supreme Court by Assistant Attorney General William Edgar Salter, III had attached to it a notarized statement from Southerland dated April 11, 1992 admitting his guilt, and exculpating petitioner R 1557

In this letter, Southerland stayed consistent with what he told everyone until after he received his new promises from the state -- that petitioner was not with him at the time he knocked the decedent out inside her house, and then took her to the pond where killed her Southerland often borrowed petitioner's car, and he stated "I'd been driving it a long time " Southerland said he was told by Red Farmer that the victim was getting a check Statement of Southerland at 1 2 R 1557 - 1558 Southerland admitted in the letter the Attorney General used against him that he then put the decedent in the car and drove her "to the pond " R 1558

Southerland further explained in the letter that "I thought about how she killed her young'un to get money for drugs She deserved it I shot her in the back "[2] "I stood back and pumped two more rounds into her head " Southerland added, "why I chopped her hands and feet off I'll never know I tried to chop off her head " R 1559

Southerland elaborated "The deal was that if anything came down over this they [Red Farmer] and [Legrand] were going to blame Tony They were mad at Tony because he wouldn't lend them anymore money ' R 1559 "When I was arrested I made a statement putting this on Tony because that's what everyone had planned to do " ' The statement that I made to the police

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[2] The decedent's boyfriend was in jail It was apparently widely believed in the Department of Corrections that she had set fire to her house for insurance money Her son was apparently killed in the fire The judge at petitioner's retrial allowed the jury to hear this same allegation -- but not for the truth of the matter asserted -- since it was relevant to explain this belief about the decedent

was not true I know where everything was because I had thrown them there myself Not because Tony had told me anything " Southerland letter at 3 R 1559

Southerland admitted in this letter that he cashed the decedent's welfare check at a bank in Cayce ' All together, I got about twelve hundred dollars worth of money, Valium, and Xanax I ate the pills myself " "Tony Cooper didn't have anything to do with this I have made the statement because this is the truth No one contacted me or asked me to make it Tony Cooper has not pressured or forced me to make this statement, I sent word to Tony Cooper's lawyer, David Bruck, that I wanted to talk to him David Bruck told me that I needed to discuss the statement with my own lawyers, because this could hurt my case " Southerland's statement at 3 and 4 R 1559 - 1560

The state would have been estopped from seeking the death penalty against petitioner given that it accepted Southerland's confession to the murder, and affirmatively used it against him in court While the state took a somewhat contradictory position by retrying petitioner for the murder, apparently under a accomplice liability theory, it still would have been estopped from seeking the death penalty against petitioner given its acceptance of the fact that Southerland was the triggerman and that petitioner did not participate in killing the decedent See, Ashe v Swenson, 397 U S 436 (1970) ,Berger v United States, 295 U S 78, 88 (1935), Smith v Groose, 205 F 3rd 1045 (8th Cir 2000), Bradshaw v Stumpf, 545 U S 175 (2005) Cf Bradshaw v Stumpf, 545 U S 175 (2005)

Consequently, it was error for this Court to hold that petitioner gained a benefit because of the delay The state, as an Eighth Amendment and estoppel matter could not seek the death penalty against petitioner again Therefore, rehearing should be granted

Further petitioner maintains the state s dilatory action in failing to secure the presence of Red Farmer was inexcusable given that this was a murder case The state and not petitioner should have suffered the consequences of the extraordinary arrogance displayed by the state in this case The solicitor did not try to hide the fact that he had *no plans to retry* petitioner and that he would get to his case whenever, and if, he ever decided to try it See State v Ferguson, 476 So 2d 1252, 1254 (Miss 1991), Lahur v State, 615 N E 2d 150, 152 (Ind App 1993), Barker v Wingo, 407 U S 514 (1972), Doggett v U S , 505 U S 647, 655 (1992) Red Farmer was a key witness, and the jury observing his demeanor in person, as argued at length in the brief and oral argument, was critical in this case Rehearing should be granted

