

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.

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

PETITIONER

APPENDIX

Volume 4

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VOLUME FOUR OF FOUR

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.,

APPELLANT

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1 Similarly, the mere fact that a defendant may
2 have associated with another person or met with
3 another person and discussed common names and
4 interest does not necessarily establish proof of the
5 existence of a conspiracy or that the defendant was
6 involved in the conspiracy.

7 I further instruct you that a defendant in an
8 alleged conspiracy must have had an intent to
9 advance the common goal of the agreement. If the
10 persons involved are not acting in concert, but are
11 instead acting separately and individually, then you
12 may rightfully conclude that they are not involved
13 in a conspiracy.

14 On the other hand, it is not necessary that the
15 agreement be a formal one, that it be in writing or
16 that the persons hold a meeting and expressly state
17 the terms of the common plan or that the agreement
18 be stated in words between them, the agreement of a
19 criminal conspiracy may come into being through an
20 implied, mutual understanding. The willful,
21 intentional and knowing adoption by two or more
22 persons of a common plan is sufficient. No overt
23 acts need to be shown to establish a conspiracy. A
24 conspiracy may be shown by circumstantial evidence
25 and the conduct of the parties.

1 In order to convict the defendant of
2 conspiracy, the State must prove beyond a reasonable
3 doubt not only that the defendant knew of the
4 unlawful conduct, but that the defendant agreed to
5 combine with the other persons for the purpose of
6 accomplishing the unlawful conduct.

7 Now, there are a couple more principles that I
8 need to go over with you pertaining to this case.
9 First, is this doctrine that's called hand of one,
10 hand of all. If a crime is committed by two or more
11 persons who are acting together in the commission of
12 that offense, the act of one is the act of all.
13 This is true if there are two persons or more than
14 two persons involved in the act.

15 If two or more persons are acting together,
16 assisting each other in the commission of an
17 offense, the law says that under these
18 circumstances, the act of one is the act of all or
19 is more commonly referred to the hand of one is the
20 hand of all.

21 Now, I've discussed with you each of the
22 offenses and the elements of those offenses. The
23 State also has the burden of proving identity beyond
24 a reasonable doubt. You may consider the
25 opportunity a witness had to observe the alleged

1 offender at the time of the offense and to
2 thereafter make an identification. You may consider
3 all of the facts and circumstances in determining
4 this issue.

5 ~~It is~~ for you, the jury, to determine whether
6 the State has proven the identification of a
7 defendant beyond a reasonable doubt considering the
8 credibility of the witnesses, the opportunity and
9 circumstances of observation and any such direct and
10 circumstantial evidence as you deem appropriate.

11 ~~And you should apply the same~~ legal standards to any
12 direct or circumstantial evidence that you consider
13 pursuant to my previous instructions on direct and
14 circumstantial evidence.

15 If the State has failed to prove the identity
16 of a defendant beyond a reasonable doubt, then you
17 must find the defendant not guilty.

18 Now, regarding intent, ladies and gentlemen,
19 I've gone over with you one or more -- I've gone
20 over with you several offenses, four different
21 charges in the indictments. In a case in which one
22 or more criminal offenses arise, the State, in order
23 to establish guilt as to multiple offenses, must
24 prove beyond a reasonable doubt that the defendant
25 had the reckless intent to commit each separate

1 offense.

2 Also, ladies and gentlemen, the defendant has
3 raised the defense of alibi. For an alibi to exist,
4 the defendant must have been at another specified
5 place at the time the crime was committed and that
6 it was therefore impossible for the defendant to
7 have been at the scene of the crime. Mere denial of
8 presence at the scene of the crime does not
9 constitute an alibi.

10 There is no burden on a defendant to prove an
11 alibi. The burden is on the State to prove beyond a
12 reasonable doubt that the defendant was actually
13 present at the scene of the crime, actually
14 participated in it and was not somewhere else. In
15 other words, the State has the burden of disproving
16 the existence of an alibi beyond a reasonable doubt.

17 Now, you have been selected as fair and
18 impartial jurors sworn to impartially try and
19 determine the facts of this case. When you comply
20 with your oath to do so, then no one will have a
21 right to criticize your verdict and you will have
22 fully discharged your duty as jurors.

23 Listen to the views of each juror during your
24 deliberation.

25 Mr. Foreman, make sure everyone has the

1 opportunity to speak and address or comment upon the
2 views of the other jurors.

3 Now, at this point, I'm going to send back with
4 you a verdict form. As to each of these charges,
5 you have two choices, either not guilty or guilty.
6 And there's no significance in the order in which I
7 put them on there. Obviously, I had to put one
8 first on this verdict form.

9 As to ~~each~~ indictment, if you have a reasonable
10 doubt as to whether the defendant is guilty or not
11 guilty, then find the defendant not guilty. If,
12 however, the State has proven guilt beyond a
13 reasonable doubt, then find the defendant guilty.

14 Now, each indictment charges a separate and
15 distinct offense. You must decide each indictment
16 on the evidence or the lack of evidence in the law
17 applicable to it. The defendant may be convicted or
18 acquitted on any or all of the offenses charged.
19 You're going to be asked to write a separate verdict
20 for each indictment on this form.

21 Now, one important thing, ladies and gentlemen,
22 as to each of these charges, your verdict might be
23 unanimous. Each and every one of you must agree on
24 the verdict. It is not a majority verdict. That
25 means when ~~you~~ come back in after your verdict is

1 reached, I could ask the clerk to call out your name
2 individually and have you stand and the clerk will
3 say, Is this your verdict and is this still your
4 verdict. And I'll -- if this is your verdict, then
5 obviously that's how you would respond to that
6 question. That means each and every one of you say
7 that this is your verdict. So please keep that in
8 mind.

9 Now, at this point, I'm going to send you to
10 the jury room, ladies and gentlemen. Do not discuss
11 any deliberations yet. I always give the attorneys
12 one final opportunity to go over any concluding
13 matters with me. Sometimes I need to bring you back
14 out and explain something further or I might need to
15 add something, sometimes I don't necessarily cover
16 everything that maybe I should cover or somebody
17 asks for me to clarify something. So I'll give them
18 the opportunity to discuss that with me.

19 Also, it gives us the opportunity to get all of
20 the exhibits together, make sure that everything
21 that's been actually introduced into the trial of
22 the case is back there with you during your
23 deliberations. So please do not begin any
24 deliberations yet.

25 Where is our alternate juror?

1 **JUROR:** Right here.

2 **THE COURT:** Do you have anything in the jury
3 room?

4 **JUROR:** My hat.

5 **THE COURT:** We'll go ahead and send you to the
6 jury room before I send the jury out. At this
7 point, your service is concluded, sir. I want to
8 thank you very much. I know it's been a long trial,
9 ~~but the law does not allow me to send you in once~~
10 they're ready to begin their deliberations. So
11 thank you again so much for your participation.

12 We'll go ahead and let him get his stuff out of
13 the jury room, please, and let me know when he's out
14 of the jury room.

15 Thank you, sir.

16 (The alternate was excused.)

17 **THE COURT:** All right. Ladies and gentlemen,
18 I'll send you to the jury room at this time. Again,
19 please do not discuss this case in any way.

20 (The jury retires to the jury room.)

21 **THE COURT:** All right. Any objections to the
22 charge from the State or anything you think that
23 needs to be clarified or anything?

24 **MR. BELL:** Nothing from the State, Your Honor.

25 **THE COURT:** All right. Defense, I had already

1 put on the record that I preserved your objection.
2 I don't know if I really actually explained it too
3 well.

4 The defendant had submitted a proposed charge
5 ~~that's in the record that there have also been~~
6 references by one or two State's witnesses about
7 having appealed their convictions and having
8 received new trials or resentencings. Please do not
9 assume or expect that anything of this sort recurred
10 in this case. Once the question of Mr. Cooper's
11 guilt or innocence is properly submitted to you and
12 you render your verdict, that verdict is final and
13 no other court may second guess it or charge it --
14 or change it -- I'm sorry.

15 And he put that in the record and I did not
16 charge that and his objection is preserved.
17 Anything else other than that one?

18 **MR. BRUCK:** Beyond that, the defendant has no
19 objections or requests for additions.

20 **THE COURT:** All right. So, at this point, if
21 you could please get all of the exhibits together in
22 one stack and let's double check again that
23 nothing's being sent back that was not admitted into
24 evidence and let's put that on the record before we
25 send it back.

1 (Pause.)

2 **THE COURT:** All right. So let's put on the
3 record, each side has reviewed the exhibits and
4 nothing is being sent back that was not introduced
5 into evidence; is that correct from the State?

6 **MR. BELL:** That's correct.

7 **THE COURT:** Defense?

8 **MR. BRUCK:** Yes.

9 ~~**THE COURT:** And I think we previously went~~
10 over, there are no objections to the verdict form,
11 correct?

12 **MR. BELL:** That's correct.

13 **MR. BRUCK:** Correct.

14 **THE COURT:** All right. Mr. Bailiff, once y'all
15 get those exhibits together with the verdict form,
16 you may tell them they can begin their
17 deliberations.

18 I appreciate the courtesies y'all extended to
19 each other and to the Court throughout the trial.
20 Thank you.

21 **MR. BELL:** Thank you, Your Honor.

22 **THE COURT:** We'll be at ease.

23 (Jury commenced their deliberations at 3:40
24 p.m.)

25 (A recess transpired.)

1 (The following occurred during jury
2 deliberations at 4:02 p.m.)

3 **THE COURT:** The jury has asked for a transcript
4 for Investigator Hite's testimony. I can tell them
5 we can play it back to them or if they want to have
6 something specific, they can let me know. Is that
7 okay? I'll write it out and y'all can look at it.

8 (Pause.)

9 **THE COURT:** Do you wish to look at my response
10 and see if there's any objection before I send it
11 back?

12 (Pause.)

13 **THE COURT:** Any problem with that from the
14 State?

15 **MR. BELL:** No problem from the State.

16 **THE COURT:** Defense?

17 **MR. BRUCK:** No objection from the defense.

18 **THE COURT:** All right. Send that to the jury.
19 Let's see what they say.

20 (A recess transpired.)

21 (The following occurred during jury
22 deliberations at 5:00 p.m.)

23 **THE COURT:** Here's a note.

24 (Pause.)

25 **THE COURT:** We'll going to replay that

1 testimony. Bring the jury in, please.

2 (The jury returns to the courtroom at 5:10
3 p.m.)

4 (Court's Exhibit Number 12, jury note, was
5 marked for identification purposes.)

6 **THE COURT:** All right. Ladies and gentlemen,
7 we got your note about that testimony. We'll play
8 it back to you at this time.

9 ~~Just in case you didn't understand my last~~
10 note, we don't ever provide any kind of written
11 transcripts to the jury. If there's certain
12 testimony you wish played back or any portion of it,
13 you're welcome to request that and we'll be happy to
14 play it back to you.

15 Go ahead, Madame Court Reporter.

16 (Whereupon, the testimony of Sharon Freeman
17 Clonts was played for the jury.)

18 **THE COURT:** All right. Ladies and gentlemen,
19 I'll send you back to the jury room to resume your
20 deliberations. Thank you.

21 (The jury retires to the jury room at 5:26
22 p.m. to continue its deliberations.)

23 **THE COURT:** We'll be at ease.

24 (A recess transpired.)

25 (The jury returns to the courtroom at 6:05

1 p.m.)

2 **THE COURT:** All right. Ladies and gentlemen,
3 we have received your request about the smoke break.
4 And, at this time, I'm going to let you stop your
5 deliberations. And the deputies will coordinate
6 taking those of you who need a smoke break down to
7 do that.

8 My instructions to you are this. You must not
9 discuss this case in any way whatsoever during this
10 break. So those of you that go downstairs to take
11 the smoke break, you must not discuss this case in
12 any way. Those of you that remain in the jury room,
13 you must not discuss the case in any way. When
14 everyone is assembled back together, then I will
15 give you your instructions again about beginning
16 your deliberations. Please remember that.

17 Now, if any of you want to go down with them to
18 just get some fresh air, they'll take you to that
19 same area, just let the deputies know. Again, at
20 this point, stop your deliberations and I will let
21 you know when to resume.

22 **JUROR:** I hate to tell you, but I haven't heard
23 one word you said. You've got a soft voice.

24 **THE COURT:** I'm sorry. What I said was I'm
25 going to -- everyone has agreed to give you a break,

1 at this point, to some of you requesting a smoke
2 break. My instructions are you must stop your
3 deliberations at this time. You must not discuss
4 the case in any way. Those of you that go
5 downstairs for the break, do not discuss the case.
6 Those of you who remain in the jury room, do not
7 discuss the case. When the break is over, I will
8 send the bailiff or the clerk to notify you to begin
9 your deliberations again.

10 Does everybody understand?

11 **JUROR:** But I have a question, may I --

12 **THE COURT:** If it's about the case, I can't,
13 but if it's just about this break, I can hear you.

14 **JUROR:** Are we allowed to call home to let
15 someone know that we will not be there directly?

16 **THE COURT:** If you give the clerk the name and
17 number, the clerk will call for you. She'll take
18 care of that right now, also. I realize it's
19 running late and some of you didn't anticipate this,
20 but --

21 **JUROR:** I'm so sorry. I didn't bring my
22 medicine, but I've got to have it.

23 **THE COURT:** That's okay. Do you have someone
24 coming over with it right now, ma'am?

25 **JUROR:** She's calling him, but I don't know if

1 he'll be home.

2 **THE COURT:** Well, if not, we'll send someone
3 for it, all right.

4 **JUROR:** Okay.

5 **THE COURT:** All right. You can go back to the
6 jury room. Again, stop your deliberations at this
7 point. Thank you.

8 (The jury retires to the jury room at 6:08
9 p.m.)

10 **THE COURT:** All right. Thank you. We'll be at
11 ease again.

12 (A recess transpired.)

13 **BAILIFF:** They're back now.

14 **THE COURT:** You can direct them to start back.

15 (The jury resumed their deliberations at
16 6:33 p.m.)

17 (A recess transpired.)

18 (The following occurred during jury
19 deliberations at 9:00 p.m.)

20 **THE COURT:** The jury has another request for a
21 smoke break. Any objection to that, State?

22 **MR. BELL:** No objection from the State, Your
23 Honor.

24 **THE COURT:** Defense?

25 **MR. BRUCK:** No objection.

1 **THE COURT:** I don't want it to be a long smoke
2 break, ten minutes at the most.

3 Also, I just wanted to see if y'all had any
4 objection to my correcting a clerical error on the
5 speedy trial order. It's nothing really
6 substantive. On the dates that I put for trial, we
7 accidentally typed 2005 instead of 2006. Do y'all
8 mind if I amend the original order to show the weeks
9 of May 22nd and 29th, 2006?

10 **MR. BELL:** No objection from the State, Your
11 Honor.

12 **MR. BRUCK:** That's fine.

13 **THE COURT:** All right. Thank you.

14 (A recess transpired.)

15 **BAILIFF:** The jury is back, Your Honor.

16 **THE COURT:** All right. Tell them they can
17 resume their deliberations.

18 (The jury resumed their deliberations at
19 9:12 p.m.)

20 (A recess transpired.)

21 (The following occurred during jury
22 deliberations at 9:46 p.m.)

23 **THE COURT:** I'm just trying to decide whether
24 or not it would be a good idea to ask the jury, if
25 everyone consents, that if they want to recess and

1 pick back up in the morning. Any objection from the
2 State?

3 MR. BELL: No objection from the State, Your
4 Honor.

5 THE COURT: Defendant?

6 MR. BRUCK: None from the defendant.

7 THE COURT: All right. It's my understanding
8 then, also each side would waive having the jury
9 sequestered for the evening; is that correct? _____

10 MR. BELL: Yes, Your Honor, the State would
11 waive.

12 MR. BRUCK: The defense waives. I would
13 suggest the clerk may direct Mr. Hill to go home and
14 not go to work.

15 THE COURT: I'll ask him to do that. Do y'all
16 have any objection to my doing it by note to the
17 jury?

18 MR. BELL: No objection from the State, Your
19 Honor.

20 MR. BRUCK: That's fine.

21 (Pause.)

22 THE COURT: If there's not any objection, I'm
23 going to say, Members of the jury, would you like to
24 recess for the evening or would you like to continue
25 deliberating today? Any objection?

1 **MR. BELL:** No objection from the State.

2 **MR. BRUCK:** No objection.

3 **THE COURT:** And I had mentioned to y'all at the
4 bench, I just wanted to make sure that the record
5 was absolutely clear that the State withdrew its
6 notice of a death penalty in this case. So a
7 sentence of death was not an option in this case
8 upon a guilty verdict and, therefore, everyone
9 agreed that any sentencing proceeding will-be—
10 conducted by the Court; is that correct?

11 **MR. BELL:** That's correct, Your Honor. We did
12 that in open court, I think, in Moncks Corner.

13 **MR. BRUCK:** Yes, we agree with that.

14 **THE COURT:** All right.

15 (Pause.)

16 **THE COURT:** Mr. Bruck, insofar as
17 sequestration, can you discuss that with your
18 client, too?

19 (Pause.)

20 **MR. BRUCK:** We've discussed it and he concurs.

21 **THE COURT:** Is that correct, Mr. Cooper, you
22 concur, if the jury requests that they be allowed to
23 break for the evening, you concur, and your
24 counsel's statement, you wish to allow the jury to
25 go home rather than be sequestered?

1 **DEFENDANT COOPER:** Yes, sir.

2 **MR. BRUCK:** Your Honor, you might have been
3 planning to do this anyway, but if it comes to that,
4 it might be helpful to tell the jury that normally
5 you would sequester them and so they're really being
6 entrusted, all the more reason why they should be
7 especially careful to avoid any information.

8 **THE COURT:** Anything special the State would
9 like me to say?

10 ~~**MR. BELL:**~~ Your Honor, we just ask that you do
11 what you usually do, don't discuss the case until
12 you come back in the morning.

13 **THE COURT:** They did indicate they would like
14 to recess for the evening.

15 (Court's Exhibit Number 13, jury note, was
16 marked for identification purposes.)

17 **THE COURT:** All right. Bring the jury in.

18 (The jury returns to the courtroom at 9:55
19 p.m.)

20 **THE COURT:** All right. Ladies and gentlemen, I
21 received your note that you would like to recess for
22 the evening. I'm going to repeat my instructions.
23 You must not discuss this case in any way
24 whatsoever, must not expose yourself to any type of
25 coverage, media, newspaper, T.V., radio, or contact

1 from anyone in any way whatsoever.

2 I understand from an earlier conversation that
3 someone may have a night job. Sir, you will not be
4 able to report to your job tonight. If you have any
5 problem with your employer, you have the clerk call
6 your employer and straighten that out, all right?

7 Now, I had a couple of options. I could keep
8 you here until a decision was reached, ladies and

9 gentlemen. I could send you to a hotel and
10 sequester you and then bring you back in the morning
11 or I could send you home under the premise that you
12 follow my instruction and not have any type of
13 contact or discussion about this whatsoever. So far
14 throughout this trial, I trust that's been done and
15 you've indicated to me that's what you've been doing
16 and everyone has agreed to do that. So please keep
17 that in mind.

18 This case has been important to everyone
19 involved. And you have had front row seats in this
20 case throughout the proceeding, so please don't
21 taint this in any way by having a conversation or
22 contact or discussion about this case in any way.
23 You may not discuss it in any manner until such time
24 as you all reconvene tomorrow and I instruct you to
25 begin your deliberations.

1 So, at this point, I will go ahead and excuse
2 you for the evening. If you will please report back
3 at 9:15. Is that okay with everyone? We'll proceed
4 with the deliberations. Thank you very much and see
5 you tomorrow.

6 If any of you would like to be escorted out to
7 your car, if you'll let the bailiff know, the clerk
8 and the deputies will arrange for that. One of you
9 needs a ride, I understand the deputy will arrange
10 for that, too.

11 (The jury was excused for the day.)

12 **THE COURT:** All right. See y'all tomorrow.
13 Thank you.

14 (Whereupon, the proceedings were concluded
15 for May 31, 2006.)

16 (The following proceedings were held on June
17 1, 2006.)

18 (The jury resumed their deliberations at
19 9:38 a.m.)

20 (A recess transpired.)

21 **THE COURT:** All right. I understand we have a
22 verdict. Is the State ready to proceed?

23 **MR. BELL:** The State's ready, Your Honor.

24 **THE COURT:** Defense ready?

25 **MR. BRUCK:** Yes, sir.

1 **THE COURT:** Bring the jury in, please.

2 (The jury returns to open court to report
3 its verdict at 10:38 a.m.)

4 **THE COURT:** Good morning, ladies and gentlemen.

5 I understand now, Mr. Foreman, that the jury
6 has reached a unanimous verdict as to each charge;
7 is that correct?

8 **FOREMAN:** That is correct.

9 **THE COURT:** Could you hand the verdict form up
10 to me, please?

11 (The clerk hands the verdicts to the Judge.)

12 **THE COURT:** All right. Madame Clerk, please
13 publish the verdict.

14 Please stand.

15 **THE CLERK:** Indictment 90-GS-32-83 and 84, the
16 State versus Gene Tony Cooper. As to an indictment
17 for murder, indictment number 1990-GS-32-0083, We,
18 the jury, unanimously find the defendant guilty.

19 As to the indictment of kidnapping, indictment
20 number 1990-GS-32-0083, We, the jury, unanimously
21 find the defendant guilty.

22 As to the indictment for armed robbery,
23 indictment number 1990-GS-32-0083, We, the jury,
24 unanimously find the defendant guilty.

25 As to the indictment of conspiracy to commit

1 armed robbery, indictment number 1990-GS-32-0084,
2 We, the jury, unanimously find the defendant guilty.

3 Mr. Foreman, ladies and gentlemen, as I call
4 your name and number, please hold your hand up so I
5 can recognize you. I will ask you as to the
6 verdicts, what is your verdict and are they still
7 your verdicts, and please respond at that time.

8 Juror Number 48, Tara Fields, as to the
9 verdicts, were these your verdicts and are they

10 still your verdicts?

11 **JUROR:** Guilty, yes.

12 **THE COURT:** You can say yes or no.

13 **THE CLERK:** Juror Number 227, Sandra Bella.

14 **JUROR:** Guilty.

15 **THE CLERK:** Wait for the question, please,
16 ma'am. As to these verdicts, were these your
17 verdicts and are they still your verdicts?

18 **JUROR:** Yes.

19 **THE CLERK:** Number 115, Dawn Morgan, as to the
20 verdicts, were these your verdicts and are they
21 still your verdicts?

22 **JUROR:** Yes.

23 **THE CLERK:** Number 78, Lawrence Kean, as to the
24 verdicts, were these your verdicts and are they
25 still your verdicts? I'm sorry, Mr. Kean was

1 excused. I apologize.

2 Number 70, Brandon Hill, as to the verdicts,
3 were these your verdicts and are they still your
4 verdicts?

5 **JUROR:** Yes.

6 **THE CLERK:** Number 219, Michael Edwards, as to
7 the verdicts, were these your verdicts and are they
8 still your verdicts?

9 **JUROR:** Yes.

10 **THE CLERK:** Number 26, Patricia Cavanaugh, as
11 to the verdicts, were these your verdicts and are
12 they still your verdicts?

13 **JUROR:** Yes.

14 **THE CLERK:** Number 30, Howard Clark, as to the
15 verdicts, were these your verdicts and are they
16 still your verdicts?

17 **JUROR:** Yes, ma'am.

18 **THE CLERK:** Number 149, Larhorda Smith, as to
19 the verdicts, were these your verdicts and are they
20 still your verdicts?

21 **JUROR:** Yes.

22 **THE CLERK:** Number 230, Ronda Taylor, as to the
23 verdicts, were these your verdicts and are they
24 still your verdicts?

25 **JUROR:** Yes.

1 **THE CLERK:** Number 206, Howard Puckett, as to
2 the verdicts, were these your verdicts and are they
3 still your verdicts?

4 **JUROR:** Yes.

5 **THE CLERK:** Number 166, Gloria Ward, as to the
6 verdicts, were these your verdicts and are they
7 still your verdicts?

8 **JUROR:** Yes.

9 **THE CLERK:** Number 154, Susan Steele, as to the

10 verdicts, were these your verdicts and are they
11 still your verdicts?

12 **JUROR:** Yes.

13 **THE CLERK:** All jurors polled, Your Honor.

14 **THE COURT:** All right. The jury's been polled.
15 Any matters pertaining to the jury before I excuse
16 them?

17 **MR. BELL:** None from the State, Your Honor.

18 **THE COURT:** Defense?

19 **MR. BRUCK:** No, sir.

20 **THE COURT:** All right. Ladies and gentlemen, I
21 want to thank you for your service in the case. I
22 know it's been a long case. I'm satisfied that you
23 gave each side your complete and upmost attention.
24 It's your job to decide who and what you wish to
25 believe and apply those facts to the law. I'm

1 satisfied you gave everyone your fair and just
2 consideration of the issues in this case.

3 At this point, you'll be excused. Again, I
4 want to thank you on behalf of the State, as well as
5 the county for your service. If you would like to
6 stay during the sentencing component of this
7 proceeding, you're welcome to stay. Otherwise,
8 you're excused and I hope y'all have a great
9 weekend. Thank you very much.

10 (The jury was excused.)

11 **THE COURT:** All right. Any matters for the
12 Court, motions or otherwise before sentencing?

13 **MR. BRUCK:** I would renew the motions made at
14 the close of the defense case, that is motion for a
15 directed verdict on the grounds stated at the time
16 and also the motion to dismiss for lack of a speedy
17 trial, renewing the grounds made prior to trial and
18 made at the close of the defense case.

19 **THE COURT:** All right. For the reasons
20 previously stated, I deny those motions. Anything
21 further?

22 **MR. BRUCK:** No, sir.

23 **THE COURT:** All right. Insofar as sentencing
24 is concerned, this was all under the old law in '89;
25 is that correct?

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1 (Brief Recess.)

2 **THE COURT:** Anything from the State on
3 sentencing?

4 **MR. BELL:** Yes, Your Honor. I think we have a
5 couple. I think my colleague would like to address
6 the Court. I know one member of the victim's family
7 would like to address the Court. And then I'll
8 address the Court at the end of that, Your Honor.

9 ~~**THE COURT:** Yes, sir.~~

10 **MR. LUPTON:** Your Honor, with regards to prior
11 record, I think the Court is aware that the
12 defendant has three prior armed robbery convictions
13 from 1977, a string of armed robberies that occurred
14 in multiple counties. Also, in that stream of
15 crimes, was a housebreaking and grand larceny.

