

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

K.C. LANGFORD,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 9

Appellant’s speedy trial rights were not violated where it took a year for the Edgefield County Sheriff’s Office to find an interpreter who could talk to the victims so the investigation could be completed, where the circuit court was unable to find a South Carolina certified interpreter in Mandarin, and where Appellant sought to harass his younger cooperating co-defendant into lying or not testifying at trial; and the issue is not preserved for review where Appellant did not renew the motion at the start of trial; and further, the issue of the constitutionality of section 1-7-330 is not preserved for review or raised by appellant and should not be considered, although the statute is constitutional. 9

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

<u>Barker v. Wingo</u> , 407 U.S. 514 (1972)	14, 18, 19
<u>Beavers v. Haubert</u> , 198 U.S. 77 (1905)	14
<u>Board of School Directors of City of Milwaukee v. Wisconsin</u> , 102 F.R.D. 596 (E.D.Wis.1984)	26
<u>Foster v. State</u> , 298 S.C. 306, 379 S.E.2d 907 (1989)	10
<u>Marshall v. Jerrico, Inc.</u> , 446 U.S. 238 (1980)	25
<u>Sinito v. United States</u> , 750 F.2d 512 (6th Cir.1984)	26
<u>State ex rel. McLeod v. McInnis</u> , 278 S.C. 307, 295 S.E.2d 633 (1982)	20
<u>State v. Brown</u> , 178 S.C. 294,182 S.E. 838 (1935)	25
<u>State v. Burroughs</u> , 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997)	12
<u>State v. Byram</u> , 326 S.C. 107, 485 S.E.2d 360 (1997)	13
<u>State v. Chapman</u> , 289 S.C. 42, 344 S.E.2d 611 (1986)	18
<u>State v. Flood</u> , 257 S.C. 141, 184 S.E.2d 549 (1971)	22
<u>State v. Kennedy</u> , 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000)	19
<u>State v. Mikell</u> , 257 S.C. 315, 185 S.E.2d 814 (1971)	21
<u>State v. Pauling</u> , 322 S.C. 95, 470 S.E.2d 106 (1996)	12
<u>State v. Pittman</u> , 373 S.C. 527, 647 S.E.2d 144 (2007)	14, 16, 17
<u>State v. Ridge</u> , 269 S.C. 61, 236 S.E.2d 401 (1977)	21
<u>State v. Robinson</u> , 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999)	18, 19, 23
<u>State v. Waites</u> , 270 S.C. 104, 240 S.E.2d 651 (1978)	14

<u>United States v. Forbes</u> , 150 F.Supp.2d 672 (D.N.J. 2001)	26
<u>United States v. Erwin</u> , 155 F.3d 818 (6th Cir.1998)	26
<u>United States v. Gallo</u> , 763 F.2d 1504 (6th Cir.1985)	26
<u>United States v. Keane</u> , 375 F.Supp. 1201 (N.D.Ill.1974)	26
<u>Vermont v. Brillon</u> , 129 S.Ct. 1283, 1290, 173 L.Ed.2d 231 (2009)	17
<u>Wheeler v. State</u> , 247 S.C. 393, 147 S.E.2d 627 (1966)	13
<u>Williams v. Bordon's, Inc.</u> , 274 S.C. 275, 262 S.E.2d 881 (1980)	22
<u>Other Authorities:</u>	
Rule 208(b)(1)(B), SCACR	13
Rule 213, SCACR	13
S.C. Code § 1-7-330.	2, 10, 19-23
S.C. Const. Art. I, Section 8	20, 24
S.C. Const. Art. V, Section 4	22, 24
Gowdy, Trey, <u>Criminal Dockets Administered by Prosecutors: Past Present and Future</u> , The South Carolina Lawyer, (January 2010) at 24	27

STATEMENT OF ISSUE ON APPEAL

Appellant's speedy trial rights were not violated where it took a year for the Edgefield County Sheriff's Office to find an interpreter who could talk to the victims so the investigation could be completed, where the circuit court was unable to find a South Carolina certified interpreter in Mandarin, and where Appellant sought to harass his younger cooperating co-defendant into lying or not testifying at trial; and the issue is not preserved for review where Appellant did not renew the motion at the start of trial; and further, the issue of the constitutionality of section 1-7-330 is not preserved for review or raised by appellant and should not be considered, although the statute is constitutional.

STATEMENT OF THE CASE

K.C. Langford was indicted by the Edgefield Grand Jury for first degree burglary, armed robbery, kidnapping and conspiracy. The trial began September 7, 2010. Langford and his co-defendant, Bryan Phillips, were both convicted by a jury. They were sentenced to concurrent sentences of twenty years imprisonment for all the charges except conspiracy, for which the sentence was five years imprisonment, concurrent to the other charges.

Langford appealed the conviction and sentence. The Public Defender's Association has also filed an *amicus curie* brief (amicus brief) to raise for the first time on appeal the issue of the Constitutionality of S.C. Code §1-7-330. The case was certified to this Court from the Court of Appeals.