Unavailable witness

Petitioner respectfully submits that this Court should reconsider its holding that petitioner's Sixth Amendment right to confront Red Farmer was not violated since the state did not make reasonable efforts to secure his presence from the Texas Correctional institution See State v Cooper, Op No 4633, Shearouse's Adv Sh # 50 at pp 51-54 Allowing Farmer to be treated as "unavailable" under these circumstances, and his prior stale testimony being read into the record was prejudicial to petitioner's defense Further, Farmer's subsequent actions and admissions since the first trial showed he was not worthy of belief, and the jury observing his demeanor in this case was critical

A brief review of pertinent facts is necessary As this Court will recall, the state only brought the problem with Farmer to the court attention on May 22, 2006, when petitioner's case was called to trial Farmer's story was that he conspired with petitioner to rob the decedent Farmer claimed he told petitioner on Wednesday, October 5, 1989 that Eugene Carter, who was the decedent's boyfriend and who was in prison with Farmer, had told him that the decedent would be

receiving an insurance check for twenty eight hundred dollars Farmer claimed he told petitioner 'that it would be good opportunity to rob her" R 957, ll 9 – 23 Farmer said he was to get five hundred dollars of the insurance money for his part in the robbery R 958, ll 4 – 10

Farmer maintained that at the prior trial that petitioner told him 'that my intelligence was wrong that she did not have the twenty-eight hundred [dollars], that he completed the construction job that he was working on and that he had burned excess material and was pleased with the job and didn't see any complications" Farmer said he took this to mean that the decedent did not have the money, that petitioner killed her, and burned her body R 960, l 8 – 961, l 5

Farmer would later to admit to a clinical psychology student, Kimberly Turner, who interviewed him in a Texas jail the month of petitioner's re-trial, that he did not tell the truth at petitioner's first trial and that he wanted to tell the truth "this time" R 1136, ll 2 – 6 Farmer also told Turner he had put the state's 'spin' on the facts at petitioner's first trial to make petitioner look bad R 1134, l 13 – 1135, l 14

Farmer now maintained that he only heard from petitioner after the murder, and that he was "completely surprised" by the telephone call He still claimed petitioner was talking to him in "code' R 1133, ll 13 – 22 The defense strongly urged that Farmer was a pathological liar, and it was imperative for the trial jury to observe his demeanor in person

The trial judge was skeptical of the state's representations that it had acted reasonably He asked "Why did it take ten days to get SLED arranged why didn't ya'll just use two local Lexington Deputies" Lupton claimed SLED was the lead law enforcement agency, and that was the proper agency to use The judge still questioned why it took "ten days to get two agents assigned to the case" R 354 ll 15 – 25

Lupton claimed that SLED did not have sufficient manpower with Myrtle Beach bike week and black bike week going on in Myrtle Beach R 355 ll 1–7 The judge responded I certainly don t think bike week takes precedence over this sort of proceeding " R 355, ll 8 – 11

Lupton then said he agreed with the judge but that he also did not think a week would have made any difference ' because the judges were unavailable [in Texas], for the month of May" – the month of the trial R 355, ll 8 – 22 Lupton told the judge he began talking with SLED on April 10, 2006, and provided "them names" between April 17 "through the 20th, somewhere in that time frame And, at that time, the paperwork was prepared " R 356, ll 11 – 24

Defense counsel told the judge "the showing is inadequate on its face " Counsel argued "Mr Farmer is a classic unreliable witness," and that petitioner would be denied his Sixth Amendment right to confrontation if his presence was not secured for trial R 357, l 6 – 360, l 22 Counsel informed the court that Farmer was a person who would "tell anybody who was talking to him anything The man has absolutely no conception of what telling the truth might involve " R 360, ll 7 – 24

Counsel noted that the defense had interviewed Farmer in Texas a few weeks ago, and that his presence at trial was critical R 360, l 7 – 363, l 14 Defense counsel *cited* Barber v Page, 390 U S 719 (1968) and Crawford v Washington, 541 U S 36 (2004), in support of his arguments that the state's efforts to obtain Farmer for confrontation purposes were unreasonable, and that petitioner would be denied his right to Constitutional right to confrontation if Farmer did not testify at trial R 362, l 18 – 366, l 21 Counsel reminded the court "[T]his case has been waiting around for a long, long time" and that the state's efforts to procure Farmer's presence from Texas were not reasonable R 364 l 1 – 365, l 20

