

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

K.C. LANGFORD, III

APPELLANT

AND

THE STATE,

RESPONDENT,

V.

BRYAN PHILLIPS,

APPELLANT

Final Brief of *Amicus Curie*
South Carolina Public Defender Association

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Table of Contents

Table of Contents	1
Table of Authorities	2
Statement of Issue on Appeal	4
Statement of the Case	5
Argument	
The trial court judge erred when he did not dismiss Langford’s case in May 2010 when Langford motioned for dismissal for violating his right to a speedy trial, and when the state sought a continuance of that trial so it could further pressure a formerly cooperating co-defendant, who elected to assert his right to remain silent under the 5 th Amendment of the federal Constitution, into testifying for the state at the subsequent trial.	9
I. Evolution of the South Carolina Supreme Court’s and solicitors’ roles in administering General Sessions Court.	10
II. Identify the potential for solicitors to abuse control of the docket.	18
III. Solicitor control of the docket is unconstitutional because it violates the Separation of Powers doctrine and Due Process.	23
IV. This Court should reverse the trial court and dismiss the charges against Langford.	26
CONCLUSION	31

Table of Authorities

Cases

<i>Barker v. Wingo</i> , 407 U.S. 514, 530-31 (1972)	27
<i>Doggett v. United States</i> , 505 U.S. 647, 651 (1992)	27
<i>Francolino v. Kuhlman</i> , 224 F.Supp.2d 615, 630 (S.D.N.Y. 2002)	25
<i>Laird v. Tatum</i> , 409 U.S. 824, 834-35 (1972).....	25
<i>McDonald v. Goldstein</i> , 191 Misc. 863, 83 N.Y.S.2d 620 (948)	26
<i>Rosemond v. Catoe</i> , 383 S.C. 320, 326, fn. 1, 680 S.E.2d 5, 8, fn. 1 (2009).....	25
<i>State v. Brazell</i> , 325 S.C. 65, 480 S.E.2d 64 (1997).....	12
<i>State v. Chapman</i> , 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986).....	12
<i>State v. Flood</i> , 257 S.C. 141, 145-45, 184 S.E.2d 549, 552 (1971).....	11
<i>State v. Godfrey</i> , 309 Ga.App. 234, 709 S.E.2d 572 (2011).....	30
<i>State v. Kennedy</i> , 339 S.C. 243, 251, 528 S.E.2d 700, 704-05 (Ct. App. 2000).....	11
<i>State v. Mikell</i> , 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971)	11
<i>State v. Pittman</i> , 373 S.C. 527, 647 S.E.2d 144 (2007).....	11
<i>State v. Robinson</i> , 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999).....	11
<i>State v. Simpson</i> , 551 So.2d 1303 (La. 1989)	25
<i>State v. Smith</i> , 307 S.C. 376, 415 S.E.2d 409 (C. App. 1992).....	12
<i>State v. Tyson</i> , 283 S.C. 375, 378, 323 S.E.2d 770, 770 (1984).....	12
<i>State v. Waites</i> , 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978).....	12, 27
<i>U.S. v. Butler</i> , 426 F.2d 1275 (1970).....	27
<i>U.S. v. Pearson</i> , 203 F.3d 1243, 1257 (10 th Cir. 2000)	25
<i>Vermont v. Brillon</i> , ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009).....	27
<i>Williams v. Bordon's, Inc.</i> , 274 S.C. 275, 262 S.E.2d 881 (1980)	24

Statutes

S.C. Code Ann. §1-1-110..... 24
S.C. Code Ann. §17-19-10..... 27
S.C. Code Ann. §1-7-330 (1976) 9

Rules

Proposed Rule 101, SCCR..... 16, 17
Proposed Rule 106(g), SCCR 17
Proposed Rule 119, SCCR..... 16
Proposed Rule 120, SCCR..... 16
Proposed Rule 121, SCCR..... 16
Proposed Rule 122, SCCR 16
Proposed Rule 123, SCCR..... 17
Proposed Rule 124, SCCR..... 17

Constitutional Provisions

S. C. Const., Art.1, §8..... 24
S.C. Const. Art. 1, §15..... 20
S.C. Const. Art. I, §11..... 27
S.C. Const. Art. V, §4..... 9

Other Authorities

“Criminal Dockets Administered by Prosecutors: Past, Present and Future,” by Solicitor
Trey Gowdy, *The South Carolina Lawyer*, March 2010..... 10
Siegel, Andrew M., When Prosecutors Control Criminal Court Dockets: Dispatches on
History and Policy from a Land Time Forgot, 32 Am. J. Crim. L. 325 (2005).....18

Statement of Issue on Appeal

Did the trial court judge err when he did not dismiss Langford's case in May, 2010 when Langford motioned for dismissal for violating his right to a speedy trial, and when the state sought a continuance of that trial so it could further pressure a formerly cooperating co-defendant, who elected to assert his right to remain silent under the 5th Amendment of the federal Constitution, into testifying for the state at the subsequent trial?

Statement of the Case

The State arrested K.C. Langford on October 3, 2008. The Edgefield County Grand Jury indicted Langford for Conspiracy in December 2008.

Langford moved for a speedy trial on June 29, 2009.

The Edgefield County grand jury indicted K.C. Langford for first degree burglary, armed robbery, and kidnapping on May 5, 2010.

The case was initially noticed for trial on May 17, 2010, but the solicitor continued the trial. On May 20, 2010 the Honorable William P. Keesley denied Langford's motion to dismiss for denial of his right to a speedy trial. On May 25, 2010, Langford again moved for the charges to be dismissed for denial of his right to a speedy trial.

The State tried Langford before the Honorable William P. Keesley and a jury on September 6, 2010. After the jurors convicted, the judge sentenced to concurrent sentences of twenty (20) years for kidnapping, armed robbery, and burglary. The judge also imposed a concurrent sentence of five (5) years for conspiracy.

This appeal follows.

Statement of Facts

The victims are a Chinese family that owned a Chinese restaurant in Edgefield. They speak the Mandarin dialect. At 10:30 p.m. on August 14, 2008, three people attacked this family after they had left their restaurant to go home for the day. One attacker struck the father in the head while he watered plants outside the house, and another attacker went inside and stole a black bag. One of the perpetrators attacked the son when he came outside to check on his father. Two women remained in the house during the crimes.