STATEMENT OF FACTS

The victims in this case were the husband, wife, and son, who ran a Chinese Restaurant, along with the son's wife. While they toiled away in their restaurant, Bryan Phillips and Alvin Phillips watched and plotted robbing the victims of their hard-earned cash for their own easy profit. Appellant K.C. Langford jumped at the opportunity to join this venture. They robbed the victims outside the restaurant and grabbed a bag of cash from the victims' house. The three Chinese-speaking victims likely seemed perfect prey because they knew virtually no English.

Alvin Phillips testified that he lived with his sister and her children about a minute away from the restaurant. He was finishing eleventh grade at Strom Thurmond High School. Alvin and his cousin, co-defendant Bryan Phillips, both noticed that the "Chinese people"¹ never seemed to go to the bank when they closed the restaurant, but they always brought a black bag with them to their nearby home instead. So Alvin and Bryan deduced that the Chinese people were bringing their cash home from the restaurant. They made plans to rob the Chinese people. Bryan called Alvin one night, August 14, 2008. Alvin got his gun and ski mask. Bryan brought his own ski mask and met Alvin. Alvin's sister is mother to K.C. Langford's child. Langford showed up at the house and Alvin and Bryan told him what they were up to. Langford wanted to join in, so Langford went into the house to grab a blue shirt to tie around his head as a mask. ROA. pp. 151-152.

They went to the Chinese restaurant as the family closed their restaurant. Alvin pointed a gun at the husband outside the restaurant. The robbers kept demanding money, but

¹ This is the term Alvin used to describe the victims.

could not understand the husband. They demanded money of the son when he came out of the house, but the robbers could not understand him either. Bryan hit one of the victims over the head with his fist. Langford ran into the house and came back out with a bag of money. They split the money up, Alvin got about \$800. Then Alvin and Langford got in the car with Alvin's sister; she was leaving to pick up Alvin's mother and take her to work. They were stopped by an officer who asked to see the sister and Langford's identification. The officer let them go afterwards. Langford stayed at Alvin's house that night. ROA. pp. 163-170.

The stop was made by Deputy Zach Strom, who corroborated the facts of the stop related by Alvin. He was responding to a bulletin about a larceny at the restaurant which described the suspects as three black males with no other details. The stop was about fifteen minutes after the bulletin and was close by where the robbery occurred. ROA. pp. 220-225.

There were more State's witnesses, who are discussed later, but the narrative is furthered by discussing the defense witness. Bryan called Investigator Roosevelt Young as a defense witness. Investigator Young received the tip that broke the case. The tip was from Joseph Patrick Stevens, an acquaintance of Investigator Young's. Investigator Young knew Stevens' family and knew Stevens for a long time. On direct examination, Investigator Young described Stevens as a good citizen. Stevens had a bench warrant served on him and called Investigator Young for information. During the conversation, he indicated Alvin, Bryan, and Langford committed the robbery. Young thought Stevens was related to one or more of the co-defendants. ROA. pp. 296-304, p. 309; pp. 312-313. Young testified he had no influence over the disposition of Stevens' warrant. ROA. p. 308. The record does not indicate that Stevens was seeking assistance with his bench warrant or charge in exchange

for the information he gave.²

Law enforcement first brought the sister, Veronica Phillips, to the station because hers was one of the names Stevens gave Young. ROA. p. 309. Then Alvin came to the station. ROA. pp. 310-311. Since Alvin knew Young, he was more comfortable with Young. Alvin confessed to Young, implicated himself completely in the robbery, and admitted he was the gunman. He also implicated Bryan and Langford. He did not try and minimize his involvement. ROA. pp. 311-313. The information Alvin gave matched up exactly with what Stevens previously told Young. ROA. p. 312.

Although the case broke in September 2008, there was a significant barrier to completing the investigation, which neither Langford or the Public Defender's Association have acknowledged in their briefs: law enforcement, like the robbers themselves, could not effectively communicate with the victims. Investigator Lamaz Robinson testified there was a great language barrier between him and the victims, who could not speak English. ROA. p. 232, lines 2-3. Robinson testified: "... I wasn't able to get much other than the fact that they had been robbed, said three black males had a gun and took the money and ran." ROA. p. 233, lines 2-4. The colloquy continued as follows:

Q: As to questions like did they have watches, jewelry, facial hair, all of those details, the normal questions that you would

² The amicus brief incorrectly stated the informant was not disclosed. Amicus Br. p. 6. To the extent the amicus brief is contending the informant was seeking a deal for the exchange of information, this contention is not supported by the record. See id. Further, although defense attorneys kept asking, and the amicus makes the implication, Stevens was not working as a confidential informant, just a concerned citizen. ROA. pp. 301-302. As shown above, Langford had his own opportunity to report the planned armed robbery to law enforcement, but instead chose to join the crime.

be able to ask a victim that spoke English, were you able to ask them those sorts of questions?

A: No.

Q: Were you – when was the first time that you were ever able to have any meaningful communication between you and the victims? How long after the fact was that?

A: That was over a year and something after the fact when we found someone from USC.

Q: Was there a difficulty in finding anybody that could translate to talk to them at all?

A: Yes.