16 Your Honor, once he was sentenced to the
17 department of corrections for those various
18 offenses, he entered the department of corrections,
19 at the time, I believe he was 17 or 18 and was sent
20 to Manning Correctional, which was, at the time, a
21 facility where younger violent offenders were housed
22 to keep them away from the CCI population. At that
23 point, he was caught plotting an escape, was
24 transferred to CCI.

25 While in CCI, he made three attempted escapes.

1 One was handled in-house administratively with
2 revocation of good time and two resulted in Richland
3 County convictions for escape. Your Honor, one of
4 those he made it out of a work detail and had to be
5 fired upon in downtown Columbia endangering citizens
6 of Columbia in that escape attempt.

7 The third escape attempt was he rushed the
8 gate. He got through the bars of his cell and made
9 it out, hid out in the yard and during a shift
10 change was able to rush some of the guards and get
11 out of the gate before he could be caught. At that
12 point, bloodhounds and a search had to be initiated
13 and it took a couple of hours before he was finally
14 caught.

15 While he was in the maximum security unit at
16 CCI, he was also involved in an incident where he
17 managed to escape from his locked cell and shanked a
18 fellow inmate. I believe he stabbed him three times
19 with an illegal shank.

20 So the defendant represents both a danger to
21 the community even while incarcerated and a danger
22 to others. I think the Court should take that into
23 consideration.

24 I also think the Court should take into
25 consideration that in the process of this offense,

1 there was some coconspirators that gave statements
2 to the police, his niece, Brenda McLauren, that the
3 defendant got with them and put them up to giving
4 him a false alibi, which she admitted later. In the
5 process of that admission that she gave him a false
6 alibi, was still trying to cover for him, admitting
7 that he was involved in casing the robbery, but said
8 that he backed out of it after discovering she
9 didn't have the money.

10 That evidence was not available to the Court
11 based on Fifth Amendment privileges with that
12 coconspirator, but I think that is relevant to the
13 Court's decision on sentencing.

14 Your Honor, the defendant has also made threats
15 against the lives of various officials involved in
16 this case, including Solicitor Myers who is in the
17 back of the courtroom. Some of that was relayed to
18 his wife who gave information about that. And then
19 based on spousal privilege, the State was not
20 allowed to present that to the jury or the Court.

21 Along with that information, she also stated
22 that he had confided in her that he had been working
23 on Bo Sutherland to get Bo Sutherland to take the
24 blame for the offense while in the department of
25 corrections. That information was not available to

1 the jury or the Court based on spousal privilege
2 assertion, but I think that it is relevant at this
3 point in consideration of sentence. Thank you, Your
4 Honor.

5 **MR. BELL:** If it please Your Honor, I think the
6 brother of the victim, Mr. Robby Branham, would like
7 to address the Court.

8 **THE COURT:** Come forward, please. State your
9 full name for the record, please.

10 **THE WITNESS:** Robby Branham. Thank you, Your
11 Honor, for allowing me to speak. The family of
12 Kimberly Quinn would like to express to the Court
13 some of what we have felt since the day in October
14 of '89. The pain and hurt we have felt due to this
15 malicious and very brutal crime can never be taken
16 back from our hearts and our minds. These
17 proceedings have brought back many tearful feelings
18 and truths about what we have been through.

19 A mother's life was shortened by her everyday
20 thoughts about her daughter's death. She was never
21 able to forget how brutal this was to a child whom
22 she gave birth to.

23 My life was changed dramatically due to this
24 life changing event. I was able to survive due to
25 the love of my wife and through the faith we shared

1 in God.

2 Amanda, Kim's daughter, had to endure and live
3 with the thoughts of her mother and the loss of her
4 mother's loving arms wrapped around her now gone
5 forever, also her not being able to help out her
6 mother due to her own condition at the time. Amanda
7 had to also take another loss just ten months after
8 losing her own brother in a house fire that she was
9 burned in, also. I can't even fathom why she was
10 spared from this or even from the defendant's
11 intentions that night.

12 I know that the so-called motive for this event
13 has come out and supposedly has said, and I can say
14 it is a disgrace that people felt that way that the
15 fire occurred the way it did. If they had only
16 taken the time to learn about why or how the fire
17 occurred the way investigators did. They found that
18 the landlord and the furnace company were at fault
19 not my sister, who was not even -- not at home at
20 the time, but a baby-sitter was.

21 Only if the defendant could have known the love
22 that my sister had for her children. She would have
23 gladly laid down her life for her children. The
24 hurting she was going through from losing her son
25 and seeing and caring for her daughter was -- from

1 death was greater than anyone should have to bear.

2 This is only a small part of what has come and
3 gone through our hearts and minds during the 16 plus
4 years. If we could draw pictures of what we have
5 felt as family and friends, I feel sure it would
6 have filled many rooms.

7 All this being said, we ask that the defendant
8 be given the maximum sentencing for the crimes he
9 ~~has been found guilty of. We know without a doubt~~

10 that the defendant would be dangerous outside of the
11 penitentiary due to his lack of care for human life
12 and a desire to see it treated with malice. We hope
13 that this time these proceedings will stand more
14 firmly upon the truth and we hope not to have to see
15 the judicial system be used again for this. In the
16 end, God knows all. Thank you.

17 **THE COURT:** All right. Thank you, sir.

18 **MR. BELL:** Your Honor, I would just like to end
19 up by saying this, that, first of all, when we took
20 the death penalty out, it wasn't because we didn't
21 think this case was serious, we wanted to
22 concentrate. It was a short time and it was a
23 complicated case and we wanted to make sure that we
24 got a guilty verdict and we did that.

25 We think that based on his prior record, based

1 on the serious nature of this crime, the terrible
2 nature of this crime just over money, the shameless,
3 the -- it's not even -- it's not worth a life for
4 money like that, Your Honor. We think that this
5 case demands the maximum verdicts in each and we
6 would ask for consecutive time on this, Your Honor,
7 because we think that he's a dangerous individual,
8 he needs to spend the rest of his life in prison,
9 Your Honor.

10 **THE COURT:** All right. Anything further?

11 **MR. BELL:** Nothing from the State.

12 **THE COURT:** Defense.

13 **MR. BRUCK:** Your Honor please, the jury has
14 spoken and, obviously, I'm not going to question
15 anything they have done. I would like to respond to
16 some things Mr. Lupton said.

17 The account -- as you know, Tony Cooper went to
18 prison when he was 17, at a time when he was under
19 the domination of an older criminal, Robert
20 Sutherland. The incidents in prison were at the
21 very beginning of his time in prison. And the
22 strongest proof of that is the fact that he was
23 paroled despite these prior escape attempts.

24 These were -- what Mr. Lupton was describing
25 were events that occurred when Tony Cooper was in

1 his teens or just 20 years old. He's now 47. I've
2 represented him nearly 16 years and he is not the
3 person now that he was in 1989 when this crime
4 occurred. Obviously, he has aged. He has matured.

5 I have never had a client who has been so
6 appreciative of the work that I and the other
7 lawyers working with me and Mr. Andrews' staff have
8 done. I've just seen Tony Cooper grow up. It
9 happened too late. But I am firmly convinced that
10 if he is released as an old man, society has
11 absolutely nothing to fear for him -- from him.

12 Thirty years is 30 calendar years. He would be
13 60 before he could be released under that sentence.
14 And taking everything into account, including this
15 still rather hazy facts of exactly who did what to
16 whom and why, in this case, I think 30 -- we would
17 submit that a 30 year sentence is punishment enough
18 in this case.

19 Your Honor is aware of plea negotiations that
20 occurred between the parties. I realize that's all
21 water over the dam now, but I don't think that the
22 record as a whole supports the notion that society
23 requires that Tony Cooper die in prison. And I
24 would ask the Court to fashion a sentence that
25 allows him when he is an old man, to be able to be

1 released to go home.

2 **THE COURT:** Anybody else? Does the defendant
3 wish to address the Court?

4 **DEFENDANT COOPER:** Judge, I'd like to ask the
5 Court to consider giving me a little bit of light in
6 the future. I'd like to ask the Court that.

7 **THE COURT:** All right. Anything further?

8 **MR. BRUCK:** No, sir. _____

9 **THE COURT:** Anything-further from the-State in
10 response?

11 **MR. BELL:** Nothing from the State, Your Honor.

12 **THE COURT:** You may be seated.

13 All right. It's the judgment of the Court,
14 having considered all of the facts and circumstances
15 of this case, that on the murder charge you receive
16 a sentence to life in prison. On the kidnapping,
17 there is no sentence pursuant to the statute since
18 you were convicted of murder. On the armed robbery,
19 25 years. On the conspiracy, five years. Good luck
20 to you, sir.

21 Thank y'all.

22 **MR. LUPTON:** Thank you, Your Honor.

23 **MR. BRUCK:** Thank you, Your Honor.

24 **MR. COOPER:** Can I say something, Judge? I'm
25 the daddy. I'd like to say something.

1 **THE COURT:** I'm happy for you to say something.
2 They indicated they didn't have anyone else, sir,
3 but I'll be happy to hear from you.

4 **MR. COOPER:** Can I speak now?

5 **THE COURT:** If you wish to approach, you may
6 say something, sir. Come forward, please.

7 You want to bring him back out.

8 I'm sorry, I didn't understand that there was
9 anyone else that wished to speak. I thought y'all
10 indicated there was no one else that wished to
11 speak. I'm happy to hear everyone out, sir.

12 State your full name for the record.

13 **MR. COOPER:** Reverend Gene Cooper. The only
14 the mistake that -- I raised that boy. The only
15 mistake he did when he come out of prison, he hired
16 Bo Sutherland, if he would have done what the prison
17 had told him. Bo Sutherland, I knowed him since he
18 was 14 years old. I stayed right down the street
19 from him.

20 Now, we better be sure what we're doing because
21 the Bible says there's a curse following all
22 lawyers. So you better be sure a man is guilty.

23 The only thing my son is guilty of is hiring Bo
24 Sutherland. And they were, I thought, good friends.
25 They used to fix cars and everything. But the only

1 thing he's guilty of is hiring him because if my son
2 would have been there, Bo Sutherland might have been
3 dead, but that girl would not because he had a
4 passion for women. I've seen him take things and
5 buy stuff for women that had children that didn't
6 have no daddy, didn't have nothing in the house. He
7 would take my lawn mower and sell it and go get them
8 something.

9 But I want to tell you, you got a curse _____
10 following you. You better be sure what you're
11 doing. I'm an ordained minister and I have
12 authority to tell you that. And you can take my
13 book, the Bible and --

14 **THE COURT:** Sir, if you could address the
15 Court, please, not any individual. This is a
16 sentencing phase in the court. I understand your
17 passion for this.

18 **MR. COOPER:** Well, I mean, I want to say if
19 Tony had of been there, I don't believe that girl
20 would have got killed. Now, Bo might have got
21 killed because he would have tried to take the gun
22 away from him.

23 **THE COURT:** All right. I understand your
24 feelings, sir. The way our system works is the jury
25 gets an opportunity to assess all of the facts and

1 make those determinations. I don't even fill that
2 role, the jury makes that decision.

3 **MR. COOPER:** I just wanted to say that. And I
4 appreciate you letting me and the Lord bless you.

5 **THE COURT:** No problem, sir. I'm happy to hear
6 from anyone that wishes to address the Court.
7 Anyone else?

8 (There was no response.)

9 **THE COURT:** All right. Thank y'all very much.

10 **MR. LUPTON:** Thank you, Your Honor.

11 **MR. BELL:** Thank you, Your Honor.

12 **THE COURT:** All right. We shall be adjourned.

13 I thank y'all again for your courtesies to one
14 another and to this Court. I appreciate it.

15 (For purposes of the record, State's Exhibit
16 Number 44, follow-up report, was marked for
17 identification purposes.)

18

19

20 **END OF PROCEEDINGS**

21

22

23

24

25

AFFIDAVIT OF JAMES M. FRAZIER, III

Being duly sworn, I, James M. Frazier, III, would offer the following:

I am an Assistant General Counsel for the Office of General Counsel of the Texas Department of Criminal Justice, a state governmental entity which includes the Texas prison system. My duties with that office include providing legal advice to the department regarding the rendition of prisoner witnesses from the department's correctional facilities. In addition to reviewing the legal sufficiency of rendition paperwork, I also schedule hearings in district courts for renditions, and attend them as a representative of the department.

The State of Texas is a signatory to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act, and the State of South Carolina does not appear to be a signatory to that Act. The Texas Department of Criminal Justice will not honor a mere subpoena presented to us for one or more of our prisoners to appear as a witness in a state court in South Carolina. What is required for the department to release one of its prisoners to South Carolina authorities to be a witness in a criminal proceeding in that state is an executive agreement between the governor of South Carolina and the governor of Texas. The agreement must be accompanied by documentation guaranteeing protection of the prisoner witness from civil lawsuits and/or criminal prosecution from circumstances arising in South Carolina prior to the rendition.

The department's procedures take into account our opinion that a prisoner witness has a legal right to a hearing before a district judge who will then decide whether or not the prisoner witness is to be transported to the requesting state. The Texas Department of Criminal Justice will not release its prisoners to the requesting state without such a hearing and an appropriate order of transport from a district judge. We are aware of only two judges in the state of Texas who hold hearings for prisoner witness renditions to other states.

A request was made for the rendition of Phillip Gary Farmer, an inmate currently incarcerated in and in the custody of a correctional facility of the Texas Department of Criminal Justice, by B. Harrison Bell, Jr., a South Carolina prosecutor, as witness in the case of State v. Gene Tony Cooper. The appropriate paperwork, including the governor's warrant, was submitted by the State of South Carolina and received by the State of Texas.

My office received the governor's warrant and other paperwork for the subject rendition on May 10, 2006. I promptly contacted the court coordinators for both judges and discovered that neither judge was available for the remainder of the month of May for the rendition hearing. On or about May 11, 2006, I informed Mr. B. Harrison Bell, Jr. by telephone call that there were no judges available for a rendition hearing for the remainder of the month of May 2006. I have no reason to believe the South Carolina

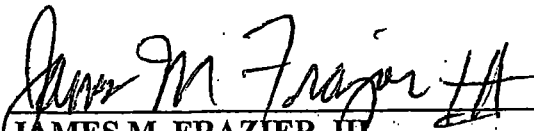
COURT'S
EXHIBIT

3

5-22-06 JS

authorities were aware of that unavailability before this week when I first informed them of such.

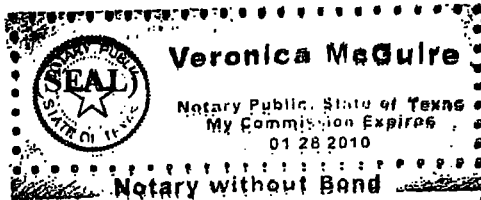
The State of South Carolina followed the proper procedures for the only means available to it to summon to one of its courts a prisoner witness from the State of Texas.

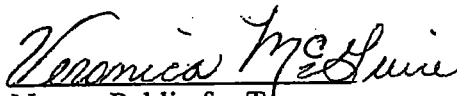

JAMES M. FRAZIER, III
ASSISTANT GENERAL COUNSEL
TEXAS DEPARTMENT OF CRIMINAL JUSTICE

STATE OF TEXAS

COUNTY OF WALKER

SWORN to before me this 12th day of MAY, 2006




Notary Public for Texas

My Commission Expires: 01/28/2010

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
 _____)

AFFIDAVIT OF B. HARRISON BELL

Being duly sworn, I, B. Harrison Bell, testify as follows:

I am the lead prosecutor in the case of State v. Gene Tony Cooper. In that capacity, I attended a status conference concerning the setting of the trial date in this case on or about February 8, 2006. At that time several potential trial dates were discussed.

During the beginning to middle of March 2006, I discovered that the case was set for trial on May 22, 2006. Until that time, I did not know the trial date had been set. Upon information and belief, opposing counsel was also unaware prior to this time that the trial date had been set. Both sides discovered this when inquiring about the trial date in order to subpoena witnesses. It appears that both parties misunderstood the court during these discussions and believed that the dates being discussed were merely potential trial dates.

I began attempting to subpoena Phillip Gary Farmer, an inmate in the Texas Department of Corrections, at this time.

Farmer was contacted in the Texas Department of Corrections and it was determined that he was willing to testify and that his testimony would be consistent with his testimony in the original trial.

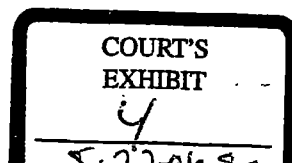
The State of Texas refused to honor a subpoena for the attendance of Farmer as a witness in this trial because South Carolina was not a signatory State in the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act. Thus, I was required to research the proper forms and procedures for requesting interstate rendition from Texas to South Carolina.

As part of the rendition process, I was required to arrange for two police officers to go to Texas, take custody of the witness and transport him back to a secure facility in South Carolina, then similarly return him once the trial was over. I arranged for the witness' housing in the Lexington County Detention Center. I also requested that two SLED agents be assigned to go to Texas and return with the prisoner.

It took seven to ten day for SLED to assign the requested agents. At this point, non-refundable airline tickets were purchased to enable the witness transportation.

Additionally, once this information was provided by SLED, the rendition paperwork was finalized and taken to the Honorable Judge Daniel F. Pieper for signature on April 20, 2006. Once signed, it was taken to the Lexington Clerk of Court for signature and finally to the Governor's Office.

Governor Mark Sanford signed that request on or about April 27, 2006. The request was forwarded to the South Carolina Secretary of State. From there it was further processed, then forwarded to Texas.



The Honorable William Keesley
 Court of General Session
 Lexington County S.C.
 105 South Lake Drive
 Lexington, S.C. 29072

RE: Restraining order

December 11, 1997

Dear Mr. Keesley,

On Wednesday, December 10, 1997 I telephoned David Bruck, Attorney, to speak with him. Mr. Bruck advised me that he was unable to talk with me due to a motion for a restraining order being filed by my Attorneys, Wayne Floyd, Bill Rast and Diana Holt. Please be advised that I do not agree with my Attorneys actions on this issue and I pray the court not to grant this motion. If the court has granted the motion I request for it to be dismissed as soon as the court can do so. Thank you for your time and consideration in this matter.

Respectfully submitted

Robert BO Southerland

Robert "BO" Southerland SK#4825
 Lieber Correctional Inst.
 P.O. BOX 205 UA1-227
 Ridgeville, S.C. 29472

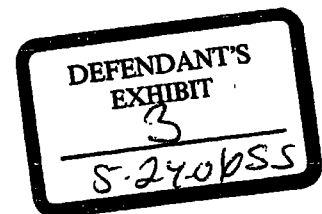
Sworn to before me this 12 day of

December, 1997 at Ridgeville, S.C.

Lawrence Edward Whitaker

My Commission expires

My Commission Expires December 2, 2001



STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Indictment No.'s 90-GS-32-83 & 84
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	STIPULATION
	)	
GENE TONY COOPER,	)	
Defendant,	)	
	)	

The parties hereby enter the following Stipulation for publication to the jury:

The State and the Defendant have agreed that on the morning of Friday, October 6, 1989, shortly after 7:00 a.m., Peter "Tony" Demos went to the victim's residence along with Ms. Norma Campbell in order to help look for the victim, Kimberly Quinn. While there he found the victim's wallet laying on the ground at the edge of the grass in her driveway. The wallet was recovered and contained her South Carolina Driver's License, but not her South Carolina Identification Card. Additionally, there was no cash in the wallet when recovered.

The parties further stipulate that the wallet in evidence is the wallet he found that morning.

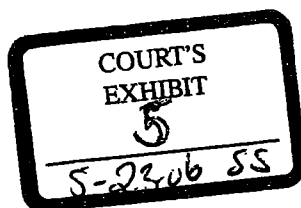
We Consent to this stipulation:

For the State:

B. Harrison Bell
B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I. Bruck
David I Bruck
John E. Duncan
Attorney for the Defendant



STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
STATE OF SOUTH CAROLINA)
v.)
GENE TONY COOPER,)
Defendant.)
_____)

IN THE COURT OF GENERAL SESSIONS
ELEVENTH JUDICIAL CIRCUIT
Indictment No.'s 90-GS-32-83 & 84

STIPULATION

The parties hereby enter the following Stipulation:

The State and the Defendant have agreed that the body found in this case on October 8, 1989, as well as the hand and feet found on October 11 ~~and~~ 12, 1989 was the victim Kimberly Quinn.

WVZ
D/12

We Consent to this stipulation:

For the State:

B. Harrison Bell
B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I. Bruck
David I Bruck
John E. Duncan
Attorney for the Defendant



STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
STATE OF SOUTH CAROLINA)
v.)
GENE TONY COOPER,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
ELEVENTH JUDICIAL CIRCUIT
Indictment No.'s 90-GS-32-83 & 84

STIPULATION

The parties hereby enter the following Stipulation for publication to the jury:

The State and the Defendant have agreed that attorney Jonathan Harvey represented the victim, Kimberly Quinn, in a personal injury case arising out of an automobile accident during the time period involved in this case. Mr. Harvey had negotiated a settlement in that case for \$7,750, and had informed her prior to October 4, 1989 that she was to receive \$2,837.18 as her portion of this settlement after all fees and expenses were deducted.

However, Mr. Harvey had deposited the settlement check from the insurance company in his trust account. The bank had placed a 10-day hold on this money. Therefore, it was not available to be paid to Kimberly Quinn until Tuesday, October 10, 1989. As a result, she had not been given her portion of the settlement money prior to her death.

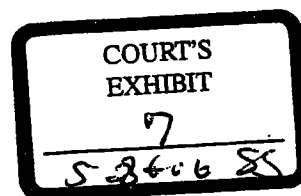
We Consent to this stipulation:

For the State:

B. Harrison Bell
B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I Bruck
David I Bruck
John E. Duncan
Attorney for the Defendant



STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Indictment No.'s 90-GS-32-83 & 84
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	STIPULATION
	)	
GENE TONY COOPER,	)	
Defendant.	)	

The parties hereby enter the following Stipulation for publication to the jury:

The State and the Defendant have agreed that Kimberly Quinn was sent a check by the South Carolina State Treasurer's Office in the amount of \$149, for Aid to Families with Dependent Children (AFDC) to which she was entitled. This check was mailed to her so that she would receive it on October 1, 1989.

Bank records show that this check was cashed at the South Carolina National Bank (now Wachovia) located at the corner of Knox Abbott Drive and 12th Street in Cayce at 9:17 a.m. on Friday, October 6, 1989. The check was cashed at the drive-thru teller from one of the 2 farthest outside lanes. The check was sent through the drive-thru tube along with the victim's South Carolina Identification Card.

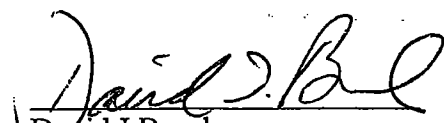
If called to testify, the teller who cashed the check would say that she had no independent memory of the transaction. She did not see who cashed the check, what type vehicle was used, how many people were in the vehicle, or what sex the person or persons were. However, she would testify, that it was her policy to cash AFDC checks that were sent through the tube with a valid driver's license or identification card if the card was in the same name as the check regardless of who presented the check.

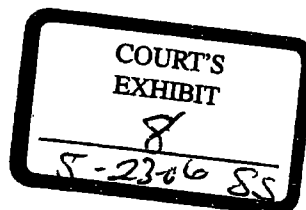
We Consent to this stipulation:

For the State:


B. Harrison Bell
Senior Assistant Solicitor

For the Defendant


David I. Bruck
John E. Duncan
Attorney for the Defendant



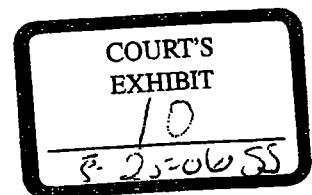
The State and Robert Southerland reached an agreement prior to his testimony in this trial.

Mr. Southerland agreed to testify for the State.

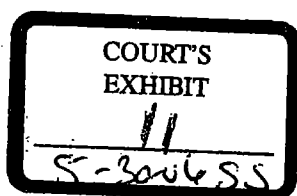
For its part, the state agreed not to seek the death penalty when Mr. Southerland is re-sentenced for the murder of Kimberly Quinn.

The effect of this agreement is that Mr. Southerland will not be sentenced to death, and could receive a sentence of not less than 30 years, in the discretion of the sentencing judge.

If the state had not agreed to withdraw its request for the death penalty, Mr. Southerland could not have received any sentence other than death, or life imprisonment without parole.



There is evidence of a blood alcohol level in this case. The parties agree that at the time of this offense, a blood alcohol level of 0.100 % ^{or greater} created an inference of impairment, and a blood alcohol level of 0.050 % or less conclusively proved ~~a~~ person was not impaired due to alcohol.



THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Lexington County

The Honorable Ralph King Anderson, Jr., Circuit Court Judge

THE STATE ,

Respondent,

v.

ROBERT H. SOUTHERLAND,

Appellant.

MOTION TO STRIKE ALL GUILT PHASE ISSUES FROM
INITIAL BRIEF OF APPELLANT OR, IN THE ALTERNATIVE TO
SUPPLEMENT-RECORD-ON-APPEAL

The above named Respondent, the movant in this matter,
would respectfully show unto this Court as follows:

I.

Appellant was indicted at the January, 1990 term of court by the Lexington County Grand Jury for conspiracy to commit murder, kidnapping and armed robbery. He was later indicted at the January, 1991 term of court for murder, kidnapping, armed robbery and forgery. All of these charges stemmed from the October 5-6, 1989 death of Kimberly Ann Quinn. The State sought the death penalty.

On March 2-9, 1992, Appellant was tried before the Honorable Ralph King Anderson, Jr. and a jury. The jury found him guilty of murder, kidnapping, armed robbery, forgery and conspiracy. Following a sentencing proceeding in accordance

with S.C. Code Ann. §16-3-20 (Supp. 1992), the jury found the existence of two statutory aggravating circumstances: that the murder was committed while in the commission of kidnapping and robbery while armed with a deadly weapon. See, §16-3-20 (c) (a) and (d). Based upon this finding, on March 9, 1992, the jury recommended a sentence of death. That same date, Judge Anderson, after making the requisite affirmation of the jury's sentence, imposed a sentence of death for murder. He imposed consecutive sentences for each of the remaining convictions. Appellant then timely served and filed a Notice of Appeal. His appeal of his sentence and conviction, which has been consolidated with this Court's mandatory review of his sentence under S.C. Code Ann. §16-3-25 (Supp. 1992), is presently pending before this Court.

II.