An undisclosed, confidential informant seeking assistance with a Family Court bench warrant helped law enforcement develop Langford, Alvin Phillips, and Bryan Phillips (brothers) as suspects. R. 302. According to the State's theory, the three defendants observed the victims over a period of time and noticed the family usually left the restaurant carrying the black bag, likely containing money.

Both Langford and Bryan Phillips exercised their right to remain silent. Alvin Phillips, however, made multiple statements. He signed two statements saying neither Langford nor his brother was involved in the crimes. R. 190, 194-95. Other statements made by Alvin Phillips, however, constituted *the only evidence* linking Langford to these crimes.

On June 22, 2009, Langford moved for the solicitor and presiding judge to give him a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. R. 3.

The solicitor scheduled Langford's case for trial to begin on May 17, 2010 and planned for Alvin Phillips to testify for the State. However, the solicitor ultimately elected not to call Langford's case to trial because "[a]t the last moment, the cooperating witness

changed his mind and declared that he was not going to testify and would assert his privilege under the 5th Amendment to the Constitution of the United States.” Langford moved for his charges to be dismissed “based on the State’s failure to provide a speedy trial.” The judge expressly found that “the case hinge[d] almost *exclusively on the testimony of the cooperating defendant*” who had “declared that he was *not going to testify* and would assert his privilege under the 5th Amendment of the Constitution of the United States.” Despite finding Langford had been “incarcerated for 20 months” and being “deeply concerned about the length of time that [Langford had] been incarcerated,” the trial court judge denied the motion to dismiss and ordered Langford’s continued pre-trial detention “without bail.” Order, Suppl. R. 3 (emphasis added). *See also* R. 190 (Phillips confirmed his refusal to testify in May, 2010).

After the court filed the order denying the motion to dismiss, Langford filed a second motion for a speedy trial on May 25, 2010. This second motion for a speedy trial referenced Langford’s first speedy trial motion. R. 1-2.

The state finally called this case to trial in September, 2010, after the solicitor had once again secured Alvin Phillips’ cooperation. Phillips testified against Langford and his brother, claiming that the three committed the crimes together and split the proceeds of the robbery. R. 150-219. Phillips admitted he “rehearsed” his testimony with the solicitor. R. 204. Before testifying Phillips had pleaded guilty to one count of armed robbery with the other indictments still pending, R. 172-72, 205, and his sentence was deferred until after he

testified. Judge Keesley ultimately sentenced Phillips to the minimum sentence for armed robbery of ten (10) years¹ with the solicitor dismissing the other charges.

Both prior to and subsequent to trial, Langford complained about the prior continuance and reasserted his speedy trial motions. Langford told the judge he had been prejudiced by the delay and denial of his right to a speedy trial. However, the trial court judge reaffirmed the rulings contained in the May 20, 2010 order. R. 3, 461-68, 475.

¹<http://publicindex.sccourts.org/edgefield/publicindex/PICaseDetails.aspx?County=19+&Casenum=J595143&CourtType=G&CaseType=Criminal&CourtAgency=19001&LastName=Phillips&FirstName=Alvin><http://publicindex.sccourts.org/edgefield/publicindex/PICaseDetails.aspx?County=19+&Casenum=J595143&CourtType=G&CaseType=Criminal&CourtAgency=19001&LastName=Phillips&FirstName=Alvin> (last viewed July 25, 2011).

Argument

The trial court judge erred when he did not dismiss Langford's case in May 2010 when Langford motioned for dismissal for violating his right to a speedy trial, and when the state sought a continuance of that trial so it could further pressure a formerly cooperating co-defendant, who elected to assert his right to remain silent under the 5th Amendment of the federal Constitution, into testifying for the state at the subsequent trial.

The State delayed 673 days before calling Langford's case to trial. The order denying the motion to dismiss incorrectly found, "None of this delay was occasioned by any impropriety on the part of the State." Suppl. R. 2. In reality, the solicitor, who has exclusive control of the criminal docket, was responsible for *all of the delay* and this solicitor docket control denied Langford his right to a speedy trial. In order to establish the Solicitor's responsibility for the delay, it is necessary to understand the Solicitors' and the courts' respective roles in administering the General Sessions Court dockets, including the judiciary's historical deference to solicitor control.

Tension exists between the South Carolina Supreme Court's constitutional authority to oversee the unified court system and the sixteen elected solicitors' statutorily authorized control of the criminal docket. Our Supreme Court has the exclusive authority to "make rules governing the administration of all the courts" and "[s]ubject to the statutory law . . . make rules governing the practice and procedure in all such courts." S.C. Const. Art. V, §4. Yet, solicitors have exclusive authority to prepare criminal dockets and to "determine the order in which cases on the docket are called for trial." S.C. Code Ann. §1-7-330 (1976). The solicitors cite public policy to justify their authority:

[H]istorically, solicitors have published and administered the criminal dockets in South Carolina, and in turn, solicitors have been called to explain burgeoning caseloads, decide whether to concentrate on jail cases in hopes of obviating the need for jail expansion construction, or call the cases of

defendants out on bond before they reoffend. Solicitors are expected to schedule guilty pleas as well as explain to crime victims when their case will be reached and why it has taken so long.

“Criminal Dockets Administered by Prosecutors: Past, Present and Future,” by Solicitor Trey Gowdy,² *The South Carolina Lawyer*, March 2010, p. 28.

As seen in Langford’s case, the actual practice can be quite different. This justification fails to consider a defendant’s due process right to be treated fairly by the courts. To fully understand how the systemic shortcomings prejudiced Langford, it is necessary to: (1) review the evolution of the Supreme Court’s and solicitors’ roles in administering General Sessions Court, (2) identify the potential for solicitors to abuse control of the docket with particular emphasis on the abuses in petitioner’s case, (3) consider the constitutional doctrines of Separation of Powers and Due Process, and (4) argue why this Court should reverse the trial court and dismiss the charges against Langford.

I. Evolution of the South Carolina Supreme Court’s and solicitors’ roles in administering General Sessions Court.

Some version of §1-7-330 has appeared in the South Carolina code since at least the 1932 edition of the code of laws. The cases challenging solicitor control of the docket can generally be grouped into two categories: (1) those arising from requests for continuances and (2) those arising from speedy trial motions.