Q: Okay. Were you finally able to find someone and how were you able to do that to have any communication with them?

A: Yes, we were able to find someone by calling a professor over at the University of South Carolina in Columbia and he directed us to someone who could speak Chinese. We attempted to call someone that night, but the lady that we called, she can only speak Spanish.

ROA. p. 233, line 12 - p. 234, line 10. Robinson testified he was unable to do anything else after arresting the three robbers, until he found the interpreter. ROA. 239, lines 14-19.

Despite what has been implied in Appellant's brief and the amicus brief, Robinson never attempted to have Alvin color his testimony. ROA. p. 239, lines 20-23.

The three victims testified at trial through an interpreter. The father, Ji, testified that he, his wife, and their son left the restaurant at about 10:30 p.m. The others went ahead of him. He was then confronted by three black men, one pointing a gun at him. He was hit in the head and was "pressed" down on the ground. His son, Li Guan, came out of the house.

He was also “pressed” down. The robbers took Ji’s wallet containing his license, credit card, and \$300 cash. One of the robbers went into the house and took a bag of money. The robbers ran away. ROA. pp. 114-122. Ji, through the interpreter, testified he could not speak English. ROA. p. 126, line 23.

Li Guan, the son, testified through the interpreter that the bag had \$3,000 in it. At gun point, he was made to kneel on the ground and forced to tell the robbers the bag of money was in the house. ROA. pp. 128-131. Li Guan understood enough English to take orders at the restaurant and to tell the 911 dispatcher that three black guys robbed the family. But otherwise, he could not communicate effectively in English. He was unable to tell the robbers where in the house the bag was kept. ROA. pp. 134-135.

Li Ai, Ji’s wife and Li Guan’s mother, testified through the interpreter that a black guy with his face covered ran into the house and took the money bag. Li Guan then called 911. ROA. pp. 142-149.

Gustav Paul Sawvell testified *in camera*, but his testimony goes to the speedy trial issue raised on appeal. He was Langford’s cell mate at the Edgefield detention center from May 9, 2009 to May 21, 2010. ROA. pp. 340-341. Alvin was also at the detention center during part of that time period. Sawvell testified that the whole time Alvin was at the detention center, Langford was trying to convince Alvin to lie and say Langford was not involved with the robbery. Alternatively, Langford was trying to convince Alvin not to testify. Langford prepared statements for Alvin and was letting Alvin know what Langford thought he should say. ROA. pp. 332-334. Sawvell recalled that Alvin was moved to Saluda around July 2009. Even after Alvin was moved to Saluda, Langford continued to exert

pressure on Alvin by making phone calls through Alvin's sister. He told Alvin not to show up to testify. Langford told Alvin that if Alvin did not show up, all three would go scot-free. ROA. pp. 334-337.

Young testified he had Alvin moved from the Edgefield detention center to the Saluda detention center because he was concerned that Alvin was being intimidated and influenced into not testifying against his co-defendants. ROA. p. 315.

Alvin testified he was telling the truth and denied he was telling the story the solicitor wanted. ROA. p. 204. Of course, the truth was not what Langford wanted. He brought two statements claiming that Langford and Bryan were not involved and wanted Alvin to sign them so Langford and Bryan would not get in trouble. Langford told Alvin that if he signed those statements, nobody would get in trouble. Alvin admitted that this did not turn out to be good advice. But Alvin admitted Langford and Bryan were his friends. He never wanted them to get in trouble. It was not easy for Alvin to testify against them. He admitted he wished the whole thing would go away for all of them. The statements he signed for Langford were false. In contrast, he testified that the truth was Langford and Bryan were with him for the robbery and further, that the prosecution and law enforcement never asked Alvin to say anything but the truth. ROA. pp. 208-211. On recross-examination, Alvin agreed he did not want to sign the statements and was forced to sign them. ROA. p. 213, lines 18-22.

ARGUMENT

Appellant's speedy trial rights were not violated where it took a year for the Edgefield County Sheriff's Office to find an interpreter who could talk to the victims so the investigation could be completed, where the circuit court was unable to find a South Carolina certified interpreter in Mandarin, and where Appellant sought to harass his younger cooperating co-defendant into lying or not testifying at trial; and the issue is not preserved for review where Appellant did not renew the motion at the start of trial; and further, the issue of the constitutionality of section 1-7-330 is not preserved for review or raised by appellant and should not be considered, although the statute is constitutional.

Appellant Langford contends the trial court erred in denying his motion to dismiss the case as a result of a violation of his right to a speedy trial. The issue is not preserved for review on appeal. Additionally, the issue is entirely without merit as there is no evidence Appellant's right to a speedy trial was violated. Langford does not come in with clean hands. He caused delay himself by harassing his cooperating co-defendant, Alvin Phillips. Langford also fails to mention that at least a year of the delay was due to the difficulties of finding an interpreter to speak to the victims for purposes of completing the investigation. Further, the Clerk of Court was unable to find a South Carolina court certified interpreter in Mandarin, which also resulted in delay.