On April 11, 1992, following his conviction and sentence, Appellant gave a statement to David I. Bruck, Esquire, counsel for Appellant's co-defendant, Gere Tony Cooper, Jr.¹ In this sworn statement, a copy of which is attached as Exhibit A and incorporated herein by reference. Appellant admits that he murdered Kimberly Quinn. In pertinent part, he stated that:

Kim was unconscious. I picked her up and put her in the front seat of the car. Why someone didn't see me I don't know. Then I drove out to the pond. She

¹ Cooper, who was likewise convicted and sentenced to die for his part in Ms. Quinn's murder, also has an appeal pending before this Court. See, State v. Gere Tony Cooper, Jr., Docket NO. _____

started moaning. I had her pocketbook. There was \$800 in cash in the pocketbook, some 60 Xanax, and about 12 of them generic Valiums. Also a welfare check. The welfare check was folded. There was a highway department ID. There wasn't any wallet, though. If she had a wallet it must have fallen out of her pocket.

First, I was going to drown her. But I had a shotgun in the car. It was my shotgun. I thought about how she had killed her young 'un to get money for drugs. She deserved it. I shot her in the back. She was laying on the ground on her left side. She was breathing heavy. I was about 6 feet away and I popped another one. I hit her in the back of neck. Joel Sexton doesn't know anything about gunshot wounds. I stood back and pumped two more rounds in her head. These were not close wounds. I stood back to do it. The last gunshot probably just hit the top of the head.

(See Exhibit A, pp. 2-3)

Appellant thereafter indicated that no one had contacted him about giving a statement and that he had contacted Cooper's attorney about giving one. He also indicates that he did not wish to talk to his own lawyers about the statement; that he wished to handle the matter himself; that Cooper's attorney advised him that "this could hurt my own case" and that although he was aware that his statement would be used against him, he wished to give a statement, which he claims was true. Appellant then swore to this statement on April 13, 1992. (See Exhibit A, p. 3)

III.

In the Initial Brief of Appellant, Appellant raises two guilt phase issues. These are found in Arguments II and III.

respectively. (See Initial Brief of Appellant at pp. 9-29). In Argument II, Appellant claims the trial judge erroneously admitted evidence of (1) his involvement in a burglary two weeks before the murder, during which he acquired a shotgun the State contended was the murder weapon, and (2) his disposition of the murder weapon on October 6, 1989, in exchange for drugs. He predicates his argument upon the alleged lack of credible evidence connecting him with the murder. (See Initial Brief of Appellant at pp. 9-22). In Argument II, he asserts that the trial judge erred by excluding evidence that the victim was allegedly involved in a conspiracy to smuggle drugs into CCI and that she was a prostitute. In part, Appellant maintains on appeal that "in the context of this evidence further confirming Cooper's guilt of the crimes, Appellant's guilt would have appeared less plausible. The fact that Kimberly Quinn had conspired to smuggle drugs with Cooper and others was, furthermore, 'so ultimately connected with the crimes charged that its introduction was appropriate to complete the story of the crime.' The exclusion of the evidence, on the one hand, created the illusion that the State's case against Appellant was stronger than it was and, on the other, denied Appellant the opportunity to present 'a complete defense.'" (Initial Brief of Appellant at p. 29) (Citations omitted). (See also Initial Brief of Appellant at pp. 23-29)

IV.

The State has filed an Initial Brief of Respondent on June 25, 1993, contemporaneous with this Motion, in which Respondent submits that Appellant's claims in his Arguments II and III are without merit. However, based upon Appellant's sworn statement, admitting his guilt, Respondent would respectfully ask this Court to issue an Order striking these arguments. In support of its position, Respondent would rely upon this Court's prior decisions in State v. Whetsell, 276 S.C. 295, 277 S.E.2d 891 (1981); State v. Sroka, 267 S.C. 664, 230 S.E.2d 816 (1976); and State v. Patterson, 263 S.C. 176, 209 S.E.2d 39 (1974).

In Patterson, the defendant was convicted of murder and appealed. On appeal he raised a contention that the trial judge erroneously failed to instruct the jury in the lesser offense of voluntary manslaughter. While his appeal was pending, Appellant testified at the trial of his alleged co-defendant. In his sworn testimony, Patterson claimed that he was the triggerman. On appeal, this Court held that "[i]f there was any error in the court's refusal to submit involuntary manslaughter, which we do not concede, Appellant has waived the error by his subsequent explicit testimony." 263 S.C. at ___, 209 S.E.2d at 41.

This Court in Patterson further held that the trial judge did not abuse its discretion by allowing the State to add Patterson's subsequent sworn testimony to the transcript of

record and it refused to address several other issues which, "if maintained, could only result in the futility of another trial of a defendant who is inextricably tied to the death weapon and who, since his connection has freely and voluntarily declared his guilt in a most solemn fashion." *Id.*

In the subsequent case of Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981), the Appellant had brought an action for Post-Conviction Relief, under S.C. Code Ann. §17-27-10, et. seq. (1985). They were granted relief on the basis of trial counsel's alleged ineffectiveness for failing to make a motion to suppress evidence. On appeal, the Court held that the guilty plea acted as a waiver of the alleged Fourth Amendment violation. The Court further held that "... review of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty." *Id.*, citing State v. Sroka, supra.

Therefore, in light of Whetsell, Sroka, and Patterson, the State would ask this Court to strike Arguments II and II from the Initial Brief of Respondent. A retrial in the guilt phase of this case would be a futile act, since Appellant has freely and voluntarily admitted his guilt in a sworn statement, although fully aware of the effect his statement would have, as well as his right to counsel. See, State v. Patterson, supra. See also, State v. Whetsell, supra; State v. Sroka, supra. In the alternative, the State would ask this Court to allow it to supplement the Record on Appeal by adding

the affidavit hereto and having this Court consider the same with regard to Arguments II and II.

WHEREFORE, Respondent would respectfully move this Court for an Order striking Arguments II and II from the Initial Brief of Appellant; or, in the alternative, for an order allowing the State to supplement the Record on Appeal, by including the April 11, 1992 statement of Appellant; and for such other and further relief as this Court may deem fair and just.

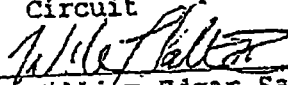
T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney
General
Chief, Criminal Appeals Section

WILLIAM EDGAR SALTER, III
Assistant Attorney General

HONORABLE DONALD V. MYERS
Solicitor, Eleventh Judicial
Circuit

By: 
William Edgar Salter, III

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Lexington County

The Honorable Ralph King Anderson, Jr., Circuit Court Judge

THE STATE ,

Respondent,

v.

ROBERT H. SOUTHERLAND,

Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the within Motion to Strike All Guilt Phase Issues From Initial Brief of Appellant or, in the Alternative to Supplement Record on Appeal on Appellant by depositing a copy of the same in the United States mail, addressed to his attorney of record, Joseph L. Savitz, III, 1122 Lady Street, Suite 940, Columbia, South Carolina, 29201. I further certify that all parties required to be served have been served. This 25th day of June 1993.

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

HAROLD M. COOMBS
Senior Assistant Attorney General
Chief, Criminal Appeals Section

WILLIAM EDGAR SALTER, III
Assistant Attorney General

HONORABLE DONALD V. MYERS
Solicitor, Eleventh Judicial
Circuit

By: William Edgar Salter, III
William Edgar Salter, III

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

STATEMENT OF ROBERT SOUTHERLAND

April 11, 1992

RS
The Wednesday before Kim Quinn was killed, Red Farmer called Tony. I was at Tony's house when Red called. I don't know whether Red said anything to Tony about a check, but I do know that he was looking for some reefer when he called Tony. Tony gave the phone to me. Red told me that this girl was getting a check, and that she wanted to buy a half pound of reefer. I said, "Yeah, I can arrange to get whatever she wants." I was under the impression that she was going to have cash. We were talking around the price. I told him that I'd have to get back with him. He said he'd call back and I told him that I would let him know something for sure.

After talking to Red that Wednesday night, I met up with Gerald LeGrand at the McDonald's near Dutch Square around 9:00 or 10:00 p.m. He wanted me to do it the next day. I was driving Tony's car at that time. I'd been driving it for a long time. LeGrand had a dude with him named Chico when I met him at McDonald's. The guy looked like Tony. He wasn't quite as heavy-set as Tony but he looked almost like him. Chico was someone that Farmer and LeGrand knew. They were all mad at Tony because he wouldn't lend them any more money after he got married. I guess he needed his money because he had four young 'uns to support. LeGrand said that Chico knew where she lived. He said to meet up with him the next day and Chico would show me where she was.

On Thursday morning I met Chico at the Shire poolroom in Triangle City. Chico said that Red wanted me to call him. I called Red on the phone from the Fastfare on Leaphart Road where Brenda works. I guess it was at the schoolhouse number. It was the number that Brenda gave me. I told Red that I could get the reefer. I told him the price was 800 bucks. Then he said that "she'd been fucking up a lot of people's dope." A lot of people didn't feel too good about her. She'd been "stepping in" people's cocaine, according to Red. That means that she'd been cutting the cocaine. Red said, "You could kill her." He said I could just take the money and everything. He told me that she'd killed her young 'un where it was supposed to be an accident. She did it to get the insurance money, so that she could buy more drugs.

After I called Red, Chico showed me where the house was. This was around 11:00 a.m., maybe 11:30. I was still driving Tony's car. We smoked reefer. I looked at all the possible ways to go into her house, around the back, and so on. I called her three times. The first and last time I got her answering machine. The middle time she picked up the phone and I acted like I'd got a wrong number. RS

After watching the house for a while we rode off and went

Statement of Robert Southerland
April 11, 1992
Page 2

RS
down to Piggy Park to get something to eat. We came back and looked at her house again. Red had said that she had a boyfriend who might be living there with her, so I wanted to check it out to be sure that he wasn't around. I told Chico to tell LeGrand that I would do it.

Red was supposed to get \$500 for the information.

After watching her house I waited around. I went to a bar, and I sat around my trailer for a while. Brenda already went down to her house that day and had found out that Kim didn't have any big check. Brenda got off a little after 3:00 that day. Me and Chico went down to the Fastfare and told Brenda to go and see if she had the money. We followed Brenda down there and parked. Brenda went down to the girl's house. She was there about 15 or 20 minutes. We met Brenda in the Post Office parking lot. She said that she didn't have the check cashed--she was getting the big money the next Tuesday. Brenda said she did have the money for the reefer. After she told me that she left and went on home or wherever she went. I took Chico back to the Shire. He was driving a dirty white Volkswagen. I didn't see him again after that.

I went back over there to Kim Quinn's house at 12:30 or 1:00 a.m. that night. The front porch light was on and the door was open. I just walked up there. I guess Red had already talked to her. She invited me in. We started smoking reefer that I had brought with me. Then I hit her in the chin with my fist. She went down. Brenda had told me that Kim had been doing morphine for a few days. I guess that's why she went down pretty easy. I hit her again. Her daughter was sleeping right in the next room. She didn't wake up, thank God. I was by myself when I did this.

Kim was unconscious. I picked her up and put her in the front seat of the car. Why someone didn't see me I don't know. Then I drove out to the pond. She started moaning. I had her pocketbook. There was \$800 in cash in the pocketbook, some 60 Xanax, and about 12 of them generic Valiums. Also a welfare check. The welfare check was folded. There was a highway department ID. There wasn't any wallet, though. If she had a wallet it must have fallen out of her pocket.

First I was going to drown her. But I had a shotgun in the car. It was my shotgun. I thought about how she had killed her young 'un to get money for drugs. She deserved it. I shot her in the back. She was laying on the ground on her left side. She was breathing heavy. I was about 6 feet away and I popped another one. I hit her in the back of neck. Joel Sexton doesn't

RC

Statement of Robert Southerland
April 11, 1992
Page 3

RS know anything about gunshot wounds. I stood back and pumped two more rounds in her head. These were not close wounds. I stood back to do it. The last gunshot probably just hit the top of the head.

I can produce the rings and the shotgun.

Why I chopped her hands and feet off I'll never know. I tried to chop off her head. That blood and liquid looking kind of stuff started slinging so I stopped. I hit her once in the back of the neck with the axe. The blade was dull and it didn't do anything. I was having trouble chopping the leg because of the pants, so I pulled the pants off, then chopped the other foot off. Then when I done that I grabbed the stumps and pulled her. Put the branches and the log on her, and then the chair that was up by the steps of the cabin. Put all that on top of her. I got a plastic gas can out of the trunk of the car. I felt like she had burned her son, so she should burn too. I poured the gas on her and put a match to it. The fire started going up into the bush, so I gathered everything up and got out of there.

The deal was that if anything came down over this they (Red and LeGrand) were going to blame Tony. They were mad at Tony because he wouldn't lend them any more money. That's what they told me, anyway. Their reason I don't know. 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 was not true. I knew where everything was because I had thrown them there myself, not because Tony had told me anything.

Anyway, that Friday morning I went over to Tony's around 6:00 or 7:00 a.m. I left Tony's about 8 or 8:30. I told him I had something to do. I told him that I'd meet him at my trailer at South Congaree. I went on down to the bank in Cayce and cashed the welfare check. I was by myself when I cashed the check. I was still driving Tony's Cougar. After I cashed the check I went back to the trailer. Tony came over and we went over to Lexington and talked to the manager of the apartment where we had a bid on repairing some damage from Hugo. Then we drove around. We went to the office where we usually worked out of. That afternoon Tony went on home. That night around 8:30 or 9:00 I went back to McDonald's at Dutch Square. I met LeGrand there. I gave him \$200. They asked about some reefer. I told them that she was dead.

RS
Altogether, I got about \$1200 worth of money, Valium, and Xanax. I ate the pills myself.

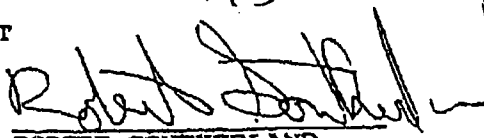
Statement of Robert Southerland
April 11, 1992
Page 4

RS I put her hands and feet in a bag and threw them in the creek. I know where the rings and the shotgun are. I am willing to take the police to find them, but I want to have someone with us when we go.

Tony Cooper didn't have anything to do with this. I have made this 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, and neither has anyone else. After I decided to make this statement, I sent word to Tony Cooper's lawyer, David Bruck, that I wanted to talk to him. When he was here seeing another client, I asked one of the officers to get him to come and talk with me. David Bruck told me that I needed to discuss this statement with my own lawyers, because this could hurt my own case. However, I don't want to talk to my lawyers about it. I want to handle this situation myself. I understand that everything in this statement could be used against me in my own case. I still have decided to go through with this statement. I have read over this statement carefully before signing it, and everything in it is true. RS

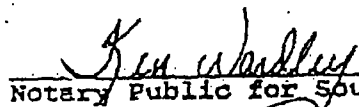
END OF STATEMENT

Signed:


ROBERT SOUTHERLAND

Sworn to and subscribed before me

This 13 day of April, 1992.

 L.S.
Notary Public for South Carolina

My Commission Expires 03-13-1996

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

INDICTMENT FOR
 MURDER AND KIDNAPPING AND ARMED
 ROBBERY AND FORGERY

At a Court of General Sessions, convened on the 8th day of January, 1990,
 the Grand Jurors of Lexington County present upon their oath:

COUNT ONE - MURDER

That GENE TONY COOPER, JR.
 did in Lexington County on or about the 5th and 6th days of October,
 19 89, feloniously, wilfully and intentionally and with malice aforethought
 kill one Kimberly Ann Quinn by means of shooting the victim's head, neck and
 back with a shotgun, and that the said Kimberly Ann Quinn did die in Lexington
 County as a proximate result thereof on or about the 6th day of October, 1989.

COUNT TWO - KIDNAPPING

That GENE TONY COOPER, JR.
 did in Lexington County on or about the 5th and 6th days of October,
 19 89, unlawfully seize, and confine, inveigle, decoy, kidnap, abduct,
 or carry away one Kimberly Ann Quinn without authority of law and without
 her consent, in violation of Section 16-3-910 of the 1976 South Carolina Code
 of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
 provided.

[Signature]
 SOLICITOR

20-08-35

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR

MURDER AND KIDNAPPING AND ARMED ROBBERY
AND FORGERY

At a Court of General Sessions, convened on the 8th day of January, 1990,
the Grand Jurors of Lexington County present upon their oath:

COUNT THREE - ARMED ROBBERY

That GENE TONY COOPER, JR.
did in Lexington County on or about the 5th and 6th days of October
19 89, while armed with a deadly weapon, to wit: a shotgun, feloniously take
from the person or presence of Kimberly A. Quinn by means of force or intimidation
goods or monies of the said Kimberly A. Quinn, such goods or monies being
described as: assorted rings, check made payable to Kimberly Quinn, U.S.
currency, and a South Carolina Identification Card.

COUNT FOUR - FORGERY

That GENE TONY COOPER, JR.
did in Lexington County on or about the 6th day of October
19 89, with intent to defraud, falsely make, forge, counterfeit, cause or
procure to be falsely made, forged, or counterfeited, utter and publish as
true, or wilfully act or assist in any of the foregoing, in regard to an
instrument of writing, to wit: check #307084226 made payable to Kimberly
Quinn, 1421 Platt Springs Road, West Columbia, dated September 25, 1989, in
the amount of One Hundred Forty-Nine (\$149.00) Dollars, drawn on the S.C. National
Bank from the Office of State Treasurer.
Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

John M. McMan
Deputy SOLICITOR

WITNESSES

Hamer, LCSD

ARREST WARRANT NO. C560955

C546057

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

Steven R. Brown 1/8/90

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 90-GS-32 - 0083

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

January TERM 1990

THE STATE

vs.

GENE TONY COOPER, JR.

CDR #116, 095, 137, 070

Indictment for

MURDER AND KIDNAPPING

AND ARMED ROBBERY AND

FORGERY

Donald V. Myers, Solicitor

DOCKET NO. **90-GS-32 0084**

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

January TERM 1990

THE STATE

vs.

GENE TONY COOPER, JR.

CDR #049

Indictment for

CONSPIRACY TO COMMIT KIDNAPPING,
ROBBERY WITH A DEADLY WEAPON,
MURDER ~~AND/OR OTHER CRIMES~~

SRB

Donald V. Myers, Solicitor

WITNESSES

Salters, WCPD

ARREST WARRANT NO. C545962,

C546055

ACTION OF GRAND JURY

TRUE BILL

Steven R Brown 4/8/90
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR

CONSPIRACY TO COMMIT KIDNAPPING, ROBBERY
WITH A DEADLY WEAPON, MURDER ~~AND/OR OTHER~~
CRIMES

At a Court of General Sessions, convened on the 8th day of January, 1990,

the Grand Jurors of Lexington County present upon their oath:

That GENE TONY COOPER, JR.
did in Lexington County and other places, on or about the 5th day of October, 1989, and on other dates, unlawfully, wilfully, knowingly and wickedly unite, combine, agree, confederate, ban together or conspire with Robert H. Sutherland, Brenda Jean McLaurin or Phillip Gary Farmer or any combination thereof and have a tacit understanding with one another, each other and among themselves for the purpose of committing robbery with a deadly weapon of Kimberly A. Quinn; and/or to unlawfully kidnap Kimberly A. Quinn and the said Gene Tony Cooper, Jr., Robert H. Sutherland, Brenda Jean McLaurin and/or Phillip Gary Farmer did any overt act(s) towards carrying out such unlawful agreement, confederation or conspiracy in violation of Section 16-3-920 of the Code of Laws of South Carolina, as amended; and/or to murder the said Kimberly A. Quinn in pursuance of said agreement and conspiracy all against the peace and dignity of the State and contrary to the statute in such cases made and provided.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

John M. McMan
Deputy SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATELAWTON

VS.

AKA:

Race:

DOB:

Address:

City, State, Zip

DL#

SID#

INDICTMENT/CASE#:

1990

-GS-

320083

A/W#:

0360955

Date of Offense:

10-5-89

S.C. Code §:

16-3-10

CDR Code #:

0 1 1 1 1 6☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murderin violation of 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTES:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$_____; provided that upon the service of _____ days/months/years and/or payment
of \$_____; plus costs and assessments as applicable; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$_____ plus 20% fee: \$_____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$	
\$	
\$100	\$100.00
\$100	\$
\$12	\$
\$500	\$
\$25	\$25.00
\$100	\$
\$50	\$
\$40/ea	\$
\$	\$125.00

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$_____ beginning _____

\$_____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

01110186/1/06

Court Reporter:

Clerk of Court/Deputy Clerk

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA

COUNTY OF Lexington
 STATE VS.
Gene Tony Cooper
 AKA: _____
 Race: _____
 DOB: _____
 Address: _____
 City, State, Zip _____
 DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE# 83
1990 -GS- 32
 A/W#: C 546037
 Date of Offense: 10-5-89
 S.C. Code §: 16-3-910
 CDR Code #: 0101915
☐ CASE RESTORED
☐ SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Kidnapping
 in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
 The plea is: ☒ With Recommendations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST: 13. Hani Rely Defendant David J. BLO Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of _____ days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
 which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
☐ set by SCDPPPS _____
 Recipient: _____
 *Fine:
 \$14-1-206 (Assessments 107.5%) \$100 \$100.00
 \$14-1-211(A)(1) (Conv. Surcharge) \$100 \$100.00
 \$14-1-211(A)(2) (DUI Surcharge) \$12 \$12.00
 \$56-5-2995 (DUI Assessment) \$500 \$500.00
 \$35.13 (Public Def/Prob) \$25 \$25.00
 \$73.3, 1B TP (Law Enforce. Funding) \$100 \$100.00
 \$33.7, 1B TP (Drug Court Surcharge) \$50 \$50.00
 \$50-21-114(BUI Breath Test Fee) \$40/ea \$40.00
 \$56-5-2942(J) (Vehicle Assessment) \$125.00
 3% to County (if paid in installments)
 TOTAL \$125.00

PTUP _____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp.
 May serve W/E beginning _____
 Substance Abuse Counseling _____
 Random Drug/Alcohol Testing _____
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: No sentence because the defendant
was sentenced pursuant to 16-3-20
(Murder) and 16-3-910 says not to
sentence on Kidnapping.
☐ Appointed PD or appointed other counsel, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 0111618
 Sentence Date: 6/1/06

Beth A. Carrington
 Clerk of Court/Deputy Clerk
 Court Reporter: S. Sigurdson

White - Clerk Green - Corrections Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Lexington

VS.

Gene Tony Cooper

AKA:

Race:

DOB

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

1990

GS- 32 - 83

A/W#:

1990-GS-32-83

Date of Offense:

10-5-89

S.C. Code §:

16-11-330

CDR Code #:

011319

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

Armed Robbery

in violation of §16-11-330 of the S.C. Code of Laws, bearing CDR Code #

011319

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations of Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

R. J. Ray

Solicitor

Defendant

David B. Bell

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$ 35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$100	\$100.00
\$100	\$100.00
\$12	\$12.00
\$500	\$500.00
\$25	\$25.00
\$100	\$100.00
\$50	\$50.00
\$40/ea	\$40.00
	\$135.00

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

011018
6/1/06

Court Reporter:

B. A. Carrico

Clerk of Court/Deputy Clerk

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA

COUNTY OF Lexington
STATE

AKA:

Race:

DOB:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

AW#: 1990 -GS- 32 - 0084Date of Offense: 10-5-89S.C. Code §: 16-17-110CDR Code #: 0 1 0 1 4 1 9☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Conspiracy Commit Van Robbery of the S.C. Code of Laws, bearing CDR Code # 0 10 1 4 1 9
in violation of § 16-17-110 ☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiation or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)	\$100	\$120
\$14-1-211 (A)(1) (Conv. Surcharge)	\$100	\$
\$14-1-211 (A)(2) (DUI Surcharge)	\$12	\$
\$56-5-299.5 (DUI Assessment)	\$500	\$
\$ 35.13 (Public Def/Prob)	\$25	\$25
\$73.3, 1B TP (Law Enforce. Funding)	\$100	\$
\$33.7, 1B TP (Drug Court Surcharge)	\$50	\$
\$50-21-11.4 (BUI Breath Test Fee)	\$40/ea	\$
\$55-5-294.2(J) (Vehicle Assessment)	\$	\$
3% to County (if paid in installments)	\$	\$
TOTAL		\$125

Clerk of Court/Deputy Clerk

Court Reporter:

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 0 1 1 0 1 8Sentence Date: 6/1/06

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

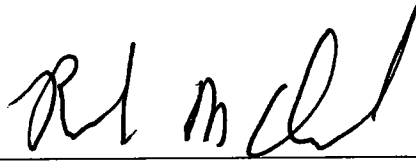
ORIGINAL

1570

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 2nd, 2009



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

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

ATTORNEY FOR APPELLANT

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.,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

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1.

Appellant was 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 solicitor's admission he "did nothing" to prepare for appellant's retrial since August 2002, the state then failed to keep its promise to try the case in the Spring of 2004, and then failed to comply with the court's order to try the case by the end of 2005, since the state's lackadaisical approach to this case caused totally unnecessary and prejudicial delay to the incarcerated appellant who always maintained his innocence..... 8

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2.

Appellant's Sixth Amendment right to confront Red Farmer was violated where the state did not make reasonable efforts to secure his presence from the Texas Correctional institution since allowing Farmer to be treated as "unavailable" under these circumstances, and that his prior stale testimony being read into the record was prejudicial to appellant'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..... 30

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3.

The court erred by ruling appellant could be impeached with his 1977 convictions for house breaking and grand larceny since these convictions were too remote under Rule 609, SCRE, and they were highly prejudicial to appellant..... 52

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STATEMENT OF ISSUES ON APPEAL

1.

Whether appellant was 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 appellant'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 appellant who had always maintained his innocence?

2.

Whether appellant's Sixth Amendment right to confront witness Red Farmer was denied where the state did not make reasonable efforts to secure his presence from the Texas correctional system for appellant'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 particular where Farmer was a key witness?

3.

Whether the court erred by ruling appellant could be impeached with his 1977 convictions for house breaking and grand larceny since these convictions were too remote under Rule 609, SCRE, and these stale convictions for crimes of dishonesty were highly prejudicial to appellant whose credibility was critical?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County grand jury for the offenses of murder, armed robbery, conspiracy, and conspiracy to commit armed robbery. R. 1561 - 1565. The state sought the death penalty. After appellant's first trial he was convicted of murder and sentenced to death.

The Supreme Court in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994) reversed appellant's conviction for murder and his death sentence and remanded for a new trial on the murder charge since there was not an on-the-record waiver of appellant's right to personally address the jury during the guilt phase of the trial. Appellant's remaining convictions were affirmed.