First, prosecutors might attempt to call a case to trial before a defendant or defense counsel is prepared to defend the charges. Because “[t]he solicitor has a broad discretion deciding the order in which cases are called,” the fact that much older cases remain on

² In November 2010, Solicitor Gowdy was elected to the United States House of Representatives for the Fourth Congressional District.

the docket³ does not show prejudice or establish grounds to continue the newer case, and a defendant must show an inadequate opportunity to prepare. *State v. Flood*, 257 S.C. 141, 145-45, 184 S.E.2d 549, 552 (1971). The solicitor's discretion is "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." *State v. Mikell*, 257 S.C. 315, 322, 185 S.E.2d 814, 817 (1971). As practitioners can attest, trial courts sometimes continue cases when a defendant demonstrates a need for additional time to prepare a defense. The trial court's supervisory authority to continue cases is codified by Rule 7, SCRCrimP.

Second, the solicitor might intentionally delay calling a case, thereby denying someone a speedy trial. This type of intentional delay is precisely what happened to Langford. In these situations, our courts are reluctant to exercise supervisory power. In fact, neither the Supreme Court nor the Court of Appeals has ever dismissed a case because the solicitor denied a defendant a speedy trial.⁴ See *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (Both state and defense gave reasonable explanations for the delay); *State v. Kennedy*, 339 S.C. 243, 251, 528 S.E.2d 700, 704-05 (Ct. App. 2000) ("Given the complexity of the case, supplying the State with a legitimate reason for the delay, and the lack of prejudice to the defendant, we conclude the trial court properly denied Kennedy's motion to dismiss based on his assertion of a speedy trial violation."); *State v. Robinson*, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999) ("There is no evidence the delay was

³ In the order denying Langford's motion to dismiss, the trial court judge recognized Langford was seeking to have his case resolved before older cases. R. *.

⁴ The Supreme Court recently dismissed a case based on pre-indictment delay. *State v. Lee*, 375 S.C. 394, 653 S.E.2d 259 (2007).

wilful or intentional,” and appellant did not assert right until ten months before trial); *State v. Smith*, 307 S.C. 376, 415 S.E.2d 409 (C. App. 1992) (delay resulted from state’s decision to try defendant on another charge for which he was sentenced to death, and state dismissed this charge until Supreme Court vacated the other conviction); *State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997) (“Although the delay was lengthy and the justification was unsatisfactory,” appellant did not establish prejudice.); *State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (“The delay was not caused by any willful neglect on the state’s part.”); *State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (“there is no record of an actual demand by Waites for a speedy trial”); *State v. Tyson*, 283 S.C. 375, 378, 323 S.E.2d 770, 770 (1984) (“Nothing in the record suggests the State caused unnecessary delay. It appears that everything possible was done to expedite the case while protecting appellant’s rights considering the serious nature of the charges. Furthermore, part of the delay was caused by his initial failure to accept appointed counsel.”).

There is not a court rule authorizing the trial court to dismiss charges for a denial of the right to a speedy trial. Our Supreme Court traditionally attempted other means to oversee the orderly disposition of General Sessions Court cases. For almost three decades, the Supreme Court has been urging solicitors to resolve cases within 180 days of arrest.

On August 17, 1983, Chief Justice Lewis ordered “all criminal cases in the State of South Carolina shall be disposed within 180 days from the date of the defendant’s arrest.” The order provided that a case could be continued by written order “if the Court determines that exceptional circumstances exist in the case.” To accomplish the purpose of the order, the Chief Justice provided:

[T]he Chief Circuit Court Judge for Administrative Purposes shall be in overall charge of and responsible for the criminal roster in order to develop a procedure for expediting the disposition of criminal cases, including the setting of rosters of cases for disposition, if such be necessary to accomplish the timely disposition of criminal cases.

This order also required the trial courts to continue cases pending for less than 180 days until such time no cases older than 180 days were pending for trial. “The order [did] not create or define a right of a defendant to a speedy trial.” By order dated January 13, 1984, Chief Justice Lewis would clarify that orders continuing cases beyond 180 days for exceptional circumstances “shall not be valid for more than thirty (30) days from the date of issuance.”⁵

Illustrating the tension between the Supreme Court’s constitutional oversight of the courts and the solicitors’ statutorily authorized control of the criminal dockets, Chief Justice Lewis’ orders, very arguably, were in direct conflict with Supreme Court precedent that seemingly supported solicitor docket control. *See Flood, supra*.

On March 5, 1999, Chief Justice Finney rescinded Chief Justice Lewis’ orders dated August 17, 1983 and January 13, 1984. Chief Justice Finney retained the 180 day benchmark, ordering “all criminal cases in the State of South Carolina [to] be disposed of within 180 days from the date of the defendant’s arrest.” Similar to Chief Justice Lewis’ orders, Chief Justice Finney’s order provided for cases to be continued “beyond 180 days by written order if the court determines that exceptional circumstances exist in the case” and explicitly “[did] not create or define a right of a defendant to a speedy trial.” However, in apparent deference to the solicitors, Chief Justice Finney’s order deleted

⁵ Copies of Chief Justice Lewis’ orders dated August 17, 1983 and January 13, 1984 are attached as Appendices A and B.

language regarding the trial court's oversight of criminal dockets and authority to set rosters.⁶

Consistent with the Chief Justice Finney's removal of the trial court's authority to set General Sessions rosters, the current order setting forth the authority of the Chief Administrative Judge is limited to granting continuances and setting "hearings on bonds, motions, probation revocations and other nonjury general sessions matters and to designate which presiding judge shall hear these matters."⁷

Chief Justice Toal implemented oversight of her predecessor's order by tracking whether the solicitors dispose of eighty percent (80%) of the cases within 180 days. Each month, the Judicial Department publishes reports including a graph of circuits meeting this benchmark. A copy of the graph for July 31, 2011 is attached as Appendix C.⁸ None of the sixteen solicitors currently meet the benchmark. The Sixteenth Circuit Solicitor is most successful, disposing of sixty-six percent (66%) of the cases within 180 days. The other fifteen solicitors disposed of forty-six percent (46%) or less of the cases within 180 days. The Eleventh Circuit, where Langford was tried, disposed of only thirty-three percent (33%) of the cases within 180 days.