Procedural background

The State called the case for trial expecting it to go forward on May 17, 2010. Bryan Phillips' counsel moved to dismiss the case based on a violation of his speedy trial rights and because the State's main witness, Alvin Phillips, no longer was willing to testify as a cooperating co-defendant. Bryan's counsel argued he was ready to proceed to trial that day,

and he “certainly believe[s] 20 months is a substantial enough period of time to give the State an opportunity to prepare its case and prosecute it.” May 17 transcript (ROA.) pp. 10-11. Langford’s attorney joined Bryan’s motion and adopted Langford’s *pro se* motion for a speedy trial.³ ROA. pp. 11-12. No other grounds for granting the motion for a speedy trial were raised by Langford.⁴

The State learned Langford and his co-defendant were actively seeking to influence co-defendant Alvin Phillips to not testify or to testify falsely, which resulted in Alvin Phillips’ decision not to testify and the necessity of the May 2010 continuance. ROA. pp. 12-14. Further, Assistant Solicitor Maye received a statement signed by Alvin Phillips on the day of the May hearing claiming the two co-defendants were not involved. This was provided by one of the defendants to his counsel. ROA. p. 18.

In responding to the Langford’s motion to dismiss, Maye advised the trial court that law enforcement provided Maye with information the co-defendants were exhorting and pressuring Alvin Phillips to not testify because if he didn’t testify, “none of them are going

³ State law does not permit or recognize “hybrid representation,” that is, representation that is partially by counsel and partially *pro se*. See, e.g., Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). The transcript is unclear when counsel was appointed or retained in the instant case, although counsel certainly could adopt a *pro se* motion if appropriate. However, the subsequent May 25 motion is clearly impermissible hybrid representation and should not be considered on appeal.

⁴ Even a cursory review of the Record would reveal the issue raised by the amicus brief, the constitutionality of section 1-7-330 of the South Carolina Code, was never raised to the trial court. Further, no issue of impropriety on the part of the solicitor was ever articulated. If Langford, in good faith, believes impropriety occurred, this should have been raised to the trial court by his counsel so the solicitor could address the baseless allegations.

to be in trouble.” ROA. p. 12. Maye advised Judge Keesley: “We believe either through pressure or threats, they have been able to persuade him not to do so and we don’t think that they should be rewarded for that. We’ll try them at the very first opportunity.” ROA. p. 14, lines 1-5.⁵ Maye indicated Langford and Bryan Phillips would be brought to trial at the first opportunity and argued that they should not be rewarded for pressuring the younger co-defendant into falsely exonerating them.

Maye attempted to call Alvin Phillips’ case that week but could not because Alvin Phillips’ prior attorney was relieved and the new attorney was appointed eight days in advance of the term. Additionally, Judge Keesley and Maye discussed the difficulties in obtaining an interpreter capable of being qualified for translating Mandarin. ROA. pp. 15-16.

Judge Keesley took the matter under advisement. ROA. p. 21. Judge Keesley denied the defendants’ motions in part by order dated May 20, 2010, but ordered the case be tried within nine months. May 20, 2010 Order, Supp. ROA. pp. 1-3.⁶

Preservation

First, the issue is not preserved for review on appeal. The State brought Langford’s case for trial September 7, 2010. Prior to trial, Langford never renewed his motion to

⁵ According to the judicial website, the next term of general sessions in Edgefield County was August 30, 2010 before Judge Maddox. The order notes “an older conflict case that a visiting judge is trying to set for the August term.” Supp. ROA pp. 2-3. This could only be the Maddox term. The instant case was tried in general sessions during the term the following week before Judge Keesley. Accordingly, the amicus brief’s allegations of judge shopping are unsupported.

⁶ Contrary to the amicus brief, the solicitor did not continue the case. Judge Keesley continued the case. See Amicus Br. p. 5.

dismiss the case based on a violation of his right to a speedy trial.⁷ He allowed the trial to proceed to verdict without ever renewing his motion to dismiss based on violation of his speedy trial. As a result, he has waived this issue and it is not properly preserved for review on appeal. See State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) (finding motion to dismiss for violation of right to a speedy trial not properly preserved when no contemporaneous objection was made).

Langford's rambling post-verdict diatribe against Judge Keesley⁸ is insufficient to preserve the issue. ROA. p. 461-467. Even if this remonstrance could be considered an objection based on his speedy trial motion or a renewal of the motion to dismiss, it came much too late to properly raise the issue for consideration on appeal. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (stating that "[h]aving denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object . . . , Appellant is procedurally barred from raising these issues for the first time on appeal").

Additionally, Langford's trial counsel never raised an objection to how the Solicitor

⁷ In his brief, Langford incorrectly claims that he renewed the motion at the beginning of trial. Actually, the passage is the tail end of a motion made by Bryan for Judge Keesley to recuse himself. Bryan's counsel indicated his client felt that Judge Keesley could not be fair. Bryan's counsel did not claim to adopt his client's position. Judge Keesley allowed Bryan to air his complaints about the case being continued in May and in Bryan not getting a bond. The comments Langford attributes to himself were Bryan's. ROA. pp. 31-35. Langford did not renew his speedy trial motion or adopt Bryan's motion.

