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## STATEMENT OF THE CASE

The Edgefield County Grand Jury indicted Appellant on charges of burglary in the first degree, armed robbery, kidnapping, and criminal conspiracy. His case was initially called for trial in May 2010, but was continued. The Honorable William P. Keesley denied a motion to dismiss by Appellant and granted the State a continuance.

The State called the case again for trial on September 7, 2010. Appellant and his co-defendant K.C. Langford proceeded to trial before Judge Keesley and a jury. The jury found Appellant guilty on all charges. Judge Keesley sentenced him to twenty years for burglary, armed robbery, and kidnapping. He received five years for criminal conspiracy. All sentences were to run concurrent. Appellant filed a timely notice of appeal and this case was consolidated with the appeal filed by K.C. Langford and certified for consideration by the South Carolina Supreme Court.

## STATEMENT OF FACTS

Alvin Phillips and Appellant noticed several individuals leaving a Chinese restaurant and believed it was possible they were taking money from the restaurant home. (T.228-229; R. 156-157). Alvin Phillips and Appellant knew where the individuals lived and watched them carry a black bag to their house and noticed they never went to the bank when they left the restaurant. (T.229; R. 157). The two had discussions of robbing the individuals at their home when the arrived from the restaurant. (T.229-230; R. 157-158).

On August 14, 2008, Appellant called Alvin Phillips about robbing the individuals when the arrived home from the restaurant. Alvin Phillips retrieved his gun and K.C. Langford, the co-defendant tried with Appellant, changed into dark clothes. The two along with Appellant went to the residence to wait for the arrival of the individuals from the Chinese restaurant. (T.232-233; R. 160-161).

When the victims arrived home, the father stayed outside while his son and wife went into the house. Appellant, Alvin Phillips, and K.C. Langford jumped out of the bushes and ordered the father to the ground. After he was down they demanded money, but could not understand what he was saying to them because he only spoke Chinese. (T.234-235; R. 162-163). Alvin Phillips pointed a gun at the man. (T.189; 235; R. 117; 163).

The man's son came out of the house to find his father and was forced to the ground by the men. (T.189-190; 202; 235; R. 117-118; 130; 163). They demanded money from the son as well. He directed the men to the house where he had placed the black bag containing approximately $3000. (T.201; 203; R. 129; 131). K.C. Langford entered the house and obtained the black bag containing the money from the restaurant. (T.236-237; R. 164-165).

Appellant and his co-defendants fled the scene and returned to Appellant's house. (T.236-238; R. 164-166). There they divided up the money. (T.239; R. 167).

The co-defendants were not immediately identified. Investigator Young received information from an acquaintance indicating Appellant, Alvin Phillips, and K.C. Langford were responsible for the robbery on August 14. (T.374-375; R. 302-303). Alvin Phillips was asked to come in for questioning and he did so voluntarily. (T.381-382; R. 309-310).

Alvin Phillips gave a statement in which he implicated himself and both Appellant and K.C. Langford in the robbery. (Statement of Alvin Phillips dated 9/29/08, Defendant Phillips Exhibit 4; R. 483). Subsequent to the three defendants being arrested, they all were placed in Edgefield county detention. While there, Alvin Phillips was approached by K.C. Langford to sign a statement Alvin Phillips did not write that indicated K.C. Langford and Appellant were not guilty of the crime and attempting to retract his prior statement. (T.280-281; R. 208-209).

The trial of Appellant and K.C. Langford was originally called in May 2010. Prior to calling the case for trial, the solicitor believed Alvin Phillips would testify against his co-defendants. Just prior to the hearing, he was presented the statement signed by Alvin Phillips in which he attempted to recant his prior statement and was told Alvin Phillips would not testify.

At the hearing, counsel for Appellant moved to dismiss the case or in the alternative for a low bond based on violation of his client's right to a speedy trial. He maintained twenty months "is a substantial enough period of time to give the State the opportunity to prepare its case and prosecute it." (May 17T.5; R. 11).

The State maintained the case was ready to be called that day for trial until he found out Alvin Phillips changed his mind about testifying. (May 17T.6; R. 12). He explained the belief that the change is the result of pressure being applied by Appellant and K.C. Langford. (May 17T.6-7; R. 12-13). The State indicated Alvin Phillips was moved to Saluda detention facility because of the pressure by the other co-defendants. (May 17T.11-12; R. 17-18). The State indicated significant effort was expended to obtain an interpreter who spoke Chinese and English fluently because South Carolina has no certified interpreters. (May 17T.9-10; R. 15-16).