Counsel also argued that the state found out eleven days ago that it 'couldn t have Mr Farmer it was casually mentioned during a meeting for another purpose ' During a discussion of discovery the state informed petitioner's attorneys that "we've run into a problem with Mr Farmer He heard about this on a Friday a week, ten days ago " Counsel told the judge that the "*court has not heard one word about this until this morning and most tellingly there was no motion for a continuance* " R 365, l 17 – 366, l 21 (emphasis added)

The judge then questioned the solicitor about why the state had not brought the problem with Farmer to the court's attention The solicitor claimed he thought the judge "at one point, [said] come hell or high water [the case would be tried] this week " R 366, l 24 – 367, l 24 An extremely testy response from the trial judge followed that suggestion The judge told the solicitor ' at no point did the court say it would not entertain your motions If that's your belief, you're wrong " R 368, l 14 – 370, l 22 The judge told the solicitor "let's just be honest, there was never any desire in your mind to convey to me that you wanted a continuance " R 370, ll 7 – 10

The judge told the solicitors that based on his experience he thought solicitors came to court "today just assuming you're going to either not have that testimony or go forward with the transcript from the prior trial " R 371, l 11 – 373, l 18 The judge told the solicitors "*you better think carefully about what you re telling this court because I know the people I ve been dealing with in this case and I never got a clue that there would be any desire to continue this case from anyone here today* R 371, l 11 – 373, l 18 (emphasis added)

Defense counsel argued the state had had time to prepare its case, and he told the court "I just could not, for this man whose been waiting for his trial for so long, agree to any further accommodations for the state to make up for the fact they don't have their witnesses lined-up If

the defense don t have their witnesses that s the end of it You do without You argue and charge And I think that's where we are in this case " R 379, ll 8 – 21

Defense counsel also noted that May 10, 2006 was twelve days before a trial that had ' been pending for four years and months," and he questioned how the state of South Carolina allowed it go unnoticed that it was not a signatory member of the Uniform Act Counsel argued the state's efforts were not reasonable and that its excuses were poor R 385, l 20 – 386, l 22

The solicitor repeated that the state had tried to obtain Farmer's presence, and he opined that Farmer should be considered an unavailable witness R 389, ll 4 – 12 The trial judge questioned that assertion He asked about developments in the case since the time of the first trial R 389, l 13 – 391, l 10 The solicitor responded that these were discretionary matters for the court to determine how it should handle them R 391, ll 3 – 10

Defense counsel noted the defense now had impeachment material against Farmer that did not exist at the time of the first trial However, "attacking a pile of paper" would be insufficient at trial This impeachment included that Farmer had thrown a party while in jail where his testimony after petitioner's first trial was applauded R 392, l 24 – 393, l 12 Defense counsel then said it was important to be able to confront Farmer and have him acknowledge the truth of the new impeachment evidence

> We can confront the witness He might very well say, yes, that's true, and give us a cynical smirk about how he got over on the system, which is what we think we would get out of him And that is very, very different That's the difference between cross-examination and a stack of paper And so there, you know, there we are The same when we confront him with his prior testimony as his own sentencing
>
> And through all of this we really think that the State - - that the jury would perceive as we confronted him with this, they would perceive a narcissistic manipulator because that is really why we

> need the confrontation We can t do that on paper We can t do that by people - -

R 393, l 17 – 394, l 6

Defense counsel said reading the testimony back into the record, and other options were unsatisfactory alternatives to his constitutional right to confrontation R 394, l 12 – 395, l 20 Counsel repeated that the state getting the paperwork "to Texas seventeen days before the case starts you've got to expect and you should reasonably expect that it may not go smoothly It's too bad They waited too long They did not use due diligence " R 394, 23 – 395, l 9