⁸ Langford, but not his attorney, complained: "I didn't **feel like** I was guilty." ROA. p. 466 (emphasis added). He also argued: "I feel last court term I was supposed to walk free." ROA. p. 466, lines 7-8. He complained that Alvin was not a reliable witness, that the State must have pressured him, and that the State was dilatory in not trying the case sooner. His attorney did not adopt any of these arguments at sentencing. ROA. pp. 461-467.

was administering the docket, the issue the Public Defender's Association discusses in its amicus brief. Because this issue was never raised, it is clearly not preserved for review on appeal. See State v. Byram, 326 S.C. 107, 112-13, 485 S.E.2d 360, 362-63 (1997) (a constitutional issue must be presented to the trial court to be preserved for review). Further, this issue is not raised in Langford's brief or in the Statement of Issues on Appeal and should not be considered. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Rule 213, SCACR (amicus brief shall be limited to argument of the issues on appeal as presented by the parties). Langford did not challenge the constitutionality of the solicitor's control of the docket at all in the brief, although making vague complaints about the solicitors controlling the docket. As a result, neither the issue raised in Langford's brief nor the one raised by the *amicus curiae* is preserved for review on appeal.

Merits

On the merits, an accused is entitled to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 14, of the Constitution of South Carolina.

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 does not imply undue haste, for the state, too, is entitled to a reasonable time in which to prepare its case; 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). The United States Supreme Court (USSC) has explained: "The right of a speedy trial is necessarily relative. It

is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.” Beavers v. Haubert, 198 U.S. 77, 87 (1905); see also, Barker v. Wingo, 407 U.S. 514, 522 (1972) (finding “any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case”).

The Barker court identified several factors to be used in determining whether a defendant has been denied the right to a speedy trial including: (1) the length of delay, (2) the reason the government uses to explain the delay, (3) when and how the defendant asserted his speedy trial right, and (4) the prejudice to the defendant. Barker, 407 U.S. at 530; see also, State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (citing factors for consideration). “The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” Barker, 407 U.S. at 530.

Even assuming the twenty-month delay between Langford’s arrest and when he raised the motion to dismiss or the twenty-four month delay between his arrest and trial is sufficient to warrant consideration of the remaining factors⁹, the trial court properly denied the motion to dismiss. This case was not set for trial initially until May 2010 and finally tried on September 7, 2010, for three predominant reasons: (1) the difficulty obtaining a qualified Chinese interpreter to assist law enforcement in its investigation and to assist at trial with the victims who spoke little to no English at trial, (2) the difficulty in the court finding an interpreter qualified to interpret at trial, and (3) the recantation and refusal to testify by Alvin

⁹ See State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978) (wherein this Court found a twenty-eight month delay sufficient to trigger the remaining factors).

Phillips resulting from the pressure and intimidation by Langford.¹⁰

At the May 2010 hearing, the trial court was aware the victims in the case spoke Chinese, and the State was having difficulties locating an interpreter to assist at trial. ROA. p. 15. Maye explained South Carolina did not have anyone on the certified interpreter's list to speak Mandarin Chinese. He indicated they had to arrange to bring someone in from out of state to assist at trial. ROA. pp. 15-16.¹¹

The trial court's ruling on May 19, 2010, explains in part: "Some of the victims needed the services of an interpreter, and the State had gone to a great deal of time and expense in arranging an interpreter for Mandarin Chinese, having to bring the interpreter from another State since none are certified in South Carolina." Supp. ROA p. 2.

Prior to trial, Judge Keesley qualified Mr. Louie as an interpreter in Mandarin Chinese. "The Clerk explained Court administration did not have any Chinese interpreters. South Carolina does not have any that are certified." The Clerk explained they "searched diligently" for an interpreter. ROA. p. 63. In making his ruling qualifying Louie, Judge Keesley explained in pertinent part:

My conversations with the Clerk before this trial were very brief, but basically I understand there was difficulty in

¹⁰ Thus, the amicus brief's assertion that the State was responsible for all the delay is incorrect. The State was not responsible for any of these situations. See Amicus Brief p. 9.

¹¹ This appears to be a different interpreter than the one that ultimately was qualified at trial. Bryan Phillips' counsel made a dubious objection at trial and on appeal despite the interpreter's obvious qualifications – he learned both Cantonese, the regional dialect, and Mandarin, the national dialect, during the twenty years he lived in China and was fluent in both. ROA. p. 54, p. 59. Presumably, Bryan wanted the case continued if the court did not find the interpreter sufficient.

even locating someone. She has provided me a list of interpreters that she obtained from court administration. It's a 2009 list, which is when this would have been - - the effort to obtain an interpreter would have been going on.

And it's a situation where there's nobody listed in there in Chinese. They're almost all Spanish. There's a few French and Haitian dialect, but there are no people on the list that we have for Chinese. I think the Clerk's office did a diligent search and only came up with a grand total of about two names.

ROA. pp. 68-69.