Subsequently, on August 12, 2002, the Supreme Court in Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002), reversed appellant's non-capital convictions finding trial counsel's failure to inform appellant of his statutory right to make a closing statement to the jury constituted ineffective assistance of counsel.

As will be seen infra, appellant subsequently moved, and kept renewing motions for a speedy trial. Appellant had maintained his innocence since his arrest in October, 1989.

The first speedy trial motion hearing was held on August 18, 2003 before the Honorable Marc H. Westbrook. David Bruck and Robert Lominack represented appellant. Donald v. Myers and C. Dayton Riddle were the solicitors. R. 4.

A second speedy trial hearing was held on February 15, 2005 before the Honorable William P. Keesley. David Bruck represented appellant. Dayton Riddle was the Deputy Solicitor. R. 22.

A third hearing speedy trial and motion to dismiss hearing was held before Judge Keesley on July 12, 2005. David Bruck, Jack Duncan, and Stuart Andrews, Jr. represented appellant. Donald V. Myers was the solicitor. R. 37.

A motion to dismiss hearing was then held on February 8, 2006 before the Honorable Daniel F. Pieper. David Bruck and Jack Duncan represented appellant. B. Harrison Bell, Jr. represented the state because the Lexington solicitor's office had moved to be recused, and that motion was granted. The state no longer sought the death penalty. R. 101.

On May 22, 2006 appellant's case was called to trial before the Honorable Daniel F. Pieper, and a jury. David Bruck, Jack Duncan and Stuart M. Andrews, Jr., represented appellant. B. Harrison Bell, Jr. and Theodore N. Lupton were the solicitors. R. 345.

At the conclusion of the trial the jury found appellant guilty on all four counts. R. 1521, l. 15 – 1522, l. 2. Judge Pieper sentenced appellant to life imprisonment for murder, twenty-five years for armed robbery, and five years imprisonment for criminal conspiracy. R. 1535, ll. 13 – 19.

This appeal follows.

STATEMENT OF FACTS

An introduction

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 appellant, 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 Niada 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

¹ Southerland's conviction and death sentence were affirmed in State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994).

Southerland had a chance for a thirty year sentence upon re-sentencing, that Southerland claimed appellant 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 appellant and therefore told everyone that he killed the decedent, and that appellant was not present during the crime. Starnes recalled "they [appellant and Southerland] interacted just like most of us did." Starnes remembered that appellant 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 appellant. 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 appellant, or, in the alternative to supplement record on appeal." R. 1549. 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 appellant. R. 1557.

In this letter, Southerland stayed consistent with what he told everyone until after he received his new promises from the state -- that appellant 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 appellant'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 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

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 appellant'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.

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.

As will be seen infra, Southerland would testify at appellant's retrial in May, 2006, where the possibility of thirty year sentence was the light at the end of the tunnel that all of this was a lie, and that appellant killed the victim.

ARGUMENT

1.

Appellant was 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 solicitor's admission he "did nothing" to prepare for appellant's retrial since August 2002, the state then failed to keep its promise to try the case in the Spring of 2004, and then failed to comply with the court's order to try the case by the end of 2005, since the state's lackadaisical approach to this case cause totally unnecessary and prejudicial delay to the incarcerated appellant who always maintained his innocence.

Speedy Trial Motions

On July 15, 2003 defense counsel filed an "amended demand for speedy trial," following his first speedy trial motion. R. 1. This motion noted "since August 29, 2002, the state has, to the defendant's knowledge, taken no action to bring him to trial." Motion at 2. R. 2.

At an August 18, 2003, speedy trial motion hearing before the Honorable Marc H. Westbrook defense counsel Bruck told the judge "Mr. Cooper has maintained his innocence of all of these charges since the day of his arrest in 1989." R. 6, ll. 3 – 16. "He wants a trial. I wanted for a trial date to be set or [to] hear on something for a number of months." Supp. R. 6, ll. 17 – 18.

Counsel noted that appellant no longer had any valid convictions against him after the Supreme Court on August 12, 2002 also granted him a new trial on his non-capital charges based on ineffective assistance of counsel. See Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002). R. 6, ll. 11 – 14. Counsel informed the judge that on June 20, 2003

he left a phone message for Solicitor Myers. However, Deputy Solicitor Riddle returned counsel's call, and told him Myers was unavailable. Riddle asked counsel to give him "ten days to get back to me about a trial date." R. 6, ll. 15-25.

On June 23, 2003 counsel left several more messages with the solicitor's office. "Finally on July 11, 2003, Mr. Riddle called me back to say I probably needed to go ahead and file this [speedy trial] motion, that the State was not in a position to propose a trial date as yet. Since then we have been going through the mechanics to bring the matter before the Court." R. 7, ll. 1-6.

Solicitor Myers then said he wanted defense counsel disqualified from representing appellant. R. 8, l. 2 – 9, l. 4. Counsel responded the motion was improper and that he had no notice of the motion. The court informed the solicitor that counsel "does have a right to some notice." R. 9, ll. 5 – 13.

The solicitor contended that he had other death penalty reversals to try in addition to appellant's case. He also said he was putting defense counsel on "notice that I'm going to move to have him disqualified for his contact with Bo Southerland, which he had admitted in transcripts that we have with the Court." R. 8, l. 2 – 9, l. 21.

Counsel further responded: "I don't think the fact the State plans to try to run me off the case affects the fact that we still have – I am Mr. Cooper's lawyer now. He has made a motion. I think we should set the case for trial. " Counsel also informed the court that the other cases Myers alluded to only involved re-sentencing. "That is to say, those people are convicted of murder. They are not going anywhere. I certainly think it would be unfair to give those cases priority over a case where the pending charge is the only thing keeping the man in jail. He wants a trial on guilt or innocence." R. 10, ll. 8-25

Counsel added, "it seems to me that the fact there are a lot of other cases piled up is not an excuse to keep people in jail year after year without a trial . . . if the state does not have the capacity to give this man a trial, then obviously he is entitled to release on bond." "[I] simply am asking the court today to set a date for Mr. Cooper." R. 10, l. 8

The judge observed that they had a tentative date of November 22, 2003 to move into the new courthouse. "They tell us that some moving may take place prior to that. Problem is we don't get to control that." R. 12, ll. 2 – 14.

Counsel replied, "understanding that, Your Honor, I would ask that we set a date. If I turns out it has to be adjusted by a few weeks, we can work our way around that. I just like we would like to get the process moving if we can." R. 12, ll. 9 – 23. Counsel also stated he was the only attorney appointed to represent appellant and he doubted that the court would find any merit to the solicitor's motion to disqualify him. R. 13, ll. 8 – 25.

At the close of the hearing defense counsel asked that "we set this case for November. Then if it has to changed, it has to be changed. I don't see that they are proposing anything else for November." R. 13, ll. 21-25. The judge took the matter under advisement, adding there could probably be another hearing in "just a couple weeks or so." R. 14, ll. 1-10.

Appellant again filed a "renewed demand for a speedy trial" on February 10, 2005 citing his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Motion at page 1. R. 18. This motion noted after the August 18, 2003 hearing before Judge Westbrook that an in-chambers conference was held with Judge Westbrook on the afternoon of August 25, 2003. "At that time, Deputy Solicitor Riddle advised Judge Westbrook and the undersigned counsel for the defendant *that the state would*

call Mr. Cooper's case for trial during the spring of 2004 - - that is, between April and the end of June 2004. Based on this representation, no on-the-record hearing was held at that time. Motion at page 2. R.19. (emphasis added).

The motion stated that despite undertaking to call appellant's case for trial during the spring of 2004, "the state has not done so." The motion reiterated that appellant had remained in prison where he had been awaiting his retrial since August 29, 2002. Motion at pages 2 – 3. R. 19 - 20.

A hearing was held before Judge William P. Keesley on February 15, 2005. Defense counsel informed the judge that appellant "at all times has desired a speedy trial, and for this reason we are now renewing our demand for a speedy trial." R. 23, ll. 10 – 19. Counsel added: "Now Mr. Riddle just a moment ago advised me that Mr. Myers is not present today and the state is not prepared to go forward with the date setting in Mr. Myers' absence." Counsel argued: "This matter should've been tried a long time ago, and as Chief Administrative judge, Your Honor has the power to set the case for trial and we ask that you do that." R. 23, l. 24 – 24, l. 5.

Counsel further added that the state had already promised to this case in the spring of 2004. Since that time counsel had taken a law professor's position at Washington and Lee University of Law School in Lexington, Virginia. "In effect, I feel like I've been waited out. I know that the state didn't know that was going to happen, but that's what happens when a case is not tried. Change and difficulties increase." R. 24, ll. 6 – 13.

Counsel argued that appellant was very anxious not to have a change of counsel since he had represented appellant for fourteen years. Counsel noted the school year was over in May and he again asked that a date be set for trial. R. 24, ll. 14 – 25.

Deputy Solicitor Riddle urged that the Supreme Court “has always appointed a judge to hear matters related to capital murder cases . . .” R. 25, ll. 9 – 19. Defense counsel countered: “I don’t know for a fact that the state intends [to seek] the death penalty, and if they do not, then it would not be necessary to assign a judge. That’s their call obviously they have not said anything to me one way or the other.” R. 26, ll. 3 – 13. The judge said the bottom line was that this was “a 1990 case and it needs to move.” R. 26, l. 18 – 27, l. 10.

Another hearing was held on July 12, 2005 before Judge Keesley. Defense counsel noted that after the prior hearing the judge had issued an order on April 25, 2005 “which directed the commencement of this trial *in the year 2005 and directed that defense counsel be notified of a date within thirty days*. The judge stated his understanding there was a renewed motion for a speedy trial, “and that there is also a motion filed by the state to excuse defense counsel, Mr. Bruck, from the case. And there is a motion by the state to have the solicitor’s office for the eleventh judicial circuit step out of the case, and that’s based on a potential conflict of interest.” R. 39, ll. 5 – 25. (emphasis added). See Order of Judge Keesley. R. 76 - 79.

Defense counsel told the judge “I’m not going to go through the entire history of Mr. Cooper’s fruitless efforts to bring this case to trial because the record already abundantly reflects them.” Counsel noted Judge Keelsey’s order of April 25, 2005 which directed the state to get “a trial date set and advise Mr. Cooper and counsel of that date in thirty days.” R. 42, ll. 11 – 21.

Regarding that order counsel “contacted Court Administration and determined that the state never contacted Court Administration to ask for the assignment of a trial judge.

Now, that could reflect that the . . . [state] doesn't intend to seek the death penalty, in which case there is no need for a specifically assigned judge." The alternative was the state "is simply not interested in complying with Your Honor's order to get a trial date set . . ." Counsel argued "close to three years have now lapsed since this case was ready for retrial, and close to two years have elapsed since first Mr. Cooper's motions for a speedy trial." R. 43, l. 8 – 44, l. 6.

"We really think they've had their chance and they missed it and it's time to dismiss the charges. The length of the delay is completely unreasonable. The reasons for the delay are entirely invalid." R. 45, ll. 11 – 21.

Counsel request that the judge dismiss the case "for lack of prosecution, lack of a speedy trial, and let that be the end of it." In the alternative, counsel asked to be heard on having appellant released on bond with conditions. R. 46, ll. 3- 19. Counsel argued the time had passed in giving the state more chances and that "just keeping a man in prison forever" could not be tolerated. R. 46, ll. 3 – 8.

The solicitor then requested that his office be disqualified from this case. The solicitor told the judge that "Rick Hubbard, who is my deputy solicitor . . . assisted Judge Long during the first trial." The solicitor argued this raised an issue of a conflict of interest. R. 53, l. 18 – 55, l. 21.

The solicitor also argued that Judge Keelsey's order stated the case must be tried "in 2005." The solicitor argued therefore the motion to dismiss for lack of a speedy trial was putting "the cart before the horse," since it was July, 2005. R. 56, ll. 22 – 25.

Counsel responded to the withdrawal motion by the solicitor. He noted that the state had wanted to "boot me off the case. And the first we've ever heard about the state wanting

to withdraw was in his letter of June 29 . . . it's dated June 29, 2005 . . .” R. 60, ll. 5 – 21.

Counsel said: “We’re at a loss to understand why its being raised at such a late date, long after the time Your Honor had ordered a trial date be set had elapsed.” R. 60, l. 22 – 61, l. 9.

Defense counsel argued:

This is the pattern that we’ve been encountering, Judge, for almost two years. It’s always mañana, it’s always “we’re not ready,” it’s always “We didn’t give notice, and plus we’ve got something else,” which would keep you, the Court, from doing anything to vindicate this man’s rights.

Everybody has got rights in this country, including Tony Cooper. And time’s up. So we think that the court should entertain both of these motions today, rule on them, and grant the speedy trial motion.

R. 63, ll. 4 – 18.

Counsel argued if the judge was not going to grant the motion that appellant should be released on bond until the day “that the state actually brings his case to trial.” R. 63, ll. 10-18.

Judge Keesley said “you’ll have an order within forty-eight hours.” R. 66, ll. 3 – 4.

Judge Keesley issued an order dated July 12, 2005 denying the speedy trial motion “on the grounds it was already covered by the order in April directing the case be tried in 2005.” See Order at page 3. R. 70. This July 12, 2005 order also denied the state’s motion to remove defense counsel, and it granted the state’s motion to have the Eleventh Circuit Solicitor’s Office disqualified due to a conflict of interest. The order also denied the defendant’s motion for bail. Order at page 3. R. 70.

The First Circuit Solicitor's Office was then appointed to the case in September of 2005, and the Chief Justice designated the Honorable Daniel Pieper to hear and dispose of the case in an order signed December 2, 2005.

Appellant filed a "notice of motion and renewed motion to dismiss all charges for lack of a speedy trial, or the alternative to release pending trial" on December 29, 2005. See Motion. R. 81 - 84. This motion once again set out the state's delay in calling the case for trial. The motion argued that the fact the state now was represented by different counsel who were not responsible "for most of the state's unconstitutional refusal to call his case for retrial" did not effect the disposition of the motion in anyway. See Motion at page 3. R. 83.

The defense therefore again asked for an order dismissing all charges against appellant for the denial of his right to a speedy trial. Motion at page 4. R. 84.

The state filed a response "to defendant's motion for speedy trial and/or granting bail" on January 11, 2006. See State's Response. R. 86 -90. The state conceded that appellant had asserted his right to a speedy trial "several times and before the proper courts." State's response at page 88. The state claimed that appellant was not prejudiced by the delay. The state also opposed granting appellant bond. State's Response at page 4 - 5. R. 89 - 90

On January 18, 2006, appellant filed a reply to state's response to renewed motion to dismiss for lack of a speedy trial, or for release pending trial. R. 91 - 100.

The reply noted that the delay of "approximately three years and four months" between the reversal of the last of appellant's convictions and his unscheduled retrial was sufficient to trigger judicial scrutiny under the speedy trial clause of the Sixth Amendment. Motion at page 2. R. 92. The reply further stated that the United States

Supreme Court had recognized as a general manner, that delays approaching one year are regarded as presumptively prejudicial. *citing, Doggett v. United States*, 505 U.S. 647, 642 n.1 (1992). See Reply at page 2. R. 92.

Counsel also argued that the state had not cited any authority for the proposition that the Sixth Amendment's speedy trial guaranteed "was diluted or rendered ineffective by an intervening conviction and appellate reversal." Reply at page 2-3. R. 92 - 93. Counsel wrote: "[C]ommon sense suggests that, ordinarily on retrial, less time would be necessary to bring a case to trial than before." *State v. Ferguson*, 476 So.2d 1252, 1254 (Miss. 1991). Counsel also *cited* *Lahur v. State*, 615 N.E.2d 150, 152 (Ind. App. 1993), for the proposition that "the delay that can tolerated for retrial is considerably less than for the initial trial because the issues and evidence have been fully explored." Reply at page 3. R. 93.

Counsel also argued that "the state also fails to explain why, in the face of at least three speedy trial demands and two orders mandating a 2005 trial, the First Circuit Solicitor's Office took no discernable action to bring this case to trial after receiving the file from the Attorney General in September, 2004." Reply at page 4. R. 94. The motion apprised the court of appellant's intention to subpoena both Solicitor Myers and Deputy Solicitor Riddle for a hearing on the present motion. Reply at page 5. R. 95

Counsel also noted it was undisputed he had repeatedly asserted his right to a speedy trial. Reply at pages 5 - 7. R. 95 - 97. Appellant asserted "the state had a reasonable time in which to retry him. He first agreed to do so, but did not. And it was ordered to do so, and still did not. Now, nearly three and a half years after the Supreme

Court ordered that the last of his charges be retried, the state's time is up." Reply at page 7. R. 97

A hearing on the motion was held on February 8, 2006 before Judge Pieper in Charleston, South Carolina. David Bruck and Jack Duncan represented appellant and B. Harrison Bell, Jr., was the solicitor.

Defense counsel argued the state had not shown any reason in their return "why in 2002, 2003 and 2004, even when there was a court order in 2005, this case was not called for trial and there is simply no other way to develop the record other than to ask the person whose job it was to call it why it wasn't called." R. 107, ll. 1 – 9.

Solicitor Myers then testified and agreed appellant's case could "very well could be" "the oldest murder case in Lexington County." R. 111, l. 19 – 113, l. 1. The solicitor said that Dayton Riddle was responsible for "all the pre-trial workup . . ." R. 113, ll. 3- 9. The solicitor admitted he really could not tell the court whether Riddle had ever given him "a progress report" about preparing this case for trial. R. 114, l. 23 – 115, l. 6.

Myers acknowledged that between August 29, 2002 and July of 2003 he made no request for Court Administration to schedule the case. R. 117, l. 17 – 119, l. 21. The solicitor also said he did not recall if Riddle had ever communicated to him that the defense wanted a trial date – "that Bruck had called and wanted a trial date for Tony Cooper." The solicitor responded: "He could have. I don't recall if he did." R. 125, ll. 21 – 24.

While the solicitor said he had other cases which had priority "over this one" he could not recall such a case or why it had priority. R. 126, l. 25 – 127, l. 2. The solicitor

said he did *not know* that in Barker v. Wingo, 407 U.S. 514 (1972) the Supreme Court said that a delay of more than a year is “presumptively prejudicial.” R. 128, ll. 17 – 20.

The solicitor did acknowledge he remembered an in-chambers meeting with Judge Keesley where his office said they would call the case to trial in the spring of 2004. R. 129, l. 22 – 130, l. 1. As to what his office did to prepare for that spring 2004 trial, the solicitor said defense counsel would have to ask Riddle that question -- “I don’t know. You will have to ask him. *I didn’t do anything.*” R. 130, ll. 19 – 22. (emphasis added).

The solicitor also said he would not be surprised to know that he had not tried any capital cases between the “date of final reversal” and the time of the speedy trial motion. R. 131, l. 16 – 135, l. 7. The solicitor again responded that he did not do anything to prepare for a trial in the spring of 2004. R. 135, ll. 3 – 7. The solicitor also said he was not aware of any problem the state had with evidence or otherwise that prevented him from calling this case. R. 137, ll. 7 – 15.

The solicitor acknowledged a thirty-three page printout dated February 7, 2006, which reflected one thousand eighty-two pending cases of which appellant’s was the second oldest in his circuit. R. 154, ll. 2 – 12; R. 296 - 327.

The solicitor asserted he was confident after Judge Keesley signed his order on July 12, 2005, and that he called “John McIntosh at the Attorney General’s Office.” R. 155, ll. 5 – 23. When defense counsel asked the solicitor to give a reason the case had not been tried, he responded, “because a judge did not set it for a date certain until Judge Keesley set it to be tried in latter part of 2005.” R. 157, l. 13 – 158, l. 15.

On cross-examination the solicitor maintained he had lost seven or eight months court time “because of the mold in the new courthouse.” R. 160, ll. 2 – 4. However, on

redirect examination the solicitor acknowledged the move into the new courthouse took place in 2004. R. 161, l. 15 – 162, l. 18

Deputy Solicitor Riddle then admitted that some murder cases had been assigned to him. However, he added: “I don’t think Mr. Cooper or Mr. Southerland ever appeared on my roster, my personal roster.” R. 166, ll. 1 – 3.

Riddle acknowledged he was not getting appellant’s case ready for trial between August 2002 and the speedy trial motion in August 2003. R. 168, ll. 16 – 16. Riddle also said he did not know of anyone else in his office that was working on this case. R. 168, ll. 12 – 20.

Riddle testified that he was not reading the trial transcript for the retrial and he was also not contacting witnesses to prepare. R. 169, ll. 3 – 19. Riddle received no direction from Solicitor Myers and he did not recall any conversation with him. R. 169, l. 14 – 176, l. 5.

Riddle claimed appellant’s death penalty case was the second oldest, and not the oldest, his office was handling, but he acknowledged Raymond Patterson -- the oldest -- was only awaiting a re-sentencing, and it was not a retrial on guilt or innocence. R. 173, l. 16 – 176, l. 5. Riddle admitted the bottom line issue -- he did not know why this case was not set for trial. R. 176, ll. 2 - 5.

Defense counsel then moved to dismiss the charges against appellant for the denial of his Sixth Amendment right to a speedy trial. R. 177, l. 7 – 178, l. 18. Counsel argued he understood it was difficult for a judge to dismiss a case where the defendant was once sentenced to death “but I would submit that this is that rarest of cases where Your Honor’s duty is to grant the motion . . .” R. 178, ll. 11 – 18.

Counsel reminded the judge appellant had denied his guilt all along. He also noted the present case was the oldest death penalty retrial case involving a guilt stage. Under the four-factor test of Barker v. Wingo, counsel argued the case should be dismissed. R. 178, l. 20 – 185, l. 14.

Defense counsel explained that without a trial date “we cannot subpoena our witnesses,” and he reminded the judge that the solicitor’s office had not “done a lick in preparing the case.” R. 185, ll. 10 – 24.

There was also the prejudice from appellant’s pretrial confinement “day after day and week after week and month after month and now its being year after year.” R. 186, ll. 4 – 15. Counsel noted the torture of appellant being unable to “vindicate his innocence three and a half years ago, and here we still here.” R. 187, ll. 1 - 16

Counsel also argued that the anxiety and stress of the pending charges against appellant where he was presumed innocent, and where for three and a half years “the sword hangs over him.” Counsel added, “[y]ou will not find another speedy trial case where a man has been dangled over the abyss for three and a half years pending trial for his life. There ain’t one. This case stands alone.” R. 188, ll. 8 – 18.

Counsel noted that under Doggett v. United States, if “you make a strong showing on the first three factors, you don’t need any of the other forms of prejudice on the fourth factor.” R. 191, l. 6 – 202, l. 8. Defense counsel argued appellant was a pretrial detainee who was not going to be released on bond and that the state just “didn’t care. They let him rot . . . that is a form of bad faith. That is no negligence. It didn’t slip their mind that Tony Cooper was sitting on death row, waiting and waiting and waiting and waiting.” R. 202, ll. 2 – 20.

Counsel also reminded the court that “Doggett was a no confinement case.” Conversely, counsel argued South Carolina had never had a speedy trial denial that had “ever been this bad.” R. 205, l. 8 – 212, l. 5.

The solicitor acknowledged to the judge that the defense was not responsible for any delay in this case cause by a motion for a continuance or otherwise. The defense had also made repeated requests for a speedy trial. R. 218, l. 9 – 221, l. 1.

Defense counsel added that the defense had made four “and perhaps five” demands for a speedy trial. R. 229, l. 3 – 232, l. 6.

Judge Pieper issued a written order dated April 21, 2006. In this order the judge noted the delay of forty-four months was sufficient to “trigger review of the other [speedy trial] factors.” Order at page 5. R. 332. Judge Pieper questioned the solicitor’s assertion that the procedures of Court Administration were an obstacle. “The solicitor has the duty of alerting court administration so that a judge would be assigned, and the consequences (in so far as delay is concerned) resulting from the postponement of this procedure is a burden the state must bear.” Order at page 8. R. 335.

The judge wrote that he was not given exclusive jurisdiction of this case until December 2, 2005 making Judge Keesley’s order directing the case to be tried by the end of 2005 “virtually impossible.” Order at pages 8 – 9. R. 335 - 336

The order also recognized that South Carolina case law had held that the delay must be due to the “neglect and willfulness of the state’s prosecution.” Order at page 8 (court’s emphasizes). R.335. However, the judge strongly questioned this precedent: “It is not clear to this court whether such precedence requiring neglect and willfulness is in line with the jurisprudence of the United States Supreme Court. Nonetheless, the court

finds that the state's conduct in this instance was not apparently willful and was largely justifiable." Order at p. 9-10; R. 336 - 337.

The judge wrote that among the goals of the Sixth Amendment's right to a speedy trial were the prevention of undue incarceration, minimization of the anxiety accompanying public accusation, and limitation of the possibility that long delay would impair the accused's ability to defend himself. The judge noted "all these goals have been recognized as forms of prejudice, not just the latter as has been more frequently seen in state jurisprudence." The judge wrote that in State v. Brazzell, 325 S.C. 65, 480 S.E.2d 64 (1997), the court held the delay of three years and five months was lengthy and the justification was not satisfactory but that Brazzell's right to a speedy trial was not denied based on the Barker factors. However, "[B]razzell was already incarcerated on other charges so he was arguably not prejudiced by the delay in the form of pretrial incarceration." Order at page 12. R. 339.

The judge again questioned South Carolina precedent: "In this regard it should be noted that the majority of South Carolina case law relies on a lack of demonstrable evidence of trial prejudice in the denial of speedy trial motions. However, as pointed out in Doggett, demonstrable trial prejudice is not essential. Doggett v. U.S., 505 U.S. 647, 655, 112 S.Ct. 2686, 2693 (1992)." Order at 12-13. R. 339 – 340. However, the judge then wrote, "In the case at hand, the court finds that the state has proved that the delay has not impaired the defendant's ability to defend himself, contrary to the circumstances in Doggett." Order at 14, n. 5; R. 341 .

In conclusion the judge reasoned that appellant had benefited to some extent because the "state have now withdrawn its notice to seek the death penalty." The judge

noted that Judge Keelsey had originally denied the speedy trial motion while ordering it tried prior to the end of 2005. Judge Pieper then denied appellant's final speedy trial motion. Order at page 15. R. 342.³

Discussion

A criminal defendant is guaranteed the right to a speedy trial by the Sixth Amendment to the United States Constitution. This right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, 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." United State v. McDonald, 456 U.S. 1, 8 (1982); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2007). Here, of course, appellant had been incarcerated the entire time.