Counsel argued the state should have started its efforts to obtain Farmer earlier and "it certainly is lackadaisical and it's not fair " R 396, ll 2 – 22 Counsel argued it was the state's mistake and that the state and not petitioner should bear the burden of its unreasonable action R 396, l 22 – 398, l 3

The judge questioned the solicitor about why the paperwork was not given to him in March rather than April of that year The solicitor could only respond "We're stuck with where we're at " However, the solicitor maintained the state did not act unreasonably R 399, l 4 – 401, l 16 The judge said he would decide the issue after thinking about it further, and that he did not want any mention of Farmer until he ruled In the end the judge ruled the state did not act unreasonably, and petitioner strongly submits that his bearing the burden of the state's dilatory tactics and it arrogant approach to this retrial was fundamentally unfair

As this Court will also recall, Farmer's testimony was read into the record R 940, l 4 - 978, l 25 In that testimony Farmer said he conspired with petitioner to rob the decedent R 944 l 22 – 945, l 19 Farmer testified at the earlier trial that because of his position in the

literacy program at CCI he could ' make calls out and receive calls, also R 954, l 10 – 955 l 16

Farmer claimed he called petitioner at his home on October 4, 1989 and told him that he and Eugene Carter had had a conversation about Kim Quinn receiving an insurance check for twenty-eight hundred dollars "[3] I also told them it would be a good opportunity to rob her " Farmer claimed petitioner said he didn't have "any problem with it," and he said petitioner added he didn't have any respect for the bitch " R 956, l 14 – 957, l 25 Farmer said he was to get five hundred dollars out of this robbery, and, as seen, he claimed petitioner called him back and told him in code that he had killed the victim and burned her body R 958, l 4- 961, l 14

Farmer maintained that he was not promised anything for his testimony against petitioner, but he acknowledged he was facing sentencing exposure of life imprisonment but he now expected to receive a five year sentence for only conspiracy R 965, l 11 – 967, l 15

While defense counsel was reading Farmer s cross-examination from the prior trial where Farmer testified he excelled as a heavy lift crane operator, and talked about being "real good at what I do, ' and getting requests from "one coast [of the country] to the other," the solicitor objected The objection was sarcasm in defense counsel's voice about Farmer's testimony The judge instructed counsel "Just read it straight from the record " R 1002, l 15 – 1005, l 7 Farmer further testified at the last trial that from being in prison he learned 'You don't need to be stealing other people's stuff You need to go out and work and you need - - and, you know, [to] earn your own way ' R 1013, ll 4 – 19

Given that the right to confrontation under the Sixth and Fourteenth Amendments is among the most fundamental rights petitioner respectfully submits this Court should grant

rehearing and reconsider its holding that his right to confrontation was not violated There are few subjects, perhaps, upon which this court and other court s have been nearly unanimous than in their expressions of belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal " Pointer v Texas, 380 U S 400, 405 (1965), Barber v Page, 390 U S 719, 721 (1968)

The test here is one of reasonableness "The length to which the prosecution must go to procure a witness's presence is a question of reasonableness " State v Hacheney, 160 Wash 2d 503, 158 P 3d 1152, 1162 (2007) *citing* Ohio v Roberts, 448 U S 56, 74 (1980), *overruled on other grounds* Crawford v Washington, 541 U S 36 (2004) In Crawford v Washington, the Court noted that "the right to confront one's accusers is a concept that dates back to Roman times " Crawford v Washington , 541 U S at 43 Further, it is the government's duty to establish the unavailability of the witness Crawford v Washington, 541 U S at 59–60

Since petitioner was denied his Sixth Amendment right to confrontation by the state's unreasonable actions in failing to secure critical witness Farmer's presence at trial, rehearing should be granted for this Court to reconsider its holding to the contrary

Respectfully submitted,

Robert M Dudek
Acting Chief Appellate Defender

This 4th day of December, 2009

[3] Quinn was seeing Carter in prison

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Daniel F Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V

GENE TONY COOPER, JR ,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter III, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201,Esquire, this 4th day of December, 2009