In addition, in 2002 Chief Justice Toal began a differentiated case management pilot program in Richland County. Each case was assigned to one of three tracks, 120 days, 180

⁶ Order of Chief Justice Earnest A. Finney, Jr. dated March 5, 1999 (available at <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=1999-03-05-01>), (last viewed July 31, 2011)

⁷ Order of Chief Justice Toal, dated February 4, 2010, <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2010-01-13-01> (setting authority of Chief Administrative judges) (last viewed July 31, 2011)

⁸ http://www.judicial.state.sc.us/monthlyReports/Jul2011/cr75_mon_graph.pdf (last viewed August 14, 2011).

days or 270 days, based on the complexity of the case. Circuit Court Judge Henry Floyd managed the tracks with the goal of processing the cases within the deadline. During calendar year 2002, the criminal case backlog in Richland County was reduced by nearly one third. Based on the success of the program, the system was adapted for use in Greenville, Horry, and Orangeburg Counties.⁹ The program has spread state-wide. On March 1, 2007, “[T]he sixteen Judicial Circuit Solicitors agree[d] to develop with the Chief Justice and implement criminal case management systems in each county throughout the State of South Carolina.”¹⁰

The Supreme Court continues to exercise more supervision of the criminal dockets. In the February 25, 2009 State of the Judiciary address, Chief Justice Toal discussed the backlog of General Sessions Court cases. She told the General Assembly that while the solicitors control the docket, there should be deadlines for disposition of cases. The Chief Justice acknowledged a practice of some solicitors allowing defendants to linger in jail until the solicitor determines the person has served enough time before offering a time served plea.¹¹

Also in 2009, Chief Justice Toal formed a task force to draft proposed South Carolina Criminal Rules (SCCR). Retired Circuit Court Judge Howard King chaired the task force that included prosecutors, public defenders, and private criminal defense

⁹ Efficient South Carolina Court Management Produces Result, Press Release for 1/22/2003, <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=132>, (last viewed July 31, 2011)

¹⁰ Consent Order of Chief Justice Toal dated March 1, 2007 and sixteen Circuit Solicitors, <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=371>, (last viewed July 31, 2011).

¹¹ <http://www.judicial.state.sc.us/whatsnew/displayWhatsNew.cfm?indexId=503> (last viewed August 14, 2011).

lawyers. The proposed rules were published on December 2, 2009.¹² The proposed rules provide for all cases to “be governed by a docket management system pursuant to Supreme Court docket management orders that now exist or may be implemented or amended by the Supreme Court.” Proposed Rule 101, SCCR. Continuing the current system, a defendant would receive discovery and a plea offer at the initial appearance. Proposed Rule 119, SCCR. By the second appearance, a defendant would have to accept the offer or be placed on a trial docket. Proposed Rule 120, SCCR. The proposed rules provide for judicial oversight, allowing the Chief Administrative Judge to hold status conferences to monitor the progress of the case or if a pretrial detainee’s case is not disposed of during the track. *See* Proposed Rules 121,122 and 124 SCCR.

The proposed rules, however, only minimally enforce a defendant’s right to a speedy trial. Rule 121(b) would provide:

Cases should be disposed of within the track to which they are assigned. **Failure to dispose of a case within the track is not grounds for dismissal** but may be considered by the chief administrative judge in determining remedies or sanctions.

(Emphasis added). There is no further specification of “remedies or sanctions.” Reconsideration of bond is the only remedy listed anywhere in the proposed rules, but “unreasonable delay” is only one factor the court “may” consider. Proposed Rule 106(g), SCCR. However, the proposed rules expressly exclude dismissal as a remedy.

The rules, likewise, would not provide for a meaningful trial order. Although the solicitor would be required to prepare a trial roster fourteen (14) days before a term of

¹² Request for Written Comments and Notice of Public Hearing on Proposed SCCR, <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=602> (last viewed July 31, 2011).

court, the solicitor is not required to specify the order the cases would be called for trial. Defendants would be required to be in court within two hours of oral notification, and failure to appear would result in a bond revocation. Proposed Rule 123, SCCR. The solicitor also would retain the authority to select the trial judge.

The Supreme Court received comments on the proposed criminal rules.¹³ The Court convened a public hearing on the proposed rules on January 5, 2009.¹⁴ Although the solicitors did not provide written comments concerning the proposed rules, the President of the Solicitors' Association appeared and opposed the Supreme Court being able to issue docket management orders pursuant to Rule 101, SCCR without the solicitors' consent. The Supreme Court is currently conducting a "comprehensive review" of the proposed rules. "Full vetting of the proposed new rules will be conducted in 2010 with submission to the General Assembly planned for the 2011 [or 2012] session."¹⁵ In February 2011, the Supreme Court announced the formation of a Docket Management Task Force chaired by the Honorable Kaye Hearn with a General Sessions Court Committee chaired by the Honorable Costa Pleicones.¹⁶

¹³ Comments received by Supreme Court on Proposed SCCR, <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=612> (last viewed July 31, 2011).

¹⁴ See Request for Written Comments and Notice of Public Hearing on Proposed SCCR, <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=602> (last viewed July 31, 2011)

¹⁵ Chief Justice Toal's Presentation to the S.C. Bar, January 22, 2010, PowerPoint slide 12, <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=621> (last viewed July 31, 2011).

¹⁶ <http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=714> (last viewed July 25, 2011).

II. Identify the potential for solicitors to abuse control of the docket.

Unchecked authority to control the flow of criminal cases through General Sessions court hands solicitors a license to exploit this control to disadvantage defendants in several ways.¹⁷ First, solicitors use their control of the docket to call cases to trial when the defense is ill-prepared or unable to present the most complete defense possible. Second, solicitors use their control to leverage guilty pleas from those who would otherwise exercise their rights to a jury trial. Third, solicitors can repeatedly and unnecessarily request the appearance of defendants who have made bond. Fourth, solicitor docket control essentially cuts off judicial involvement with trial cases until the morning of trial. Fifth, docket control allows the solicitors to “judge shop.” Sixth, unchecked docket control allows solicitors to call a case when the State has the best possible opportunity to convict. Each of these abuses will be discussed in detail below, along with how these abuses affected Langford.

A. Solicitors use their control of the docket to call cases to trial when the defense is ill-prepared or unable to present the most complete defense possible.

Whether they are public defenders or members of the private bar, criminal defense lawyers juggle dozens, even hundreds, of clients at any given time; and the solicitors are adept in using this to their advantage. There is no method to be used in guessing which cases solicitors will call to trial during any given term of court.

Since solicitors have total discretion in formulating a trial docket, they have the ability to stack the list with a number of cases all handled by a specific defense lawyer.