In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530. Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary and unreasonable. State v. Waites, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978).

Here, the delay was both arbitrary and unreasonable. Solicitor Myers openly admitted he did *nothing* to bring appellant to trial or to prepare for trial after his

³ Judge Pieper later noted that the order contained a footnote stating the case was to be tried in May 22, 2005 where obviously he had meant May 22, 2006. The order was

convictions were vacated in August 2002. Defense counsel correctly argued the solicitor's office was willing to let appellant "rot" in jail without any intention of retrying him. That constituted bad faith. The solicitor's intention to leave appellant in jail without a trial was true even though appellant was not facing re-sentencing, he was facing a new trial where his guilt or innocence were at issue.

Solicitor Myers said it was Deputy Solicitor Riddle's responsibility to prepare the case. As seen, Riddle testified that he did not understand the case was even assigned to him as Myers testified under oath. The solicitor's office bungled this case out of arrogance. It promised to try appellant in the Spring of 2004, and it did not. It was ordered to try appellant by the end of 2005, and it did not. It made a belated motion to withdraw based upon an assistant solicitor having worked for Judge Hubert Long many years ago. The solicitor's office was well aware of that fact, and it took no action until after the last minute. Surely, a solicitor hiring an assistant solicitor took into account the applicant's clerkship with a circuit court judge.

The delay in this case was forty-four months between the reversal of the last of appellant's convictions and the final hearing. As seen, the United States Supreme Court has recognized that, as a general matter, delay approaching one year are regarded as presumptively prejudicial. Doggett v. United States, 505 U.S. 647, 652 n.1 (1992).

A delay of forty-four months, (three years and eight months) already exceeded that found in almost any reported South Carolina case. See State v. Brazzell, 325 S.C. 65, 480 S.E.2d 64, 70 (1997) (two years, four months); State v. Chapman, 289 S.C. 42, 344 S.E.2d 611, 612 (1986) (one year); State v. Tyson, 283 S.C. 375, 323 S.E.2d 375

amended without objection.

(1984) (2001) (thirteen months); State v. Waites, 270 S.C. 104, 240 S.E.2d 651, 652 (1978) (two years, four months); State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977) (two years, four months); Cf. State v. Robinson, 335 S.C. 620, 518 S.E.2d 269, 271 (Ct.App. 1999) (delay of nearly four years triggered Barker scrutiny, but trial occurred ten months after defendant's first request for speedy trial, and no prejudice resulted from delay); State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973) (seven and a half year delay in trying defendants who jumped bond before trial and were imprisoned in another state for unrelated crimes; trial occurred within fifteen months of their belated demand to be returned to South Carolina for trial).

Here, the state had already tried appellant one time, and where it had already marshaled its proof once, as argued above, common sense dictated that less time was needed to prepare to retry appellant. Yet it treated appellant's demands, its own promises of a trial date, and a judge's order for a trial by the end of 2005 with equal arrogance.

Second, as argued above, the government's reason for the delay was both arbitrary *and* unreasonable. A fair reading of this record was at that solicitor's office was more than content with allowing appellant to sit on death row even though he had been granted a new trial by the Supreme Court in August 2002. Any delay caused by the "mold" in the Lexington County Courthouse was minimal. Further, that minimal delay only came after appellant attempted to force the solicitor's hand through the speedy trial motion and the hearing before Judge Westbrook.

The attempt to blame the delay on Court Administration was equally unavailing since the solicitor had the responsibility to call his case, and be sure the system was

prepared. A phone call is not a difficult task. Appellant would respectfully point to the extraordinary authority the solicitor had to control the criminal court docket, and such excuses offered against appellant's Sixth Amendment right to a speedy trial under the highly unusual facts of this case should be quickly dispatched.

Later, after at least three speedy trial demands and two orders mandating a 2005 trial the First Circuit Solicitor's Office took no discernable action to bring appellant's case to trial after receiving the file from the Attorney General in September 2005. Again, the state had already broken its promise to try appellant in the spring of 2004. The state's delay was willful, arbitrary, and unreasonable.

Appellant respectfully submits the trial judge erred by finding the delay was justified. The judge did not given due consideration to what occurred *before the case arrived on his doorstep*: No preparation for trial or intention to prepare by the solicitor, the deputy solicitor denying he was aware it was his responsibility to prepare the case, the broken promise to try the case in 2004, and not trying the case in 2005 as ordered. Barker v. Wingo, 407 U.S. at 531.

Next, it is clear appellant was far more than diligent in continuously demanding a speedy trial ever since July of 2003. Appellant's persistent attempts seeking to vindicate his constitutional right to a speedy trial differentiate this case from the great majority of reported cases dealing with claims of pretrial delay, and it should have weighed heavily in favor of granting his motion to dismiss. The reason for the delay, as already argued above was the arrogance of the Solicitor doing nothing, the Deputy Solicitor not knowing he was assigned the case, and unacceptable excuses and bungling.

Finally, as to the prejudice prong, as seen above, the trial judge noted his apparent discomfort in his order with South Carolina precedent he thought overemphasized this prong of the analysis. The Court in Barker v. Wingo emphasized that no one factor was determinative in the balancing test noting, “[W]e regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum . . . courts must still engage in a difficult and sensitive balancing process.” Barker v. Wingo, 407 U.S. 514, 533 (1972).

It must further be remembered that Barker v. Wingo listed “oppressively pretrial incarceration” and anxiety and concern of the accused as two of the three forms of possible prejudice that may arise from the denial of a speedy trial. Barker v. Wingo, 407 U.S. at 532.

Appellant’s rigid incarceration on death row in Lieber Correctional Institution amounted to no small prejudice, particularly given the state’s arrogance in failing to call his case to trial, and indeed to do any preparation for trial. Further, appellant’s anxiety and concern as he waited for the state to call his case also cannot be diminished.

Moreover, the First Circuit Solicitor’s Office then displayed its unreasonable ineptitude in failing to secure the presence of Red Farmer as a state’s witness through its unnecessary delay to appellant’s obvious prejudice as will be shown infra. The earlier solicitor’s office also knew Red Farmer was again a witness, and its doing “nothing” to prepare for trial undoubtedly included not worrying about securing Farmer’s presence from the Texas prison system for appellant’s trial. Yet Farmer was a witness whose demeanor the jury needed to observe since by his subsequent admissions he was a liar

who intentionally put his “spin” on the evidence in the state’s favor to appellant’s detriment at appellant’s earlier trial.

Further, memories were clearly affected by the delay at trial. Edward Hite was called as a reply witness. Hite admitted that the solicitor’s office (neither the Eleventh Circuit or the First Circuit) provided him with his original trial notes, and he was not sure they even existed any more. Hite’s assertion that appellant told him “He was out driving around in his pick-up truck drinking beer, said he got home at, approximately, 2300 hours, or 11:00 p.m.” on the night of the incident was based on his review of only the earlier transcript. His further testimony that appellant’s mother told him “she did not see Tony Cooper at all [on the day of the murder]” were based on a “follow-up” sheet from the notes he did not know still existed, or were not provided for him. R. 1307, l. 14 – 1315, l. 4.

Hite’s reply testimony was used to impeach appellant’s testimony that he did not drive around drinking beer, and his late mother’s earlier testimony that provided appellant part of a corroborated alibi. R. 1143, l. 14 – 1147, l. 15; R. 1260, l. 23 – 1262, l. 17. While all of this was not known at the time the judge issued his order denying the motion, it was perfectly predictable. As counsel earlier argued, when unreasonable delay occurs there are foreseeable consequences.

In the final analysis, the trial judge observed that “[S]outh Carolina jurisprudence is somewhat undeveloped on the topic, including the different forms of prejudice, and there has not been any state guidance on the issue since the United States Supreme Court issued its opinion in Doggett v. U.S., 505 U.S. 647, 112 S.Ct. 2686 (1992).” Order at 5; R. 332. The judge also wrote that all of the goals of the of a speedy trial, prevention of

undue incarceration, minimization of anxiety accompanying public accusation, and limitation of the possibility that long delay will impair the accused's ability to defend himself were recognized as forms of prejudice – “not just the latter as has been more frequently seen in state jurisprudence.” Order at 11-12. R. 338 - 339

The judge recognized that “[T]he Sixth Amendment Right to a speedy trial is thus 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.” United States v. MacDonald, 456 U.S. 1, 8 (1982). See order at 12; R. 339. The trial court erred in the final analysis by ruling “upon balance of the Barker factors, especially with this court heavily weighing the lack of demonstrable evidence of trial prejudice, the presumption of prejudice has been persuasively rebutted and as such, this Court must deny the defendant's motion. Doggett at 656, 2694.”

The state's delay in this case was not excusable. The trial judge may have considered his hands tied by what he considered an incorrect overemphasis on trial prejudice in this state's precedents, unsupported by the United States Supreme Court precedent, but appellant must respectfully submit he erred by denying his motion. The state was given more than enough totally reasonable chances to remedy its inaction, and the judge erred by refusing to grant appellant's motion.

Appellant's Sixth Amendment right to confront Red Farmer was violated where the state did not make reasonable efforts to secure his presence from the Texas Correctional institution since allowing Farmer to be treated as "unavailable" under these circumstances, and that his prior stale testimony being read into the record was prejudicial to appellant'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.

Relevant Facts

The state brought the problem with Farmer to the court attention on May 22, 2006, when appellant's case was called to trial. Red Farmer was incarcerated at CCI in Columbia, South Carolina in October, 1989. Farmer later pled guilty to criminal conspiracy for his part in the decedent's death and he faced a sentence of five years imprisonment at the time of appellant's prior trial. R. 943, ll. 12 – 23. Farmer's story was that he conspired with appellant to rob the decedent. Farmer claimed he told appellant 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 appellant "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 testified that appellant called him at CCI on a state phone he had access to because of his work in the library as part of a literacy program. Farmer said that call came at 10:00 on Friday on October 6, 1999. R. 960, ll. 2 – 15.

Farmer stated that because the phones were monitored “we talk in riddles.” Farmer maintained that at the prior trial that appellant 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 appellant 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 appellant’s re-trial, that he did not tell the truth at appellant’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 appellant’s first trial to make appellant look bad. R. 1134, l. 13 – 1135, l. 14.

Farmer now maintained that he only heard from appellant after the murder, and that he was “completely surprised” by the telephone call. He still claimed appellant 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. Prior to trial, Assistant Solicitor Lupton told the judge the state had not been able to secure Farmer’s presence from the state of Texas through a “normal out-of-state subpoena.” Lupton said the state’s attempt to have Farmer transported was rejected by the state of Texas. The solicitor attempted to blame this on the fact “[W]e’re [South Carolina] not a signatory state in the uniform rendition of prisoners as witnesses in criminal proceedings act.” Texas was a signatory state. Therefore Lupton maintained it was more difficult to obtain Farmer’s presence for appellant’s trial. R. 349, l. 16 – 351, l. 4.

Lupton also maintained “the paperwork was drawn up in April, submitted, you signed it” and that the “paperwork” went to the Texas Governor’s Office, the Texas Secretary of State’s office and then to their Criminal Justice Department. R. 350, l. 22 – 351, l. 4. Lupton opined that the state acted reasonably to obtain Farmer as a witness since it would normally took one to two weeks, “often times less time than that” to secure an out-of-state witness. R. 351, ll. 5 – 17. Therefore, the state claimed that Farmer was an unavailable witness within the meaning of Rule 804(a)(5), SCRE. R. 351, ll. 13 – 20. Lupton added that the state therefore should be allowed to merely read Farmer’s prior testimony from fifteen or sixteen years ago into the record. R. 351, l. 13 – 354, l. 14.

The trial judge was skeptical of the state’s representations. 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 appellant 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 appellant 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 appellant’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.

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.

Lupton acknowledged that he did not intend to move for a continuance, and solicitor Bell also confirmed he did not intend to ask for a continuance to deal with the problem with Farmer. R. 370, l. 13- 371, l. 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.

Lupton offered that he did not know how long it took for a judge to act in Texas, and that “their whole thing [the Texas authorities] is to make sure that a prisoner is not served with any civil judgments or any other arrest warrants and all of that and that’s the kind of the agreement is what it is.” R. 377, l. 19 – 378, l. 16.

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.

As the judge continued to inquire about the state's actions the solicitor said "the paperwork was received in Texas at the beginning of May, processed in Texas. And, ultimately, we were informed on May 11 that he would not be available to South Carolina during the month of May." R. 384, ll. 11 -22.

The judge then observed it appeared very unusual there would not be a "back up procedure" to have a judge available to process the paperwork. Solicitor Bell said he inquired about the possibility of another judge handling the paperwork and he said he was told "these judges must do it and these are the only two judges that are designated to do it." R. 384, l. 24 – 385, l. 19.

Defense counsel responded 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 appellant’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 appellant should bear the burden of its unreasonable action. R. 396, l. 22 – 398, l. 3.

Counsel also informed the court that in his thirty years of practicing criminal law he had never seen a situation where if he could not get a witness to trial "the judge just recessed until I could get him there." R. 397, l. 20 – 399, 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.

Later, while reserving his objection to the state not having Farmer present, and to the state using Farmer's testimony from the prior trial during this trial, defense counsel told the judge that the alternative of "adjourning the trial for more than a week" was not a real remedy at that point. "We still don't know for certain when Mr. Farmer would be here." Counsel noted the prejudicial effect of adjourning the trial since the jurors would tend to forget the testimony they had already heard, and there was also the risk of contamination since the jury were not sequestered. There would be publicity about the case. R. 875, l. 14 – 876, l. 16. At the point adjournment was raised during the trial the

jury had already heard the testimony of fourteen witnesses including Robert "Bo" Southerland. R. 940 - 941.

Farmer's testimony was later read into the record. R. 940, l. 4 - 978, l. 25. In that testimony Farmer said he conspired with appellant 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 appellant 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."⁴ I also told them it would be a good opportunity to rob her." Farmer claimed appellant said he didn't have "any problem with it," and he said appellant 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 appellant 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 appellant, 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.

Other Evidence - Southerland repudiates his confession of sixteen-and-a-half years

As seen above Bo Southerland repeatedly told other people, including Norman Starnes, the women the church ministry, the lower court and in a letter the Attorney General provided to the Supreme Court in its motion, that he killed the decedent and that appellant was not present. As seen, after Southerland received a re-sentencing trial, and in April, 2006, when the state agreed not to seek the death penalty against him if he testified for the state against appellant, Southerland completely changed what he had told everyone for many years. The state stipulated for testifying against appellant, Southerland now faced a sentencing exposure of thirty years to life imprisonment, rather than the options being only death or life without parole. Southerland now had hope he would get out of prison one day where he had already served almost seventeen years for this crime. R. 940, ll. 1-25. Southerland went from being killer, and appellant not being present, to almost the complete opposite. R. 681, ll. 8 – 19.

Southerland now claimed appellant came by his trailer on a Thursday morning at 8:30, and asked “if I’d help him rob this gal, kill her.” Southerland maintained appellant told him that “Red Farmer had called him and told him that she was getting an insurance

⁴ Quinn was seeing Carter in prison.

check for twenty-eight hundred dollars and she wanted to buy half of pound of reefer.”

R. 681, l. 22 – 682, l. 9.

Southerland said he then rode with appellant to a Crown Station on Highway 378 where appellant’s niece, Brenda, worked. Southerland claimed Brenda told appellant that “Red wanted him to call.” R. 686, l. 4 – 687, l. 13.

Southerland also maintained that Brenda gave them a description of the decedent’s house, and that they rode around looking for the house. They finally sat in an apartment complex across from the house and watched the house. Southerland said appellant left him at the apartment complex at one point, and telephoned the decedent’s house from a pay phone. However, he maintained he only got the answering machine. R. 689, l. 3 – 691, l. 7. While parked at the apartment complex watching the house Southerland said that a lady came out of the apartments and began staring at the car. R. 690, l. 22 - 691, l. 20.

The woman who was staring at Southerland was Sharon Freeman Clounts. Clounts testified that she recalled two white males parking their car into a parking space near her apartment. Clounts became suspicious and watched the car carefully. When she later read in the newspaper about a woman across the street from the apartment complex being kidnapped, she called the police. In Southerland’s statement that was forwarded to the Supreme Court he said a man, Chico, looked very much like appellant, and had been riding with him. R. 518, l. 12 – 527, l. 5; Letter attached to motion. R. 1557.

Clounts gave a statement to the police and she identified “Bo” Southerland as being one of the men from a six person photographic array. R. 526, l. 22 – 530, l. 6.

Clounts testified the man with Southerland had shoulder length brown hair and he was wearing glasses. R. 532, l. 24 – 533, l. 25.

Appellant's ex-wife, Marsha Crane, testified that appellant never had anything "but short hair." Crane also said appellant did not have wear glasses. Crane identified a picture of appellant "and my boys" with appellant's short hair and a mustache. R. 886, l. 7 – 888, l. 4. In addition, Crane confirmed that appellant had a medical condition that caused his eyes to "twitch" or keep blinking. This condition was very noticeable, and the twitching was constant. R. 888, ll. 1 – 18.

Crane verified that they had three phones in their house at the time, and it was common for "people in the community" and their friends to use the phone. That included Bo Southerland. Crane it was "very possible" that Southerland could have used the telephone on the night in question. R. 888, l. 19 – 890, l. 23. The import of this was that the state claimed appellant talked to Farmer from his house, in the face of Southerland's earlier admissions that he was talking to Red Farmer on the telephone and not appellant. See Statement of Robert Southerland attached to State's Motion to Strike Guilt Phase Issues in State v. Robert H. Southerland. R. 1557.

Dana Harley was the maintenance man at the apartment complex where Sharon Freeman Clounts lived. He also remembered watching the two men in a white Mercury Cougar that drove in and out of the apartment complex and parked on October 5, 1989. Harley testified the two men drove in at 9:30 a.m., again at 11:30, again at 1:00, and finally at about 3:00 p.m. on October 5, 1989. R. 482, l. 11 – 495, l. 13.

The following day on October 6, 1989 Harley remembered there was a "big commotion on Platt Springs Road at a house." This was after the decedent had been kidnapped, and the police arrived. R. 497, l. 15 – 498, l. 12.

Harley had identified appellant and Southerland from a photographic line-up as being the two men at the apartment complex that day. R. 499, l. 16 – 504, l. 20. However, on cross-examination Harley admitted he based his identification "on the three seconds you saw him walking in front of the window [of the apartment Harley was repairing]" R. 513, ll. 9 – 20.

West Columbia Investigator Larry Hall testified that he showed photographic line-ups to Sharon Freeman Clounts, Cynthia Roof and Dana Harley. Clounts and Roof identified both Southerland. Neither identified appellant. Harley was the only witness to the apartment complex circumstantial evidence tie who claimed appellant was the man with Southerland in the car that day. Harley also provided the police with the license number on the car which traced was traced back to appellant. Again, however, there was evidence Southerland often drove that car, and that intended to buy it in the future. R. 547, ll. 2 – 11; R. 1225, ll. 1-25; State's motion in Southerland case. R. 1549.

Physical evidence

The evidence in this case showed that the decedent was taken to a pond and shot three times with a shot gun. After she was dead, her hands and feet were chopped off and her body was burned underneath a log at the pond. R. 575, l. 1 – 592, l. 25.

The decedent's AFDC check in the amount of \$949.00 was later cashed at a West Columbia bank on October 10, 1989. There was also a stipulation that Jonathan Harvey, an attorney in Columbia, had negotiated an insurance settlement for the decedent in

which she was to receive \$2,837.18. However, the decedent was not going to receive the actual settlement check until Tuesday, October 10, 1989. R. 639, ll. 3- 17. As seen, Southerland for many years admitted responsibility for all of this.

Southerland's present testimony

Southerland now claimed that when Brenda told them the decedent did not yet have her insurance settlement check that appellant "blew up." Southerland maintained appellant said that Southerland and Red Farmer had lied to him. Southerland claimed appellant then angrily said: "Damn the money, I'm going to kill the bitch." R. 692, l. 22 – 693, l. 16.

Southerland testified he later went with appellant to the decedent's house where Southerland smoked marijuana with her and drank beer with her. Southerland also said the decedent told him the marijuana made her feel better after doing morphine. R. 697, l. 2 – 700, l. 9. However, the toxicology report showed was no THC found in the decedent's blood stream, and also no trace of morphine. R. 1167, l. 13 – 1168, l. 7.

Southerland's testimony was that appellant left with the decedent while he stayed and "babysat" her young child who was asleep. Southerland said he drank three more beers while he waited for appellant to return. Southerland claimed appellant returned and told him he had to go down to the pond off of Beckman Drive. Southerland said when they arrived at the pond appellant told him "he was going to kill her." R. 699, l. 5. – 700, l. 19.

Southerland maintained appellant had a shotgun with him, and he claimed appellant had the decedent's hands handcuffed behind her back, and that he had her "tied

up to the door.” R. 700, l. 12 – 701, l. 16. However, the pathologist, Dr. Joel Sexton, testified there was no evidence the decedent had been handcuffed. R. 595, ll. 1 – 25.

Southerland claimed appellant untied the decedent, and Southerland said: “I turned my head and I heard the shotgun go [off].” Southerland said appellant then shot the decedent two more times. Southerland stated appellant cut off the decedent’s hands with an axe because the handcuffs could be traced to those he stole from CCI. R. 702, l. 8 – 703. 17. Southerland testified appellant told him to chop off the decedent’s feet, and Southerland complied, and he chopped them off. R. 703, l. 7 – 22.

Southerland further said it was appellant who placed limbs and other items on top of the decedent’s body, and set it on fire. It was also appellant who took the decedent’s rings off “and threw them into the pond.” “I tried to show SLED where they were at, but they could not find them.” R. 704, ll. 14 – 25.

Appellant a suspect

When appellant became a suspect in the murder he talked to Sheriff Metts in Lexington. Appellant “told them I wasn’t guilty of no crimes.” R. 1262, ll. 1 – 17. Appellant said he did not have anything to do with the decedent’s death, and he denied that he attempted to intimidate Southerland while they were in prison to say Southerland committed the crime, and that appellant was not with him. R. 1247, l. 1 – 1249, l. 25.

Appellant presented his alibi defense that his wife left for work at 7:00 p.m. on the night the decedent was killed, and that he went by his father’s house later because “my truck was running hot.” After appellant adjusted the hoses of the truck late that night, his father followed appellant home to be sure he arrived without the truck

becoming disabled on the road. Appellant arrived home around midnight. R. 1229, l. 6 – 1239, l. 19.

Appellant testified he was not with Southerland at all that night, and he did not know who was with Southerland. R. 1239, l. 20 – 1241, l. 8. Appellant's father corroborated appellant's testimony that appellant came by his house because of problems with his truck that night, and that appellant insisted that this father follow him home because his truck was running hot. R. 1170, l. 10 – 1181, l. 18.

Kimberly Turner's Testimony

Kimberly Turner, a doctoral candidate in psychology, was sent by the defense to interview Red Parker in the Texas Prison. Turner interviewed Red Farmer in the Texas prison on May 5, 2006. R. 1130, ll. 6 – 17. They talked for two to three hours. Farmer told Turner that he met the decedent while she was visiting another inmate at CCI. Farmer said the first time he heard about the murder was the morning after it happened when he claimed he got a telephone call from appellant. R. 1130, l. 14 – 1132, l. 12.

Turner recalled Farmer told her that appellant said "in some type of code language, that he had done something [and] about the construction job was done. And Mr. Farmer had taken that to mean that Ms. Quinn had been killed." R. 1132, ll. 4 – 12.

Farmer also told Turner that a lot of inmates in the prison "disliked Ms. Quinn because they thought she had intentionally burned her house and her son had been killed in that fire and her daughter injured." This, the inmates thought, was what the decedent had done for the insurance money. R. 1132, l. 4 – 1133, l. 15.

On direct examination, Turner remembered Farmer saying he was completely surprised by appellant's call the day after the murder. Farmer told Turner that "Ms.

Quinn's fiancé" was standing next to him when appellant called. R. 1133, l. 16 – 1134, l. 12. Turner remembered Farmer telling her that he did "spin" his testimony in favor of the state at trial to make "Mr. Cooper look worse than he was." Turner thought Farmer was conveying to her that his testimony represented the state's "version of the truth." R. 1134, l. 13 – 1135, l. 14.

However, on cross-examination the solicitor was able to get Turner to go along with his characterization of the Cooper to Farmer phone call as a "confession" by appellant to Farmer. R. 1136, l. 19 – 1140, l. 25.

Discussion

The right to confrontation is a "trial right" and a defendant is entitled to the opportunity for effective cross-examination at trial. Barber v. Page, 390 U.S. 719 (1968); Kentucky v. Stincer, 482 U.S. 730 (1987); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1992).

The right to confrontation under the Sixth and Fourteenth Amendments is among the most fundamental rights. "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).

In Barber v. Page, the Court noted it was no longer reasonable to simply state that a witness was unavailable because he was in prison in another state. The Supreme Court stated there was now cooperation between the states and the federal government to

procure the attendance of witnesses in prison and out of prison. Barber v. Page, 380 U.S. at 723 – 724.

The Court in Barber v. Page explained that “for witnesses in prison, quite probably many state courts would utilize the common-law writ of habeas corpus testificandum at the request of prosecutorial authority of a sister state upon a showing that adequate safeguards to keep the prisoner in custody would be maintained.” Barber v. Page, 390 U.S. at 724, n. 4.

The Court in Barber v. Page held: “A witness is not ‘unavailable’ for purpose of the forgoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Barber v. Page, 390 U.S. 724-725. The Court wrote that, “The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor at the witness.” Barber v. Page, 390 U.S. at 725.

It was understood at trial that this is a test 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). The Court in Hacheney recognized that the United States Supreme Court has drawn a distinction between unavailability for Constitutional confrontation purposes, and unavailability for purposes of the rules of evidence. Here, as in Hacheney, the issue was solely confrontation.

In Hacheney, the parties knew in advance that three witnesses would be out-of-the-country at the time of trial. The state successfully moved to videotape their testimony

at the deposition for later use. The defendant was present, and his attorneys were fully able to confront and cross-examine these witnesses. The court found that the witnesses were unavailable because even if the state had paid the cost of their coming back to the country for the trial, it was safely inferable they would have remained in Scotland and Bolivia. Further, the court noted "the jury was able to observe each witnesses' demeanor." State v. Hacheney, 160 Wash.2d 503, 158 P.3d. 1152, 1162 (2007).

Most recently 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.

The prior opportunity to meaningful cross-examination is only one part of the analysis. Unavailability under Barber v. Page can only be truly found where the state has made reasonable efforts to secure the presence of the witness. It is the government's duty to establish the unavailability of the witness. Crawford v. Washington, 541 U.S. at 59-60.