The trial court denied the motion to dismiss. The trial court considered the changed testimony of Alvin Phillips, the fact Alvin Phillips would have to be tried before the other two co-defendants but could not be tried in May, and the difficulty in obtaining the Chinese interpreter. (Order of the Court dated May 2010; R. 23-25). Alvin Phillips subsequently pled guilty to armed robbery. (T.244; R. 172).

Appellant and co-defendant K.C. Langford were brought to trial on September 7, 2010. Prior to trial, the trial court qualified an interpreter in Chinese to translate for the victims. (T.141-142; R. 69-70). During trial, the victims testified about the events of the robbery. Alvin Phillips testified to the involvement of all three individuals charged. He also explained the pressure put on by K.C. Langford resulting in the statements recanting his initial confession implicating Appellant and K.C. Langford. (T.266-267; 279-282; R. 194-195; 207-210).

## ARGUMENT

**I. The trial court properly denied Appellant's motion for a mistrial based upon the comments of the solicitor during closing argument. Further, this issue is not properly preserved for review on appeal.**

Appellant contends the trial court erred in denying his motion for a mistrial based on comments by the solicitor he alleges were comments on his right to remain silent and not take the stand in his defense. The issue is not properly preserved for review on appeal because a contemporaneous objection was not made. The issue is also without merit because the solicitor was discussing the testimony of Alvin Phillips and never commented on Appellant's right to remain silent.

**Preservation**

First, the issue is not properly preserved for review on appeal. In order to preserve an issue, an objection must be contemporaneously made. It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (to preserve error for appellate review, defendant must make contemporaneous objection on specific ground). "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured." State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991)(eliminating *in favorem vitae* review in death penalty cases and instead requiring a contemporaneous objection to preserve and issue for direct appeal)(emphasis added).

Appellant's failure to contemporaneously object to the alleged improper comments by the solicitor eliminated the trial court's ability to cure any prejudice. Normally a curative instruction would have cured any error if the contemporaneous objection was made. See Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001) ("Furthermore, even if the solicitor makes an improper comment on the defendant's failure to testify, a curative instruction emphasizing the jury cannot consider [the] defendant's failure to testify against him will cure any potential error."). Instead, counsel waited until the conclusion of the closing argument and moved for a mistrial, a drastic remedy which may have been avoided by a curative instruction if one was even needed. As a result, by failing to object at the time of the improper comments by the solicitor, Appellant's issue is not preserved for review on appeal.

**Merits**

The issue raised is also without merit. Under the United States and South Carolina Constitutions, a defendant has a right to remain silent and to not testify during his trial. See U.S. Const. amend. V; S.C. Const. art. I, § 12. "An accused has the right to remain silent and the exercise of that right cannot be used against him. The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." State v. Smith, 290 S.C. 393, 394-95, 350 S.E.2d 923, 924 (1986) (citing Doyle v. Ohio, 426 U.S. 610 (1976); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984)).

A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such

motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." Id.

The commentary which formed the basis of Appellant's motion for a mistrial was not a comment on Appellant's right to remain silent. The prosecutor spent the majority of his closing argument discussing the statements given by Alvin Phillips, the co-defendant. He discussed the pressure to recant and the fact that he still came forward to testify even though

he did not want to testify against Appellant and K.C. Langford. The prosecutor was merely continuing this line of argument.

Specifically, the solicitor argued:

> You saw what Alvin Phillips said. You saw what he told Roosevelt Young. The statements match. The timeline's there. He was with Bryan ahead of time. He was with K.C. Langford right afterwards. There wasn't anybody else. He told the truth up here. He didn't want to. He didn't want to tell on them. You know he's got genuine affection for them. And he didn't want to testify against them, but he did do the right thing. This comment about don't snitch on anybody, don't tell anybody, this system breaks down when people get up here under oath and they don't tell the truth. The only way this system works is when people get up here and take that oath and tell the truth.