Robert M Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of December, 2009

(L S)
Notary Public for South Carolina
My Commission Expires July 1, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs

GENE TONY COOPER, JR ,

Petitioner/Appellant

OPINION NO 4633

RETURN TO PETITION FOR REHEARING

INTRODUCTION

On November 19, 2009, this Court issued a published Opinion in which it affirmed Petitioner's 2006 Lexington County convictions and sentences for murder, kidnapping, armed robbery and conspiracy to commit armed robbery All of the convictions stemmed from the October 5-6, 1989 murder of Kimberly Ann Quinn *State v Gene Tony Cooper Jr* , ___ S E 2d ___ , Opinion No No 4633, 2009 WL 4038274 (S C Ct App , Nov 19, 2009) Petitioner filed a Petition for Rehearing on December 4, 2009 On December 7, 2009, the Court directed Respondent to file a Return addressing the rehearing petition In compliance with that Order, Respondent would submit the following Return to Petition for Rehearing

At the outset, Respondent submits that this Court's Opinion correctly rejected the issues presented Also, Respondent incorporates by reference the arguments from the Final Brief of

Respondent

I

Cooper's first claim is that 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 On rehearing, he specifically claims that this Court "overlooked the fact that the trial judge did not perform the balancing test required by Rule 609(b)," SCRE, and articulate his reasoning on the record pursuant to State v *Colf*, 337 S C 262, 626S E 2d 246, 248 (2000) Respondent submits that this argument is procedurally barred from appellate review for two reasons First, Cooper did not complain in the trial court of the sufficiency of the trial judge's balancing test under *Colf* and its progeny **R pp 1027-34** *See State v Bailey*, 298 S C 1, 5-6, 377 S E 2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal), *State v Liverman*, Op No 4635, 2009 WL 4574228 (S C Ct App , Dec 4, 2009) ("The precise argument appellant raises on appeal, that the hash mark testimony referred to prior homicides and thus violated Rules 403 and 404(b), was not raised to the trial judge and therefore is not preserved for review"), *State v McKnight*, 352 S C 635, 646-47, 576 S E 2d 168, 174 (2003) (issue must be raised to and ruled upon by trial court to be preserved for review), *State v Prioleau*, 345 S C 404, 411, 548 S E 2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error), *State v Watts*, 321 S C 158, 167, 467 S E 2d 272, 278 (Ct App 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court")

Second, he did not complain in the Initial Brief of Appellant on appeal (**pp 52-55**) of the sufficiency of the trial judge's balancing test under *Colf* and its progeny *See* Rule 208 (b)(1)(D),

SCACR, *Jinks v Richland County*, 355 S C 341, 585 S E 2d 281, 282 n 3 (2003) (issue must be argued fully in the initial brief of appellant to be preserved for the Court's consideration), *First Savings Bank v McLean*, 314 S C 361, 444 S E 2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal), *Glasscock Inc v United States Fidelity and Guar Co* , 348 S C 76, 557 S E 2d 689 (Ct App 2001) (an argument in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief)

Alternatively, Respondent submits, for the reasons stated in the Final Brief of Respondent, that Cooper cannot show a prejudicial abuse of discretion because it is clear that the colloquy between the trial judge and the parties reflected that the trial judge concluded, after performing a balancing test consistent with Rule 609(b) and *Colf*, that the facts and circumstances of this case demonstrated that the probative value of Cooper's convictions substantially outweighed their prejudicial effect *See State v Dunlap*, 346 S C 312, 322-323, 550 S E 2d 889, 895 (Ct App 2001), *State v Mizzell*, 341 S C 529, 535-37, 535 S E 2d 134, 137-38 (Ct App 2000) *See* **Final Brief of Respondent, pp 60-68**

Cooper further suggests that the South Carolina Supreme Court's decision in *State v Johnson*, 363 S C 53, 609 S E 2d 530 (2005), requires reversal, and that there was error 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 Court on appeal *See Bailey*, 298 S C at 5-6, 377 S E 2d at 584 [1] Also, *Johnson* is clearly distinguishable from this case In addition to the reasons set forth, in the Final Brief of Respondent, Respondent would note that the trial judge in *Johnson* did not apply