Here, defense counsel correctly argued the state's attempts to secure Farmer's presences were not reasonable. The judge chastised the solicitors for failing to bring the problem with Farmer to his attention earlier.

Defense counsel correctly argued the state's failure to obtain Farmer's presence from Alabama prison authorities was the result of its lackadaisical approach to the retrial. The trial judge was clearly very unhappy with the state's attempts to secure Farmer's presence. The trial judge strongly questioned why the state waited ten days to have SLED act on the request. The judge had the solicitor agree that bike week at the beach did not have priority over this type of case, and the state abandoned that excuse. The state found out eleven days before trial, May 11, 2006, that it probably could not secure

Farmer's presence, and it only then mentioned it in passing to the defense. R. 364, l. 1 – 384, l. 22.

As seen, the judge was highly critical of the state's contention that it did not bring the problem to the judge's attention because it thought any motion for a continuance or for delay to secure Farmer's presence was not possible. The judge had the solicitors admit that they had not planned to move for a continuance.

The judge also told the solicitors that he thought they fully expected to come to Court without having Farmer live as a witness, and they would get the court to agree for Farmer's former testimony to be read to the jury. A fair reading of the solicitor's statements to the court on Farmer's "unavailability" given their delay in acting, their delay in learning procedure, their delay in reporting the problem, and their delay in searching for alternatives proves the judge correct. The judge also questioned the solicitor about why they had not taken action earlier in March rather than waiting into April. Again, it was not until May that the Texas authorities were able to act, and they told the solicitors in this state of the problem.

Counsel also correctly argued that the state created the problem through its consistent failure to move reasonably ahead in preparation for appellant's retrial. The state and not appellant should have borne the negative consequences of the state's unreasonable failure to secure Farmer's presence, and its failure to reasonably prepare for trial. Cf. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001).

The failure of the state to have Farmer available to testify in person denied appellant the opportunity to have the jury observe Farmer's demeanor. Defense counsel strongly argued Farmer was a witness the jury needed to observe because he was a

pathological liar. As seen, in one instance, the solicitor objected to the “sarcasm” as defense counsel read Farmer’s claims to be a world class crane operator who was in demand from one coast of this country to the other. If a picture is worth a thousand words, then surely observing a pathological liar’s like Farmer’s demeanor from a few feet away was a costly loss to the trier of fact’s ability to do its job, and at appellant’s expense.

Further, the attempts of the defense to make up for Farmer not being at trial caused them to use Kimberly Turner, who interviewed Farmer, as a witness. The Turner testimony went badly because the solicitor was able to successfully characterize the statements attributed to Farmer by Turner as constituting a “confession” by appellant to Farmer. That was hardly the only inference even if one was to believe Farmer’s new claim that appellant called him only after the murder, and talked in code.

A skilled cross-examination of Farmer about his new claims, and appellant’s alleged telephone call would not have allowed that result. Yet, Turner’s testimony is directly attributable to the defense having to scramble because of the state’s failure to reasonably act to secure Farmer’s presence for trial.

Bo Southerland’s testimony had to be regarded as incredible given his statements to anyone and everyone that he alone killed the decedent, and that appellant was not present. Farmer’s testimony was critical in this case. The state did not act reasonably to obtain Farmer’s presence, and the judge respectfully erred by ruling Farmer “unavailable” under the highly unusual facts of this case which clearly showed a lackadaisical approach to securing Farmer’s presence on the part of the state. Appellant

was denied his Sixth Amendment right to confrontation. Appellant should be granted a new trial. See Barber v. Page, supra.

The court erred by ruling appellant could be impeached with his 1977 convictions for housebreaking and grand larceny since these convictions were too remote under Rule 609, SCRE, and they were highly prejudicial to appellant.

Relevant Facts

After the judge informed appellant of his right to testify the solicitor informed the court he wished to impeach appellant with house breaking, grand larceny and armed robbery convictions from 1977. R. 1027, l. 6 – 1029, l. 14. Defense counsel argued these convictions were too remote, and outside the ten year time period allowed by Rule 609, SCRE. R. 1029, l. 15 – 1030, l. 11.

The solicitor admitted that more than ten years had elapsed “from this date.” R. 1030, ll. 12 – 14. The conviction was twenty-nine years old at the time of appellant’s trial on May 22, 2006. The solicitor argued the crime occurred in 1989, that the 1977 crimes were ones of dishonesty. He also argued that the jury already knew appellant had been in prison so “I don’t know how the prejudicial effect would outweigh the probative value in this thing.” R. 1030, l. 22 – 1032, l. 10.

Defense counsel argued that “the fact that Tony Cooper was a prison inmate was inherent in the evidence of this case” and that the real point of appellant’s prior record “of a string of crimes from when he was seventeen” was to show the “disparity in ages between Cooper and Southerland.” Counsel again repeated these 1997 crimes were too remote to be used for impeachment purposes. R. 1032, l. 6 – 1033, l. 11.

The judge ruled he would not allow the armed robbery conviction to be used for impeachment, apparently agreeing because armed robbery was also an issue in this case.

However, the judge ruled he would allow the housebreaking and larceny conviction to be used for impeachment purposes. R. 1032, l. 8 – 1034, l. 5.

At the beginning of appellant's testimony he acknowledged that on September 16, 1977 he pled guilty to the offenses of housebreaking and grand larceny in Lexington County and he received a fifteen year sentence. He returned to Lexington County after his release from jail. R. 1187, ll. 13 – 23.

Discussion

This case is controlled by the Supreme Court's decision in State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005). In State v. Johnson, the Court held the trial judge erred in admitting Johnson's prior convictions because he did not apply to proper legal standard in calculating the ten-year limit under Rule 609(b), SCRE.

The Court noted that evidence of a prior conviction was admissible to impeach a witness unless a period of more than ten years had elapsed since the date (1) of the conviction or (2) the release of the witness from confinement of that conviction which ever is later.

In State v. Johnson, the defendant in 1986 was sentenced for grand larceny and burglary as a juvenile. The record did not reflect whether the date of the conviction or his release was from confinement was later. Johnson was originally tried for murder in the 1990's, and he was convicted. However, his conviction was overturned in State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998).

Appellant's retrial took place in 2000. The court noted that it was clear that Johnson's conviction and release from confinement were both "pre-1990," and "because

appellant's trial was in 2000, the 1986 conviction was improperly admitted." State v. Johnson, 363 S.C. 53, 609 S.E.2d 520, 522 (2005)

The same was true here. Appellant's convictions for grand larceny and house breaking occurred in 1977. Appellant was released under the parole laws as they existed at that time. Appellant's trial did not take place until May 2006.

Thus it is clear the date of appellant's conviction and the release were well over ten years before the date of his trial. As present counsel argued in State v. Johnson, even if there were any ambiguity in resolving the ten year "too remote" date issue of Rule 609(b), SCRE it would have to be resolved to be in favor of appellant. Although Rule 609, SCRE is an evidentiary rule, it is surely penal in nature. Consequently, any ambiguity in the statute was to be strictly construed against the state, and in favor of the defendant. See Hair v. State 305 S.C. 77, 406 S.E.2d 332 (1991); State v. Cutler, 274 S.C. 376, 364 S.E.2d 420 (1980).

Here, appellant's trial was held seventeen years after his arrest, and twenty-nine years after his convictions in 1977. Appellant made every effort to obtain the speedy retrial. The state was able to reach back and have appellant impeached with these 1997 convictions for grand larceny and house breaking. These were crimes of dishonesty, and the judge instructed the jury they could consider them in weighing appellant's credibility.

The improper impeachment went to appellant's credibility. Defense counsel's statements to the jury were not evidence. Counsel's argument was that appellant was only a seventeen years old kid at the time of the 1977 "series of crimes" which appellant was present for, but they were under the influence of career criminal "Bo" Southerland. This argument was offered to prepare the jury to think about such things as why appellant

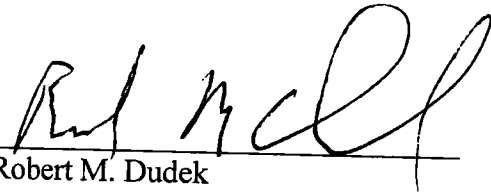
let Southerland have such great access to appellant's car. See R. 416, ll. 2-20. The "series of crimes" under Southerland reference was vague.

Credibility in this case was critical, particularly where the jury was asked to believe Bo Southerland over appellant after Southerland's years of telling everyone appellant was not involved in the crime, and his obvious motivation to now lie to try and secure a thirty year sentence or at worst a life rather than death sentence. The improper impeachment of appellant with crimes involving dishonesty, which the judge told the jury they could consider when determining whether appellant was credible, was prejudicial. Appellant should be granted a new trial given this highly unusual record.

CONCLUSION

By reason of the foregoing arguments, this Court should issue an order vacating appellant's convictions based upon the denial of his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. In the alternative, appellant's convictions should be reversed, and this case remanded to the Lexington Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

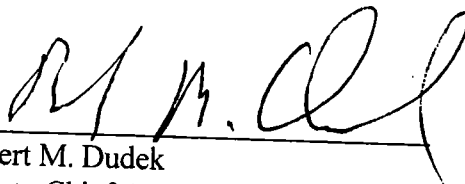
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March 23, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 23, 2009

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

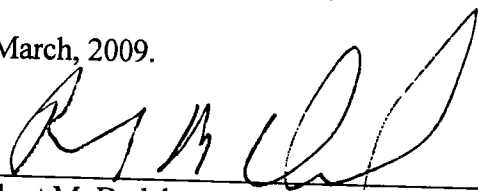
V.

GENE TONY COOPER, JR.,

APPELLANT

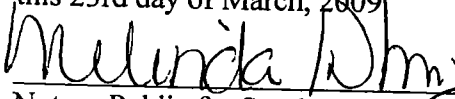
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 23rd day of March, 2009.


Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 23rd day of March, 2009

 (E.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018

**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.,

Appellant.

FINAL BRIEF OF RESPONDENT

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FEDERAL CASES

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial judge abused 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 the trial judge abused 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. Further, any error was harmless?

STATEMENT OF THE CASE

Appellant, Gene Tony Cooper, Jr., (Cooper) is incarcerated in Leiber Correctional Institution, of the South Carolina Department of Corrections. The Lexington County Grand Jury indicted him at the January 1990 term for murder, kidnapping, armed robbery, forgery and conspiracy, in connection with the October 5-6, 1989, death of Kimberly Ann Quinn, the victim. Philip "Red" Farmer, Brenda McLauren, and Robert H. "Bo" Southerland were also charged in connection with one or more of these crimes. The State thereafter served its Notice of Intention to Seek the Death Penalty on Cooper and Southerland.

On January 24, 1991, the Honorable Julius H. Baggett granted Southerland's motion for a severance. Cooper's case was called for trial before the Honorable Hubert E. Long and a jury on February 11, 1991. (His law clerk at that time was Rick Hubbard). Lexington County Public Defender H. Patterson McWhirter and John Earl Duncan, Esquire, represented Cooper in all pre-trial hearings and at trial. Also, Cooper was appointed to act as co-counsel on January 31, 1991. The Honorable Donald V. Myers, Solicitor of the Eleventh Judicial Circuit, and Deputy Solicitor Knox McMahon represented the State.

On February 19, 1991, the jury found Cooper guilty of murder, kidnapping, armed robbery and conspiracy to commit armed robbery but found him not guilty of forgery. A sentencing hearing was commenced on February 20. The State alleged the statutory aggravating circumstances that the murder was committed while in the commission of kidnapping, robbery while armed with a deadly weapon and larceny while armed with a deadly weapon. On February 22, 1991, the jury found the existence of each of the alleged statutory aggravating circumstances and recommended a death sentence. Therefore, the trial judge sentenced him to death. He also received consecutive sentences

of twenty-five years imprisonment for armed robbery and five years for conspiracy. Cooper timely served and filed a notice of appeal.

On January 10, 1994, the South Carolina Supreme Court filed a published Opinion, in which it affirmed his kidnapping, armed robbery and conspiracy to commit armed robbery convictions, reversed his murder conviction and remanded the matter to the trial court, *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994). On February 3, 1994, the Court filed an unpublished Order denying the Petition for Rehearing. On September 4, 1995, Cooper filed an Application for Post-Conviction Relief, attacking each of his convictions. The PCR court signed an Order Granting Post-Conviction Relief on December 3, 1998.

Respondent served and filed a timely notice of appeal. The South Carolina Supreme Court granted Respondent's Petition for Writ of Certiorari but, after briefing, filed an Opinion on August 12, 2002, affirming the PCR judge's decision. It thereafter remanded the matter to the lower court. *Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002).

Cooper subsequently made a motion for a speedy trial. The Honorable Marc H. Westbrook held a hearing on his motion on August 18, 2003. David I. Bruck and Robert E. Lominack, Esquires, represented Cooper at the hearing. Eleventh Circuit Solicitor Donald V. Myers and Deputy Solicitor C. Dayton Riddle, III, represented the State. Judge Westbrook took the matter under advisement. R. pp. 4-17.

Following a second demand for a speedy trial, the Honorable William P. Keesley held a hearing on February 15, 2005. Mr. Bruck again represented Cooper, while Mr. Riddle represented the prosecution. Judge Keesley initially took the motion under advisement. He thereafter filed an Order dated April 25, 2005, directing the prosecution to speak to the judge assigned to the case and to the Chief Judge for Administrative Purposes; and to select a trial date "which shall begin in 2005."

The Order further provided that notice was to be given to defense counsel of the trial date within thirty days of the Order. **R. p. 29.**

Cooper filed another motion for a speedy trial and moved for dismissal of the charges against him. The Eleventh Circuit Solicitor's Office filed a motion on May 18, 2005, in which it sought to disqualify Cooper's trial counsel and have them removed because of Mr. Bruck's improper contact with Southerland that resulted in a statement exculpating Cooper. The Solicitor's Office also made a motion to be recused because of a conflict of interest arising from the Office's employment of the original trial judge's law clerk. Judge Keesley held a hearing into these motions on July 12, 2005. Mr. Bruck, along with Stuart M. Andrews, Jr., Esquire, and Assistant Lexington County Public Defender John E. Duncan represented Cooper; and Solicitor Myers represented the State. **R. pp. 30-71.** Judge Keesley filed an Order.

The prosecution of the case was thereafter assigned to First Circuit Solicitor David Michael Pascoe, Jr. On December 29, 2005, Cooper filed a Notice of Motion and Renewed Motion to Dismiss All Charges for Lack of a Speedy Trial, Or in the Alternative for Release on Bail. **R. pp. 81-85.** The prosecution thereafter filed the "State's Response to Defendant's Motion for Speedy trial and/or Granting Bail," (**R. pp. 86-90**) and Cooper filed a reply to that pleading. **R. pp. 91-100.**

The Honorable Daniel F. Pieper held a hearing on Cooper's motions February 8, 2006. Messrs. Bruck, Andrews and Duncan represented Cooper at the hearing. Senior Assistant First Circuit Solicitor Benjamin Harrison Bell represented the State. Judge Piper denied both of Cooper's motions in a lengthy Order dated April 21, 2006. **R. pp. 328-344.**

Cooper then received a jury trial before Judge Pieper on May 22 - June 1, 2006. Messrs. Bruck, Andrews and Duncan represented him. Mr Bell and Assistant Fifth Circuit Solicitor Theodore Nichols Lupton represented the State The jury convicted Cooper of each of the charged

offenses. Judge Pieper sentenced him to life imprisonment for murder, twenty-five years for armed robbery and five years for the conspiracy count. Because of the murder sentence, Judge Pieper did not impose a sentence for kidnapping. See S.C. Code Ann. § 16-3-910 (Supp. 2008).

Cooper timely served and filed a notice of appeal.

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.¹

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

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

down to Platt Springs Road.² 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."³ **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.⁴ She

² 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.**

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

⁴ After they saw her pull up to the house, they realized that this was not the house they had previously been watching.

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.⁵ 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 waited for Cooper, in the trailer belonging to Shumpert's nephew.⁶ When Cooper arrived, he was in his green truck.⁷ They then went to a "beer joint" off of Platt Springs Rd., where 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.⁸ 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. 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

⁵ He knew a few people in the trailer park and that Mr. Cooper, who is Cooper's father, lived on Greenwood Dr.

⁶ This trailer was on the same property as the Shumpert's trailer.

⁷ 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.

⁸ Southerland knew that it was 9:00 p.m. because Cooper had to call his wife at 9:00 p.m.

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.

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.⁹ Kim was inside the house. She was tied to the door, and 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. 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. 700-02.¹⁰

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

⁹ The shotgun came from a trailer that they had broken into a few weeks before. Southerland testified that he had fired off a round at Donnie Shumpert's house on the previous night. R. p. 701.

¹⁰ 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." R. p. 702.

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.¹¹ 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

¹¹ Cooper told him that he could rent the camper for \$50 a week. **R. p. 709.**

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 1st. At the time of her murder, Kim's boyfriend, Eugene Carter, was incarcerated at C.C.I. Carter was 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.**¹²

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.¹³ The following day, October 4, Farmer received a visit from McLauren, (Cooper's niece and co-defendant), who routinely visited

¹² 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.**

¹³ 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.**

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.**¹⁴

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.**

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.¹⁵ 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.

¹⁴ 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.**

¹⁵ 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.**

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." **R. pp. 497-506; 516-26.¹⁶**

On Friday, October 6, 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.**

¹⁶ Her description of the passenger fit Southerland. She testified that he had boldly stared at her.

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.¹⁷ 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

¹⁷ There would not be any telephone record for a local call to this State telephone.

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.¹⁸ R. pp. 901-04; 914-33. Cooper appeared to be the leader between the two 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

¹⁸ Chavis testified that they seemed to be "good friends." R. p. 917.

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.¹⁹ 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.**

She 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. Tr. p. 632. 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,²⁰ 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.**

¹⁹ 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 30th. **R. p. 897.**

²⁰ This would have been October 8, 1989.

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. Dr. Sexton recovered buckshot, birdshot and wadding from the wounds.²¹ R. pp. 578-604.

²¹ The buckshot was recovered from her neck, while the birdshot was found in the head wound. R. pp. 588-89.

ARGUMENTS

- I. 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 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.

- A. How issue was raised in trial court

1. August 2003 hearing

After the Supreme Court affirmed Post-Conviction Relief on the non-murder offenses and remanded the matter to the Lexington County Clerk of Court, Cooper submitted "Defendant's Amended Demand For Speedy Trial, which is dated July 11, 2003."²² The Honorable Marc H. Westbrook held a hearing on his motion on August 18, 2003. David I. Bruck and Robert E. Lominack, Esquires, represented Cooper at the hearing.²³ Eleventh Circuit Solicitor Donald V. Myers and Deputy Solicitor C. Dayton Riddle, III, represented the State. R. pp. 5-15.

Defense counsel stated at the outset of the hearing that the motion was filed "to get a trial date set." R. p. 5, ll. 8-9. He noted that the Supreme Court had affirmed the granting of PCR relief on the convictions other than murder on August 12, 2002, and that the prosecution and defense had

²²South 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).

²³ Counsel waived Cooper's presence at this hearing, R. p. 5, and at the February 2005 hearing. R. p. 5.

agreed that the retrial of the murder indictment should not proceed "until the status of his noncapital cases was finally resolved" in PCR. Counsel claimed that he had called Solicitor Myers on June 20, 2003. Mr. Riddle returned this call on June 23rd, and told him that Solicitor Myers was unavailable for family reasons. He asked the court to consider setting a November 2003 trial date because the case had been pending for over a year. **R. pp. 5-7.**

The Solicitor noted that Cooper's was one of about eight or nine pending capital cases that were lined up to be tried, including trials for Caleen Radwell, Norman Starnes (who had a hearing earlier that afternoon), Clinton Robert Northcutt, Jeffery Jones, Jeffery Haselden and Cooper's co-defendant, Robert Southerland. Northcutt's case was then set for the following month.²⁴ **R. pp. 8-10.**

Counsel argued that the other cases to which the Solicitor referred were only pending for re-sentencing, as opposed to Cooper whose entire case had to be retried; and counsel argued for a November trial date. He did not see that a tentative date in November was feasible, since that was when court was to move to the new courthouse. So, Judge Westbrook took the matter under advisement. He did not thereafter act on Cooper's motion. **R. pp. 10-14.**

2. 2005 hearings before Judge Keesley

Following a second demand for a speedy trial, the Honorable William P. Keesley held a hearing on February 15, 2005. Mr. Bruck again represented Cooper, while Mr. Riddle represented the prosecution. Trial counsel argued that, at an unrecorded, in chambers hearing on August 25, 2003,²⁵ the State had represented that it would try Cooper's case in the Spring of 2004. However,

²⁴ The State also moved to disqualify Cooper's counsel because of improprieties in taking a statement from Southerland that exculpated Cooper, without the knowledge or permission of Southerland's counsel. Judge Westbrook did not address this motion because of inadequate notice to defense counsel. **R. pp. 8-9**

²⁵ See April 25, 2005 Order, **R. p. 29.**

the State failed to try the case and Cooper renewed his request for a speedy trial. After that time, counsel accepted a job as a law school professor in Virginia. Counsel argued that Cooper was anxious for him to remain on the case and suggested a June or July 2005 trial date to accommodate counsel's school schedule. He noted that Deputy Solicitor Riddle was reluctant to agree to a trial date without the Solicitor's input, but he noted Judge Keesley's authority to set a date as the Chief Administrative judge. **R. pp. 5-6.**

Deputy Solicitor Riddle stated that Judge Keesley should refrain from setting a date because it was a capital case and a judge had not yet been appointed to try the case. He suggested that it would be more appropriate for the appointed judge to set a trial date which would accommodate that judge's schedule; and he confirmed that he could not agree to a date in the Solicitor's absence. Trial counsel stated that it would be unnecessary to assign a judge if the State did not seek the death penalty; and he noted Cooper's willingness to have Judge Keesley serve as trial judge.²⁶ **R. pp. 7-8.**

Judge Keesley took the motion under advisement. **R. pp. 8-9.**

He then filed an Order dated April 25, 2005. He directed the prosecution to speak to the judge assigned to the case and to the Chief Judge for Administrative Purposes, and to select a trial date "which shall begin in 2005." The Order further provided that notice was to be given to defense counsel of the trial date within thirty days of the Order. **R. p.29.**

Cooper subsequently filed another motion for a speedy trial and he moved for dismissal of the charges against him. The Eleventh Circuit Solicitor's Office filed a motion on May 18, 2005, in which it sought to disqualify Cooper's trial counsel and have them removed because of Mr.

²⁶ *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").

Bruck's improper contact with Southerland that resulted in a statement exculpating Cooper. The Solicitor's Office also made a motion to be recused because of a conflict of interest arising from the Office's employment of the original trial judge's law clerk. The concern was that, as a law clerk, he had been privy to privileged communications between the judge and defense counsel. **R. pp. 68-71.**

Judge Keesley held a hearing into these motions on July 12, 2005. Cooper was present, and Messrs. Bruck, Andrews and Duncan represented him. Solicitor Myers represented the State. Trial counsel noted that he was seeking dismissal of the charges for violation of Cooper's right to a speedy trial or, alternatively, he was asking for bail pending trial. He then recounted the procedural history discussed, *supra*. He admitted that the Solicitor had written Judge Westbrook within thirty days of the April 25th Order "concerning the scheduling of a trial date;" but 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.**

He further maintained that almost three years had elapsed since the case could have been retried and almost two years had lapsed since his original speedy trial motion. Also, the State had supposedly waited until the last minute to file the motion relating to its conflict of interest. He argued that the length of the delay was "completely unreasonable" and that "the reasons for the delay are entirely invalid." Because the State had prosecuted other cases before Cooper and had not complied with the April 25th Order, he moved for dismissal. **R. pp. 10-14.**

On the other hand, the Solicitor maintained that he had previously informed both Judge Westbrook and Judge Keesley of his motion to recuse his Office based upon a conflict of interest. As to the motion to dismiss, he stated that he had written Judge Westbrook twenty-three days after

the April 25th Order because he had assumed that the case was assigned to Judge Westbrook. He enclosed the April 25th Order, a copy of the State's motion to disqualify trial counsel and an e-mail from trial counsel asking that the case be set between May and August 2005.²⁷ In his letter, the Solicitor explained that "it would be impossible to try it in that time frame," and he asked for a hearing on the motion to disqualify. The Solicitor further noted that Cooper's motion was premature because 2005 had not expired; and he noted the importance of first resolving the other motions. **R. pp. 19-22.**

Trial counsel again argued that the motion to recuse the Solicitor's Office was filed late, he maintained that it was part of a pattern of trying to deprive Cooper of a speedy trial, and he urged Judge Keesley to resolve that motion and the motion to disqualify trial counsel. He also re-asserted that the case should be dismissed. In response to questioning from Judge Keesley, Cooper twice indicated that he wanted Bruck to represent him. **R. pp. 23-30.**

Judge Keesley filed an Order dated July 12, 2005, denying the motion to dismiss for failure to have a speedy trial, the request for bail and the motion to disqualify trial counsel. He granted the Solicitor's motion to be recused. **R. pp. 76-79.**

As to the speedy trial motion, he found that an Order had not been issued after the State had agreed to call the case for trial in Spring 2004. His Order further noted his April 25th Order, trial counsel's request to have the case set before the school year resumed and the motions filed by the Solicitor. He found that there was "insufficient cause at this stage to dismiss the charges." Although he was troubled by the delay that would be caused by disqualification of the Solicitor's Office, he rejected Cooper's assertion that this was "part of an intentional pattern of delay." He further stated

²⁷These documents were part of the Solicitor's file, which Cooper introduced as Defendant's Ex. 1 (**R. pp. 267-295**) at the February 8, 2006 motions hearing.

that the issue could be revisited by the trial judge subsequently assigned to the case if it was tried before the end of 2005. **R. pp. 76-79.**

In his conclusion, Judge Keesley noted 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.” He noted that there were eight cases where a death penalty notice had been served and a case involving a minor whose murder case had been pending ten years.²⁸ Finally, he noted that efforts were being made to improve the docket with respect to death penalty trials, and he directed the Solicitor to “transmit [his] file to the Attorney General’s Office or the designated prosecutors immediately.” **R. pp. 76-79.**

3. February 8, 2006 hearing before the trial judge

The prosecution of the case was thereafter assigned to First Circuit Solicitor David Michael Pascoe, Jr. On December 29, 2005, Cooper filed a Notice of Motion and Renewed Motion to Dismiss All Charges for Lack of a Speedy Trial, Or in the Alternative for Release on Bail. **R. pp. 81-85.** The prosecution thereafter filed the “State’s Response to Defendant’s Motion for Speedy Trial and/or Granting Bail,” (**R. pp. 86-90**); and Cooper filed a reply to that pleading. **R. pp. 91-100.**

The trial judge, Judge Pieper held a hearing on Cooper’s motions February 8, 2006. Messrs. Bruck, Andrews and Duncan represented Cooper at the hearing. Senior Assistant First Circuit Solicitor Benjamin Harrison Bell represented the State. Cooper argued that one of the four factors to consider in determining whether his right to a speedy trial had been violated was the reason for the delay, and he indicated that he wished to offer testimony from Solicitor Myers and Deputy Solicitor Riddle on this issue and to answer the trial judge’s question about why a judge was not

²⁸ The Solicitor’s Office had been disqualified in that case. **R. p. 78.**

assigned to the case. After the State noted that Judge Keesley had already ruled on matters occurring before July 12, 2005, the trial judge stated that he was considering the motion *de novo*. **R. pp. 7-11.**

Solicitor Myers testified that he is the Solicitor to the Eleventh Judicial Circuit, and that he originally prosecuted Cooper. He did not know what case was the oldest in the circuit after Cooper had received PCR relief on the convictions for kidnapping, armed robbery and conspiracy counts, but he did not think that Cooper's was the oldest case.²⁹ However, the case could have been the oldest because of the length of the appeal process. When cases come back to his Office for re-trial, they are typically assigned to a member of his staff, and Deputy Solicitor Riddle helped him on this case. Mr. Riddle was responsible "for all the retrial workup." (Sic). He did not know or remember what was done to prepare for Cooper's retrial after August 29, 2002; and he stated that his Office "probably had eleven or twelve death penalty cases pending for the last several years." **R. pp. 12-16.**

When asked about a progress report prepared by Mr. Riddle, the Solicitor explained that he had not seen his file since his Office was recused. He acknowledged that a potential capital case requires Court Administration or the Chief Justice of the Supreme Court to assign a judge to hear it. For his part, Solicitor Myers notifies the Chief Administrative Judge, and the Chief Administrative Judge usually talks to Court Administration. "Sometimes I communicate with Court Administration and then send copies to the Chief Administrative Judge." **R. p. 114-16.** Judge Westbrook was the Chief Administrative Judge at the time and he would have notified Judge Westbrook "probably within six months" of August 29, 2002. He could not recall a specific date

²⁹ The Raymond Patterson case, which was awaiting re-sentencing, was the oldest case.

because he met with Judge Westbrook periodically about scheduling capital cases, since Judge Westbrook "handled most of the capital cases." R. pp. 115-117; 135.³⁰

Although he would personally notify court administration on occasion, it was the Chief Administrative Judge's responsibility "to make this process happen;" and judges control court schedules, not him. He did not personally notify court administration in this case because, based on his conversations with Judge Westbrook, he was under the impression that the case was assigned to Judge Westbrook. He did not make any request to have a judge assigned to Cooper's case before the motion to dismiss because of his impression that Judge Westbrook was assigned to the case. He also explained the confusion caused by problems in the old courthouse and the construction of the new courthouse. R. pp. 117-20; 137; 159-61.