¹⁷ For a discussion of these abuses, *see* Siegel, Andrew M., When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot, 32 Am. J. Crim. L. 325 (2005).

That lawyer would then have a choice to make: divide time between all of their cases appearing on the trial docket or attempt to prioritize and prepare a select few. Neither of these options provides the defendant with effective assistance of counsel. Under the first scenario, the lawyer is unable to devote the necessary time and attention to each case, falling short of being fully prepared for any one case. Under the second scenario, some cases will be neglected, and since the lawyer does not know which cases will actually be called to trial, it is possible the lawyer would be wholly unprepared for the right case. Further, solicitors may call cases of one lawyer to trial in consecutive weeks which would wear down that lawyer and leave little time to prepare for upcoming trial cases or manage other clients. This is not the only way solicitors can use their docket control to sabotage the defense. Solicitors can also schedule trials when strong defense witnesses may not be unavailable. The defense would be in a position to either utilize weaker witnesses, who may not present well to a jury or be highly impeachable, or forgo presenting crucial evidence all-together.

While each of the scenarios above lend themselves to a request for a continuance, that is not a surefire way to combat solicitor docket control. A continuance is never automatic because the decision of whether or not to reschedule a trial lies solely within the discretion of the presiding judge. This problem is often exacerbated by the fact that in our current judicial rotation system, a motion for continuance may not be heard until the proposed trial judge is on the bench, on the date the trial is slated to start. Defense lawyers seeking a continuance due to unpreparedness or unavailable witnesses may still have to spend precious time doing their best to get ready for a trial that may later be continued. That time could surely be spent tending to other matters.

B. Solicitors use their control to leverage guilty pleas from those who would otherwise exercise their right to a jury trial.

Not all defendants make bond after being arrested. Some defendants, like Langford, are held without bail. *See* S.C. Const. Art. 1, §15. Those who remain in pretrial detention face a difficult decision – remain in jail until the solicitor sees fit to call their case to trial or take a plea offer that would either release them or send them to the Department of Corrections. In many situations, there is no true choice to be made; the plea offer is taken. Langford, however, asked the trial court to enforce his constitutional right to a speedy trial.

Each day people are arrested for things they are not guilty of and cases full of legal or evidentiary issues come into being. Unless the solicitor exercises his or her discretion and dismisses the charge, the only way to raise legal or evidentiary challenges or assert claims of actual innocence is to take the case to a jury trial. The right to a jury trial is central to our system of justice, yet cannot be freely exercised in South Carolina because the power to schedule the trial lies solely with the prosecution.

Often defendants, like Langford, request a jury trial but have to wait months, sometimes even years, for the solicitor to call the case to trial. In the interim, many defendants decide, regardless of how strong their case may be, to take a plea offer rather than languish in jail. The solicitor's power to refuse to call a case trial goes unchecked by the judiciary and sends a message to the defendant that the only way to resolve the pending charges is a guilty plea. In other cases, the solicitor holds someone like Langford in pre-trial detention until the prosecutor removes the weaknesses in the State's case and gains the maximum possible strategic advantage.

C. Solicitors can repeatedly and unnecessarily request the appearance of defendants who have made bond.

Prior to the implementation of county or circuit-wide case management systems, it was common for the state to require all defendants with pending charges to appear each and every term of court. These mass roll calls served little purpose other than harassing the defendants who were fortunate enough to make bond and jeopardize employment that the defendants may have secured.

Even after these case management orders have been put into place, the solicitors can, and have, compelled the appearance of defendants, both represented and *pro se*, under threat of bench warrant. Most times, these appearances are used merely to insure that the defendants are available at the beck and call of the state.

D. Solicitor docket control essentially cuts off judicial involvement with trial cases until the morning of trial.

Under the current system of solicitor docket control, judges are not assigned to cases prior to the case being called for trial.¹⁸ Thus, it is nearly impossible to address pretrial matters, such as exclusion of evidence, in advance of trial. In a case where there is a strong argument for the exclusion of evidence the state will heavily rely on, the defendant has no choice but to request a jury trial, wait for the state to call the case to trial, and then gamble away any plea offer by pressing forward with jury selection and pretrial hearings. If the defendant loses and the evidence in question is found to be admissible, the defendant has often lost any favorable plea offers that may have previously been extended and must either plead guilty and receive a harsher sentence or continue on with trial and risk the maximum punishment.

¹⁸ However, judges are assigned to capital cases once the defendant is served with notice of the state's intention to seek the death penalty.

In larger jurisdictions, this lack of judicial involvement can lead to judges being unfamiliar with cases. The absence of a judge who will be familiar with the peculiarities of a given case and be in a position to rule on pretrial matters removes options from the defendant's menu of possible resolutions to his or her case.

Langford's case was tried in one of the smallest counties of the state. While the same circuit court judge was involved in multiple proceedings, Langford did not receive the benefit of any judicial supervision. The solicitor, however, used docket control to manipulate the judicial proceedings to the state's benefit. When Alvin Phillips refused to cooperate in May, 2010, the solicitor declined to go forward, despite claiming "great...expense" to the state in preparing the case for trial during that term of court. Order Suppl. R. 2. Once the state again secured Alvin Phillips cooperation, the solicitor increased his leverage over the witness by securing a guilty plea and deferring sentencing until after Langford's trial. In addition to presiding over Langford's trial, Judge Keesley also sentenced Phillips on October 5, 2010.¹⁹

E. Docket control allows the solicitors to "judge shop."

Because cases may be called for plea or trial entirely at the whim of the solicitor, the prosecution has the unique ability to unilaterally select which judge will hear a given case. With the increased ability to communicate with other prosecutors around the state, especially those who practice regularly in front of a particular judge, prosecutors can learn which judges will be likely to rule favorably on evidentiary issues and sentence defendants to the maximum allowed by statute.

¹⁹<http://publicindex.sccourts.org/edgefield/publicindex/PICaseDetails.aspx?County=19+&Casenum=J595143&CourtType=G&CaseType=Criminal&CourtAgency=19001&LastName=Phillips&FirstName=Alvin> (last viewed July 31, 2011).