At trial, Investigator Lamaz Robinson indicated he could not obtain meaningful information during an interview with the victims because of the great language barrier. ROA. p. 232. He testified he had difficulty finding a translator, and they did not find one to facilitate meaningful communications with the victims until over a year later ("a year and something"). ROA. p. 233. The translator was finally found when a professor at the University of South Carolina in Columbia directed Investigator Robinson to a person who could assist. ROA. p. 234. As a result, it is clear a significant cause of delay regarding the trial of this case was caused by the need to obtain qualified interpreters, a situation of Langford's making, not the State's.¹² See Pittman, 373 S.C. at 552, 647 S.E.2d at 156 ("The record does not reflect any intentional or malicious delays by the prosecution, nor does the record reflect any negligent prosecutorial behavior in connection with this case.").

Certainly it was appropriate to complete the investigation by meaningfully

¹² Note that Alvin testified they had difficulty understanding the victims when they robbed them and tried to get their money. Further, the prosecution had difficulty with even the names of the victims while preparing the indictments, due to lack of assistance from an interpreter. ROA. pp. 272-273. Judge Keesley noted he understood what "... the difficulties would be[,] just from sitting through the trial." ROA. p. 273, lines 5-8.

interviewing the victims. This could have even been potentially beneficial to the defendants – it is conceivable that facts could have been discovered from the victims that would exculpate Langford or Bryan.

Alvin Phillips' recantation and refusal to testify caused significant delays. As discussed above, the State did not learn of the recantation or receive a copy of the signed document alleging recantation until the day the case was called for trial in May 2010. Further, the State justifiably maintained the recantation was obtained by the use of pressure and threats by Appellant and his other co-defendant. Vermont v. Brillon, 129 S.Ct. 1283, 1290, 173 L.Ed.2d 231 (2009) (noting "delay caused by the defense weighs against the defendant . . ."); Pittman, 373 S.C. at 551, 647 S.E.2d at 156 ("While the ultimate responsibility for timely completion of the trial rests with the State, the defenses's contributions to the delay cannot be ignored.").

The State attempted to solve the obstructionist ambitions by moving Alvin Phillips from the Edgefield County jail to Saluda County detention when they became aware of the pressure the two defendants were exerting on Alvin not to testify. ROA. p. 315.

The resulting false recantation due to improper influence and pressure by Langford, served as a significant factor in the delay occurring. Yet Langford's position seems to be that he pressured the witness fair and square, so his case should be dismissed. But the trial court acted within its broad discretion in determining that a continuance was proper. Further, the State did not make Alvin change his position, Alvin chose to plead guilty and tell the truth, presumably on advice of counsel, when faced with the alternative of being tried and convicted for the crimes he admitted committing.

Accordingly, the delay was occasioned by the defendants, not the State. See also State v. Chapman, 289 S.C. 42, 344 S.E.2d 611 (1986) (noting a portion of the delay was attributable to the normal condition of the docket); State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999) (finding that reasons the State gave for delay - complexity of the case required a thorough investigation, difficulty in locating a co-defendant whose testimony was essential, and negotiations with a co-defendant who finally cooperated and was available to testify justified five year delay for trial).

The third prong considers when and how a speedy trial motion is raised. The first time Langford raised the issue was his *pro se* motion in June 2009. This was before law enforcement even found an interpreter to interview the victims. The next time was the hearing in May 2010 when counsel adopted Langford's pleading and the co-defendant's motion. Co-defendant counsel's motion was obviously perfunctory, perhaps to satisfy his client, and only alleged that twenty months was long enough. The motion was granted to the extent that the State was required to try the case in nine months, and as shown, it was tried at the first opportunity on September 9. The May 25 motion was impermissible hybrid representation and should not be considered. The issue was never raised again until after the verdict, by Langford, not his attorney. Robinson, 335 S.C. at 626, 518 S.E.2d at 272 (finding speedy trial rights were not violated where the case was tried within ten months after the first formal motion was filed, even though the case took five years to go to trial).

In considering the fourth prong of the test, whether Langford suffered prejudice, Barker is again instructive:

Prejudice, of course, should be assessed in the light of the

interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Barker, 407 U.S. at 532.

Langford advanced no prejudice suffered as a result of the delay other than the twenty months he was incarcerated without bond due to the seriousness of his charges. The time spent incarcerated pre-trial on very serious charges should not alone constitute sufficient prejudice to justify dismissal of the case. See State v. Kennedy, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) (“We are unwilling, however, to hold that the prejudice he suffered by his pretrial incarceration is sufficient to warrant dismissal of his charges for a speedy trial violation.”). Langford made no showing of the possibility his defense could be or was impaired by the delay. His main argument for prejudice, although not argued by his counsel below, appears to be that he should be able to take advantage of the fact his victims barely spoke English and he should reap the benefit of improper influence and pressure placed on the younger co-defendant. As a result, Langford has not demonstrated the prejudice required to warrant dismissal of his case for a violation of his right to a speedy trial. Robinson, 335 S.C. at 626, 518 S.E.2d at 272 (finding Robinson did not satisfy his burden of showing the delay resulted from neglect and wilfulness of the State and there was no evidence the delay was wilful or intentional).