Cooper introduced the Solicitor's file as Defendant's Exhibit 1 (R. pp. 267-95). There was no written communication to Judge Westbrook or any other judge about scheduling this case, nor would he have written a letter. Rather, this would have been one of the many cases they discussed, and there was no discussion about a trial date. With respect to the August 2003 hearing, Solicitor Myers stated that there were several capital cases pending at that time.³¹ He emphasized that he did not know of any supposed "proof problems" in Cooper's case at that point. When asked about the failure to try the case in Spring 2004, he explained the part of this was caused by court schedules and part was caused by the fact that his Office moved four times in one year. He did not recall what capital cases he tried between August 2003 and the end of 2004, even though trial counsel suggested

³⁰ There were about ten death penalty cases pending in 2003. R. pp. 159. Also, Solicitor Myers would provide a list of cases and they would try to schedule the cases six months in advance. This included cases "sent back by the Supreme Court" for retrial or re-sentencing. R. p. 117.

³¹ He did not recall the subsequent in-chambers meeting with Judge Westbrook. R. p. 130.

that Northcutt's was the only case tried. Further, he does not get actively involved in death penalty cases until the case is near trial. **R. pp. 123-24; 159-61.**³²

Even after Judge Keesley's April 25, 2005 Order, Solicitor Myers was under the impression that Judge Westbrook was assigned to the case. So, he wrote Judge Westbrook on May 18, 2005 and enclosed the correspondence discussed, *supra*. Although Deputy Solicitor Hubbard (Judge Long's former clerk) had worked for him for a number of years, he did not recall when Mr. Hubbard brought the conflict of interest to his attention. **R. pp. 139-43.**

After Judge Keesley's July 12, 2005 Order, the Solicitor wrote the Attorney General the following day and enclosed a copy of the July 12th Order. He was confident that he had also spoken to John McIntosh before sending the letter, and that he explained what was happening. There were approximately eight death penalty cases awaiting trial in the beginning of 2005. He acknowledged that a list of pending cases in the circuit was prepared at Judge Keesley's request, but this was compiled by Deputy Solicitor Riddle. Finally, the Solicitor was unaware that Judge Westbrook had recused himself from hearing Cooper's PCR and he had dealt with Judge Westbrook both as the assigned Judge and the Chief Administrative Judge. **R. pp. 143-47; 152-57.**

Deputy Solicitor Riddle testified that he did not know whether the case was ever formally assigned to him, but he admittedly dealt with trial counsel. He also did not think either Cooper or Southerland ever appeared on his roster. His first involvement in this case that he could recall was when he received an email from trial counsel, although he conceded that he might have spoken to counsel on the phone before receiving the email. He did not have any involvement in this case

³² In addition to repeatedly relocating, there was only one courtroom being used during this period because of a problem with mold. This further slowed the docket and resulted in the loss of seven or eight months of court. **R. pp. 159-60.**

before the speedy trial motion in August 2003; he did not do anything on his own initiative in the case; and he did not recall Solicitor Myers directing him to prepare the case for trial, between 2002 and 2005. He also did not know of anyone else in the office who would prepare the case in the period. **R. pp. 164-70; 175-76.**

Deputy Solicitor Riddle did not know whether any necessary witnesses were unavailable in this case; and the only problem with the case that delayed its retrial was the motion to disqualify trial counsel. He did not know why this case had not been set for trial, and he had been unaware of Mr. Hubbard's previous employment by Judge Long at the time of the original trial. He identified a computer generated roster, introduced as Defendant's Ex. 2 (**R. pp. 296-327**), as a roster that he generated for 2005. The oldest case reflected on the roster was Raymond Patterson's case, which was awaiting re-sentencing. Cooper's case was the next oldest case. **R. pp. 170-75.**

Cooper then argued that his right to a speedy trial under the Sixth Amendment and the South Carolina Constitution had been violated; and that he was entitled to dismissal of the charges against him. He asserted that the cases were ready for retrial in August 2002. Since that point, he had faced a "sit-down strike by the prosecution," and the State had refused to set the case for trial. He noted that the trial judge had to consider the four-prong test established in *Barker v. Wingo*, 409 U.S. 514 (1972), in determining whether or not to grant his motion. The first factor to consider is the length of the delay, which he asserted was presumptively prejudicial because it was three and one-half years. **R. pp. 177-84.**

Cooper further asserted that he had made repeated demands for a speedy trial, and that the reason for delay was the State's "willful refusal to do anything to try the case." With respect to the requirement that he show prejudice, he focused mainly upon the fact that he had been held on death row for the entire period while he waited for a trial "to vindicate his innocence," as well as the

anxiety and stress of the pending charges. Even when questioned by the trial judge, he attempted to minimize the significance of the impairment to his ability to defend himself as one of the aspects of prejudice under *Barker*; and he suggested that the existence of a transcript from the earlier trial did not ensure that there would not be prejudice.³³ He and the trial judge then discussed the applicability of several decisions of the United States Supreme Court and several South Carolina cases. **R. pp. 184-99; 204-05; 208-10.**

Cooper acknowledged that there was a difference between negligence and intentional, bad faith conduct. However, he asserted that the State's refusal to act prevented him from establishing that inactivity was "not negligence." In response to the trial judge's inquiry, he also stated that even if the delay following the July 12, 2005 Order was attributable to Court Administration (as opposed to the prosecution), it was irrelevant for purposes of his speedy trial motion; and that the State was responsible for all of this delay under *Barker* and its progeny. Likewise, there was no justification for the delay, even with the trial of the Northcutt case in the Fall of 2003.³⁴ **2/08/06 R. pp. 199-211.**

Mr. Bell conceded that Cooper had been awaiting retrial for three and one-half years. However, he noted Judge Keesley had found, in the July 12, 2005 Order, that there was no intentional pattern of attempting to delay the case. He also observed that Judge Keesley had concluded that the motion to dismiss should be denied based upon the record before him. He further represented that the First Circuit Solicitor's Office had attempted to get this case set for trial quickly after receiving the file in late September 2005. Because his Office had been directed "to get with"

³³ He took the position that he would not be able to accurately gauge prejudice until a trial date was set and he had an opportunity to subpoena defense witnesses. **R. pp. 182-85.** He further asserted that the State could argue that part of the problem with respect to the defense being impaired occurred during the lengthy appeals process after his original conviction and sentence, which was not protected by his right to a speedy trial. **R. p. 196.**

³⁴ He also called upon Mr. Bell to explain any delay after September 2005.

the judge assigned to the case, he took it upon himself to contact Judge Keesley. Judge Keesley thereafter discovered that the case had not been assigned to anyone; and the trial judge was eventually assigned to the case. **R. pp. 212-14; 220.**

Mr. Bell quite correctly noted that, although the effects of pretrial confinement and anxiety of the accused awaiting trial are relevant to a *Barker* prejudice analysis, they are purely subjective and not easily rebutted by the State. However, he emphasized that the key component to showing prejudice from denial of a speedy trial (or, here, retrial), was whether the accused had been impaired in presenting a defense. Here, it was not a problem because this case had been tried previously and evidentiary issues were developed and the testimony of the various witnesses had been "flushed out." The State had obtained a conviction in 1991, and he thought the State could again convict Cooper. **2/08/06 R. pp. 214-16.**

In response to the trial judge's inquiry about the applicability of *Doggett v. United States*, 505 U.S. 642 (1992), Mr. Bell stated that *Doggett* had involved a delay of over eight years; and, even though the defendant had been free during that period, the government had not made any effort to try the case despite knowing where the defendant was located. He further acknowledged that the defense did not move for a continuance. He also represented that he had been appointed in September 2005. **R. pp. 215-19; 220-21.** The trial judge stated that he had been designated to try the case at the end of November or early in December 2005, and that none of the delay from December 2005 was caused by the State because the last two weeks of December had been designated as in chambers weeks. **R. pp. 220-23.**

In reply, Cooper acknowledged that Supreme Court had stated that whether the defense had been impaired was relevant to a prejudice analysis under *Barker*; but he asserted that *Barker* was distinguishable because the delay in *Barker* was reasonable and because "you could infer" that the

accused did not want a trial until after his co-defendant had been convicted, since the defendant could not be convicted if his co-defendant was acquitted. **R. pp. 223-25; 229.**

4. The trial judge's Order

The trial judge denied the motion to dismiss the indictments because of a violation of Cooper's right to a speedy trial in a sixteen page Order dated April 21, 2006. **R. pp. 328-43.** Applying the four-part text set forth in *Barker*, the trial judge found that the length of the delay was forty-four months;³⁵ and that this delay was sufficient to trigger a review of the other three factors. **R. pp. 332-33.**

The trial judge then analyzed the reasons for the delay at length. He found that:

[t]he delay was not apparently part of an intentional scheme designed to prejudice the defendant. However, the court finds that the delay was to some degree the result of prosecutorial and governmental negligence, and partly justifiable. There were a variety of reasons offered by the Eleventh Circuit Solicitor's Office to show why the defendant's case had not been set for trial in a timely fashion. However, while none of these excuses alone are sufficient to justify such delay, in the aggregate they sufficiently justify the majority of the delay.

R. p. 333.

After discussing the various reasons for delay,³⁶ he found that "the state's conduct in this instance was not apparently willful and was largely justifiable." **R. pp. 328-43.** The trial judge found

³⁵ He apparently calculated the delay from the Supreme Court's action in *Cooper v. Moore, supra*, and the date of his Order.

³⁶ The trial judge found that the delay after the appointment of the First Circuit Solicitor's Office was justified. Likewise, he accepted the explanation that part of the delay was caused by the mold in the Lexington County Courthouse and the repeated moving of the Solicitor's Office. He also considered delay caused by confusion as to who the trial judge was, but found that attributable to the Solicitor's failure to notify Court Administration. The delay after the trial judge's own appointment was also reasonable. He further found that the delay resulting from recusal of the Eleventh Circuit Solicitor's Office was reasonable. **R. pp. 328-343.**

that Cooper had consistently asserted his right to a speedy trial since 2003 and that Cooper timely asserted his right.³⁷ R. pp. 328-343.

The trial judge then addressed prejudice to Cooper and, while clearly considering each of the four *Barker* factors (*see* R. pp. 328-343), he emphasized that prejudice was the “most important factor.” R. pp. 328-343. He also recognized that the Sixth Amendment, right to a speedy trial is designed to prevent “undue incarceration, minimization of the anxiety accompanying public accusation, and the limitation of the possibility that long delay will impair the accused’s ability to defend himself.” R. pp. 328-343 (citing *State v. Waites*, 270 S.C. 104, 107, 323 S.E.2d. 651, 653 (1978)). He concluded that impairment of the defense was the most serious factor in assessing prejudice. He specifically found that Cooper had not shown how the defense “has been or will be prejudiced by the delay through the use of demonstrative evidence,” and that this weighed against Cooper’s Sixth Amendment claim. R. pp. 328-43.

He acknowledged that the court in *Doggett* had stated that actual trial prejudice was not essential to demonstrating a speedy trial violation, *see Doggett*, 505 U.S. at 655-58, but that “presumptive prejudice” must be considered with the other *Barker* factors. He found that Cooper’s main argument regarding prejudice was his pretrial incarceration for forty-four months. However, the trial judge concluded that the presumption of prejudice was persuasively rebutted by the State, which had demonstrated that the delay did not impair his ability to present a defense. He further found that Cooper had received a benefit by the delay, since the State had withdrawn its intention to seek the death penalty in the interim; and he denied the motion. R. pp. 328-43.³⁸

³⁷ However, he acknowledged that some delay after his assignment to the case was to accommodate trial counsel’s schedule. R. pp. 328-43.

³⁸ He also denied Cooper’s request for bond. R. p. 341.

5. Motion renewed at trial

Cooper renewed his motion at the conclusion of all evidence. However, the trial judge denied his motion **R. pp. 1327-31.**

B. There was no speedy trial violation

Every person accused of a crime is entitled to a speedy trial under Article I, §14 of the Constitution of South Carolina, as well as the Sixth and Fourteenth Amendments of the United States Constitution. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

Whether or not a person accused of crime has been denied his constitutional right to a speedy trial is a question to be answered in the light of the circumstances of each case. A speedy trial does not mean an immediate one; . . . it simply means a trial without unreasonable and unnecessary delay.

Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). *See also State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64, 70 (1997). The determination of whether or not an accused has been denied his constitutional right to a speedy trial depends on the circumstances of each case. *Brazell*, 325 S.C. at 75, 480 S.E.2d at 70; *State v. Monroe*, 262 S.C. 346, 204 S.E.2d 433, 435 (1974).

In *Barker*, 407 U.S. at 530, 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 courts must engage in a balancing test with these "related factors," which "must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. 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. See *Brazell*, 325 S.C. at 75, 480 S.E.2d at 70. 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*, 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*, *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 (finding a three years and five months delay 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” 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. 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. However, Respondent agrees with most of the remaining findings by the trial judge on this prong of the *Barker* analysis. 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.³⁹ 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

³⁹ 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.

interest, was reasonable and not part of a "pattern of delay," as Cooper argues.⁴⁰ 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, he clearly accommodated the schedule of Cooper's trial counsel when scheduling the case. *R*, p. 76-77, 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).⁴¹ As a result, the trial judge properly concluded that all of the delay between July 12, 2005 and the subsequent trial⁴² was reasonable.

⁴⁰ 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 raised the issue, either at trial or (more likely) in PCR. Any contrary suggestion ignores both the zealotness with which Cooper was represented below and his trial counsel's familiarity with PCR.

⁴¹ The record reflect that Cooper desired to have Mr. Bruck continue representing him, and that Mr. Bruck sought to have the trial set around his academic schedule. *R*. pp. 23-24; 41-43; 65-66; 250-53. 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.*

⁴² 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 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 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. *Barker*, 407 U.S. at 532. These interests include: (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. *Id.* 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.⁴³ *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.⁴⁴ As the record makes abundantly clear, Cooper had previously been under

⁴³The 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.

⁴⁴His argument in this regard 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.” His reliance upon this *dicta* is misplaced because the majority in *Doggett* clearly indicated that the lack of prejudice to the defense caused by the passage of time is the primary manner, in most speedy trial cases, for the prosecution to rebut presumptively prejudicial delay. 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).

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.⁴⁵ 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 and by the other means discussed in Argument II. 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

⁴⁵ This is particularly true when one considers the other evidence of his criminal history which was more fully developed at the subsequent trial. See Argument III. 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 the misleading nature of Cooper's argument as to this aspect of prejudice under *Barker*.

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. 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.

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's second contention is 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.

A. Events at trial

- 1. The prosecution's request to have Farmer declared "unavailable" because the State's good faith, reasonable efforts to obtain Farmer's presence at trial had failed.**

The question of Phillip "Red" Farmer's availability as a witness was initially addressed at a pretrial hearing. 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). These Affidavits and the State's argument reflect that Mr. Bell immediately "began attempting to subpoena. . . Farmer, an inmate in the Texas Department of Corrections" upon

hearing "in the beginning to middle of March 2006" that the trial of this case would begin on May 22, 2006.⁴⁶ Farmer was contacted. It was determined that he was willing to testify, and that his testimony would be consistent with his original trial testimony. *Court's Ex. 4, R. p. 1541; see also R. pp. 349-50.*

Because Texas is a signatory to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act and South Carolina is not, the Texas Department of Criminal Justice (which is a state government agency that includes the Texas prison system), "will not honor a mere subpoena presented to [it] for one of [its] prisoners to appear as a witness" in a South Carolina court. Rather, to obtain the release of such a prisoner, they must be "an executive agreement between the Governor of South Carolina and the Governor of Texas...accompanied by documentation guaranteeing protection of the prisoner witness from civil lawsuits and/or criminal prosecution from circumstances arising in South Carolina prior to the rendition." *Court's Ex. 4 R. p. 1541. See also R. p. 350.*

After researching the proper forms and procedures for making a rendition request, Mr. Bell began preparing the necessary paperwork. He made housing arrangements for Farmer in the Lexington County Detention Center and he asked SLED to assign two agents to transport Farmer from Texas to South Carolina and back.⁴⁷ SLED acted on his request in about a week. Mr. Bell then finalized the rendition paperwork; he took the paperwork to the trial judge, who signed it on April 20, 2006; he obtained the Lexington County Clerk of Court's signature, and he sent the request to the Governor of South Carolina. Governor Sanford signed the request on April 27, 2006; and it was

⁴⁶ Following the motions hearing on February 8, 2006, he had thought that the discussions had been of a tentative trial date. (*Court's Ex. 4, R. p. 1541*).

⁴⁷ SLED was used instead of local law enforcement because it was the chief investigating agency. Also, Mr. Bell contacted SLED on April 10, 2006. Part of SLED's delay was caused by its involvement in policing Biker Week and Black Bikers Week at Myrtle Beach, South Carolina. However, even if SLED had acted more swiftly, it would not have helped secure Farmer's presence. *R. pp. 354-56.*

sent to the South Carolina Secretary of State, where it was further processed and sent to Texas. Court's Ex. 4, R. p. 1541. See also R. pp. 350-51; 354-55.

The rendition request was received by the Governor of Texas on May 5th. Court's Ex. 4, R. p. 1541. After he signed it, it was sent to Mr. Frazier's Office. He received it on May 10th. There are only two judges available in Texas to hold hearings on rendition requests, and Mr. Frazier's Office views such a hearing mandatory. Although Mr. Frazier promptly attempted to locate an available judge, he discovered that neither was available to hold a hearing for the remainder of May 2006. Court's Ex. 3, R. p. 1539.

The State argued that it had made reasonable, good faith efforts to secure Farmer's presence, by submitting its paperwork well in advance of trial. The State's rendition efforts only failed because a judge was not available to hold a hearing in Texas in May. The State asked the trial judge; who was obviously familiar with requests for out-of-state witnesses in other trials, to judicial notice that "normally prisoners can be brought from out-of-state on a normal subpoena within one or two weeks, often...in less time than that." R. pp. 351-53; 356.

The State further noted that Farmer had indicated his willingness to testify, and that he had consistently testified adversely to Cooper.⁴⁸ Additionally, Farmer had been fully cross-examined at the first trial. Therefore, there had been adequate confrontation by Cooper. As a result, the State asked the trial judge to declare that Farmer was an "unavailable" witness and to permit the State to utilize his prior sworn testimony. In support of this position, it relied upon *Barber v. Page*, 390 U.S. 719 (1968). R. pp. 351-52; 353-54; 356.

⁴⁸ He likewise gave similar testimony in Southerland's trial. R. pp. 353; Court's Ex. 4 R. p. 1541.

Cooper maintained that the State's showing was "inadequate on its face." He claimed that Farmer was "a classic unreliable witness" who ended up receiving a five year sentence, in exchange for his testimony, when he was facing a life sentence. Cooper further argued that he had been unable to cross-examine Farmer about Farmer's subsequent criminal activity, which occurred after the 1991 trial.⁴⁹ Farmer had also given a statement to Cooper's investigator to the effect that he would not testify at Cooper's retrial, and that his earlier testimony resulted from physical coercion by police. Although he did apparently change his mind, he had recently given another statement to an agent for Cooper in which he said that he would not testify. "He'll tell anybody who is talking to him anything." R. pp. 357-61.

Cooper suggested that a prior transcript of Farmer's testimony was not adequate to confront Farmer, but he acknowledged that a middle ground would be to allow him to impeach Farmer with witnesses and documentary evidence concerning matters occurring after 1991. When questioned by the trial judge, Cooper conceded that the absence of face-to-face confrontation was not the standard. He also stated that he was not asserting that the prosecution had acted in bad faith in the sense that the State made a "manipulative effort to ensure that Mr. Farmer would not be present;" but he contended that the State had not made reasonable efforts to secure Farmer's presence because the State had learned eleven days before the hearing that Farmer was not going to be present, but it did not move for a continuance. R. pp. 361-66.

⁴⁹ This included favorable treatment or charges in Aiken, South Carolina, from which he absconded. Also, he was later arrested in Texas as for manufacturing methamphetamine. When released on that charge, he was arrested shortly thereafter for the same offense. Hwe was then convicted of both charges and gave testimony about Kim's murder at his sentencing hearing in Texas that significantly differed from his 1991 testimony. R. pp. 357-59.