[1] Again, his only argument in the trial court was that the convictions were too old *See* **R pp 1032-33**

a balancing test required by *Colf* Also his ruling on the admissibility of the remote conviction was guided by outdated law *i e* , that the offense was one involving moral turpitude Likewise, the fact that his credibility was important has been addressed in Respondent's Brief and Cooper's argument is without merit [2]

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, for the reasons argued in the **Final Brief of Respondent, pp 68-70** *See State v Mitchell*, 286 S C 572, 573, 336 S E 2d 150, 151 (1985)

II

Cooper next attacks this Court's affirmance of the trial judge's denial of his motion to dismiss the charges against him based upon an alleged violation of his Sixth Amendment right to a speedy trial Again, Respondent submits that there was no error

In *Barker v Wingo*, 407 U S 514, 530 (1972), the United States Supreme Court adopted a four-part balancing test to determine whether an accused has been denied his right to a speedy trial Courts must balance (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant The Court in *Barker* stated that reviewing

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[2] Moreover, 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** In light of 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 United States v Holmes* 822 F 2d 802, 804 (8th Cir 1987)

courts must engage in a balancing test with these "related factors," which "must be considered together with such other circumstances as may be relevant " *Id* at 533 These factors are recognized by this Court and the South Carolina Supreme Court *See State v Chapman*, 289 S C 42, 144 S E 2d 611 (1986), *State v Tyson*, 283 S C 375, 323 S E 2d 770 (1984), *State v Waites*, 270 S C 104, 240 S E 2d 651 (1978), *State v Foster* 260 S C 511, 197 S E 2d 280 (1973), *State v Kennedy*, 339 S C 243, 528 S E 2d 700, 703 (Ct App 2000), *aff d*, 348 S C 32, 558 S E 2d 527 (2002)

In this case, it is clear that Cooper cannot show a prejudicial abuse of discretion resulting from denial of his motion because the trial judge correctly applied these factors *See State v Brazell*, 325 S C 65, 75, 480 S E 2d 64, 70 (1997) The first factor, length of delay, acts as a threshold requirement *Barker*, 407 U S at 530 *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 v United States*, 505 U S 642, 651-52 (1992), 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, supra*, and the trial judge's Order 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 *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)

Contrary to Cooper's representation to this Court , the delay here did not "already exceed[] that found in almost any reported South Carolina case," **Final Brief of Appellant, p 25**, 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 Indeed, the delay in *Barker* was more than five years *See also Brazell, supra* (delay three years and five months) However, the Court must consider the other three factors under *Barker* because this delay was "presumptively prejudicial" under *Doggett*

As for 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 It was not a "sit-in" or a willful refusal to act by the prosecution Rather, 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**

Further, to the extent there was any arrogance involved, it was that of defense counsel Although he did repeated ly 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** However, the trial judge found that some delay after *his* assignment to the case was because of *his efforts to accommodate trial counsel s schedule* **R pp 250-53, 328-43**

Respondent agrees with most of the remaining findings by the trial judge on this prong of the *Barker* analysis [3] 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 [4] 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 [5]

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[3] However, Respondent 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

[4] 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**

[5] The lack of merit to 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

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 Also, 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 (3rd 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 (9th Cir 2001), *amended*, 262 F 3d 1033 (9th 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) [6]As a result, the trial judge properly concluded that all of the delay between July 12, 2005 and the subsequent trial[7] was reasonable

Therefore, the record of the case shows that 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

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raised the issue, either at trial or (more likely) in PCR Any contrary suggestion ignores both the zealousness with which Cooper was represented below and his trial counsel's familiarity with PCR

[6] Obviously, trial counsel'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*