(T.490; R. 418). Clearly, the solicitor is talking about Alvin Phillips getting on the stand and telling the truth based on his statement to police and not commenting on Appellant's invoking his right not to testify. The trial court properly concluded this was the basis for the comment and that the comment did not warrant the drastic remedy of a mistrial. (T.493-494; R. 421-422).

Further, even if the comment was a comment on Appellant's failure to take the stand, it was entirely harmless. If the comment is not read as applying to the testimony of Alvin Phillips, then the only other possible interpretation is a general comment on the need for the truth in testimony. This commentary does not prejudice Appellant, and is harmless, especially in light of the entire record including numerous reminders by the court as well as by the solicitor that Appellant is presumed innocent and has no burden of proof. (T.479;

488; 499-502; R. 407; 416; 427-430). See State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004).

## II. The trial court properly qualified Mr. Louie as an interpreter in Chinese. Further, it is questionable whether the issue is properly preserved for review on appeal.

Appellant contends the trial court erred in qualifying Mr. Louie as an interpreter for the Chinese victims. The preservation of the issue is questionable in light of the very generic objection raised at trial. In any event, Mr. Louie was properly qualified as an interpreter in Mandarin Chinese by the trial court pursuant to section 15-27-155 of the South Carolina Code.

It is questionable whether this issue is properly preserved for review on appeal. Appellant in his brief contends Mr. Louie is not qualified to be an interpreter in Mandarin Chinese because he does not have the sufficient experience or training in the language and also maintains his primary dialect was Cantonese and not Mandarin. These specific issues were never raised to the trial court. At the end of voir dire regarding Mr. Louie's qualification as an interpreter, Appellant's counsel simply stated: "For the record, I do object to his qualification." He did not raise the issues to the trial court he now raises on appeal. As a result the issue should not be preserved for review. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding issue not preserved when appellant did not object to testimony at trial on the grounds raised on appeal); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding "[a] general objection is ordinarily insufficient to preserve an issue for appeal.").

On the merits, section 15-27-155 governs the use and qualification requirements of an interpreter. The section provides:

> (A) Notwithstanding any other provision of law, whenever a party or witness to a civil legal proceeding does not sufficiently speak the English language to testify, the court may appoint a qualified interpreter to interpret the proceedings and the testimony of the party or witness.
>
> (B) An "interpreter" means a person who:
>
> (1) is eighteen years of age or older;
> (2) is not a family member of the party or witness;
> (3) is an instructor of foreign language at an institution of education; or
> (4) has educational training or experience that enables him or her to fluently speak a foreign language and interpret the language of another person.
>
> An "interpreter" shall not be a person confined to an institution.

S.C. Code Ann § 15-27-155 (A) & (B) (Supp. 2010).

The trial court offered Appellant's counsel the opportunity to talk with Mr. Louie during an overnight break in the trial. Counsel did so and indicated he had questions about his qualifications. (T.117-118; R. 45-46). The court allowed voir dire of Mr. Louie regarding his qualifications. Mr. Louie acknowledged he was not certified by any state, including South Carolina. He stated there is no program for certification in Chinese in either Maryland or North Carolina. (T.121-122; R. 49-50).

He testified he has served as an interpreter in the court system "[o]ver 50 times." (T.123; R. 51). He indicated he was required to translate from English to Chinese and back.

Further, he indicated he met with the victims and was able to communicate with them effectively and was able to understand them. He specifically indicated no problem in communication. (T.124; R. 52).

On examination by Appellant's counsel, Mr. Louie indicated he learned both his local dialect, Cantonese, and the national dialect, Mandarin. (T.125-126; R. 53-54). He indicated he began interpreting for the judicial system in 1996 and had always been qualified as an interpreter. (T.126-127; Court Exhibit 1, Resume; R. 54-55; 479). He again indicated he had no difficulty communicating with the victims and they had no problem communicating with him. (T.128; R. 56).

The trial court then questioned Mr. Louie regarding his abilities to interpret. Mr. Louie indicated he lived in Hong Kong until he was twenty and graduated high school there speaking Cantonese and Mandarin. (T.130; R. 58). Mr. Louie told the court he felt he was fluent in Chinese and Mandarin Chinese. (T.131; R. 59). After having Mr. Louie read the ethical rules related to being an interpreter, the court ensured he understood his job was to interpret verbatim, and Mr. Louie indicated he understood. (T.136; R. 64). The court further inquired into Mr. Louie's ability to be fair and accurate in his translation. (T.138-140; R. 66-68). The court then recited significant and expansive findings of fact regarding Mr. Louie's qualification as an interpreter. (T.140-142; R. 68-70).