Defendants can do little to escape the wrath of an unfavorable judge. If there is a plea offer extended by the solicitor, they have the unfettered ability to revoke the offer at any time, leaving the defendant with no choice but to plead guilty in front of the state's judge of choice. If the defendant has elected to exercise his or her right to a jury trial, their case will be tried in front of the judge selected by the state unless a continuance is granted. However, a continuance can only be sought if meritorious grounds exist and even then, the sole discretion in granting the continuance lies with the trial judge.

In Langford's case, the solicitor used the same circuit court judge to ensure Alvin Phillips cooperation. Judge Keesley continued Langford's case in May, 2010 when "the cooperating witness changed his mind" about testifying for the state. Next, the solicitor arranged for Alvin Phillips to plead guilty before Judge Keesley with sentencing deferred until after he testified for the state. Finally, the solicitor called Langford's case to trial before Judge Keesley in September, 2010, correctly predicting he would allow the state to proceed to trial since he had denied Langford's motion to dismiss in May, 2010.

III. Solicitor control of the docket is unconstitutional because it violates the Separation of Powers doctrine and Due Process.

Solicitor control of the docket is not constitutional. First, solicitor control of the docket violates the constitutional doctrine of separation of powers. Second, solicitor control of the docket violates the due process clauses of the United States and South Carolina Constitutions. Each are discussed below.

A. The constitutional doctrine of Separation of Powers.

The South Carolina Constitution explicitly divides the government into three branches and prohibits encroachment of one branch into the purview of another:

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 or any other.

S. C. Const., Art.1, §8.

Judges are inherently members of the judicial branch and solicitors are statutorily defined as members of the executive branch. S.C. Code Ann. §1-1-110 (Supp.). However, the South Carolina Code of Laws bestows on the solicitor the power to control dockets for General Sessions Court:

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.

S.C. Code Ann. §1-7-330 (Supp.).

The South Carolina Supreme Court has held that managing the court docket is an inherently judicial function, at least in the Court of Common Pleas. *Williams v. Bordon's, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980). Section 1-7-330 takes a judicial function, control of the court docket, and places it in the hands of an executive officer. This statute violates the Separation of Powers clause of the South Carolina Constitution. Judicial oversight should include the authority for the trial court to prevent solicitors from abusing their control of the docket to gain a strategic and tactical advantage over a defendant. Through separation of powers, a judicial officer should have decided when Langford's case was set for trial.

B. Due Process²⁰

Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a

²⁰ U.S. Const. Am. 5 and 14 and S.C. Const. Art. I, §3.

world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about ‘shopping’ for a judge; Senators recognize this when they are asked to give their ‘advice and consent’ to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

Laird v. Tatum, 409 U.S. 824, 834-35 (1972) (Rehnquist, J.) (quoting *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74, 137, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970) (Douglas, J., dissenting)).

Solicitor control of the docket includes the awesome power to select the trial judge. This practice “raises substantial due process concerns.” *U.S. v. Pearson*, 203 F.3d 1243, 1257 (10th Cir. 2000). “Any criminal justice system in which the prosecutor alone is able to select the judge of his choice, even in limited types of cases, raises serious concerns about the appearance of partiality, irrespective of the motives of the prosecutor in selecting a given judge.” *Francolino v. Kuhlman*, 224 F.Supp.2d 615, 630 (S.D.N.Y. 2002). In fact, our Supreme Court recently observed, “[T]he practice of the prosecutor selecting the trial judge is inappropriate and troubling” and “is no longer possible . . . in death penalty cases.” *Rosemond v. Catoe*, 383 S.C. 320, 326, fn. 1, 680 S.E.2d 5, 8, fn. 1 (2009). This practice is just as inappropriate and troubling in non-capital cases.

At least two states hold it violates due process for the prosecutor to assign the trial judge. *State v. Simpson*, 551 So.2d 1303 (La. 1989) (“To meet due process requirements, capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.”) and *McDonald v.*

Goldstein, 191 Misc. 863, 83 N.Y.S.2d 620 (948) (“A court dealing with the life and liberty of the people must be free from outside control. . . . That a judge should ever be burdened with the thought that his assignments depended on the district attorney's appraisal of his court work is unthinkable in American jurisprudence.”).

As a result of the judiciary's historical deference to solicitor control of the docket, the circuit courts have developed a systemic bias against enforcing the right to a speedy trial. In Langford's case, the solicitor recognized the state had an advantage in front of Judge Keesley. The solicitor arranged for all the proceedings to be in front of this judge. The state obtained a favorable ruling from Judge Keesley, denying Langford's motion to dismiss for denial of a speedy trial. This order also granted the solicitor and additional “9 months” before Langford could “reassert his motions.” Suppl. R. 3. The solicitor then manipulated the docket for Judge Keesley to be the trial judge and to later sentence the cooperating co-defendant. Judicial supervision in this manner allowed the solicitor additional time to pressure Alvin Phillips into testifying against Langford and then to reward Phillips when he complied.

IV. This Court should reverse the trial court and dismiss the charges against Langford.

The Court should reverse the trial court judge and order Langford's case be dismissed. This section will review the law applicable to speedy trial claims and argue why dismissal is necessary for judicial supervision of the criminal docket.

A. Law applicable to speedy trial claims.

There is a four part test for analyzing a speedy trial claim: (1) whether delay before trial was uncommonly long, (2) whether the government or defendant is more to blame for the delay, (3) whether, in due course, the defendant asserted his right to a speedy

trial, and (4) whether the defendant suffered any prejudice as to the delay's result. *Doggett v. United States*, 505 U.S. 647, 651 (1992).

First, the delay here was uncommonly long. In his May 20, 2010 order, the trial court judge found that Langford had been "incarcerated for 20 months" and was "deeply concerned about the length of time [Langford had] been incarcerated." Suppl. R. 2. "[B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). The length of delay in Langford's case, however, is consistent with delays that have triggered further judicial review. "[A] delay of nine months [is] overly long, absent a good reason, in a case that depended on eyewitness testimony." *Id.* at 531 (fn. 31) (citing *U.S. v. Butler*, 426 F.2d 1275 (1970)). The South Carolina Supreme Court has held a twenty-eight month delay triggers further review. *State v. Waites*, 270 S.C. 104, 240 S.E.2d 651 (1978). The 673 day delay in Langford's case, therefore, is uncommonly long, and likewise, triggers further review.