To the extent the issue regarding the constitutionality of section 1-7-330 is before the Court the issue is also without merit.¹³ The amicus brief argues the statute violates the separation of powers under Article I, Section 8 of the South Carolina Constitution. The amicus brief further argues allowing Solicitors to control the calling of cases violates due process. The arguments fail in light of the facts of this case and the remedies available to Langford and other defendants.

Section 1-7-330 of the South Carolina Code provides:

The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.

S.C. Const. Art. I, section 8, provides:

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

As stated by the Court in State ex rel. McLeod v. McInnis:

One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

¹³ The State does not concede this issue is even possibly preserved for review on appeal.

278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). The purpose of the separation of powers is carried out through the system established by section 1-7-330. The Solicitors function in their role in the executive branch to carry the laws into effect by deciding the cases to be brought to trial and when. Further, the courts of the state maintain their right to oversee and provide the necessary check of the executive power through judicial remedies such as continuances, sanctions, and dismissal of cases.

As this Court pronounced:

We hold that the solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge. If a defendant feels that his rights are prejudiced by reason of the calling of his case at any particular time, he may apply to the judge for a continuance beyond the term or for postponement to a date later within the term. In the calling of cases for trial the solicitor has a broad discretion in the first instance, and the trial judge has a board discretion in the final analysis.

State v. Mikell, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971); see also, State v. Ridge, 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977) (“In this State, the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time.”). This Court has recognized the separation of powers, with the executive branch in control of charging decisions including calling the case, and the judicial branch providing the oversight through remedies such as continuances, dismissal for violation of a right to a speedy trial, and sanctions or dismissal for other abuses by the Solicitors. This Court has acknowledged these fact appropriate checks and balances are in place with regard to administration of the docket.

Additionally, Article V, Section 4 of the South Carolina Constitution provides:

The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. . . . The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. . . . The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

This provision related to the administrative functions of the Supreme Court and the Chief Justice clearly presupposes the “rules governing the practice and procedure in all such courts” to be subject to statutory law, which would include the statutory rule under section 1-7-330 granting the power to Solicitors to decide which cases should be called for trial. See e.g., State v. Flood, 257 S.C. 141, 146, 184 S.E.2d 549, 552 (1971) (“The solicitor has a broad discretion deciding the order in which cases are called”).

Further, S.C. Const. Article V, Section 4 empowers the Chief Justice to set the terms of court that are available within a particular county and the judges to sit in any court. The amicus brief claimed the potential for judge shopping occurred. In this particular case, however, between the May 2010 hearing date and the September 2010 trial, there was only one other term of court and only one term of court not handled by Judge Keesley.¹⁴

In Williams v. Bordon’s, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980), this Court determined the trial court has the inherent power to grant continuances so as to safeguard the rights of litigants. As a result, the Court found a statute purporting to limit or require when

¹⁴ This may be the term of court in which Alvin Phillips pled guilty to armed robbery as it is the only term in between the May and September hearings.

a court can exercise its inherent authority within the judiciary to grant or deny a continuance was unconstitutional. Nothing in section 1-7-330 prohibits, requires, or in any way affects the trial court's control and final say on whether a case goes forward through the grant or denial of a continuance. This check inherent to the judiciary remains intact and remains a strong device for curbing any possible abuse by the Solicitor to require a defendant to trial before he has had a reasonable opportunity to prepare.

Further, another inherent judicial function can serve to prevent abuse by the Solicitor at the other end of the spectrum when he delays calling a case—a motion for speedy trial and ultimately a motion for dismissal based on a violation of the defendant's right to a speedy trial. While the facts of this case clearly do not support the grant of the motion, the judicial discretion to grant the motion can serve as a deterrence to the prosecutor who clearly delays a trial for vindictive or other improper purposes.¹⁵

Robinson suggests another remedy employed in that case. Robinson notes that the Administrative Judge ordered the case set for trial after “the last of several status conferences.” An administrative judge could require a scheduling order or status conferences where delays become troubling, either *sua sponte* or on motion made by defense counsel that demonstrates the need for such judicial monitoring. This certainly seems a less drastic drain on limited judicial resources than complete administration of the docket by the judiciary, presumably the remedy put forward by counsel for the Public Defender's Association.

¹⁵ The amicus brief attempts to dismiss the availability of this remedy by speculating that Judge Keesley was unaware that he could dismiss the case as a remedy for a speedy trial violation. Amicus Brief, p. 30. The record does not support this unlikely conclusion. Instead, the Order found that sufficient reason did not exist to dismiss the case. Supp. ROA pp. 1-3.

The amicus brief raises the purely speculative spectre of numerous abuses perpetrated by Solicitors in control of the docket, frequently using the term “potential for abuse”. The vast majority are clearly remediable by the checks inherent in the judiciary such as the ability to grant a continuance and the ability to dismiss a case. Other potential abuses may only occur when one presumes bias on the part of the judiciary¹⁶ or assumes judges will take into consideration the factor a Solicitor chose to bring a case before that judge.