Mr. Louie met the qualification requirements of section 15-27-155(B) and the trial court properly qualified him as an interpreter. Mr. Louie testified he was raised in China, the Canton province, and learned both Cantonese and Mandarin because Mandarin was the national language of the county. He lived in China for his first twenty years. This

experience, of living in and growing up speaking both Cantonese and Mandarin, sufficiently satisfies section 15-27-155(B)(4).

Further, even if there are differences in the Cantonese and Mandarin dialects, Mr. Louie was sufficiently questioned regarding his understanding and capabilities in Mandarin Chinese which is the dialect spoken by the victims. He indicated he could communicate with the victims, and vice versa, and he indicated he felt he was fluent in Mandarin Chinese. Accordingly, the trial court properly qualified Mr. Louie as an interpreter in Mandarin Chinese.

## III. The trial court did not err in denying Appellant's motion to dismiss the case due to a violation of his right to a speedy trial. Further, this issue is not preserved because it was not raised prior to the commencement of the trial.

Appellant 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.

**Factual Background**

Appellant filed a motion for a speedy trial on January 14, 2010. (Motion for Speedy Trial dated January 14; R. 3). The State called the case for trial expecting it to go forward on May 17, 2010. Appellant moved to dismiss the case based on a violation of his speedy trial and because the State's main witness, Alvin Phillips, no longer was willing to testify as a cooperating co-defendant. Appellant 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 17T.4-5; R. 10-11). No other grounds for granting the motion for a speedy trial were raised by Appellant.[1]

The State learned Appellant and his co-defendant were actively seeking to influence co-defendant Alvin Phillips to not testify or testify falsely, which resulted in Alvin Phillips decision not to testify and the necessity of the May 2010 continuance. (May 17 T.6-8; T.279-284; R. 12-14; 207). Further, the solicitor received a statement signed by Alvin Phillips on

[1]Even a cursory review of the Record would reveal the issue raised by the *Amicus Curiae* 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.

the day of the May hearing claiming the two co-defendants were not involved. This was provided by one of the defendants to their counsel. (May 17T. 12; R. 18).

In responding to the Appellant's motion to dismiss, the solicitor advised the trial court law enforcement provided the solicitor 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 to be in trouble." (May 17 T. 6; R. 12). The solicitor indicated Appellant and K.C. Langford would be brought to trial at the first opportunity and should not be rewarded for pressuring the younger co-defendant into exonerating them.

The solicitor attempted to prosecute Alvin Phillips at the May term, but could not because Alvin Phillips's prior attorney was relieved and the new attorney was appointed eight days in advance of the term. (May 17T. 9-10; R. 15-16). Additionally, the court and the State discussed the difficulties in obtaining an interpreter that was capable of being qualified for translating Mandarin Chinese. The court ultimately denied the motion for dismissal and continued the case.

**Preservation**

First, the issue is not preserved for review on appeal. The State brought Appellant's case for trial September 7, 2010. Prior to trial, Appellant never renewed his motion to dismiss the case based on a violation of his right to a speedy trial. 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).

Appellant attempts to rely on a rambling diatribe against the trial court by his co-defendant in order to argue the motion to dismiss based on the violation of his right to a speedy trial was raised at the September 2010 trial. (T.533-539; R. 461-467). Appellant stated: "I want to follow what Mr. Langford said, you know, about the charges not being dismissed, us coming to court last term." (T.541; R. 469). Even if the remonstration could be considered an objection based on his speedy trial motion or a renewal of the motion to dismiss, it came much to 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, Appellant's trial counsel never raised an objection to how the Solicitor was administering the docket, the issue the Public Defender's Association discusses in its *Amicus Curiae* 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 Appellant'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). As a result, neither the issue raised in Appellant'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 I, 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 USSC, in Barker, 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 Appellant'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 factors[2], 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 two predominant reasons; the difficulty obtaining a qualified Chinese interpreter to assist law enforcement and to assist at trial with the victims who spoke little to no English, and the recantation and refusal to testify by Alvin Phillips resulting from the pressure and intimidation by Appellant and K.C. Langford.