Second, the government was solely at fault for the delay in petitioner's case. The solicitor delayed indicting petitioner until May 5, 2010, when a grand jury indictment is required to prosecute these offenses. S.C. Const. Art. I, §11 and S.C. Code Ann. §17-19-10. The prosecution alone decides when a case is presented to the grand jury. Thus, the entire delay is attributable to the state. *Vermont v. Brillon*, ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009). "Deliberate delay to hamper the defense weighs heavily against the prosecution." *Id.* 129 S.Ct. at 1290. The trial court, therefore, erred by concluding, "None of the delay was occasioned by any impropriety on the part of the State." Suppl. R. 2.

Third, Langford asserted his right to a speedy trial by filing his first speedy trial motion on June 22, 2009 and moving to dismiss the charges in May, 2010. After this motion was denied, Langford filed a second speedy trial motion on May 25, 2010, even though the trial judge ordered him to wait “9 months” before he “may reassert his motions.”
Suppl. R. 3.

Turning to the fourth prong, Langford was prejudiced by the solicitor’s intentional delay. Langford was ready to go to trial on May 17, 2010, the very day the solicitor had noticed him for trial. “[T]he State claimed it had gone to a great deal of time and expense” to give Langford a trial on this date. The state’s decision not to proceed with the trial was entirely strategic – they needed additional time in order to gain an evidentiary advantage by securing the cooperation of Alvin Phillips. The so-called “*Bruton*”²¹ problems and confrontation clause issues” are red herrings. Since Phillips’ statement implicating Langford could have been redacted in a joint trial, the judge erred in relying on *Bruton*. In reality, proceeding to trial on May 17, 2010 would have resulted in Langford being acquitted because the solicitor’s “case [against Langford] hinge[d] almost exclusively on the testimony of the cooperating codefendant” who had “declared that he was not going to testify.” Solicitors using docket control to gain this type of strategic advantage violates Due Process. See Section III(B), *supra*. By filing a speedy trial motion and moving for the charges to be dismissed, Langford was seeking judicial oversight to enforce his right to a speedy trial. See Section III(A), *supra*. In addition to being the presiding judge for the May 17, 2010 term of court, Judge Keesley was also the Chief Administrative Judge for General

²¹ *Bruton v. United States*, 391 U.S. 123 (1968).

Sessions Court in the Eleventh Circuit.²² Rather than dismissing the charges against Langford, Judge Keesley became a *de facto* instrument of the prosecution by denying the motion and giving the solicitor up to nine months to re-secure the cooperation of the “cooperating codefendant.”

With Langford establishing a violation of his speedy trial right, dismissal is “the only possible remedy.” *Baker*, 407 U.S. at 522.

B. Dismissal is necessary for judicial supervision of the criminal docket.

As pointed out in Section I, *supra*, the appellate courts in South Carolina have never ordered a case to be dismissed for violation of a defendant’s right to a speedy trial. There is no statute or court rule providing guidance to the bench and bar about enforcement of the right to a speedy trial in this state. Dismissal may be unprecedented in South Carolina, but it is not unprecedented in Sixth Amendment jurisprudence. As the United States Supreme Court observed in *Baker*:

The amorphous quality of the [speedy trial] right also leads to the unsatisfactorily severe remedy of **dismissal of the indictment** when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is **the only possible remedy**.

Baker, 407 U.S. at 522 (emphasis added).

²² <http://www.judicial.state.sc.us/adminJudges/changeTermsCir.cfm> (last viewed July 30, 2011).

The prosecution's flagrant disregard for Langford's right to a speedy trial is exactly what the Sixth Amendment was designed to prohibit. Judicial oversight and intervention is not only appropriate but also constitutionally required.²³

The current scheme of administrative orders, *see* Section I; *supra*, does not provide sufficient judicial oversight of a defendant's right to a speedy trial. Even though Judge Keesley was the Chief Administrative Judge at the time, he very likely believed that his administrative authority did not include the power to dismiss the charges against Langford. Intervention by this Court is necessary to recognize dismissal as an appropriate remedy for denying a defendant the right to a speedy trial.

Dismissal is a necessary remedy for the courts in South Carolina to provide meaningful oversight of General Session Court. As discussed in Section II, *supra*, solicitor control of the docket may lead to unacceptable abuses of defendants' rights. The threat of dismissal will ensure solicitors do not use their control of the criminal docket to deny the right to a speedy trial. Based on the proposed South Carolina Criminal Rules, it appears this state may retain solicitor control of the docket but with increased judicial oversight. Such oversight of the constitutional right to a speedy trial is an essential addition to the case management orders and the proposed rules of criminal procedure. As a result, the courts would exercise the authority to administer the criminal dockets, a defendant would receive due process, and the separation of powers would be preserved. *See* Section III, *supra*.

This Court, therefore, should dismiss petitioner's charges with prejudice.

²³ Other States have developed procedures for enforcing the right to a speedy trial. *E.g. State v. Godfrey*, 309 Ga.App. 234, 709 S.E.2d 572 (2011) (trial court was required on remand to balance speedy trial factors under proper standard).

Conclusion

Langford demanded a speedy trial. Instead of providing him a speedy trial, the solicitor delayed calling Langford's case for trial until the state obtained a strategic advantage. Rather than enforcing Langford's right to a speedy trial by dismissing the charges, the trial court judge deferred to solicitor control of the docket. The trial judge's deference to solicitor control of the docket in this case is representative of a larger, systemic problem.

This Court should reverse the trial court judge and dismiss the charges against Langford. In the process, this Court should provide guidance to the bench and bar for enforcing the right to a speedy trial.

Respectfully submitted,

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March 19, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Edgefield County

William P. Keesley, Circuit Court Judge

THE STATE,

K.C. LANGFORD, III

V.

RESPONDENT,

APPELLANT

AND

THE STATE,

BRYAN PHILLIPS,

V.

RESPONDENT,

APPELLANT

CERTIFICATE OF SERVICE

I certify that I served two copies of the proposed initial *amicus curie* brief of the South Carolina Public Defender Association on the date reflected below on counsel by United States Mail, postage prepaid, addressed as follows:

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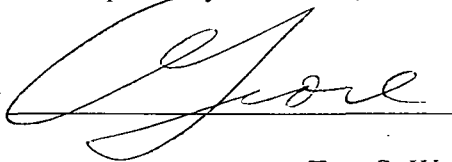
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Rule 211(b), SCACR Certification

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

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March 19, 2012

Appendix A

The Supreme Court of South Carolina

ORDER

Effective Date: October 1, 1983

Pursuant to the provisions of Section 4, Article V, South Carolina Constitution,


IT IS ORDERED that all criminal cases in the State of South Carolina shall be disposed within 180 days from the date of the defendant's arrest. Provided, however, that the Circuit Court may continue a criminal case beyond 180 days by written order if the Court determines that exceptional circumstances exist in the case.