When one branch of government has a check which limits the other branch’s ability to abuse its power, the separation of powers established in Article I, section 8 of the South Carolina Constitution is effectuated. As a result, there is no separation of powers violation by having the executive branch responsible for charging decisions including what case to call and the judicial branch having the final say on which cases move forward and whether any remedies are necessary to curtail abuse by Solicitors.

Additionally, the terms of court and assignment of judges to preside over terms of court are determined by the judicial branch. See S.C. Const. Art. V, Section 4. The terms of court and rotating or random assignment of judges to the terms of court are subject to change by the judicial department at any time upon order of the court. The solicitor’s control over the criminal docket is limited by the assignment of terms and judges and because case

¹⁶ The amicus brief boldly claims “Judge Keesley became a *de facto* instrument of the prosecution” when he exercised his discretion in denying the motion to dismiss. Amicus Br. p. 29. The record itself reveals how unfair this allegation against Judge Keesley is. Judge Keesley noted, when the defendants (but not their attorneys) claimed the trial was unfair, that “I have called it straight down the middle.” ROA, p. 475. He also noted “I don’t have any personal favoritism for the State.” ROA, p. 476. The State agrees that Judge Keesley’s assertion is correct and that he is a fair and impartial judge, not the State’s instrument.

scheduling is subject to motions for continuance and other matters that are not subject to the solicitor's docketing discretion but are matters solely with the control of the courts.

Further, there is no due process violation in the current system of administering the docket. Due process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property. State v. Brown, 178 S.C. 294, 182 S.E. 838, 841 (1935). The United States Supreme Court has stated:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (internal citation omitted). The procedure of administration of the dockets by the Solicitors subject to the judicial "final analysis" protects the due process rights of the defendant and ensures the right to a fair and impartial trial.

The federal courts examining whether a defendant's due process rights have been violated by a particular method of assigning a case to a judge generally agree there is no due

process violation without proof of prejudice suffered. See generally, United States v. Gallo, 763 F.2d 1504, 1532 (6th Cir.1985) (“a defendant does not have the right to have his case heard by a particular judge,’ does not ‘have a right to have his case selected by a random draw,’ and ‘is not denied due process as a result of the error unless he can point to some resulting prejudice.’”) (quoting Sinito v. United States, 750 F.2d 512 (6th Cir.1984)); Sinito, 750 F.2d at 515 (same); United States v. Erwin, 155 F.3d 818, 825 (6th Cir.1998) (“Even when there is an error in the process by which the trial judge is selected, or when the selection process is not operated in compliance with local rules, the defendant is not denied due process as a result of the error unless he can point to some resulting prejudice.”); United States v. Forbes, 150 F.Supp.2d 672, 681-682 (D.N.J. 2001); Board of School Directors of City of Milwaukee v. Wisconsin, 102 F.R.D. 596, 598 (E.D.Wis.1984) (“Even a criminal defendant has no due process rights in the assignment of his case.”); United States v. Keane, 375 F.Supp. 1201, 1204 (N.D.Ill.1974) (concluding that “a defendant has no vested right to have his case tried before any particular judge, nor does he have the right to determine the manner in which his case is assigned to a judge”).

Public policy supports the current system of administration of the docket, especially in light of the lack of a violation of due process or the separation of powers.

The principal reasons prosecutors have been called upon to administer the dockets are fourfold: (1) neither circuit court judges nor clerks of court have the personnel, time or infrastructure to organize, publish and administer a criminal docket; (2) solicitors are elected to represent a hybrid of public safety and justice balanced with efficiency within their circuits; (3) prosecutors are uniquely well suited to know the nuances of individual cases and the availability of lay witnesses, law enforcement witnesses, as well as expert witnesses they

routinely share with other circuits; and (4) since prosecutors are the ones called upon to provide an explanation for the current state of the criminal justice system, the muses thought it only fair to provide them with a few tools to actually impact the administration of the justice.

Gowdy, Trey, Criminal Dockets Administered by Prosecutors: Past Present and Future, The South Carolina Lawyer, (January 2010) at 24. Solicitors are responsive and held accountable by two groups—the public who elects them and the judges before whom they practice. The Solicitor faces reelection and as such, his record in moving cases efficiently and without abuses is an issue for the public’s consideration. Further, as discussed above, the Solicitor must operate without abusing the system or the judge before whom he brings the case has numerous remedies at his disposal to provide a check on the Solicitor’s actions. No other entity has such checks and balances in place to provide for the administration of the docket.

Accordingly, Langford fails to demonstrate he was entitled to dismissal of his case based on a violation of his right to a speedy trial even if the issue is preserved for review on appeal. The delay in this case was reasonable in light of the victims involved and the refusal of the witness to testify as a result of improper influence by Langford. Further, the solicitor’s duties in setting the docket did not result in the denial of a fair trial or prejudice Langford. Ultimately, the case would have been tried in May had he not attempted to obstruct justice. Additionally, neither the issue raised on appeal by Langford, nor the completely different issue addressed in the Amicus Curiae Brief is preserved for review on appeal. Therefore, this Court should affirm Langford’s conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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March 22, 2012

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IN THE COURT OF APPEALS

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William P. Keesley, Circuit Court Judge

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vs.

K.C. LANGFORD,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b),
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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

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