In a lengthy discussion with the trial judge, both prosecutors stated that they did not feel that they could move for a continuance, in light of the trial judge's ruling on the motion to dismiss for denial of Cooper's right to a speedy trial. Both men acknowledged that this understanding was based entirely on the Order denying the speedy trial motion; and that the trial judge had never indicated that he would not entertain a continuance motion from either party. The State noted that it was still in the process of attempting to obtain Farmer's presence, and it stated that it was ready to proceed regardless of the trial judge's ruling on Farmer's unavailability. So, it had not brought the matter to the trial judge's attention. **R. pp. 366-76.**

When asked what additional steps had been taken to secure Farmer's presence, Assistant Solicitor Lupton stated that he had spoken to the Texas Department of Criminal Justice that morning, but still had not heard back "as to the earliest opportunity for getting this hearing scheduled," even though he asked them to hurry and he explained that the trial had already begun. Mr. Bell explained that the concern by Texas was that the prisoner would not be served with any civil judgments or arrest warrants while here. After the State indicated that the State's case "might go fairly quickly," Cooper objected to the trial judge's proposal to take Farmer out of turn or allowing the State to reopen its case because, in Cooper's estimation, the State had not acted reasonably; and he noted that the State had not needed Farmer's testimony to convict Southerland. **R. pp. 376-81.**

However, the State observed that Farmer's testimony was not as important in Southerland's case, and that he was "very important in this case" because he initiated the conspiracy with Cooper to rob Kim; he had the information that Kim was to receive an insurance check; he relayed this information to Cooper; and Cooper had made admissions to him after the crime. The State then outlined Farmer's testimony about these admissions. As stated by Mr. Bell, the other witnesses "can communicate part of it, but they can't communicate the meat of it." **R. pp. 381-82.**

Cooper noted that another eyewitness had testified against Southerland and suggested that this witness could testify in this case. Also, the State had informed him that Southerland would testify. Therefore, the State could present the jury the same information without calling Farmer as a witness. Also, Cooper learned in 2002 that Farmer was in Texas. Thus, the State had not acted reasonably because it could have moved sooner to secure Farmer's attendance. **R. pp. 382-84.**

The State again asserted the reasonableness of its actions. Mr. Bell stated that he had not known that no Texas judges were available to hold hearing in May until "they called [on May 11th] and said we can't do it." In response to his questions, he was told that the hearing in Texas was mandatory, that Farmer could not waive it, and that only two judges could conduct the hearing. **R. pp. 384-85.**

The State again maintained that Farmer was an unavailable witness under Rule 804 (a)(5) because the State had acted with due diligence to secure his attendance, beginning the process sufficiently far enough in advance that there should not have been any problem. However, the State's efforts were frustrated by Texas, an independent sovereign State. The trial judge agreed that his experience was that this "generally routine...[and] doesn't present an issue." **R. pp. 384-91.**

The trial judge then addressed questions related to Cooper's ability to cross-examine Farmer about post-1991 matters. The State represented that it would be "willing to stipulate to convictions and certain things that are subject to verification." Also, Cooper could impeach Farmer's testimony with subsequent inconsistent statements to persons who had interviewed him. Although he adhered to his position that prior sworn testimony was not sufficient, Cooper noted that Farmer had given statements to interviewers in 2003 and 2006 that were inconsistent with his trial testimony. **R. pp. 392-96.**

Copper asserted that the State had been on notice that the trial would be held at the end of May or in early June, but did not make reasonable efforts to get Farmer's attendance, and that Farmer's presence could have been obtained if the State had acted sooner. He further asserted that this was unfair because it occurred long after the deadline that Judge Keesley had set for the trial. **R. pp. 396.** The trial judge stated that he would "consider a temporary delay but nothing in any kind of substantial way," if Farmer's attendance could be obtained during the course of the trial. **R. p. 397.**

When the trial judge asked the State why it had not gotten the rendition request to him in March, the State replied that it had begun the process in March. However, it was not completed until later for the previously stated reasons. 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." Although the State's efforts to obtain Farmer's presence may have failed, it had acted in good faith and reasonably. **R. pp. 398-400.**

The trial judge observed that while it may "be Mr. Bruck's experience that you've got to be ready to go and that's the end of the discussion. That's not my experience." He then explained that his philosophy was that he always attempts to give litigant's a fair trial. So, he took the matter under advisement. **R. p. 401.**

The trial judge thereafter addressed this issue during the State's case. Mr. Bell stated that he had inquired about other possible options after learning that no Texas judges were available in May, and he was told no options were available. Again, the State explained the importance of Farmer's testimony to its case, particularly with respect to the conspiracy to rob Kim. His testimony would corroborate Southerland and other witnesses, but he was the only direct participant in the initiation of the conspiracy whose testimony could be offered. In light of Cooper's cross-

examination of Southerland, establishing that Southerland lacked knowledge of the details of Farmer's conversation with Cooper, the State argued that it was important for the jury to hear Farmer's testimony. Likewise, Farmer's testimony would reflect Cooper's post-crime admissions to him. **R. p. 836-41.**

Cooper responded by noting that the court in *State v. Cooper* had ruled that the original trial judge had erroneously restricted Cooper's cross-examination of Farmer. However, he admitted that he would read the original proffer, and the State conceded it's admissibility. However, the emphasized that his argument was based on the State's failure to make reasonable efforts to obtain Farmer's presence, which the State disputed. The State maintained that the question for the trial judge to resolve was whether a reasonable person would have acted in the manner that the State acted; and it asserted that its actions were reasonable. **R. pp. 842-850.**

Cooper reiterated that the State had not requested a continuance to obtain Farmer's presence. The judge was not pleased with this. However, the trial judge noted that the State had started the paperwork "about a month in advance" of trial, and that normally there would not have been a problem. This did not demonstrate unreasonableness or bad faith. **R. pp. 850-53.**

The trial judge then further questioned the State about the timeliness of the rendition request. Mr. Bell stated that after he received the paperwork from the trial judge, his investigator took it to the Lexington County Clerk of Court, obtained the Clerk's signature and it was then taken to the Governor's Office. Upon returning to work on Wednesday, April 26th,⁵⁰ the Governor's Office informed him of a scrivener's error, which he corrected; and he immediately forwarded a corrected copy. A week later, the Governor's Office called to tell him that the Secretary of State had not acted

⁵⁰ He had been ill for several days.

because it required a duplicate. Mr. Bell e-mailed the trial judge to obtain another signature⁵¹ and sent the duplicate to the Governor's Office. The Secretary of State obtained a copy, then, it faxed a copy to Texas and sent the original overnight delivery. **R. pp. 853-55.**

Mr. Bell stated that he had consulted both with the Governor's Office and the State of Texas about the process, but he did not have any knowledge that a duplicate was required until he was told one was required by the Secretary of State. Mr. Lupton observed that the request would not have been timely even if the State had originally submitted a duplicate because Texas would not have received it until May 1st, which was too late. A copy of the State's paperwork was introduced as Court's Ex. 9. **R. pp. 856-63.**

2. The trial judge's Order

After a brief recess, the trial judge stated that he had reviewed the record, including Farmer's prior testimony. He found that there had originally been some uncertainty as to the trial date, but that this was clarified by March. The rendition request (Court's Ex. 9) was initiated in April, but it was delayed because a duplicate had not been submitted to the Secretary of State. However, the trial judge had reviewed the "pertinent procedures and statutory requirements" and did not see any requirement that a duplicate had to be submitted. Thus, he did not attribute that delay to the prosecution. **R. pp. 863-64.**

He further found that both governors had signed the paperwork in early May. However, no judge was available to hold a hearing, which is mandatory under Texas law. He also found that "it's difficult for me to say that the State acted unreasonably" when Texas did not make any judges available to hear the rendition request. He therefore found that Farmer was an unavailable witness.

⁵¹ The trial judge came into work on his vacation to sign it. **R. pp. 855.**

Moreover, he found that "[t]he second aspect of the rule has been met by Agreement," since Farmer was under oath in the original trial and Cooper had engaged in "the full right of confrontation" at that time. Cooper's only argument was denial of "face-to-face confrontation." After he observed that there was apparent argument as to the record for impeachment purposes, the trial judge noted that he had never prevented either party from requesting a continuance and he observed that neither party had requested a continuance. **R. pp. 865-66.**

Cooper was then given until the following morning to determine whether he wanted a continuance (**R. p. 866**), but he ultimately decided not to request one. **R. pp. 871-72; 875-76.**

3. Farmer's testimony and Cooper's impeachment

The direct examination from Farmer's prior testimony was subsequently 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.**

There was then a relatively brief *in camera* hearing about the additional impeachment evidence Cooper would be permitted to use; and Cooper has not raised any contention on appeal that the trial judge erred in this regard. *See R. pp. 979-91.* When the jury returned, Cooper published 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.⁵² **R. pp. 992-93.**

⁵² 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. p. 993.**

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.**

B. Cooper did not preserve his *in limine* objection.

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

C. Farmer was an "unavailable" witness under Rule 804(a)(5) because, although unsuccessful, the State made reasonable, good-faith efforts to obtain his presence at trial

The trial judge did not abuse his discretion by finding that Farmer was an "unavailable" witness under Rule 804(a)(5), SCRE, and by permitting the State to publish his 1991 testimony. The Sixth Amendment Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., amend vi. *See also* article I, § 14, S.C. Const.

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 51.⁵³ See also *Mattox v. United States*, 156 U.S. 237, 244 (1895) (“The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of”).

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.

Rule 804, SCRE, creates a hearsay exception and allows admission of prior testimony into evidence if the declarant is “unavailable.” The “unavailability as a witness” requirement 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).⁵⁴ See also *State v. Sanders*, 356 S.C. 214, 217, 588 S.E.2d 142, 144 (Ct.

⁵³ At issue in *Crawford* was an unavailable declarant’s tape-recorded statement that was played to the jury to refute the defendant’s theory of self defense. *Id.* at 39–40. The Court ruled that the trial court erred by admitting the unavailable witness’s tape recorded statement, taken during police investigation and 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.” *Id.* at 38 n. 9 (Citations and punctuation omitted).

⁵⁴ 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.

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)"). Here, the State acted in good faith and utilized "other reasonable means" but was ultimately unsuccessful.

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 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.

In *Barber*, the witness was incarcerated in a prison outside of Oklahoma. The prosecution made no effort to secure the witness' presence at trial,³⁵ other than to ascertain that he was incarcerated outside of the state. *Id* at 723. The Court held that this did not constitute a good-faith

³⁵ It neither used the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings nor sought a common law writ of habeas corpus *ad testificandum*. *Id* at 724 n. 4.

effort to obtain the witness' presence and he was not "unavailable" for Confrontation Clause purposes. *Id* at 724-25.

The present case is clearly distinguishable from *Barber*. Here, the prosecution immediately "began attempting to subpoena ... Farmer, an inmate in the Texas Department of Corrections" upon hearing "in the beginning to middle of March 2006" that the trial of this case would begin on May 22, 2006. Farmer was contacted and it was determined 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 because South Carolina is not a signatory state for the Uniform Act to secure rendition of prisoners in criminal proceedings.⁵⁶ *Contra Brumley v. Wingard*, 269 F.3d 629, 641 (6th Cir. 2001) (witness was available to testify at petitioner's trial, under the rule established in *Barber*, since "Ohio and Arizona have both enacted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings," and witness' presence could be obtained. Also, the prosecution had employed these procedures to obtain witness' presence for the trial of his brother). Instead, Texas required the executive agreement between the governors of both states as described above.

Mr. Bell, the prosecutor to whom the case was assigned, 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. 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." By April 20th, the State had obtained the necessary signatures of the trial

⁵⁶ See Vernon's Ann. Texas C.C.P. Art. 24.29.

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 26th, he promptly submitted corrected paperwork. 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. 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. 2008). However, Mr. Bell expeditiously complied with this requirement, and the rendition request was received by the Governor of Texas on May 5th.

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 10th 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 (2d Cir 1989).⁵⁷ A number of cases from other jurisdictions support the conclusion that the State

⁵⁷ 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] 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

Nor did the State act in an objectively unreasonable fashion by not requesting a continuance. First, 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 Order does not expressly state 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. 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.*

Additionally, Cooper conceded in the lower court that he was permitted full confrontation in the 1991 trial. Also, 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 (11th Cir. 1998)* (defendant's Sixth Amendment right to confront witnesses is satisfied

where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

D. Harmless error

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.

First, although 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. Second, much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her.

Third, many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence discussed at length in the "Statement of Facts." Fourth, 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.

Finally and 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 puts the murder weapon in Cooper's hands. He also established Cooper's intent to commit the murder even after he knew that he would get less than two 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. Therefore any error was harmless. *Id.*

III. 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. Further, any error was harmless

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.

A. Events at trial

1. The jury hears evidence of other offenses by Cooper

In defense counsel's opening statement, he told jurors 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. 8.⁵⁸

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

⁵⁸ While counsel quite reasonably made this statement, see R. p. 1032, Respondent would submit that any error was made by counsel and therefore not properly before this Court. 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), citing *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962). See also *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993); *State v. Logan*, 279 S.C. 345, 306 S.E.2d 622 (1983).

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.*

2. The *in camera* ruling

The trial judge addressed the admissibility of Cooper's prior convictions before he testified. In response to the trial judge's statement that he thought that the parties had reached an agreement about which of Cooper's previous convictions could be used for impeachment purposes, Cooper argued that his entire record was too remote. Senior Assistant Solicitor Bell then indicated that he intended to impeach Cooper with armed robbery convictions from February and March 1977, as well as September 1977 convictions for housebreaking and larceny. Cooper maintained that they were "too remote" under Rule 609(b), SCRE, because more than ten years had passed between the convictions and his testimony. *R. pp. 948-49.*

Mr. Bell noted that Cooper was not released from custody for these convictions until 1988. Also, Mr. Bell had filed a motion and had given written notice in accordance with Rule 609. Mr. Bell did not dispute that more than ten years had passed between the conviction and the time of trial, but he noted that the "they're close in time to the date" of the October 1989 offenses for which Cooper was being retried. He further argued that armed robbery and larceny bore on Cooper's credibility because they were crimes of dishonesty, and he stressed the importance of attacking credibility. He maintained that the probative value of these convictions substantially outweighed their prejudicial effect under Rule 609(b), particularly since the jury had heard evidence of Cooper's record and Cooper's opening statement waived any complaint about their introduction by referencing them. *R. 1030-32.*

Cooper conceded that his opening statement admitted that he had a record dating back to when he was seventeen years old; but he argued - contrary to what he had told his jury - that he had not waived objection to introduction of the offenses. Cooper further asserted that the similarity of the armed robberies to the present charges made their use more prejudicial, but he admitted that the same argument did not apply to the convictions for housebreaking and larceny. The trial judge was concerned about the introduction of the armed robbery convictions, and he ruled that they were inadmissible. However, he ruled that the convictions for housebreaking and larceny were admissible. **R. pp. 1032-33.**

3. Cooper's testimony and closing argument

Cooper's trial counsel elicited evidence of the 1977 convictions at issue on direct examination. **R. p. 1186, ll. 13-20.** 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).**

B. There was no prejudicial abuse of discretion under Rule 609(b)

The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice. *State v. Sherard*, 303 S.C. 172, 399 S.E.2d 595 (1991); *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981). "Under the common law rule, a witness could be impeached by showing he was convicted of a crime of moral turpitude as long as it was not too remote in time and its probative value outweighed its prejudicial effect." *Green v. State*, 338 S.C. 428, 432, 527 S.E.2d 98, 100 (2000) (footnote omitted). Today, however, "Rule 609(b), SCRE, governs the admissibility of remote convictions." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 248 (2000). Rule 609(b) provides that:

(b) Time limit. 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 the 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.

The use of remote convictions was first addressed by the South Carolina Supreme Court in *Colf*, where the Court reasoned as follows:

This case raises a novel question in South Carolina. However, since the rule is identical to the federal rule, federal cases may be persuasive. The Fourth Circuit has explicitly held that evidence of remote convictions should only be admitted for impeachment purposes "in exceptional circumstances," and that Rule 609(b) requires the trial court to articulate the specific facts and circumstances supporting its determination that the probative value of the evidence substantially outweighs its prejudicial effect. *United States v. Cavender*, 578 F.2d 528 (4th Cir.1978) (Russell, J.); see also Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.06[3][a] (2d ed. 1999) ("Courts generally have held that Rule 609(b) requires the district court to make a finding on the record that articulates the facts and circumstances that justify the admission of conviction evidence."); but see *United States v. Spero*, 625 F.2d 779, 781 (8th Cir.1980) (declining to follow *Cavender* and require articulation on the record "at this time.").

Rule 609(b) establishes a presumption against admissibility of remote convictions, *United States v. Beahm*, 664 F.2d 414, 418 (4th Cir.1981), and the State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption. *Id.* at 418, see also *Cavender*, 578 F.2d at 529. In both *Cavender* and *Beahm*, the Fourth Circuit reversed the defendants' convictions because the trial courts failed to state specific facts supporting the probative value of the prior convictions for impeachment purposes or show how their probative value substantially outweighed their prejudicial effect. The rule is very clear and we agree with the Fourth Circuit's analysis in *Cavender* and *Beahm*.

In determining whether the probative value of a prior conviction outweighs its prejudicial effect, federal courts often apply the following 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.

5. The centrality of the credibility issue.

Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.05 [3][a] (2d ed.1999); Stephen A. Saltzburg, *Federal Rules of Evidence Manual* 1040 (7th ed.1998). These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case. See Michael H. Graham, *Handbook of Federal Evidence* § 609.3 (4th ed.1996) (additional factors may include the defendant's age and circumstances, the length of the defendant's criminal record, the likelihood the defendant would not testify, and facts surrounding the conviction).

Colf, 337 S.C. at 626-27, 525 S.E.2d at 248. See also *State v. Johnson*, 363 S.C. 53, 59, 609 S.E.2d 520, 523-24 (2005)

Cooper cannot show a prejudicial abuse of discretion.⁹⁹ The convictions at issue were almost eighteen years old because he was released in 1988 and testified in May 2006. See *Johnson*, 363 S.C. at 57, 609 S.E.2d at 522. However, the State rebutted the presumptive inadmissibility of these convictions, see *Colf*, 337 S.C. at 626, 525 S.E.2d at 248, for several reasons. First, the impeachment value of these convictions was great. Credibility was a key issue. See *Colf*, *supra*. Southerland gave vivid eyewitness testimony that was corroborated, in many respects, by other circumstantial evidence. Farmer's published testimony likewise implicated Cooper in the conspiracy as well as the robbery and murder. On the other hand, Cooper denied any involvement in the crimes. He claimed alibi and suggested that Southerland was the guilty party.

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*

⁹⁹ Although Cooper did not complain below and does not complain on appeal of the sufficiency of the trial judge's balancing test under *Colf* and its progeny, 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).

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). Respondent submits that the same is true of housebreaking. See *United States v. DiLorenzo*, 429 F.2d 216 at 220 (2nd Cir. 1970) (crimes which involve stealing "reflect on honesty and integrity and thereby on credibility"); *United States v. Spero*, 625 F.2d 779, 780-81 (8th Cir. 1980) ("considering the importance of the credibility resolutions in this particular appeal, we cannot say that the district court erred" at trial for one count of conspiring to possess a destructive device not registered in the National Firearms Registration and Transfer Record, and one count of possession of such a device, by admitting evidence of twenty-two year old grand theft conviction).⁶⁶ Therefore, Cooper's prior convictions were not such as would have only minimal bearing on the issue of his credibility. *Id.* See also *United States v. Cathey*, 591 F.2d 268, 276 (5th Cir. 1979) (noting that in a 609(b) analysis, a crime involving dishonesty is more likely to overcome the presumption against over-age convictions, but more than that bare conclusion must be shown); *United States v. Brown*, 956 F.2d 782 at 787 (8th Cir. 1992) (where the jury had to choose between two different versions of the event - one presented by the government and one presented by the defendant - and the credibility of the witnesses was a critical factor for the jury, a prior burglary conviction, although more than ten years old, had sufficient probative value so as to substantially outweigh any prejudicial effect); *United States v. Redditt*, 381 F.3d 597, 601 (7th Cir. 2004) (trial court did not err by admitting defendant's conviction for stealing electricity, even though it was over

⁶⁶ In *United States v. Gilbert*, 668 F.2d 94 (2d Cir. 1981), the Court held that the trial judge had not abused his discretion in ruling that the defendant's prior mail fraud conviction would be admissible under FRE 609(b) if the defendant chose to testify at his trial for violations of the federal securities laws, since the prejudicial effect of the evidence did not outweigh its probative value. The trial court had found that the defendant's credibility would be a crucial issue if he testified, that the impeachment value of a fraud conviction was high, that the two crimes were not so similar as to invite improper inferences, and that the age of the prior conviction and the defendant's subsequent history did not suggest that he had abandoned his earlier ways.

ten years old, where his testimony completely contradicted testimony of prosecution witness and his testimony was a critical factor in the case); *United States v. Murray*, 751 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 979 (1985) (determining that the credibility of witnesses was highly probative in resolving the conflict between the government witnesses and the defendant, the Court upheld the introduction of a prior conviction for receiving stolen property for impeachment purposes); *United States v. Jefferson*, 925 F.2d 1242 at 1256 (10th Cir. 1991) (the offense of aggravated robbery is an offense that "shows such a degree of dishonesty...as to affect a person's credibility").

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

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

[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 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 (5th Cir. 1977). *See also* Wright and Gold, 28 *Federal Practice & Procedure, Evidence*, § 6136(b). In the present case, 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 (10th Cir.1991) (although it was unclear whether the defendant's conviction was more than ten years old, the Court found that, that even if it were, the district court's decision to admit it into evidence did not constitute an abuse of discretion where defendant was paroled on December 18, 1973 from his prior conviction and he had been re-incarcerated for a parole violation and other offenses on three occasions before November 1990 trial); *United States v. Holmes*, 822 F.2d 802, 804-805 (8th Cir. 1987) ("[T]he probative value of delving into convictions more than ten years old is substantially increased by the number and frequency of [defendant's] felony convictions in the ten-year period immediately preceding his last incarceration. Because of his lengthy and steady record of criminal activity ... [defendant] is in a poor position to claim entitlement to the presumption that the probative value of prior convictions decreases over time."); *Gilbert*, 668 F.2d at 97.

The third factor under *Colf* is "[t]he similarity between the past crime and the charged crime." 337 S.C. at 627, 525 S.E.2d at 248. Again, this factor 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.

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. 1131.⁶¹ 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).

Cooper argues that this Court's decision in *Johnson* 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 *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). See also *State v. Byram*, 485 S.E.2d 360 (S.C. 1997) (same).⁶²

Further, *Johnson* is clearly distinguishable from this case. In addition to the reasons set forth, supra, the trial judge in *Johnson* did not apply 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 and Appellant's argument is without merit.

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). First, there was overwhelming evidence of Cooper's guilt, which was established by Farmer's testimony, Southerland's testimony and circumstantial evidence. See Argument II.D; "Statement of Facts." Also and as discussed, defense counsel strategically introduced

⁶¹ Much of this evidence, including evidence of his prior death sentence in this case, was elicited by defense counsel.

⁶² Again, his only argument in the trial court was that the convictions were too old. See R. pp. 1032-33.

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.

Furthermore, the trial judge gave a limiting charge, both with respect to evidence of earlier proceedings in this case; and evidence of prior crimes or bad acts by a witness.⁶³ Thus, he appropriately focused the jury's attention on the fact that Cooper's convictions and the other bad acts by him could only be considered for impeachment purposes. Moreover, the prosecution placed no other emphasis on these prior convictions, either through cross-examination or closing argument. R. pp. 1252-63; 1347-54; 1446-86. Therefore, the impact of this evidence "was minimal because other evidence introduced by the prosecution [and trial counsel] likely damaged [Cooper's]

⁶³ For instance, he instructed jurors that:

"there have been some references to prior proceedings in Mr. Cooper's case. Please understand that these proceedings have nothing to do with Mr. Cooper's guilt or innocence. He is presumed innocent...you may not rely on any prior hearing or proceedings; but [you] must base your verdicts entirely on the evidence or the lack of evidence in this case since the trial has begun."

R. p. 1489, ll. 2-13.

Moments later he charged jurors as follows:

"Now, you may have heard a reference to evidence of some other crime or misconduct by a witness. Evidence of some other crime that was committed by a witness may be considered by you on the limited issue of credibility or impeachment of that witness and certainly must not, in any way, be considered as evidence of - - that a person committed a crime on the particular occasion in question.

It's not provided to you for any other purposes and you should not consider it for any other purposes. You may give it much weight as you may believe it to be entitled on the sole issue of the credibility or believability of that witness."

R. p. 1490, ll. 13-15.

credibility" and any error was harmless. *Johnson*, 363 S.C. at 60, 609 S.E.2d at 524. *See also Mitchell*.

CONCLUSION

For the foregoing reasons Respondent respectfully submits this Court should affirm Appellant's convictions and sentence.

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

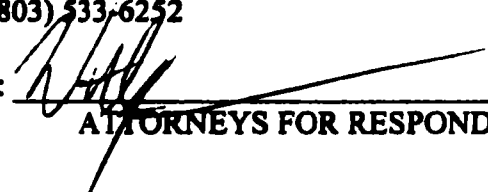
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By: 
ATTORNEYS FOR RESPONDENT

March 23, 2009.

**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-

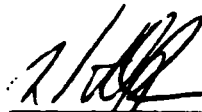
GENE TONY COOPER, JR.,

Appellant.

CERTIFICATE OF COMPLIANCE

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

This 23rd day of March, 2009.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY 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.,

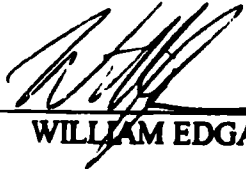
Appellant

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via the United States Postal Service to his attorney of record, Robert M. Dudek, Esq., SCCID, Division of Appellate Defense, 1330 Lady St., Ste 401, Columbia, SC 29201.

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

This 23rd day of March, 2009.



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Appeal from Lexington County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GENE TONY COOPER, JR.,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

2.

Defense counsel Bruck preserved the issue of Red Farmer being unavailable, and against allowing his prior testimony to be read into the record. The issue was argued at great length, and forcefully. Further, at a point well into the jury trial, a discussion was had about practicality of suspending the trial to obtain Farmer's presence, and counsel again renewed his objection which the judge recognized while it was agreed upon as a practical matter the trial had to go forward without Farmer being present. It was highly prejudicial error to allow this pathological liar's testimony to be read to the jury without the opportunity for the jury to observe his demeanor.

It is hard to imagine what more counsel could do preserve his objection – and his point – that Red Farmer's testimony had to, in fairness, be live for the jury to appreciate the sleaziness of his character, and to impress upon the trial court that *the state*, and not appellant, should bear the brunt of its lackadaisical attitude towards obtaining Farmer's presence at trial. R. 221, l. 22 – 223, l. 3.

As seen, defense counsel argued reading the testimony back into the record, and other options were unsatisfactory alternatives to his constitutional right to confrontation of Farmer. R. 219, l. 12 – 220, 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. 219, 23 – 220, l. 9. (emphasis added).

Counsel also informed the court that in his thirty years of practicing criminal law he had never seen a situation where if he could not get a witness to trial “the judge just recessed until I could get him there.” R. 222, l. 20 – 224, 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.” R. 224, l. 4 – 225, 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.

Later, while reserving his objection to the state not having Farmer present, and to the state using Farmer’s testimony from the prior trial during this trial, defense counsel told the judge that the alternative of “adjourning the trial for more than a week” was not a real remedy at that point. “We still don’t know for certain when Mr. Farmer would be here.” Counsel noted the prejudicial effect of adjourning the trial since the jurors would tend to forget the testimony they had already heard, and there was also the risk of contamination since the jury were not sequestered. There would be publicity about the case. R. 875, l. 14 – 876, l. 16. At the point adjournment was raised regarding Farmer’s live testimony during the trial the jury had already heard the testimony of *fourteen witnesses including Robert “Bo” Southerland*. R. 940 - 941

This issue was argued at great length and the state’s attempt at a procedural bar in this situation is the ultimate attempt at putting form ahead of substance. Defense counsel aptly explained to the trial court:

We can confront the witness [Farmer]. 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 - -

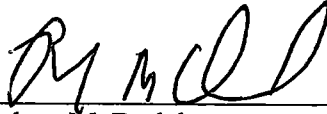
R. 393, l. 17 – 394, l. 6.

The Red Farmer issue was raised repeatedly, and everyone understood at the time that Farmer's prior testimony was read to the jury, that Farmer's prior testimony was going to be read to the jury --- that trial war had been fully fought and it was over. This appeal is the mechanism to right the wrong of the lack of the fundamental right to confront Farmer in the presence of the jury due to the state's lackadaisical approach to trial preparation. See Barber v. Page, 390 U.S. 719, 721 (1968); Kentucky v. Stincer, 482 U.S. 730 (1987); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1992); Pointer v. Texas, 380 U.S. 400, 405 (1965).

CONCLUSION

If this Court does not dismiss the charges against appellant for the failure to grant him a speedy trial as repeatedly demanded, appellant should be granted a new trial.

Respectfully submitted,

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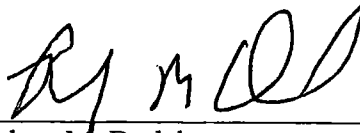
Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

March 23, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

March 23, 2009

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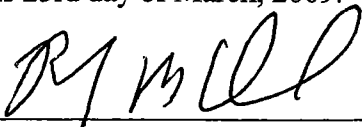
V.

GENE TONY COOPER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 23rd day of March, 2009.


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 23rd day of March, 2009.


Notary Public for South Carolina

My Commission Expires: October 30, 2018.