IT IS FURTHER ORDERED that the Chief Circuit Court Judge for Administrative Purposes shall be in overall charge of and responsible for the criminal roster in order to develop a procedure for expediting the disposition of criminal cases, including the setting of the roster of cases for disposition, if such be necessary to accomplish the timely disposition of criminal cases.

IT IS FURTHER ORDERED that each circuit court judge is to continue any and all criminal matters which have been pending for a period of less than 180 days from date of arrest until such time as there are no cases exceeding 180 days from date of arrest pending and awaiting trial. This shall not include the taking of guilty pleas nor cases in which capital punishment is being sought or cases

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in which the circuit court judge by written order determines that exceptional circumstances exist which require the disposition of the case in advance of a case pending for more than 180 days. This order does not create or define a right of a defendant to a speedy trial.


J. Woodrow Lewis

Columbia, South Carolina

August 10, 1983

Appendix B

The Supreme Court of South Carolina

O R D E R

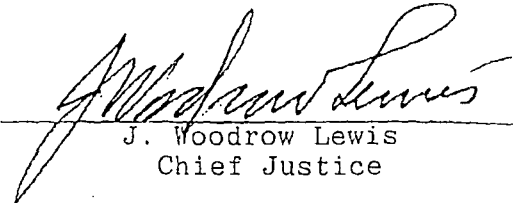
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S. C. SUPREME COURT

I find that there currently exists some misunderstanding concerning the scope and compliance requirements of my August 17, 1983 order establishing a 180-day time limitation for the disposition of criminal cases, particularly as it relates to the contingent docket and the duration of an exceptional circumstances order.

Therefore, pursuant to the provisions of Section 4, Article V, South Carolina Constitution,

IT IS ORDERED that all criminal cases, including contingent docket cases, are subject to the requirements of my August 17, 1983 order, a copy of which is attached to and made a part of this Order.

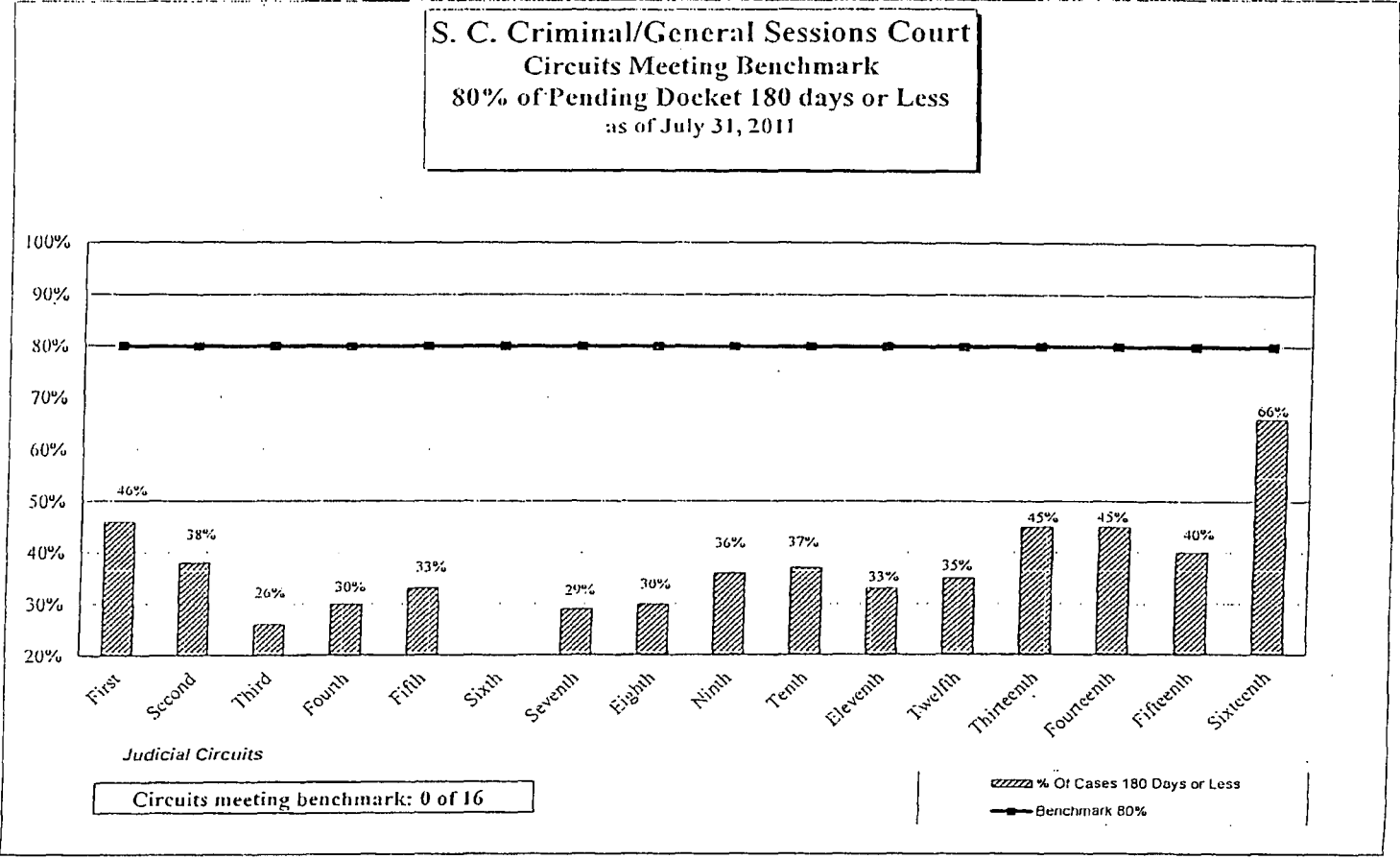
IT IS FURTHER ORDERED that any exceptional circumstances orders shall not be valid for more than thirty (30) days from the date of issuance.



J. Woodrow Lewis
Chief Justice

Darlington, South Carolina

January 13, 1984



Source: S.C. Court Administration, CRM75, July 31, 2011. Run Date: August 11, 2011.