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. (May 17T.9; R. 15). The solicitor 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. (May 17T.9-10; R.15-16).

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." (Order dated May 20, 2010; R. 23-25 ).

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[2]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).

Prior to trial, the court had to qualify 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. (T.135; R. 63). In making his ruling on the qualification of Mr. Louie, the trial court explained in pertinent part:

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

(T140-141; R. 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. (T.304; R. 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"). (T.305; R. 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. (T.306; R. 234). As a result, it is clear a significant cause of delay regarding the trial of this case was cause by the need to obtain qualified interpreters, a situation not of the State's making.

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 case was called for trial in May 2010. Further, the State maintained the recantation was obtained by the use of pressure and threats by Appellant and his other co-defendant.

Alvin Phillips had to be moved from the Edgefield County jail to Saluda County detention because of the pressure the two defendants were exerting on him not to testify. (May 17T. 10; T.387; R. 16; 315). As the solicitor noted: "We are now faced with trying the individual that was going to previously be a testifying witness in this case." (May 17T. 7; R. 13). The solicitor further advised the trial court: "We believe either through pressure or threats, they have been able to persuade him not to [testify] and we don't think that they should be rewarded for that. We'll try them at the very first opportunity." (May 17T. 8; R. 14).[3] As a result, the recantation as a result of improper influence and pressure by Appellant and K.C. Langford served as a significant factor in any delay that occurred.

In considering the fourth prong of the test, whether Appellant 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

[3]It should be noted all of this information was ultimately corroborated by Alvin Phillips when he testified at trial against Appellant and K.C. Langford. (T.279-283; R. 207-211). Additional corroboration came from Investigator Young who testified he had concerns Alvin Phillips was being intimidated and influenced into not testifying by Appellant and K.C. Langford so he made the decision to move Alvin Phillips to Saluda pending trial. (T.387; R. 315).

> 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.

At the May 2010 hearing, Appellant 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."). Appellant made no showing of the possibility his defense could be or was impaired by the delay. His main argument appears to be that he should be able to take advantage of the fact his victims barely spoke English and the State had to expend time and resources to obtain interpreters, and he should reap the benefit of the improper influence and pressure placed on the younger co-defendant resulting in a recantation later explained to be a lie made at the request of Appellant and K.C. Langford. As a result, Appellant has not demonstrated the prejudice required to warrant dismissal of his case for a violation of his right to a speedy trial.

To the extent the issue regarding the constitutionality of section 1-7-330 is before the Court the issue is also without merit.[4] The *amicus* argues the statute violates the separation

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

of powers under Article I, Section 8 of the South Carolina Constitution. Further, the brief argues allowing the Solicitor 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 Appellant 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, § 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.

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 executive branch in the form of the Solicitors 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, Article V, Section 4 allows and provides for 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* 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.[5]

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 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

[5]It is likely this is 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.

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 in tact 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.

The *amicus* raises the purely speculative spectre of numerous abuses perpetrated by Solicitors in control of the docket. 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 judiciary 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 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.

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, 182 S.E. 838, 841 (1935). The USSC 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 with a proof of the 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."); U.S. 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").

Further, 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.

"Criminal Dockets Administered by Prosecutors: Past Present and Future," by Solicitor Trey Gowdy, The South Carolina Lawyer, (2010). Further, 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 can become 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, Appellant has failed 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 recantation by a witness resulting from improper influence by Appellant and K.C. Langford. Additionally, neither the issue raised on appeal by Appellant, nor the completely different issue addressed in the Amicus Curiae Brief is preserved for review on appeal. Therefore, this Court should affirm Appellant'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,

ALAN WILSON
Attorney General

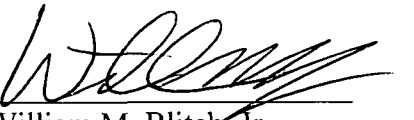
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

205 E. Main Street, 3rd Floor
Lexington, South Carolina 29072
(803) 785-8352

BY: 
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

March 12, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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The State,

Respondent,

v.

Bryan Phillips,

Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, 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."

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

205 E. Main Street, 3rd Floor
Lexington, South Carolina 29072
(803) 785-8352

By: 
WILLIAM M. BLATCH, JR.

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

ATTORNEYS FOR RESPONDENT

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, 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:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 12th day of March, 2012.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727