[7] 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

over Cooper or to impede his defense, and he failed to meet his burden *See State v Smith*, 307 S C 376, 415 S E 2d 409 (Ct App 1992) (burden is on the defendant to show the delay was due to the State's willful neglect), *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 factor under *Barker* is the accused's assertion of his constitutional right to a speedy trial In the present case, Cooper waited to assert his right until July 11, 2003 before making a demand for a speedy trial This was almost eleven months after the Supreme 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 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 The Court emphasized in *Barker* 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 [8] *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 State v Pittman*, 373 S C 527, 647 S E 2d 144, 156 (2007) ("regardless of whether the defense is able to show particularized prejudice or the delay warrants a finding of presumptive prejudice, prejudice remains only one of the four factors to be considered in a speedy trial analysis") (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 his 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

Cooper's reliance upon the first two, subjective components of the *Barker* prejudice analysis is disingenuous, at best [9] As the record makes abundantly clear, Cooper had previously been under

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[8]The State notes that a delay oftentimes works in favor of a defendant, because memories of the **prosecution's witnesses** also fade and other prosecution witnesses may be unavailable

[9] His argument is predicated upon *dicta* from *United States v McDonald*, 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

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 [10] Also, he may have waited upon his opportunity for a retrial on the charges against him, but any anxiety he felt 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

The fact Farmer was not physically present was not prejudicial to Cooper In this regard, he was no different from any other unavailable witness Further, Farmer's direct examination from the 1991 trial was more than adequately impeached, both through the cross-examination from that trial

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dissenting)

[10] This is particularly true when one considers the other evidence of his criminal history which was more fully developed at the subsequent trial *See* **I** *supra* 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*

and by the other means discussed in **Argument II of the Final Brief of Respondent** For the reasons set forth in **Argument II**, Cooper cannot show any prejudice from the trial judge's ruling with respect to Farmer [11] 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 323-343 n 3** Cooper's argument lacks merit

Further, Cooper's heavy reliance upon Southerland's admission to Bruck or at PCR is not properly before this Court because not argued in the Initial Brief of Appellant *See* **FBOA, pp 8-29** "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time " 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 was therefore abandoned and may not be raised in the rehearing petition *Id See also Kennedy v South Carolina Retirement System*, 349 S C 531, 532, 564 S E 2d 322, 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument Rule 221(a), SCACR Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court Therefore, contrary to the dissent's argument, this Court should not consider appellants' previously unpresented evidence when deciding whether to grant the petition for

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[11] 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 (9th 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

rehearing"), *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"), *Video Gaming Consultants Inc v South Carolina Dep't of Revenue*, 342 S C 34, 535 S E 2d 642 (2000) [12]

III

Finally, Cooper attacks this Court's affirmance of the trial judge's ruling 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 Initially, Respondent submits that the issue is not preserved for appellate review 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) 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) Here, the *in camera* ruling was not immediately before the State published

[12] 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)

Farmer's testimony, and the issue is not preserved for appellate review *See Schumpert*

Apart from this point, Respondent submits that this Court's Opinion and the trial judge's ruling correctly applied the appropriate state and federal law, and that Cooper not advanced any point of law or fact that the Court overlooked or misapprehended Respondent would, therefore, rely upon that Opinion and the **Final Brief of Respondent, pp 41-59**

CONCLUSION

Therefore, Respondent would ask the Court to deny the Petition for Rehearing

HENRY D MCMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P O Box 11549
Columbia, SC 29211
(803) 734-6305

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

December 15, 2009

BY _____
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs

GENE TONY COOPER, JR ,

Petitioner/Appellant

OPINION NO 4633

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within ***Return to Petition for Rehearing,*** on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Robert M Dudek, Esquire, Acting Chief Appellate Defender, South Carolina Commission 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 15th day of December, 2009

WILLIAM EDGAR SALTER, III

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

December 15, 2009

ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Respondent,

v

Gene Tony Cooper, Jr , Appellant

The Honorable Daniel F Pieper
The Honorable Daniel F Pieper
Lexington County
Trial Court Case No 1990-GS-32-00083
1990-GS-32-00084

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing It is, therefore, ordered that the Petition for Rehearing be denied

J Short

J Williams

J Geathers

Columbia South Carolina

January 21, 2010